



LITIGATING TRUST DISPUTES IN JERSEY

Law, Procedure & Remedies

James Sheedy

Consultant Editor

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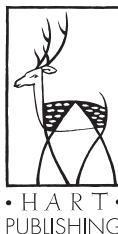
Litigating Trust Disputes in Jersey

Law, Procedure & Remedies

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FOREWORD

I am very pleased to have been asked to write a foreword for this publication. Although the situation is slowly being rectified, there has been a disappointingly low number of text books written on the law of Jersey in the last 100 years. One can understand perhaps that in the time of Poingdestre and Le Geyt the law of Jersey was not being developed week in, week out as it is now the case with a much larger Bar, four local judges and a Court of Appeal. It is a real pleasure to see such a substantial work on an area of Jersey law and procedure being published.

This is particularly so because of the importance of the trust industry on the Island of Jersey, and, as a consequence, the importance of having a source of reference to the material decisions of the courts and provisions of the statutes. Trust law has travelled some distance since its birth and development by the Courts of Equity in England and Wales several hundred years ago. Whereas once the trust was primarily a vehicle for family asset protection, its use has now widened considerably – relevant still of course in those family circumstances, but also now relevant in a number of corporate and commercial arrangements, which would not have been contemplated earlier. Overlying all these uses is the ability to use the trust for fiscally advantageous purposes. The trust industry, for that is what it now is, has become an important cornerstone of the financial services industry of the Island; and because it makes itself a specialist offering for both private and commercial purposes, the States of Jersey as the legislature and the Island courts (Royal Court, Court of Appeal and Privy Council) have made an essential contribution to the development of trust law internationally.

The Trust (Jersey) Law 1984 was ahead of its time in offshore jurisdictions, which hitherto had perhaps assumed that the trust law of England and Wales could arrive in each jurisdiction by some sort of osmosis. Indeed, at the time the Rahmen senior proceedings were issued in 1981, there were still some English counsel who questioned whether Jersey had a trust law at all, and whether an additional ground of attack on a trust purporting to be governed by the proper law of Jersey was that Jersey law did not recognise trusts. For Jersey practitioners, such a view was clearly wrong, albeit that gifts into trust were gifts like other gifts and were governed by the customary Jersey laws on *donations*. The late Advocate Keith Baker was one of those responsible for the framing of the 1984 Trust Law and deserves much credit for it. The Law was deliberately designed to reflect the principles to be found in the law of England and Wales, but at the same time to provide a flexible statutory framework for development, and that is precisely what it has done. More recent amendments have arguably become more prescriptive, but nonetheless the success of the 1984 Law can be measured by its imitation, as a common form of flattery, in other offshore jurisdictions since.

The continuing development of Jersey's identity is demonstrated both in political circles and in the Law. In relation to trust law, an obvious illustration is the approach of the Royal

Court to applications to set aside a trust or a gift into trust for mistake, or to authorise actions by trustees to be set aside on Hastings Bass principles. In these cases, the development of the law in Jersey has not followed quite the same path as it has in England and Wales, although the approaches are arguably today more aligned than it would have been the case some 4 or 5 years ago.

The fact is that the number of trusts that are either Jersey law trusts or are foreign law trusts administered in Jersey is such that the Royal Court regularly exercises jurisdiction over such trusts or their trustees. This has led to many judicial decisions in this area for a small jurisdiction such as our own. It is fundamentally important for Jersey law and cases to be brought together in a comprehensive way, and the extensive use of footnotes in *Litigating Trust Disputes in Jersey* makes it easy to check the source material for authenticating the summary that the book contains. I warmly congratulate Advocate Sheedy and the Consulting Editor, Advocate Baker, on this very substantial piece of work, which adds greatly to a bibliography of Jersey law.

William Bailhache
Bailiff of Jersey
January 2017

TABLE OF CONTENTS

<i>Foreword</i>	v
<i>Table of Cases</i>	xxix
<i>Table of Legislation and Legislative-Type Instruments</i>	lxiii
1. Jersey as a Jurisdiction in which to Litigate Trust Disputes.....	1
I. Introduction	1
II. Jersey's Legal System.....	2
A. Jersey's Legal Profession	4
B. Precedent in Jersey.....	4
C. Equity in Jersey.....	5
D. The Royal Court of Jersey	7
E. The Bailiff	7
F. The Jurats.....	8
G. The Viscount.....	9
H. The Judicial Greffier	10
I. The Law Officers.....	11
J. Jersey's Rules of Civil Procedure—General Points	12
III. Commencing Proceedings in Jersey	13
A. Orders of Justice	14
i. Commencement of Proceedings by way of Order of Justice	15
ii. Tabling the Action	16
iii. Failure to Table	17
B. Representation	17
i. Commencement of Proceedings by Representation	19
C. Summons	20
i. Interlocutory Summons	20
ii. Fixing a Date for the Hearing of a Summons before the Greffier or Royal Court.....	22
iii. Abridgements of Time	24
D. Commencing Proceedings Using the Wrong Form of Originating Process.....	24
E. Pre-Action Conduct and Pre-Action Disclosure	25
F. Service of Process	25
i. Ordinary Service	26
a. Proper Address	26
b. RCR 5/6(1)(a)—‘Leaving it at the Proper Address’	27
c. RCR 5/6(1)(b)—‘Post’	28
d. RCR 5/6(1)(c)—‘by Fax’	28

e.	Service by Email	29
f.	Service on Corporate Bodies	29
g.	Service on a Company Registered under a Foreign Law	30
h.	Service on a Party's Advocate or Solicitor	31
i.	Deemed Dates for Ordinary Service of Documents.....	31
j.	Public Holidays.....	32
k.	Proving Ordinary Service	33
ii.	Personal Service.....	33
a.	Personal Service on an Individual	33
b.	Personal Service on a Corporation.....	33
c.	When Personal Service is Required	34
d.	Effecting Personal Service.....	34
e.	Personal Service out of the Jurisdiction.....	34
f.	Proving Personal Service.....	35
iii.	Substituted Service	35
a.	Method of Substituted Service	37
b.	Orders for Substituted Service.....	37
c.	Substituted Service out of the Jurisdiction	37
d.	Proving Substituted Service.....	37
G.	Consequences of a Failure to Serve in an Authorised Manner	38
H.	Timings for the Exchange of Pleadings.....	39
IV.	Case Management and Directions for Trial	40
A.	Standard Procedure for Directions.....	41
B.	Applications to Amend Proceedings Once Served	43
V.	Litigation Costs.....	44
A.	Costs Incidental to the Proceedings	45
i.	Recovering the Cost of Foreign Lawyers	45
ii.	Recovering an After the Event Insurance (ATE) Premium	45
B.	The Court's Discretion as to Costs	46
C.	Common Costs Orders	46
D.	The Basis of Taxation	48
i.	Standard Basis of Taxation.....	48
ii.	Indemnity Basis of Taxation	48
iii.	Taxation and Trustee's Costs.....	49
iv.	Orders for an Interim Payment of Costs on Account	51
E.	Taxation Procedure	51
i.	Standard Basis Taxation Procedure	53
a.	Format of a Bill of Costs	55
Form 1.....	55
Form 2.....	57
b.	Specific Matters of Taxation	57
Correspondence	57
Time Sheets.....	58
Statements of Accounts.....	58
Bills of Costs of Foreign Lawyers.....	58
Travelling Expenses	58

The Cost of Communications	58
Copies of Documents	58
c. Documents in Support of Taxation	59
d. Guidance on Factor B Uplift.....	60
ii. Indemnity Basis Procedure for Taxation.....	62
iii. Summary Assessment in Interlocutory Applications	62
iv. Interlocutory Applications Disposed of by Consent	62
v. Costs of Taxation.....	63
vi. Appealing Costs Decisions.....	63
VI. Funding Solutions: Litigation Funding and After the Event Insurance	63
A. Maintenance and Champerty	64
B. Funding Arrangements with Lawyers.....	64
C. Third Party Litigation Funding	65
i. Types of Funding Arrangement.....	65
ii. Factors for the Court to Take into Account in Upholding a Third Party Funding Agreement.....	66
iii. Consequences of a Champertous Funding Arrangement.....	67
iv. After the Event Insurance	68
v. Non-Party Cost Orders	69
a. Principles	70
b. Procedure for Seeking an Order for Costs against a Non-party	71
c. Applications to Trial Judge	72
d. Summary Procedure	72
e. Ancillary Orders	72
f. Points in Considering a Non-party Costs Order against a Third Party Litigation Funder.....	73
g. The Effect of the Order for Costs against a Non-party	75
2. Conflict of Law Issues in Jersey Trust Litigation.....	77
I. Introduction	77
II. Jurisdiction	77
A. Jurisdiction Based on Service within the Jurisdiction	77
i. Jurisdiction Conferred by other Means	78
ii. Consequences of Submission to the Jurisdiction of a Foreign Court.....	78
B. Jurisdiction Based on Service out of the Jurisdiction.....	79
i. Jurisdictional Gateways.....	79
ii. Rule 7(b): Injunctive Relief.....	81
iii. Rule 7(c): A Necessary or Proper Party.....	81
iv. Rule 7(j): Trusts	81
v. Rule 7(q): Liability as a Constructive Trustee, Claims for Restitution and 'other Relief'	82
a. A Claim for Money Had and Received.....	82
b. A Claim for an Account or other Relief against the Defendant as Constructive Trustee	83

C.	Standard and Burden of Proof.....	84
	i. A Good Arguable Case	84
	ii. A Serious Issue to be Tried.....	86
D.	<i>Forum conveniens</i>	86
	i. Relevant Principles.....	87
	ii. Relationship between the Jurisdictional Gateways and whether Jersey is the <i>forum conveniens</i>	88
E.	Applications for Leave to Serve Proceedings out of the Jurisdiction.....	88
	i. The Affidavit in Support of an Application to Serve out of the Jurisdiction	89
F.	Applications to Contest Jurisdiction	91
	i. Applications for Stay on Grounds of <i>forum non conveniens</i>	92
	a. Availability of the Foreign Jurisdiction	93
	b. Rebutting the <i>prima facie</i> Case for a Stay on Grounds of <i>forum non conveniens</i>	93
	ii. A Stay on the Basis of the Existence of Parallel Proceedings— <i>lis alibi pendens</i>	95
G.	Effect of a Jurisdiction Clauses in the Trust Instrument	95
	i. Jurisdiction Clauses.....	96
	ii. Exclusive Jurisdiction Clauses versus Non-exclusive Jurisdiction Clauses.....	97
	iii. Matters Falling with the Scope of the Jurisdiction Clause	97
	iv. Royal Court's Approach to Exclusive Jurisdiction Clauses	98
	v. Relevance of a Jurisdiction Clause to Applications to Serve-out	100
	vi. Relevance of Jurisdiction Clauses on Claims against the Trust	101
	vii. Powers in the Trust Instrument Changing the Judicial Forum of the Trust.....	101
III.	Choice of Governing or Proper Law	102
A.	Hague Trust Convention	102
	i. Jersey and the Hague Trust Convention.....	103
	ii. Recognition of Trusts	104
	iii. The Effect of the Convention in States that Do Not Recognise Trusts	104
	iv. Temporal Application of the Convention	105
	v. Types of Trust Falling within the Scope of the Convention.....	105
	vi. Evidenced in Writing.....	106
	vii. Trusts Created Voluntarily	107
	a. Resulting Trusts	107
	b. Constructive Trusts	108
	viii. Preliminary Matters Excluded from the Scope of the Convention	109
	a. Capacity of the Settlor	109
	b. Capacity of the Trustee	110

c. Capacity of the Beneficiary.....	110
d. Vesting Property in the Trustee	110
e. Forced Heirship.....	111
B. Determining Proper or Governing Law of a Trust	111
i. Implied Choice of Law	113
ii. Applicable Law in the Absence of Choice of Law	113
iii. Renvoi	114
C. Scope of the Governing Law	114
D. Limits on the Scope of the Governing Law	117
i. Distinguishing Mandatory Rules and Public Policy Considerations	117
ii. Mandatory Rules of the Law Applicable to Related Areas of Law	117
iii. International Mandatory Rules of the Forum	118
iv. Public Policy	119
3. Applications for Directions, the Variation of Trusts.....	121
I. Introduction	121
II. The Supervisory Jurisdiction of the Royal Court and Applications for Directions.....	123
A. Article 51(1) of the Trusts (Jersey) Law 1984—Directions Concerning the Manner in which the Trustee May or Should Act in Connection with any Matter Concerning the Trust	125
B. Article 51(2)(a)(i)–(ii) of the Trusts (Jersey) Law 1984—Orders Concerning the Administration of any Trust and Orders Concerning the Trustee	125
C. Article 51(2)(a)(iii) of the Trusts (Jersey) Law 1984—Orders Concerning a Beneficiary or any Person Having a Connection with the Trust	126
III. Examples of Applications under Article 51 of the Trusts (Jersey) Law 1984	128
A. Construction Disputes and Questions of Law.....	128
B. General Administration Issues.....	129
C. Approval of Transactions	129
IV. Applications for Directions Concerning the Exercise of Powers	130
A. ‘Category 1’: The Trustees Seek a Determination on their Powers	131
B. ‘Category 2’: The Trustees Seek the Court’s Blessing of a Momentous Decision.....	131
i. The Nature of the Application and the Surrender of Discretion	132
C. ‘Category 3’: The Trustees do Surrender their Discretion to the Court.....	133
D. ‘Category 4’: Challenging the Purported Exercise of a Power after the Event.....	135

V.	Distributions and the Trustee's Right of Indemnity for Liabilities and the Insolvency of a Jersey Trust	136
A.	Distributions from the Trust Fund	136
B.	Declaratory Relief	137
C.	Distributions and Transactions from the Trust that Prejudice Creditors and/or the Trustee's Indemnity	138
VI.	Beddoe Proceedings	139
A.	Procedure to Apply for Beddoe Relief.....	141
B.	Parties Convened to the Beddoe Proceedings	142
C.	The Beddoe Court.....	143
D.	Costs of Beddoe Proceedings	143
E.	Outcome of the Beddoe Proceedings.....	143
VII.	Procedure in Proceedings to Obtain Directions under Article 51 of the Trusts (Jersey) Law 1984.....	144
A.	Commencing Proceedings.....	144
B.	Parties	145
C.	Representation Orders.....	145
D.	Evidence.....	146
VIII.	Costs of Proceedings under Article 51	147
A.	Statutory Provisions as to the Incidence of Costs	147
B.	The Trustee's Indemnity for Costs Reasonably Incurred.....	148
C.	Types of Proceedings Brought under Article 51 and their Respective Costs Treatment.....	149
i.	<i>Buckton</i> Category 1: Beneficiaries' Costs in Proceedings for the Construction of the Trust Instrument, Determination of Questions of Law and the Scope of Powers.....	151
a.	Trustee Neutrality and Costs	151
b.	Costs of Appeals from Proceedings for the Construction of the Trust Instrument, Determination of Questions of Law and the Scope of Powers	152
ii.	<i>Buckton</i> Category 2: Proceedings in which Directions Are Sought for the Guidance of the Trustee in the Administration or Execution of the Trust	153
iii.	<i>Buckton</i> Category 3 Proceedings for the Accounts, the Provision of Information to Beneficiaries or Distribution of the Fund.....	154
iv.	Claims against the Trustee for the Production of Accounts or Information about the Trust.....	154
v.	Proceedings Commenced by the Trustee for Relief from the Consequences of the No-Conflict and No-Profit Rules.....	155
vi.	Proceedings for the Removal of Trustees.....	155
vii.	Pre-emptive Costs Orders for Beneficiaries.....	156
D.	The Taxation of Costs in Proceedings Commenced under Article 51	157

i.	Basis of the Taxation of Costs in Article 51 Applications	158
a.	Trustees' Costs.....	158
b.	Beneficiaries' Costs.....	159
IX.	Article 47—Applications for the Variation of a Trust	159
A.	An Arrangement	161
i.	The Classes of Persons on whose Behalf the Court May Approve an Arrangement	161
a.	Article 47(1)(a): Minors and Interdicts	161
	Foreign Powers of Attorney	162
	Indirect Interests of Minors and Interdicts	162
b.	Article 47(1)(b): Unascertained Persons and Persons who May Become Entitled to an Interest.....	163
c.	Article 47(1)(c): Unborn Persons	163
d.	Article 47(1)(d): Persons whose Interest Arises by Reason of any Discretionary Power	163
B.	Scope of the Court's Powers to Vary	164
C.	Varying Trustees' Powers.....	165
D.	Benefit	165
E.	Variation in the Context of Matrimonial Proceedings.....	167
F.	The Trustee's Role in an Application for Variation of a Trust.....	168
G.	The Effect of an Order Varying the Trust.....	168
H.	Article 47(3): Power of Court to Vary Administrative Powers.....	169
I.	Procedure for Applications to Vary	170
i.	Parties to Be Joined and Who Need Not Be Joined.....	170
ii.	Representation Orders	171
iii.	Separate Representation	171
iv.	Representor's Evidence	172
v.	Responses and Evidence	173
vi.	Hearing.....	174
vii.	The Act of Court	174
viii.	Costs	174
X.	Privacy Orders	175
A.	Principles of Privacy.....	176
B.	Factors to be Considered in Applications for Privacy Orders.....	177
C.	Consequences of Privacy.....	178
D.	Privacy and the Implied Undertaking	179
i.	Material Protected by the Implied Undertaking	179
E.	Privacy and Privilege	181
i.	Whether the Material is Privileged.....	181
a.	Joint and Common Interest Privilege	182
ii.	In whose Hands is the Material Privileged?	185
iii.	Has the Privilege in Material already been Waived?	185
iv.	Can the Court Give Leave to Use Privileged Material outside Private Proceedings?	186

F.	Seeking Leave to Use Material Subject to a Privacy Order	186
i.	Procedure.....	187
ii.	What Material Can the Court Release?	188
iii.	Factors for the Court in Lifting a Privacy Order	189
iv.	Costs.....	189
4.	Litigation Concerning the Existence of the Trust, the Rectification of its Terms and the Exercise of Powers	191
I.	Introduction	191
II.	Sham Trusts	192
A.	The Shamming Intent	194
B.	The Position of the Original Trustee	196
C.	The Appointment of Subsequent or New Trustees.....	196
D.	The Effect of Finding a Sham	196
E.	Reliance on the Sham by the Settlor and Trustee.....	197
F.	Reliance by those who are not Parties to the Sham	198
G.	The Relationship between Settlor Reserved Powers, Interests and Control.....	198
H.	The Proper Law Governing the Question whether a Trust is a Sham.....	199
III.	Jersey's Rules as to Rescission for Mistake	200
A.	Meaning of Mistake.....	200
B.	The Rule in <i>Re Hastings Bass</i> and Applications under Articles 47E to 47I of the Trusts (Jersey) Law 1984	202
C.	Articles 47B to 47I of the Trusts (Jersey) Law 1984.....	203
D.	What Remains of the Rule in <i>Re Hastings Bass</i> at Common Law?.....	206
IV.	Rectification and Construction of Trust Documents.....	208
A.	Locus to Apply for Rectification	210
B.	Standard of Proof	210
i.	The nature of the Operative Mistake in Rectification Cases after <i>Pitt v Holt</i>	211
C.	Bars to Relief for Rectification and Rescission.....	211
D.	Practical Considerations in Applications for Rectification, Rescission and under Articles 47F and 47H of the Trusts (Jersey) Law 1984	212
E.	Construction of Trust Documents	213
i.	Applicable Principles.....	214
ii.	Admissible Evidence in the Interpretation of Trust Documents	215
iii.	Tools for Interpreting Patent and Latent Ambiguities	217
5.	Disclosure of Trust Information and Documents	219
I.	Introduction	219
II.	The Voluntary Provision of Trust Information to Beneficiaries	219
A.	Voluntary Disclosure.....	220
III.	Disclosure by Trustees to Beneficiaries on Demand.....	221
A.	Applicable Principles.....	223

B.	Categories of Trust Documents for Which Disclosure is Often Sought.....	225
i.	Category 1.....	226
a.	Trust Accounts.....	226
b.	Trust Documents.....	227
c.	Information about Trust Charges, Fees and Remuneration	229
ii.	Category 2.....	229
a.	Documents that Disclose, in Whole or in Part, the Deliberations of the Trustees as to whether and the Manner in Which They Should Exercise Their Powers.....	229
	Internal Trust Correspondence and Records.....	231
	Letters and Memoranda of Wishes.....	231
	Legal Advice and Communications with Lawyers.....	235
	Disclosure of Communications with Lawyers in the Context of Hostile Proceedings with the Trustee	237
iii.	Category 3.....	237
a.	Company Documents	237
C.	Locus to Demand Trust Documents and Information	239
i.	Discretionary Beneficiaries	239
ii.	Unascertained Beneficiaries or Beneficiaries with a Mere Future Expectation of Interest.....	240
iii.	Beneficiaries with an Existing but Remote Fixed Interest under the Trust	240
iv.	Minor Beneficiaries.....	241
v.	Former Beneficiaries and those with Doubtful Status as Beneficiaries	241
D.	Procedure in Applications for Disclosure of Trust Documents and Information.....	242
E.	Disclosure and The Data Protection (Jersey) Law 2005.....	242
F.	Restrictions on Disclosure in the Trust Instrument	243
G.	The Proper Law Governing the Principles of Disclosure of Trust Information	244
H.	The Costs of a Demand for Trust Documents and Information	244
I.	Disclosure of Trust Documents to Settlors and Protectors.....	245
J.	Disclosure by Outgoing Trustees to their Successors	246
K.	Disclosure to Foreign Revenue Authorities.....	247
i.	Scope of Information under a TIEA	248
ii.	Requests for Information.....	249
iii.	Notices Issued by the Comptroller	250
iv.	Challenges to Notices Issued by the Comptroller.....	251
IV.	Disclosure of Trust Documents and Information in Hostile Proceedings against the Trustee.....	252
A.	Pre-action Discovery of Documents	253
B.	<i>Norwich Pharmacal</i> and <i>Bankers Trust</i> Orders	253
i.	Procedure to Obtain <i>Norwich Pharmacal</i> Relief.....	255

C.	Discovery of Documents during the Course of Proceedings.....	256
D.	Discovery and the Court's Inherent Supervisory Jurisdiction	257
E.	Discovery against Former Trustees and Non-parties	257
F.	Discovery in Article 51 Proceedings.....	258
V.	Disclosure of Evidence from Jersey in Support of Foreign Proceedings	258
A.	Service of Process and Taking of Evidence (Jersey)	
	Law 1960 (The 1960 Law)	258
	i. Issuing a Request to the Royal Court	260
	ii. Contents of a Request	260
	iii. Form and Execution of a Request	261
	iv. Types and Extent of Examination	262
	v. Documents Disclosable	262
	vi. Summoning the Witness	263
	vii. Record of Service	263
	viii. Open or Closed Proceedings?.....	263
	ix. Presiding Officer	264
	x. Order and Exclusion of Witnesses	264
	xi. Proceedings at the Examination.....	264
	xii. Who May Appear to Conduct the Examination of Witnesses?	264
	xiii. Compellability of Witnesses.....	265
	xiv. Objections to Answering Questions	265
	xv. Representation of the Witness.....	266
	xvi. Recording and Transcribing Evidence	266
	xvii. Privacy and 'Gagging' Orders	267
	xviii. Completion of Testimony.....	267
	xix. Signing and Transmission of the Deposition	267
	xx. Costs	268
	xxi. Witnesses' Allowances and Expenses	268
B.	Bankers' Books Evidence (Jersey) Law 1986 ('The 1986 Law')	269
C.	Discovery of Documents and Information Ordered in Support of Foreign Insolvency Matters	269
6.	Trusts Arising by Operation of Law: Resulting and Constructive Trusts	273
	I. Introduction	273
	II. Constructive Trusts and Constructive Trusteeship.....	273
	A. Fiduciary Relationships.....	275
	B. Personal and Proprietary Remedies.....	276
	C. Type-1 Constructive Trustees: 'True' or 'Institutional' Constructive Trustees	277
	i. Unauthorised Gains by a Fiduciary and their Proceeds.....	278
	ii. Constructive Trusts Arising from a Breach of Confidence	279
	iii. Constructive Trusts Arising on the Taking of a Corporate Opportunity	280
	iv. Constructive Trusts Arising over Bribes and Secret Commissions.....	281

v.	Constructive Trusts Arising on the Transfer of Trust Property to a Third Party in Breach of Trust	281
D.	Type-2 Constructive Trustees: Liability to Account as a Constructive Trustee	282
	i. Constructive Trusts Arising by Reason of Fraudulent Misrepresentation	283
	ii. Constructive Trusts Arising by Reason of the Theft of Property.....	284
	iii. Constructive Trusts and Unjust Enrichment.....	284
III.	Resulting Trusts	285
A.	Presumed Resulting Trusts—‘Purchase-money’ Resulting Trusts	285
B.	Automatic Resulting Trusts—Resulting Trusts Arising from a Failure to Exhaust the Settlor’s Beneficial Interest.....	286
C.	Quistclose Trusts.....	288
D.	To whom the Property Results.....	289
7.	Personal Remedies against Trustees: The Personal Accountability of the Trustee and Liability for Breaches of Trust.....	291
I.	Actions for an Account.....	292
	A. Proceedings for an Account in Common Form.....	293
	B. The Beneficiary’s Entitlement to an Account.....	294
	C. Settled Accounts	294
	D. Taking the Account.....	295
	i. Accounting for the Income of the Trust.....	295
	ii. Accounting for the Outgoings from the Trust	296
	iii. Accounting for the Misapplication of Trust Assets	296
	iv. Consequential Relief upon the Taking of the Account.....	297
	E. Accounts on the Footing of Wilful Default.....	297
	i. Orders for an Account on the Basis of Wilful Default.....	298
	F. Rescission of Transactions and an Account of Profits	299
II.	The Basic Rule for the Personal Liability of the Trustee.....	299
A.	What Loss Is Recoverable?	300
B.	Causation and Loss.....	300
C.	Valuation of the Loss	301
D.	Setting off Losses Against Gains	302
E.	Breach of Duty in Relation to Companies in Which the Trust Has an Interest	302
F.	Interest	302
G.	Compound Interest	303
III.	The Personal Liability of Protectors	304
IV.	Procedure and Parties	304
	A. Joinder of Beneficiaries	305
	B. Locus Standi for a Breach of Trust Action	307
	C. Claims by Trustees.....	308
V.	Personal Liability for Breaches of Trust as between Co-trustees	309
	A. Assessing the Contribution.....	310

VI.	Trustee's Responsibility for Asset Managers, Agents and Companies.....	310
VII.	Defences of Concurrence and Release by a Beneficiary	311
	A. The Requirements for a Valid Release.....	312
	B. Effect of Concurrence and Release.....	312
VIII.	Defence under Exculpatory Provisions in the Trust Instrument	313
	A. Enlarging the Powers of the Trustees	313
	B. Abridged Duties of Trustees	313
	C. Anti- <i>Barlett</i> Clauses	314
	i. An Irreducible Core of Obligations.....	315
	D. Excluding the Trustee's Liability for Breach of Trust—Trustee Exemption Clauses.....	315
	i. The Scope of Exemption Clauses.....	316
	ii. Interpretation of Exemption Clauses	318
	E. Enlarged Rights of Indemnity in Respect of Liabilities to Third Parties	320
IX.	Power of Court to Relieve a Trustee from Personal Liability	320
	A. The Power is Discretionary.....	321
	i. Honestly and Reasonably.....	321
	a. Conduct Held Unreasonable	322
	b. Conduct Held Reasonable	323
	ii. The Court's Discretion as to whether the Trustee Ought Fairly to be Excused.....	324
	iii. Practice	325
8.	Conflicts of Interest and Unauthorised Profits.....	327
	I. Introduction	327
	II. Conflicts of Interest.....	330
	A. Self-dealing.....	332
	B. Fair-dealing	333
	C. Profits by the Trustee	334
	i. Renewal of Leases	336
	ii. Bribes and Secret Commissions.....	336
	iii. Use of Trust Property to Trustee's own Benefit.....	337
	III. Conflicts of Duties.....	338
	A. Potential Conflict of Duties.....	340
	IV. Conflicts of Interest in the Exercise of Powers.....	341
	A. Administrative Powers.....	342
	B. Dispositive Powers	342
	V. Defences.....	346
	A. Authorisation by Trust Instrument.....	346
	B. Concurrence of the Beneficiaries	346
	C. Authorisation by the Court	347
	VI. Trustees' Remuneration.....	347
	A. General Rule.....	347
	B. Remuneration of Director of Corporate Trustee	348

C.	Nature of Trustee's Rights under Remuneration Provisions	348
D.	Effect of a Breach of Trust on the Trustee's Right to Remuneration	349
E.	Challenging a Trustee's Charges.....	349
F.	Remuneration Authorised by Order of the Court	350
G.	Allowance for Skill and Labour of Trustee who is Liable to Account for Profits.....	351
H.	The Duration of the Trustee's Entitlement to Remuneration	351
VII.	Remedies	352
A.	An Account of Profits	353
B.	Proprietary Remedies	355
C.	Compensation for Loss.....	357
D.	Rescission of the Transaction	358
i.	Rescission of Transactions Entered into by Directors of a Jersey Company.....	360
E.	Forfeiture.....	361
F.	Removal.....	362
9.	Remedies against Wrongful Recipients of Trust Property.....	363
I.	Introduction.....	363
II.	Recovering Trust Funds Paid Away by Mistake	363
III.	Actions of Knowing Receipt.....	364
A.	Locus	365
B.	Requirements for Liability.....	365
i.	Property that Is Subject to a Trust	366
a.	Companies and Fiduciary Agents and Directors	366
b.	Property Subject to a Resulting or Constructive Trust.....	367
ii.	A Transfer of Trust Property.....	367
iii.	The Transfer is in Breach of Trust	368
iv.	The Property (or its Traceable Proceeds) is Received by the Defendant	369
a.	Receipt by Agents and Nominees and Ministerial Receipt	369
v.	The Receipt Is for the Defendant's own Benefit.....	370
vi.	The Defendant's Receipt Is with the Knowledge that the Property Is Trust Property and Has Been Transferred in Breach of Trust.....	371
C.	Knowledge and Notice.....	374
i.	Imputing Knowledge from an Agent to a Principal	374
ii.	The Knowledge of Companies.....	374
iii.	Proof of Knowledge.....	377
iv.	Pleading Knowledge	378
v.	With such Knowledge, the Defendant Retains or Deals with the Property Inconsistently with the Trust	379
vi.	The Defendant Is Not a Bona Fides Purchaser of the Property for Value without Notice	379

IV.	Trustees de son Tort.....	379
A.	Liability of a Trustee de son Tort	380
B.	Validity of Acts Done by a Trustee de son Tort	381
C.	Confirmation and Ratification of Acts of a Trustee de son Tort.....	381
D.	Relief from Liability.....	384
V.	Unjust Enrichment	384
10.	The Retirement, Removal or Replacement of the Trustee by the Royal Court	387
I.	Introduction.....	387
II.	Removal of Trustee under an Express Power in the Trust Instrument	387
A.	<i>Ex officio</i> Trustees.....	389
B.	Removal of an Insolvent or Incapable Trustee	389
III.	Removal of Trustee—Removal by the Court under its Inherent Jurisdiction	390
A.	Locus to Seek Removal	391
B.	Grounds on which a Trustee May be Removed.....	391
C.	Principles Guiding the Court in the Exercise of its Inherent Jurisdiction	392
i.	Removal on Grounds of a Breach of Trust.....	393
ii.	Friction and Hostility between the Trustee and Beneficiaries.....	394
iii.	Loss of Trust and Confidence	396
iv.	Conflicts of Interest.....	397
v.	Other Factors for the Court’s Consideration as Part of the Court’s Discretion.....	398
D.	Procedure for Removal and the Form of Proceedings.....	398
i.	Replacement by the Court.....	399
E.	Court-ordered Removal of Power Holders other than the Trustee: Protectors and Enforcers	400
F.	Costs of Applications to Remove a Trustee	404
IV.	The Transition between Outgoing and Incoming Trustees	407
A.	Provision of Trust Records to the Successor Trustees	410
B.	Contingent Liabilities and the Probability that They Will Materialise.....	412
C.	Retention of the Entire Trust Fund as Reasonable Security.....	414
D.	Independent Advice.....	415
E.	Suggested Procedure for Securing Reasonable Security	416
11.	The Trustee’s Protection from Personal Liability: The Trustee’s Indemnity	419
I.	Introduction.....	419
II.	General Principles.....	419
A.	Indemnity of Particular Trustees	421
i.	Constructive Trustees.....	421

ii. Trustees of Void or Voidable Trusts	421
B. Beneficiaries' Indemnity	422
C. The Indemnity of Third Parties Involved in the Administration of the Trust	422
D. The Limited Liability of Jersey Trustees	423
i. The Meaning and Effect of Article 32(1)(a) of the Trusts (Jersey) Law 1984.....	423
ii. The Meaning and Effect of Article 32(1)(b) of the Trusts (Jersey) Law 1984	424
iii. The Relationship between Article 32(1) and 32(2) of the Trusts (Jersey) Law 1984.....	424
III. Common Liabilities of Trustees	426
A. Contracts	426
B. Tortious Liabilities	427
C. Fiscal Liabilities.....	428
D. Costs Incurred by an Incoming Trustee	429
E. Litigation Costs.....	429
i. Costs of Trust Proceedings.....	429
ii. Costs of Proceedings against the Trust or the Trust Property	429
iii. Costs of Third Party Proceedings	432
a. Position as between the Trustee and Third Party	432
b. Position as between the Trustee and the Beneficiaries	433
c. Article 32 and Litigation Costs	434
IV. Mechanism for Satisfaction of the Trustee's Right of Indemnity.....	434
A. Rights of Third Party Creditors of the Trustee to the Trust Fund	436
i. Where a Third Party Claim May Exhaust the Trust Fund.....	436
a. Third Party Claims against the Trustee where the Trustee's Liability is Limited	436
b. Third Party Claims against the Trustee where the Trustee Does not Have the Benefit of Limited Liability.....	437
V. Insolvency and the Trustee's Indemnity	437
A. The Insolvency of the Trustee	437
B. The Test for Insolvency.....	438
C. Effect of a Declaration of <i>désastre</i>	438
D. Winding up a Corporate Trustee	438
E. Effect of the Insolvency of the Trustee on Trusteeship and the Trust Fund	438
F. Costs and Expenses of the Trustee's Insolvency	440
G. The Effect of the Trustee's Insolvency on the Trust Property and the Administration of the Trusts	441
VI. Insolvent Trusts.....	442
A. Test for Insolvency of a Trust	442

B.	Winding up an Insolvent Trust	443
C.	The Office Holder	444
D.	The Effect of the Trustee's Insolvency on the Trustee's Indemnity	445
E.	Priority as between the Trust's Unsecured Creditors.....	446
F.	The Claims of Third Party Creditors against Beneficiaries	447
12.	Remedies against Accessories to a Breach of Trust and Miscellaneous Claims against Third Parties other than in Respect of Breach of Trust	449
	I. Introduction	449
	II. Impounding a Beneficial Interest in Order to Indemnify the Trustee	450
	A. Extent of the Beneficiaries' Knowledge that they Are Instigating, Requesting or Consenting to a Breach of Trust.....	451
	B. Exercise of the Court's Discretion	452
	C. Impounding a Trust Interest in Order to Indemnify the Beneficiaries.....	452
	D. Where a Co-trustee Is also a Beneficiary Whose Interest Is Sought to Be Impounded.....	454
	III. Dishonest Assistance	455
	A. Basis of Liability.....	456
	i. Locus.....	456
	ii. Requirement (1)—a Trust	456
	iii. Requirement (2)—a Breach of Trust.....	458
	a. What Sort of Breach of Trust is Required?.....	458
	b. Breach of Duty and Trustee Exoneration or Trustee Exemption Clauses.....	459
	iv. Requirement (3)—Inducement or Assistance in a Breach of Trust	460
	a. When Must the Assistance be Rendered?.....	460
	v. Requirement (4)—Dishonesty	461
	a. The Subjective and Objective Elements of Dishonesty	462
	b. Doubts as to whether a Proposed Application of Trust Property is Authorised.....	463
	c. Assistance in Improper or Unauthorised Investments or Similar Transactions.....	465
	d. Assistance in Distributions to Beneficiaries Who Are Not Entitled	466
	e. Ignorance of the Law—Relevance to Dishonesty.....	467
	f. Ignorance of the Trust—Relevance to Dishonesty.....	468
	g. Pleading Dishonesty.....	468
	h. Proving Dishonesty.....	469
	B. Measure of Liability.....	470

i.	Protection of Agent by Application to the Court	471
ii.	Vicarious Liability of Partners.....	471
C.	Defences	472
i.	The Illegality Defence and the Attribution of Wrongdoing as a Defence	472
ii.	A Contribution.....	472
iii.	Prescription	473
IV.	The Liability of a Director of a Corporate Trustee—‘Dog-Leg’ Claims.....	474
A.	General Position	475
B.	Claim by Beneficiaries against Directors.....	476
C.	A ‘Dog-leg’ Action	476
D.	Negligence Claims by Beneficiaries	477
V.	Economic Torts	478
VI.	Derivative Claims by Beneficiaries	479
A.	Administration Action by Beneficiaries	480
B.	Derivative Action by Beneficiaries	480
C.	Need for Special Circumstances to Bring a Derivative Action	481
D.	Dispute between Beneficiaries whether Action to Be Brought	482
E.	Need for Joinder of Trustees as Defendants.....	482
F.	Do Other Beneficiaries Need to Be Joined to a Derivative Action?	482
VII.	Claims for Breach of Duty in Relation to Companies in which the Trust Has an Interest—Claims for Reflective Loss	483
A.	Conclusions	488
13.	Proprietary Remedies against Trustees and Third Parties	491
I.	Introduction—Tracing in Jersey.....	491
II.	Terminology Relevant to Proprietary Remedies and Tracing in Jersey Trust Litigation.....	492
A.	Following	492
B.	Purchase without Notice	492
C.	Tracing.....	493
D.	Recovery	494
E.	Clean and Mixed Substitutions.....	494
III.	Proprietary Remedy	494
A.	The Trust to which the Traceable Property Is Subject	495
B.	The Breach of Trust	495
C.	Breach of Trust and Proprietary Constructive Trusts.....	496
D.	Evidence to Establish what Property or Money Is Subject to the Proprietary Remedy: General Principle in Relation to Trustee.....	496
E.	Tracing into Jersey Land.....	497
F.	Bank Accounts	498
IV.	Remedies against a Trustee	499
A.	Proprietary Claims against an Original Trust Asset.....	499
B.	Tracing into a Clean Substitution.....	500
C.	Tracing into a Mixed Substitution	500
D.	Subordination of Trustee’s Interest in a Mixed Substitution.....	501

E.	Income and Interest Derived from a Traceable Asset.....	502
F.	Locus standi to Trace	502
G.	Forms of Relief.....	502
H.	Reinstatement of Misappropriated Funds by the Trustee.....	503
V.	Proprietary Remedy against Purchasers with Notice and Volunteers	503
A.	Tracing Trust Money into and through a Loan between a Donee of Misappropriated Trust Money and a Company.....	504
VI.	Proprietary Remedy between Innocent Contributors to a Mixed Substitution.....	505
A.	A Proprietary Constructive Trust Imposed by the No-profit Rule.....	506
VII.	Mixed Substitutions in a Bank Account	508
A.	Mixed Substitutions in a Bank Account	508
B.	Simple Case: A Mixed Substitution in a Bank Account	509
C.	Running Account	509
D.	The Rule in <i>Clayton's Case</i>	510
E.	Running Account—Claim against Trustee or other Wrongdoer: the Rule in <i>Re Hallett</i>	510
F.	The Lowest Intermediate Balance	511
G.	Claims and Priorities as between Innocent Contributors and Innocent Donees and Innocent Recipients	512
VIII.	Mixed Substitutions—Tracing into Assets Acquired with Trust Monies	513
A.	Asset Purchase with Credit Secured on the Asset.....	513
B.	Trust Money Used to Discharge Credit Secured on the Asset	514
C.	Assets Purchased with Money Withdrawn by Trustee or other Wrongdoer from a Mixed Bank Account—the <i>Re Oatway</i> Rule	514
D.	Claim to a Proportionate Share against Assets Bought by a Trustee with Money Withdrawn from a Mixed Bank Account	515
E.	Dissipation and Mixed Performing Assets Purchased with Mixed Funds	516
i.	Dissipation by the Trustee	516
ii.	Asset Cherry-Picking to Maximise Recovery.....	516
F.	Assets Bought with Money Withdrawn from a Mixed Bank Account—Claim to a Proportionate Share between Innocent Contributors or against a <i>Diplock</i> Recipient	518
IX.	Improvements to Traceable Assets.....	518
A.	Improvement of Trustee's or Wrongdoer's own Assets with Trust Money.....	519
B.	Improvement to an Innocent Recipient's Land or Chattels with Trust Money.....	520
C.	Trustee Spending Money of one Trust on Improvements to Assets in another Trust	520
X.	Mixtures and Identification—Shares in Companies	522
XI.	When Assets Become Untraceable.....	522

A.	Tracing through Overdrawn Bank Accounts	523
B.	Assets Purchased with the Assistance of a Credit Facility	524
C.	Backwards or ‘Reverse’ Tracing.....	524
XII.	‘Equity’s Darling’—a bona fides Purchaser for Value without Notice	527
A.	A Purchase for Value.....	528
B.	Purchase in Good Faith or bona fides	528
C.	Without Notice	528
	i. Notice of Doubtful Claims on the Property	529
	ii. Notice and Trustees of Multiple Trusts	529
	iii. No Notice at the Time of Transfer of the Legal Estate	529
	iv. Purchasers without Notice from a Purchaser with Notice and Purchasers with Notice from a Purchaser without Notice.....	530
D.	Governing Law.....	530
14.	Trust Property and the Proceeds of Crime.....	531
I.	Introduction	531
A.	Primary Legislation	532
B.	Secondary Legislation.....	532
C.	JFSC Guidance.....	533
II.	Jersey’s Money Laundering Offences	533
A.	Proceeds of Crime	534
	i. The Acquisition, Use, Control or Possession or Use of the Proceeds of Criminal Property	534
	a. Criminal Property	534
	b. Criminal Conduct	535
	Tax-related Offences.....	535
	Knowledge or Suspicion.....	536
	c. The Adequate Consideration Defence	537
	ii. Arrangements that Facilitate the Acquisition, Use, Control or Possession of Criminal Property.....	538
	a. Prohibited Arrangements	538
B.	Offence of Money Laundering.....	539
C.	Defences	540
D.	The Informal Freeze	541
III.	Jersey’s Anti-Terrorism Finance Offences	542
A.	‘Terrorism’.....	542
B.	‘Terrorist Property’	543
C.	‘Terrorist Entity’.....	543
D.	Proscribed Organisations.....	542
E.	Offences Relating to Terrorist Financing.....	544
	i. Use and Possession etc of Property for Purposes of Terrorism	544
	ii. ‘... has reasonable cause to suspect that ...’	544
	iii. Providing Property or Financial Services that May be Used for Terrorism	545
	iv. Dealing with Terrorist Property	545

F. A Trustee Accepting Trust Property Must Take Necessary Precautions	546
IV. Disclosure and Non-disclosure	546
A. Duties of Disclosure	547
B. Restrictions on Disclosure—Anti-tipping off.....	549
V. Confiscation Orders and <i>Saisie Judiciaire</i>	550
A. Realisable Property	552
B. Basis upon which a <i>saisie judiciaire</i> May Be Granted.....	553
C. Consequences and Duration of a <i>saisie judiciaire</i>	554
D. Trusts and <i>saisies judiciaires</i>	555
E. Discharge or Variation of a <i>saisie</i>	557
VI. Civil Recovery of Criminal Property	558
15. The Recognition and Enforcement of Judgments against Jersey Trust Assets and Trustees	565
I. Introduction.....	565
II. Recognition and Enforcement	565
III. Enforcement and Recognition of Foreign Judgments at Customary Law.....	566
A. Enforcement of Foreign Judgments <i>in personam</i>	568
B. A Judgment Given <i>in personam</i>	568
C. A Judgment for a Debt or Definite Sum of Money	569
i. Judgment Must be Final and Conclusive	569
ii. Whether the Foreign Court Is to Be Treated as Having Jurisdiction	570
a. Presence in the Foreign Jurisdiction at the Time the Foreign Proceedings Are Commenced.....	571
Individuals	571
Corporations	571
b. Entering an Appearance in Proceedings	572
c. Challenges to Jurisdiction of the Foreign Court	572
d. Agreement to Submit to the Jurisdiction.....	573
D. Reliance on Foreign <i>in personam</i> Judgments for Purposes other than Enforcement	574
E. Procedure to Enforce a Foreign Judgment at Customary Law	576
F. Defences to Proceedings Seeking the Recognition or Enforcement of a Foreign Judgment at Customary Law	577
G. Enforcement and Recognition of a Foreign Judgment <i>in rem</i> at Customary Law	577
IV. The Enforcement and Recognition of Foreign Judgments under Statute.....	579
A. Jurisdiction of the Foreign Court	581
B. The Procedure for Registration of a Foreign Judgment under the Judgments (Reciprocal Enforcement) (Jersey) Law 1960.....	583
C. The Effect of Registration.....	584
D. Basis upon which Registration May Be Set Aside	584

E.	Procedure to Set Aside the Registration of a Foreign Judgment	585
F.	The Recognition of a Foreign Judgment under the Judgments (Reciprocal Enforcement) (Jersey) Law 1960.....	585
V.	Article 9 Trusts (Jersey) Law 1984—The Firewall.....	587
A.	The Position prior to the Enactment of the Trusts (Amendment No 5) (Jersey) Law 2012.....	590
B.	The Position following the Trusts (Amendment No 5) (Jersey) Law 2012.....	592
C.	The Efficacy of the Firewall.....	593
	i. The Trustee's Decision whether or not to Submit to the Jurisdiction of a Foreign Court.....	594
16	Prescription of Actions	597
I.	Introduction: Prescription or Limitation?	597
II.	Article 57(1) of the Trusts (Jersey) Law 1984—Actions to Recover Trust Property from the Trustee and Frauds to which the Trustee Was a Party or Privy.....	598
A.	Locus	599
B.	'Trustee'	599
C.	Article 57(1)(a)—a Fraud to which the Trustee was a Party or Privy	600
D.	Article 57(1)(b)—Possession, Control or Converted to the Trustee's Use	601
E.	Laches	602
III.	Article 57(2) of the Trusts (Jersey) Law 1984—Actions Founded on a Breach of Trust.....	603
A.	Actions Founded on a Breach of Trust	603
	i. Claim for Breach of Trust	603
	ii. Claim to Recover Trust Property	604
B.	The Accrual Date—From which Point Does Time Begin to Run?	605
	i. Delivery of the Final Accounts.....	606
	ii. Date of Knowledge.....	607
C.	Claims by Co-trustees or New Trustees for Breach of Trust.....	607
	i. Claims for Contribution between Trustees.....	608
D.	Laches Not Applicable	609
IV.	Constructive Trusts and Similar Liabilities	609
A.	Claims against Trustees de son tort	610
B.	Inconsistent Dealing with Trust Property	610
C.	Knowing Recipients	610
D.	Dishonest Assistants	611
E.	Claims against Innocent Volunteers who Receive Trust Property	612
F.	Claims for Breach of the No-Profit Rule	613
G.	Claims for Breach of the Self-dealing and Fair-dealing Rules	614

V.	Extension and Postponement of the Prescription Period	615
A.	Statutory Suspension of Prescription for Breach of Trust Claims.....	615
i.	Age	616
B.	<i>Empêchement</i>	616
i.	<i>Empêchement de droit</i>	616
ii.	<i>Empêchement de fait</i>	617
a.	Fraud and Concealment	618
b.	<i>Empêchement de fait</i> and Article 57(3B) of the Trusts (Jersey) Law 1984.....	619
iii.	The Longstop—Article 57(3C) of the Trusts (Jersey) Law 1984	621
C.	Suspension of Prescription by Service of Proceedings	622
D.	Extension of the Prescription Period—Stand-still Agreements	622
VI.	Prescription Periods in Miscellaneous Claims	623
A.	Claims against Directors.....	623
B.	Testamentary Dispositions into Trust.....	628
Appendix I.....	631	
Appendix II	633	
Appendix III	637	
Appendix IV	645	
<i>Index</i>	647	

TABLE OF CASES

[All references are to paragraph number]

A

A v A [2007] EWHC 99 (Fam)	4-9, 4-13, 4-19
A as trustee of the D Trusts, Re [2012] JRC 130.....	3-18
A Employee Share Trust, Re [2009] JRC 089.....	3-28, 3-125
A Limited, In the Matter of the Representation of [2013 (1) JLR 305].....	3-40
A Settlement, Re [1994 JLR 139].....	3-52, 5-20
A Settlement, Re [2009] JRC 125	3-18
A Settlement, Re [2011] JRC 109	5-24, 5-32, 5-36, 5-68
A Trust, Re [2009] JRC 245, [2009 JLR 447].....	2-48, 4-21, 4-29, 4-47, 16-16
A Trust, Re [2012 (2) JLR 253], [2012] JRC 066.....	10-7, 10-17
A Trust, Re [2012] Bda LR 79.....	2-55
A Trustees Ltd v W [2008 JLR N[25]].....	8-48, 8-51
A & B Trusts [2007 JLR 444]	2-6, 3-44, 3-54, 3-58, 5-43, 8-52, 15-93
A & B Trusts, In the Matter of [2012] JRC 169A.....	10-9, 10-11, 10-14, 10-22
AA, Re Representation of [2010] JRC 164.....	2-55
A, B and C v Rozel Trustees (Channel Islands) Ltd	3-138
AB Jnr v MB Grand Court of the Cayman Islands, 13 August 2012	8-50, 8-65
AB, Trustor v Smallbone (No 2) [2001] 1 WLR 1177	9-18
Abacus (C.I.) Ltd v Appleby [2007 JLR 499].....	6-20
Abacus (C.I.) Ltd v Hirschfield [2001 JLR 530]	3-18, 3-22 , 3-29, 8-51
Abacus (C.I.) Ltd v Imperial Cancer Research Fund 2002/194C (unreported)	4-50
Abacus (C.I.) Ltd, Re Representation of [2004] JRC 219.....	4-50
Abdel Rahman v Chase Bank (C.I.) Trust Co Ltd 1984 JJ 127	11-21 , 15-14
Abdel Rahman v Chase Bank (C.I.) Trust Co Ltd & Ors [1993 JLR N-4], [1991 JLR 103], [1990 JLR 59]	1-94, 1-98, 1-99, 4-5, 4-9, 4-55, 15-14, 15-73
Aberdeen Railway Co v Blaikie Bros (1854) 1 Macq 461	8-9, 8-17
Abidin Daver (The) [1984] AC 398	2-45
ABN International SA (R on the application of) v FSA [2010] EWCA Civ 123.....	5-81
Abou-Rahmah v Abacha [2006] EWCA 1492, [2007] 1 All ER (Comm) 827	12-27
Abrahams' Will Trusts, Re [1969] 1 Ch 463.....	6-35
Abram Steamship Co v Westville Shipping Co [1923] AC 773	8-90
Acturus Properties Ltd & Ors v AG [2001 JLR 43]	14-22
Adams v Cape Industries plc [1990] Ch 433	15-8, 15-9, 15-17, 15-20, 15-27, 15-55
Adams' Trust, Re (1879) 12 ChD 634.....	10-9, 10-19
Adamson, ex parte (1878) 8 ChD 807 (CA)	7-4
AG v De Carteret [1987-88 JLR 626].....	1-26

AG v Guardian Newspapers (No 2) [1990] 1 AC 109	6-14, 6-20
AG v Hall [1995 JLR 102]	1-9
AG v Rosenlund and FNB International Trustees Ltd [2015] JRC 186.....	14-9, 14-48, 14-63, 14-69
AG v Tantular [2014 (2) JLR 25], [2014] JRC 243.....	12-4, 14-43, 14-46
AG for Hong Kong v Reid [1994] 1 AC 324.....	6-14, 6-22, 8-1, 8-19, 8-21, 8-77, 13-8, 16-34
AG Securities v Vaughan [1990] 1 AC 417.....	4-14, 4-55
Agip (Africa) Ltd v Jackson [1990] Ch 265, [1991] Ch 547.....	9-2, 9-20, 9-23, 9-38, 12-23, 12-49, 12-51
Ahmed Angulin bin Hadjee Mohamed Salleh Angullia v Estate and Trust	
Agencies (1927) Ltd [1938] AC 624, PC.....	7-5, 7-10
AIB Group (UK) plc v Mark Redler & Co Solicitors [2014] UKSC 58	7-26, 7-27, 12-62
Aiden Shipping v Interbulk Ltd (The Vimeira) (No 2) [1986] 1 AC 965	1-158
Aiken v Short (1856) 1 H & N 210.....	9-2
Air Jamaica Ltd v Charlton [1999] 1 WLR 1399	6-34
Akar v AG of Sierra Leone (1969) 3 All ER 384 PC.....	1-9
AK Investment CJSC v Kyrgyz Mobil Tel Ltd [2011] UKPC 7	2-23, 2-45
A, K, L v H [2016] JRC 116.....	16-6
Aktieselskabet Dansk Skibsfinansiering v Brothers [2001] 2 BCLC 324.....	12-51
Alfred Crompton Amusement Machines Ltd v Customs and Excise	
Commissioners (No 2) [1974] AC 405	5-99
Alhamrani v Alhamrani [2007 JLR 44], [2007] JCA 164, [2008 JLR N [45]]	1-94, 3-10, 3-49, 5-93, 5-98, 11-3, 11-20, 12-67, 12-68, 16-1, 16-2, 16-55, 16-56, 16-58, 16-59
Alhamrani v JP Morgan Trust Co (Jersey) Ltd [2007 JLR 527].....	1-108, 1-109, 3-58, 3-63, 3-76, 3-77, 3-80
Al Khudairi v Abbey Brokers Ltd [2010] EWHC 1486 (Ch)	12-49
Alkin v Raymond [2010] WTLR 1117	10-15
Allied Irish Banks (C.I.) Ltd, In re [1987-88 JLR 157]	2-45
Allnut v Wilding [2007] EWCA Civ 412, [2007] WTLR 941	4-36, 4-38, 4-44, 4-50
Allsop, Re [1914] Ch 1	7-80, 7-81, 7-83
Alsop Wilkinson v Neary [1996] 1 WLR 1220	2-52, 2-53, 3-1, 3-44, 3-58, 3-59, 3-60, 3-69, 5-50, 10-7, 10-31, 10-37, 11-24, 11-33, 11-39
Amalgamated Metal Trading Ltd v City of London Police Financial Investigation Unit [2003] 4 All ER 1225.....	
Amory, Re [1951] WN 561	3-62
Anagram v Mayo [1994 JLR 181].....	1-57, 1-88
Andrews v Ramsay & Co [1903] 2 KB 635	8-94
Angullia v Estate and Trust Agencies (1927) Ltd [1938] AC 624 (PC)	7-14
Anker-Petersen v Anker-Petersen (1998) 12 TruLI 166 (6 December, 1990).....	3-101
Antonio Gramsci Shipping Corp & Ors v Recoletos Ltd & Ors including	
Aviars Lembergs [2012] EWHC 1887 (Comm).....	2-22
APEF Management Company 5 Ltd v Comptroller of Income Tax [2013] JRC 262	5-83
Application for Information about a Trust, Re (2013-14) 16 ITEL 955	5-71
Apricus Investments Ltd v CIS Emerging Growth Ltd [2004] JRC 038.....	3-124
Arab Monetary Fund v Hashim (No 5) [1992] 2 All ER 914.....	5-95
Araham v Perry [2005] JRC 150A	1-83, 1-88
Arkin v Borchard Lines Ltd & Ors [2005] EWCA Civ 655	1-154

Armitage v Nurse [1998] Ch 241, [1997] EWCA Civ 1279.....	3-69, 5-20, 5-70, 7-18, 7-43, 7-65, 7-66, 7-67, 7-69, 7-71, 7-72, 12-21, 12-41, 16-6, 16-17, 16-44
Armstrong v Jackson [1917] 2 KB 822.....	8-89
Armstrong DLW GmbH v Winnington Networks Ltd [2012] EWHC 10 (Ch)	9-26
Armstrong Whitworth Securities Co Ltd, Re [1947] Ch 673.....	3-33
Arthur v AG of Turks & Caicos Islands [2012] UKPC 30.....	7-4
Arya Holdings Ltd v Minories Fin Ltd [1993 JLR N-5].....	1-103
Ashbourne Marketing Ltd v Alfred Mosca and Yankee Exports 1999/10A (unreported)	1-88
Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223	14-22
ATC (Cayman) Ltd v Rothschild Trust Company Ltd (2011-12) 14 ITELR 523	11-5, 11-41
Aurthur v AG of Turks & Caicos Islands [2012] UKPC 30.....	9-24
Australian Commercial Research and Development Ltd v A.N.Z. McCaughan Merchant Bank Ltd [1989] 2 All ER 65.....	2-46
Australian Postal Corporation v Lutak (1991) 21 NSWLR 584	13-51
Australian Securities Commission v AS Nominees Ltd (1995) 62 FCR 504, [1996] PLR 297	8-23, 12-67
Avalon Trust, Re [2006 JLR N19]	5-25, 5-36, 5-37
Avrahami v Biran [2013] EWHC 1776 (Ch)	8-94, 8-95
B	
B v Auckland District Law Society [2003] UKPC 38	3-138
B v B [1978] 3 WLR 624	5-100
B v C [2009] JRC 245.....	2-28
B v M-R [2007 JLR N-48].....	1-92
B, Re [2012] JRC 299, (35/2012) Guernsey CA	4-21, 5-13
B Life Interest Settlement, In re [2012] JRC 229, [2013 (1) JLR 1], [2013 (2) JLR 324]	4-22, 4-23, 4-24, 4-25, 4-27, 4-29, 4-47
B Settlement, In re [2010 JLR 653], [2010 JLR N[29]], [2011 JLR 236], [2012 (1) JLR N [11]], [2012] JRC 005, [2013 (1) JLR 1].....	3-10, 3-12, 3-14, 3-18, 3-29, 3-54, 3-67, 4-34, 5-11, 5-14, 5-43, 5-48, 5-92, 8-48
B Trust, In re [2006 JLR 562].....	3-97, 15-6, 15-75, 15-77, 15-79, 15-80, 15-81, 15-91, 15-97
BA Peters plc, Re [2008] EWCA Civ 1604.....	12-10
Baden v Societe General pour Favoriser le Developpement du Commerce et de l'Industrie en France SA [1993] 1 WLR 509	9-8, 9-22, 9-44, 12-17, 12-22, 12-67, 13-99
Bagus Investments Ltd v Kastening [2010 JLR 355].....	1-94, 6-4, 6-23, 6-24, 9-6, 9-10, 9-21, 9-24, 9-25, 9-40, 12-13, 16-2, 16-5, 16-9, 16-10, 16-13, 16-14, 16-26, 16-29, 16-30, 16-52, 16-62
Bahin v Hughes (1886) 21 ChD 390	7-49
Bailey v Barnes [1894] 1 Ch 25	13-99
Bainbridge v Blair (No 1) (1839) 1 Beav 459.....	10-19
Baker v Courage & Co [1910] 1 KB 56	16-33

Baker v Willoughby [1970] AC 467.....	7-49
Bald Eagle Trust, In re [2003 JLR N 16].....	15-6, 15-77
Bamford, In the Matter of the Estate of [2003 JLR N13]]	12-24
Bank of Credit & Commerce International (Overseas) Ltd v Akindele [2001] Ch 437	9-1, 9-6, 9-21, 9-23, 9-24, 9-25
Bank of Credit and Commerce International SA v Saadi [2005] EWHC 2256 (QB).....	16-34
Bank of Ireland v Jaffery [2012] EWHC 1377 (Ch).....	8-94, 8-95
Bank Mellat v HM Treasury [2013] UKSC 39, [2014] AC 700.....	5-85
Bank Tejarat v Hong Kong and Shanghai Banking Corporation (CI) Ltd [1995] 1 Lloyd's Rep 239	12-17, 12-23
Bankers Trust Co v Shapira [1980] 1 WLR 274, CA	5-93, 5-95
Bankes v Salisbury Dioceasan Council of Education [1960] Ch 631.....	10-5
Banque Financière de la Cité v Parc (Battersea) Ltd [1999] 1 AC 221	13-93
Banton v CIBC Trust Corp (2000) 182 DLR (4th) 486.....	13-22, 13-27
Barclays Bank v Bhander 1998/152 (unreported)	3-44
Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567.....	6-31, 6-37, 6-38, 9-10, 11-55, 12-20
Barclays Bank plc v Quinecare Ltd [1992] 4 All ER 488	9-25
Barclays Wealth Trustees (Jersey) Ltd & Barclays Wealth Fund Managers (Jersey) Ltd v Equity Trust (Jersey) Ltd & Equity Trust Services Ltd [2013 (2) JLR 22], [2013] JRC 094, [2014 (1) JJLR 517]	1-147, 1-150, 1-154, 12-75 , 16-22
Barclays Wealth Trustees (Jersey) Ltd, Re Representation of [2008] JRC 165	4-42
Barings plc (in liquidation) v Coopers & Lybrand (a firm) (No 7) [2003] EWHC 1319 (Ch), [2002] 2 BCCLC 364	7-82, 12-88, 12-90
Barker, In re [1985-86 JLR 186].....	1-9
Barker's Trusts, Re (1875) 1 ChD 43	10-9
Barlow Clowes International Ltd v Eurotrust International Ltd [2005] UKPC 37, [2006] 1 WLR 1476	7-69, 9-3, 12-27, 12-20, 12-49
Barlow Clowes International v Vaughan [1992] 4 All ER 22	13-33, 13-40, 13-42, 13-48, 13-67
Barnes v Addy (1874) 9 Ch App 244.....	9-3, 9-20, 12-23, 12-71
Barnes v Tomlinson [2006] EWHC 3115 (Ch), [2007] WTLR 377	7-67, 7-69
Barney, Re [1892] 2 Ch 265	7-11, 9-45
Barra Hotel Ltd v AG [2000 JLR 370]	1-67
Barret, Re [2001 JLR N 34]	4-42
Bartlett v Barclays Trust Co Ltd [1980] 1 Ch 515.....	5-57, 7-16, 7-18, 7-22, 7-28, 7-58, 7-59, 7-60, 7-81, 12-87, 12-99
Barton v Armstrong [1976] AC 104.....	6-16
Bastiaan Broere Trust and the Cornelis Broere Trust, In the Matter of [2003 JLR 509].....	3-14
Batalla-Esquival, In the Matter of [2002 JLR 192]	14-55
Bathurst (Countess) v Kleinwort Benson (Channel Islands) Trustees Ltd (Guernsey RC) 38/2004, 2003-04 GLR N [32].....	5-25, 5-39, 5-42, 5-58, 5-66, 5-76
Baudains v Du Heaume (1886) 211 Ex 379.....	10-7
Bayley v SG Associates [2014] EWHC 783 (Ch) [2014] WTLR 1315	12-78, 12-79

BB, In re [2011 JLR 672]	8-60
BB, A and C, In the Matter of the Representation of [2011 JLR 672]	7-78, 7-83, 7-86, 11-6
BB, A and D, In re [2011 JLR 672]	9-43, 9-44, 9-46, 9-47, 9-48, 9-50
B, C and D Settlements, Re [2010] JCA 231, [2010 JLR N[36]], [2010] JRC 085.....	3-12, 5-51, 5-52, 5-53
Beachcroft Trust, Re [2004] JRC 144	4-42
Beale's Settlement Trusts, Re [1932] 2 Ch 15.....	3-101
Beatty, Re [1990] 1 WLR 1503.....	8-41, 8-42, 8-45
Beddoe, In re [1893] 1 Ch 547.....	3-39, 3-41, 3-58
Beer v Tapp (1862) 31 LJCh 513	3-69, 13-85
Bell v Heating & Ventilating Engr Co Ltd [1985-86 JLR 241].....	16-24
Bell, In re [1995] JLR 23]	15-16, 15-50
Bell's Indenture, Re [1980] 1 WLR 1217.....	12-53
Belmont Finance Co Ltd v Williams Furniture Ltd (No 2) [1980] 1 All ER 393.....	9-8, 9-9, 9-11, 9-12, 9-16, 9-23, 9-34, 9-40, 9-51, 16-5
Bene Ltd v VAR Hanson & Partners [1997 JLR n10a]	5-98
Benest v Kendall [1992 JLR N 2].....	1-21
Benest v Langlois [1993 JLR 117].....	6-17
Benett v Wyndham (1857) 4 De GF & J 259.....	11-20
Beningfield v Baxter (1886) 12 App Cas 167	8-13, 12-79
Benjamin, Re [1902] 1 Ch 72	3-18
Benne Ltd v VAR Hanson & Partners [1977 JLR N10a]	3-29
Bennet v Bennet (1879) 10 ChD 474	6-32
Bentinck v Fenn (1887) 12 AppCas 652.....	8-80, 8-81
Bergliter v Cohen [2006] EWHC 123 (Ch)	7-81
Berry v Farrow [1914] 1 KB 632	1-60
Berry v Green [1938] AC 575	5-64
Berry Trade Ltd v Moussavi [2003 JLR N [51]]	1-63
Berry's Settlement [1966] 1 WLR 1515.....	3-96
Bhandher, In re [1997 JLR N-16B], [1998 JLR N-18]	1-30, 3-46
Bhander v Barclays Bank & Trust Co Ltd (1997-98) 1 OFLR 497	3-70
Biddulph, Re (1869) LR 4 Ch App 280	7-36
Bilta (UK) Ltd v Nazir [2013] EWCA Civ 968.....	9-31, 9-34, 9-35, 9-36, 12-57
Binet v Foot [2008 JLR 172]	1-65
Bird Charitable Trust and Bird Purpose Trust, In the Matter of [2008 JLR 1], [2008] JRC 013, [2012 (1) JLR 62]	4-54, 5-11, 5-80, 8-37, 10-2, 10-27, 10-45, 14-12, 14-17
Bishopsgate Investment Management Ltd v Homan [1995] Ch 211, CA	13-45, 13-47, 13-53, 13-83, 13-88, 13-93
Blackburn v Russell-Hills, unreported, 24 July 1990.....	5-64
Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG [1975] AC 591.....	15-33, 15-71, 15-72
Blair v Vallely [2000] WTLR 615.....	8-42
Blake, Re [1932] 1 Ch 54.....	16-33
Blenheim Ltd v Morgan [2003 JLR 598].....	1-94
Bluebird Settlement, Re [2003] JRC 098.....	4-42
B.M.P. Global Distribution Inc v Bank of Nova Scotia [2009] SCC 15, [2009] 1 SCR 504.....	9-20

Boardman v Phipps [1967] 2 AC 46	6-14, 6-17, 8-7, 8-9, 8-18, 8-50, 8-74, 16-34
Bodega Co Ltd, Re [1904] 1 Ch 276.....	9-2
Bolton v Curre [1895] 1 Ch 544.....	12-8
Bomford, In re [2002] JLR N[34]	5-133 , 15-11
Bonham v Blake Lapthorn Linell [2006] EWHC 2513 (Ch), [2007] WTLR 189	11-38
Boscowen v Bajwa [1996] 1 WLR 328.....	9-16, 12-23, 13-5, 13-92, 13-93
Boultting & Anor v Association of Cinematograph, Television and Allied Technicians [1963] 2 QB 606.....	8-17, 8-50, 8-79
Bowman v Fels [2005] EWCA 226 Civ	14-17
Boyd v Pickersgill and Le Cornu [2000] JLR 310], [1999 JLR 284]	1-96, 1-107, 1-154, 16-43, 16-44, 16-59
Boyd v Rozel Trustees (Channel Islands) Ltd [2014] JRC 056	4-32
Bradstock Trustee Services Ltd v Nabarro Nathanson [1995] 1 WLR 1405	12-78, 12-79
Brassey's Settlement, Re [1955] 1 WLR 192	3-101
Bray v Ford [1896] AC 44.....	8-1, 8-7, 8-8, 8-9, 8-17, 8-45
Brazil (Federal Republic) v Durant Intl Corp [2010] JLR 421], [2012 (2) JLR 117], [2012] JLR 356, [2012] JCA 025, [2013 (1) JLR 273], [2013] JRC 071, [2015] UKPC 35	2-27, 2-28, 2-42, 2-43, 6-23, 6-29, 6-30, 7-4, 7-31, 7-34, 7-36, 8-85, 9-1, 9-2, 9-6, 9-7, 9-10, 9-16, 9-30, 9-37, 9-40, 9-51, 10-31, 12-10, 13-1, 13-5, 13-6, 13-11, 13-12, 13-15, 13-22, 13-53, 13-84, 13-88, 13-92, 15-29, 15-33, 16-14
Brazil (Federal Republic) and Municipality of Sao Paolo v Citibank NA [2006] JLR 478]	1-30, 1-43, 5-93, 5-95
Breakspear v Ackland [2008] EWHC 220 (Ch), [2009] Ch 32.....	5-14, 5-39, 5-43, 5-44, 5-45, 8-45, 8-46
Brian Munro Ltd Settlement, In re [1995] JLR N30]	3-96
Brinks Ltd v Abu-Saleh (No 3), The Times, 23 October 1995.....	12-17, 12-22
Bristol & West Building Society v Mothew [1998] Ch 1, [1996] EWCA Civ 533, [1996] 4 All ER 698.....	6-28, 7-26, 8-1, 8-25, 833, 8-34, 8-35, 8-46, 8-50, 9-38, 12-19, 16-24, 16-57, 16-59
British American Elevator Company Ltd v Bank of British North America [1919] AC 658 (PC)	7-4, 7-14, 9-20
Broere Trusts, In re [2004] JLR N2].....	5-43, 5-97
Brook's Settlement, Re [1968] 1 WLR 1661.....	3-94
Brown v Barclays Bank plc [2002] JLR N [1]]	1-94
Brown v Bennett [1999] 1 BCCL 649.....	12-17, 12-23
Brown v IRC [1965] AC 244.....	8-18, 8-49, 8-50
Brown v Sivera [2011] ABCA 109	7-6
Brudnell-Bruce v Moore & Cotton [201] EWHC 3679 (Ch).....	3-18, 10-7, 10-14, 12-5
Brunei Investment Agency v Fidelis Nominees Ltd & Ors [2008] JLR 337]	15-11, 15-13, 15-17, 15-34, 15-41
Bruno Sangalli-Ferriere Children's Settlement, In re [2007] JLR N8]	3-94, 3-96
Brush v Bower Cotton & Bower [1993] 4 All ER 741 QBD	1-138
Buckton v Buckton [1907] ChD 406.....	10-36

Buckton, Re [1907] 2 Ch 406.....	3-60
Bullivant v Attorney General for Victoria [1901] AC 196.....	16-44
Burridge v Row (1842) 1 Y & C Ch 183.....	12-9
Burrow's Case (1880) 14 ChD 432, CA.....	13-104
Burt, Boulton & Hayward v Bull [1985] 1 QB 276.....	11-19
Business Environment Bow Lane Ltd v Deanwater Estates Ltd [2009] EWHC 2014	1-103
Butler v Axco Trustees Ltd [1997] JLR N-17a	7-5, 7-7, 10-7, 16-13
Butt v Kelson [1952] Ch 197	5-53, 5-54
Buttes Gas & Oil Co v Hammer (No 3) [1981] QB 223	3-126, 3-130, 3-132, 5-98
Byrne v South Sefton Health Authority [2001] EWCA Civ 1904	1-160

C

C v P-S [2010] JLR 645]	1-106, 1-107
C Corporation formerly CH Trust, Re [2009] JRC 025A	3-18
C, In the Matter of the Representation [2012] JRC 050.....	10-9
C Ltd, In re [1997] JLR N8]	5-125, 5-134
C Trust Co Ltd v Temple [2009] JLR N[13]]	8-51, 15-93, 15-95
C Trust, In the Matter of [2008] JLR N20], [2008] JRC 071	4-49, 4-50
C. A. Settlement, In re [2002] JLR 312]	3-14, 5-11, 5-13, 5-55, 5-91, 5-92, 5-99
Café de Lecq Ltd v RA Rossborough (Insurance Brokers) Ltd [2012 (2) JLR 115].....	1-106
Campbell v Campbell & Ors [2014 (2) JLR 465]	2-41, 2-43
Campbell v Gillespie [1900] 1 Ch 225	7-19
Canada Trust & Ors v Stolzenberg & Ors (No 2) [1997] EWCA 2592.....	2-22
Cannon v Nichol [2006] JLR 299].....	6-8
Cape Breton Co, Re (1885) LR 29 ChD 795	6-21, 8-89
Carafe Trust, In re [2005] JLR 159]	3-43, 3-58, 5-30, 6-15, 8-56, 8-59, 8-64, 8-78, 10-15, 10-37, 10-43, 10-51, 11-7, 11-41
Carapiet's Trusts, Manoogian (Armenian Patriarch of Jerusalem) v Sonsino [2002] EWHC 1304 (Ch)	2-106
Carl Zeiss Stiftung v Herbert Smith & Co (No 2) [1969] 2 Ch 276	6-2, 9-25, 13-100
Carl Zeiss Stiftung v Rayner & Keeler (No 2) [1967] 1 AC 853.....	15-29, 15-30, 15-31, 15-35
Carman v Yates [2004] EWHC 3448 (Ch), [2005] BPIR	4-15
Castrique v Imrie (1870) LR 4 HL 414	15-40
Catch a Ride Ltd & Anor v Gardner & Ors [2014] EWHC 209 (Ch).....	1-103
Cattley v Pollard [2007] Ch 353, [2007] 3 WLR 317, [2006] EWHC 3130 (Ch)	12-60, 12-61, 16-10
Caversham Trustees Ltd v Patel & Ors [2007] JLR N-30], [2007] JRC 070.....	5-30, 7-8, 7-12, 7-36, 8-59, 10-46, 10-54
Caversham Trustees Ltd, Re [2010] JRC 054, [2008] JRC 065.....	3-18, 10-43
CCC Ltd v Apex Trust Ltd [2012 (1) JLR 314]	4-27
C, D, E & F, In the Matter of the Representation of [2012] JRC 169A	10.9, 10-11, 10-14, 10-22, 10-28
Cecil & Ors v Bayat & Ors [2010] EWHC 641	2-25
Centre Trustees (C.I.) Ltd v van Rooyen [2009] JLR N [29]]	1-110
Certain Ltd Partners in PFI Secondary Fund II LP (a firm) v Henderson PFI Secondary Fund II LP (a firm) [2012] EWHC 3259 (Comm) [2013] QB 934.....	12-79

C.F. AD v C Trust and PW [2010] JRC 001	5-105
Chan v Zacharia (1984) 154 CLR 178.....	8-1
Channel Islands & International Law Trust Company v Pike [1999 JLR 28]	15-29
Channel Islands Knitwear Co Ltd v Hotchkiss [2001 JLR 570].....	1-158
Chapman v Browne [1902] 1 Ch 785	7-81
Chapman v Chapman [1954] AC 249.....	9-49
Chapman, Re [1896] 2 Ch 763 (CA).....	7-18, 7-20, 7-67
Chapman's Settlement Trusts (No 2), Re [1959] 1 WLR 372	3-111
Charalambous v Charalambous [2004] EWCA Civ 1030.....	15-75
Charitable Corp v Sutton (1742) 2 Atk 400.....	7-36
Charlton, Re [1993 JLR 360]	5-81
Charman v Charman (No 2) [2007] EWCA Civ 503	10-3
Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101	4-54
Charter plc v City Index Ltd [2007] EWCA Civ 1382.....	9-1
Chellaram v Chellaram [1985] Ch 409	2-52, 2-53, 2-106, 2-108
Chellaram v Chellaram (No 2) [2002] EWHC 632 (Ch).....	2-71, 2-75, 2-106
Cherney v Neuman [2011] EWHC 2156 (Ch)	7-86
Chessells v British Telecommunications plc [2002] PLR 141.....	3-53, 3-74
Chief Aleyideio, In re Estate of [2003 JLR N[7]].....	4-56
Chief Officer of the States of Jersey Police v Minwalla [2007] JRC 137	14-22
Chillingworth v Chambers [1896] 1 Ch 685	12-8, 12-12
Christie-Miller's Marriage Settlement, Re [1961] 1 WLR 462.....	3-104
Christoforides v Terry [1924] AC 566.....	8-13
Chvetsov v BNP Paribas Jersey Trust Corp Ltd [2009 JLR 217]	7-50, 12-69, 12-74
C.I. Law Trustees Ltd v Minwalla & Ors [2005 JLR 359], [2005] JRC 099.....	2-6, 4-5, 4-19, 15-43,
	15-75, 15-77, 15-80,
	15-89, 15-93
CIS/213/2004, Re [2008] WTLR 189.....	2-106
Citadel General Assurance Co v Lloyds Bank Canada [1997] 3 SCR 805.....	9-20
City Equitable Fire Insurance Co Ltd, Re [1925] Ch 407	7-67, 7-73
Claes Enhörning v Nordic Link Investments Ltd & Ors , unreported, 24 January 1997	3-125
Clapham v Le Mesurier [1991 JLR 5]	5-81
Clapham, Re [2005] EWHC 3387	7-80
Clarke v Heathfield (No 2) [1985] ICR 606.....	10-21
Clayton's Case (Devaynes v Noble) (1816) 1 Mer 572	13-40, 13-41
Clitheroe's Settlement Trusts, Re [1959] 1 WLR 1159	3-107
CMS Dolphin Ltd v Simonet [2001] 2 BCAC 704.....	8-75
CMC Holdings Ltd v RBC Trust Company (International) Ltd, Regent Trust Company & Anor [2015] JRC 149, [2016] JRC 149	8-21, 12-13, 16-1, 16-2, 16-5, 16-6, 16-44, 16-52, 16-57, 16-62, 16-63
Cocks v Chapman [1896] 2 Ch 763	7-72
Coco v A.N. Clark (Engineers) [1969] RPC 41	6-17
Cole v Muddle (1852) 10 Hare 186	12-9
Cole v States Police (Chief Officer) [2008 JLR N [47]].....	1-56
Coleman v Bucks and Oxon Union Bank [1897] 2 Ch 243	9-20
Commerzbank Aktiengesellschaft v IMB Morgan plc [2004] EWHC 2771 (Ch)	13-48
Commonwealth Reserves v Chodar (2001) 3 ITTEL 549	9-52
Comninos v Prudential Assurance Co Ltd (The Ikarian Reefer) [2000] 1 All ER 37.....	1-162
Compagnie Commerciale Andre SA v Artibell Shipping Co Ltd (No 2) 2001 SC 653	9-20

Compagnie Financiere du Pacifique v Peruvian Guano Co (1882) 11 QBD 55, CA.....	5-97
Company K 1989 (C No 4081), Re, 26 July 1993, unreported.....	1-138
Compass Trustees v McBarnett & Ors [2002] JLR 312]	2-6, 15-6, 15-75, 15-77,
	15-80, 15-81
Competetive Insurance Co v Davies Investments Ltd [1975] 3 All ER 254	9-8
Concord Trust v The Law Debenture Trust Corporation plc [2004]	
EWCA Civ 1001, [2005] UKHL 27	10-43, 11-41
Connelly v RTZ Corp Plc (No 2) [1998] AC 854	2-45
Consul Development Pty Ltd v D.P.C. Estates Pty Ltd (1975) 132 CLR 373, Aus HC	12-19
Continental Caoutchouc and Gutta Percha Co v Kleinwort	
Sona & Co (1904) 90 LT 474	9.20
Conway v Stokes (1952) 4 DLR 124.....	10-13
Cook v Deeks [1916] AC 554	8-75
Cook v Dey (1876) 2 Ch D 218	1-84
Cooper v Cooper (née Resch) [1985–86] JLR N-6]	10-50
Cooper v Lieutenant Governor [2001] JLR 325]	1-21
Cooper v Resch [1987–88] JLR 428]	15-28
Cooper v Scott-Farnell [1969] 1 WLR 120	1-63
Cornick v Le Gac [2003] JLR N-46]	1-102
Corporación Nacional del Cobre de Chile v Sogemin Metals Ltd [1997] 1 WLR 1396.....	12-56
Coulard v Disco Mix Club Ltd [2000] 1 WLR 707	7-17
Courtauld's Settlement. Re [1965] 1 WLR 1385	3-104
Cowan de Groot Properties Ltd v Eagle Trust plc [1992] 4 All ER 700.....	12-19, 12-32, 13-9
Coxwell v Franklinski (1864) 11 LT 153	16-28
Crédit Agricole Corporation and Investment bank v Papadimitriou	
[2015] UKPC 13.....	9-26, 9-27, 9-39
Cridland (t/a Classic Trading Co) v Declercq [1992] JLR 34]	1-69
Crill Canavan v Mackinnon [2013] JRC 192A	2-10
Criterion Properties plc v Stratford UK Properties LLC [2002] EWHC 496 (Ch),	
[2002] EWCA Civ 1783	9-27
Crociani, Foortse, BNP Paribus Jersey Trust Corporation Ltd & Appleby Trust	
(Mauritius) Ltd v Crociani & Ors [2014] JCA 095, [2014] (1) JLR 426],	
[2014] (2) JLR 508], [2014] UKPC 40, [2014] JCA 089, [2015] (2) JLR N5].....	1-94, 1-110, 2-5,
	2, 15-26
Cunningham v Cunningham [2009] JLR 227], [2010] JRC 074.....	1-94, 3-137, 3-139, 5-46,
	5-48, 5-50, 7-36, 7-50, 7-69,
	9-43, 9-45, 12-19, 12-25,
	12-50, 16-44
Curatorship of X, In the Matter of [2002] JLR 259].....	3-34
Cusack v Scoop Ltd [1997–98] 1 OFLR 68	9-52
D	
D (in liquidation), Re [1985] PCC 279.....	5-131
D'Abo v Paget (No 2) [2000] WTLR 863.....	3-62
Dacre, Re [1916] 1 Ch 344, CA.....	12-9, 12-12
Dagnell v JL Freedom & Co [1993] WLR 388	3-38
Dalemont Ltd v Senatorov [2013] (2) JLR N [35]], [2012] (1) JLR 168]	1-56, 1-107, 1-110,
	2-9, 5-100
Dartnall, Re [1895] Ch 474, CA	3-70
Davies v British Geon Ltd [1957] QB 1, [1956] 3 All ER 389 (CA)	1-60

Davies v Davies (1837) 2 Keen 534	12-79
Davies v Watkins [2012] EWCA 1570.....	3-48
Davies & Christin v Riley 1975 JJ 443	1-57, 1-88
Davy v Garrett (1878) 7 ChD 473	16-44
Dawson, In re [1966] 2 NSW 211.....	12-62
DD v B & C [2010] JRC 193	4-42
DDD 1976 Settlement, In re [2012 (1) JLR N8].....	3-92, 3-94, 3-95, 3-96
De Beer v Kanaar & Co (No 2) [2002] EWHC 688 (Ch).....	8-84
Deed of Trust made by Equity Trust (Jersey) Ltd, Re [2008] JRC 069.....	3-18
Deeny (née Dawson) v Health & Social Services Committee [2003 JLR 138].....	5-99
Deepak Mokhandas Dalmal & Ors v Rhone Company Ltd, 27 April 1988, Jersey, unreported	3-125
Deery v Continental Trust Co Ltd [2010 JLR N[8]]	3-44
Del Amo (AP) v Viberts, Collas Crill, S. Moralee & Ors [2012 (1) JLR 180], [2012 JRC 038	8-1, 8-17, 11-66
Deloitte, Re [1926] Ch 56	5-64
Den Haag Trust, Re (1997-98) 1 OFLR 495	3-70
Derrin Brothers Properties (R on the application of) v HMRC [2014] EWHC 1152 (Admin).....	5-88
Derry v Peek 14 App Cas 374	16-6
Desilla v Fells (1879) 40 LT 423.....	5-104
Devaynes v Noble, Clayton's Case (1816) 1 Mer 572	13-40, 13-41
Dextra Bank & Trust Company Ltd v Bank of Jamaica [2001] UKPC 50.....	9-2
Dick v Dick [1993 JLR [N]1b]	5-119, 5-121
Dick, Re [2000 JLR N-4].....	5-131
Dick-Stock v Pantrust International SA & Ors[2016] JRC 021, [2016] JRC 053, [2016] JRC 069, [2015] JRC 208, [2015] JRC 223]	1-110, 2-22, 2-28, 2-32, 2-49, 2-50, 2-52, 2-64, 2-100, 3-17, 4-6, 4-9, 4-19, 5-80, 8-1, 8-6, 8-13, 8-17, 8-19, 8-38, 8-69, 8-86, 8-87, 8-88, 8-93, 8-95, 10-7, 10-8, 10-9, 10-12, 10-13, 10-14, 10-16, 10-18, 10-20, 10-32, 10-37, 10-44
Diplock, Re [1948] Ch 465	13-22, 13-26, 13-27, 13-28, 13-67
Dixon v Jefferson Seal Ltd [1998 JLR 47], [1996 JLR N2b]	1-106, 5-97
Dixon, Re [1900] 2 Ch 561, CA.....	16-28
D'Jan of London Ltd, Re [1994] 1 BCLC 561	7-82
Doering v Doering (1889) 42 ChD 203	12-9, 12-12
Don King Productions Inc v Warren [2000] Ch 2914	8-1
Donohue v Armco Ltd [2001] UKHL 64, [2002] 1 All ER 749	2-56
Doorstop Ltd v Gillman and Lepervier Holdings Ltd [2012 (2) JLR 297]	7-30, 7-32, 7-34, 8-90
Doraville Properties Corporation v AG [2016] JRC 128	14-59, 14-63, 14-65, 14-67, 14-69
Double Happiness Trust, Re [2003] WTLR 367, [2002 JLR N [48]]	3-33, 4-59
Douglas, In re [2000 JLR 73]	3-92, 3-94, 3-96
Downes v Grazebrook (1817) 3 Mer 200.....	8-16
Dowse v Gorton [1891] AC 190.....	16-13
DPP v Kilbourne [1973] AC 756.....	5-104
Drake (née Neville) v Gouveia & Anor [2000 JLR 411]	1-158, 1-162

Drexel Burnham Lambert UK Pension Plan, Re [1995] 1 WLR 32.....	3-27, 8-45
Druce's Settlement Trusts, Re [1962] 1 WLR 363	3-96, 3-98
DSL Remuneration Trust, In the Matter of [2007] JRC 251.....	4-39
Dubai Aluminium Co v Salaam [2002] UKHL 48, [2003] 2 AC 366.....	6-24, 9-43, 9-45, 12-55, 12-60
Duckwari (No 2), Re [1999] Ch 268	7-14
Duke of Manchester v National Westminster Bank Ltd [1987] Ch 264.....	7-72
Dunlop Settlement, In re [2013 (2) JLR N [6]], [2013] JRC 029	3-1, 3-18, 3-60, 4-51
Duomatic Ltd, In re [1969] 2 Ch 365.....	9-30
Dymocks Franchise Systems (NWS) Pty Ltd v Todd & Ors [2004] UKPC 39.....	1-159, 1-160, 1-161
Dyson Technology Ltd v Curtis [2010] EWHC 3289 (Ch).....	12-17

E

E v E (financial provisions) 1990 2 FLR 233.....	3-97
E Trust, Re [2003] JRC 132	3-18
E Trust, Re [2008 JLR N[17]], [2008 JLR 360]	3-46, 3-52, 3-72, 16-13
Eagle Star Ins Co Ltd v Arab Bank plc, 25 February 1991, unreported.....	3-125
Eagle Trust plc v SBC Securities Ltd [1992] 4 All ER 700	9-23, 9-25, 9-38, 13-99, 13-100
Easyair Ltd v Opal Telecom Ltd [2009] EWHC 779 (Ch).....	1-110
EC Investments Holdings Pte Ltd v Ridout Residence Pte Ltd [2013] SGHC 139	11-74
E. D. & F. Man (Sugar) Ltd v Haryano [1990 JLR 169].....	15-69
Edge v Pensions Ombudsman [2000] Ch 602, [1998] Ch 512	8-36, 8-41, 8-46, 8-47
Edinburgh Corporation v Lord Advocate (1879) 4 App Cas 823, HL SC.....	13-81
Edward's Will Trusts, Re [1947] 2 All ER 521	8-36
EE v Royal Bank of Canada Trust Co (Jersey) Ltd [2014 (1) JLR N [27]]	5-30, 5-68, 8-59
18th August Trust, In re [2006 JLR N [23]]	10-14
Eiro v Equinox Trustees & Ors [2006] JRC 119.....	10-11, 10-13
Eiro v Lombardo [2005] JRC 172.....	10-9
11 Trust, In re [2006 JLR 280]	2-6
El Ajou v Dollar Land Holdings plc [1993] 3 All ER 717, [1994] 2 All ER 685.....	6-28, 9-12, 9-18, 9-20, 9-26, 9-27, 9-30, 13-21, 13-88
Elizabeth K Gates Trust, Re [2000 JLR N-68]	3-96
E, L, O and R Trusts, In the Matter of [2008] JRC 150, [2008 JLR 360]	6-6, 8-1, 8-3, 8-17, 8-25, 8-27, 8-31, 8-32, 8-35, 8-51, 10-7, 10-9, 10-13, 10-14, 10-18, 10-31, 10-32, 10-34, 10-37
EMM Capricorn Trustees Ltd v Compass Trustees Ltd [2001 JLR 205]	2-49, 2-55, 2-59, 15-18, 15-25
Emmet's Estate, Re (1881) 17 ChD 142	5-7
Equitas Lts & Anor v Horace Holman & Co Ltd & Anor [2008] EWHC 2287 (Comm).....	1-161, 1-162
Erlanger v New Sombrero Phosphate Co (1878) 3 App Cas 1218.....	16-10
Ernest Farley & Sons Ltd v Takilla Ltd [1992 JLR 54].....	15-28
Erskine Trust, Gregg & Anor v Piggott & Ors [2012] EWHC 732 (Ch).....	4-54
Esnouf v AG for Jersey (1883) 8 AppCas 304	1-9
Essel Trust, In re [2008 JLR N [19]].....	10-41, 11-41
Estate of Father Amy [2000 JLR 80].....	1-5

Esteem Settlement, In re [2003 JLR 188], [2003] JCR 092, [2003 JLR 188], [2002 JLR 53], [2001 JLR N[8], [2000 JLR N-41], [2000 JLR 119], [1995 JLR 266]	1-30, 1-91, 3-14, 3-46, 3-56, 3-58, 3-67, 3-124, 3-125, 3-126, 4-8, 4-9, 4-12, 4-14, 4-17, 4-18, 4-55, 5-37, 5-68, 6-1, 6-3, 6-8, 6-12, 6-29, 6-30, 6-33, 8-1, 8-17, 9-10, 9-51, 9-52, 10-20, 10-43, 11-40, 12-60, 13-2, 13-4, 13-7, 13-8, 13-10, 13-13, 13-16, 13-21, 13-24, 13-30, 13-40, 13-41, 13-70, 13-75, 13-83, 15-73, 16-5, 16-29, 16-30, 16-55, 16-56, 16-59
Evans v Benyon (1887) 37 ChD 329.....	12-2
Evans v European Bank Ltd [2004] NSWCA 82, (2004) 61 NSWLR 75.....	9-20
Eves v Le Main [1999] JLR 44.....	16-43, 16-44
Excalibur Ventures LLC v Texas Keystone Inc [2013] EWHC 2767 (Comm)	11-18
Exeter Settlement, Re [2010 JLR 169], [2010] JRC 012.....	4-1, 4-10, 4-37, 4-41, 4-42, 6-35, 11-7
Exsus Travel Ltd v Turner [2014] EWCA Civ 1331	7-10
Eyre-Williams, Re [1923] 2 Ch 533.....	16-28

F

F & O Finance AG, In re [2000 JLR N-5].....	5-131
Fales v Canada Permanent Trust Co (1977) 70 DLR (3d) 257, Can SC.....	7-82, 7-86
Fane v Fane (1879) 13 ChD 228.....	10-38
Farah Construction Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22	12-19
Farrell & Anor v Direct Accident Management Services Ltd & Anor [2009] EWCA Civ 769	1-161
Fay v Moramba Services Pty Ltd [2009] NSWSC 1428	10-15
FC Jones & Sons (a firm), Trustees of the Property of v Jones [1997] Ch 159	9-11
FG Hemisphere Assocs LLC v Democratic Republic of Congo [2011 JLR 486].....	13-105, 15-20, 15-21
FHR European Ventures LLP v Cedar Capital LLC [2014] UKSC 45	6-8, 6-14, 6-21, 6-22, 8-1, 8-19, 8-21, 8-77, 8-87, 8-94, 9-9, 12-17, 13-8, 13-34, 6-7, 16-34
FHR European Ventures LLP & Ors v Ramsey Neil Mankarious & Ors [2013] EWCA Civ 17, [2011] EWHC 2308	6-21, 8-21, 8-50, 9-9
Field, Re [1971] 1 WLR 555.....	12-79
Figg v Clarke [1997] STC 247.....	5-64
Finance & Economics Committee v Bastion Offshore Trust Co Ltd [1994 JLR 325]	1-21
Finers v Miro [1991] 1 WLR 35, CA	3-17, 3-33
Finnigan v Yuan Fu Capital Markets Ltd (in liquidation) [2013] NZHC 2899.....	11-74
Fiona Trust & Holding Corp v Privalov [2010] EWHC 3199 (Comm).....	12-17
Fiona Trust & Holding Corp v Skarga [2013] EWCA Civ 275	12-17
First American Co v Sheik Zayed Al-Nahyan [1999] 1 WLR 1154, CA	5-112
First Conference Trust [2010] JRC 055A	4-21
First Intl Bank of Granada Ltd, In re [2002 JLR N[7]]	5-131
Fish, Re [1893] 2 Ch 413 (CA)	7-8
Fisher v Brooker [2009] UKHL 41	4-48
Fletcher v Collis [1905] 2 Ch 24, CA.....	7-52, 12-8
Fletcher v Green (1864) 33 Beav 426	7-36

Flynn v Reid [2012 (2) JLR 226], [2012 (1) JLR 370]	1-144, 2-14, 6-33, 9-52, 13-13
Ford v Financial Services Authority [2011] EWHC 2583 (Admin)	3-131
Foreman v Kingstone [2005] WTLR 823.....	5-5
Forward v West Sussex County Council [1995] 1 WLR 1469.....	1-62
Forster v Davies (1861) 4 De GF & J 133	10-13, 10-14
Fortis Aviation Group Employee Benefit Trust, Re unreported, 10 October 2006, (Guernsey RC).....	5-24
Foskett v McKeown [2001] 1 AC 102.....	2-87, 7-14, 9-2, 13-2, 13-4, 13-5, 13-18, 13-19, 13-20, 13-21, 13-22, 13-24, 13-29, 13-30, 13-32, 13-34, 13-35, 13-38, 13-53, 13-66, 13-79, 13-81
Foss v Harbottle (1843) 2 Hare 451	12-66, 12-86
Foster v AG [1992 JLR 287]	14-9, 16-6
Foster v Spencer [1996] 3 All ER 672.....	11-42
Fountain Trust, In re [2005 JLR 359]	4-6, 15-6, 15-77
Fraser v Murdoch (1881) 6 App Cas 855 HL.....	11-42
Frawley v Neill [2000] CP Reports 20, The Times, 5 April 1999, CA.....	16-10, 16-25
Freeman v Ansbacher Trustees (Jersey) Ltd [2009 JLR 1], [2009] JRC 003.....	4-43, 7-37, 7-43, 12-83, 12-86, 12-90, 12-92, 12-94, 12-95, 13-8, 16-4, 16-17, 16-55
Freiburg Trusts, Re [2004] JRC 056, [2004 JLR N [13]], [2004] JRC 056.....	3-15, 10-7, 10-9, 10-22, 10-29
Freme's Contract, Re [1895] 2 Ch 256	3-34
French Caledonia Travel Service Pty Ltd (in liq), Re [2003] NSWSC 1008.....	13-48
Friedman & Asiatrust Ltd, Re Representation [2006] JRC 187	2-5
Friends of Burbage School Ltd v Woodhams [2012] EWHC 1511 (QB).....	7-7
Fuller v Knight (1843) 6 Beav 205.....	12-9
Futter v Futter [2013] UKSC 26, [2011] EWCA Civ 197	1-11, 4-21, 4-22, 4-23, 4-24, 4-27, 4-34, 4-37, 4-45, 4-47, 4-48

G

G, In re [2010 JLR N [27]].....	7-3
G Family Trusts, In the Matter of [2014 (2) JLR N 2].....	3-14
Gale v Rockhampton Apartments Ltd [2007 JLR 27], [2007 JLR 332]	16-61
Gamlestaden Fastigheter AB v Baltic Partners Ltd & Ors [2005 JLR 57].....	16-10
Gamlestaden Fastigheter AB v Boleat [1998 JLR N-6]	12-66
Gardner v Parker [2004] EWCA Civ 781	8-83, 12-92, 12-99
Garnham v PC & Ors [2012] JRC 078	11-38
Gartside v IRC [1968] AC 553.....	14-50
Gastios Holdings Pty Ltd v Nick Kritharas Holdings PTD Ltd [2002] NSWCA 29.....	11-20
Gee & Co (Woolwich) Ltd, Re [1975] Ch 52.....	12-90
Gencor ACP Ltd v Dalby [2000] 2 BCLC 734.....	8-75, 12-17
Gerber Garment Technology Inc v Lectra Systems Ltd [1997] RPC 443.....	12-88
Gheewala v Compendium Trust Co Ltd [2003 JLR 627], [1999 JLR 154].....	2-7, 2-27, 2-28, 2-41, 2-43, 2-44, 2-45
Gibbon v Mitchell [1990] 1 WLR 1304.....	4-22, 4-28, 4-36
Gichuru v States of Jersey Police [2008] JCA 163A.....	14-22
Giles v Rhind [2002] EWCA Civ 1428, [2003] Ch 618	12-89
Giles v Royal National Institute for the Blind [2014] EWHC 1373.....	4-44

Giumelli v Giumelli (1999) 73 ALJR 547.....	9-52
GKN (Jersey) Ltd v Resources Recovery Board [1982] JJ 359	15-25
Glazier v Australian Men's Health (No 2) 2001 NSWSC 6	7-18
Gleeds Retirement Benefits Scheme, Re [2015] Ch 212.....	9-49
Glencore International AG v Metro Trading International [2001] 1 Lloyds Rep 284	2-91
Gluckstein v Barnes [1900] AC 240	8-80
Goddard Trustees, In re [1990] JLR N-2]	1-69
Godfray v Godfray (1865) 3 Moo PC NS 316	1-5
Goldcorp Exchange Ltd, In re [1995] 1 AC 74	6-38, 13-83
Golder v Peak [1966] JJ 555.....	12-70
Goldtrail Travel Ltd v Aydin [2014] EWHC 1587 (Ch)	12-17, 12-22, 12-57
Goldtron v Most Investments Ltd [2002 JLR 424].....	5-96
Good Luck (The) [1992] 2 Lloyd's Rep 540	3-136
Goody v Baring [1956] 1 WLR 448.....	8-35
Goose v Wilson Sandford & C [2001] Lloyd's Rep 189, CA, unreported, 1 April 1996, ChD	12-17
Gordon v Gore (1890) 214 Ex 95	10-50
Goulding v James [1997] 2 All ER 239, CA	3-96, 3-112
Government of India v Taylor [1955] AC 491.....	5-81, 5-133, 11-21, 15-11
Grace v Grace [2012] NSWSC 976.....	7-20
Grant v Gold Exploration and Development Syndicate Ltd [1900] 1 QB 233	8-87
Grant v Southwestern and County Properties Ltd [1975] Ch 185	5-97
Gray v Guardian Trust Australia [2003] NSWSC 704.....	5-23
Gray v New Augarita Porcupine Mines Ltd [1952] 3 DLR 1, PC (Canada).....	6-16
Green v Astor & Ors [2013] EWHC 1857.....	3-62, 3-68
Green v Gaul [2006] EWCA Civ 1124.....	16-10, 16-25
Green v Jernigan (2003) 6 ITELR 330.....	2-55
Green GLG trust, In the Matter of [2002 JLR 571]	4-24
Gregson v HAE Trustees Ltd [2008] EWHC 1006 (Ch)	12-68
Greville Bathe Fund, In re [2013 (2) JLR 402]	8-54
Grimthorpe, Re [1958] Ch 615	11-3
Grindlays Bank plc v Corbett [1987-88 JLR N-2]	1-98
Grindley, Re [1898] 2 Ch 593	7-80, 7-83
Grove v Baker [2005 JLR 348]	11-17
Grupo Torras SA v Al-Sabah (No 1) [1996] 1 Lloyds Rep 7, [1999] CLC 1469, AT	11-18, 12-53, 12-62, 13-30
Grupo Torras SA v Royal Bank of Scotland plc [1994 JLR 41]......	5-93, 5-100
Guardian Trust and Executors Company of New Zealand Ltd v Public Trustee of New Zealand [1942] AC 115.....	12-24, 12-54
Guinness Peat v Fitzroy Roinson [1987] 1 WLR 1027	3-133
Guiness Plc v Saunders [1990] 2 AC 663	8-74, 8-86
Gurney, Re [1893] 1 Ch 590	19-9
Gwemble Valley Development Co Ltd v Koshy (No 3) [2003] EWCA Civ 1048, [2004] BCLC 131	6-16, 7-25, 8-50, 8-65, 8-81, 16-5, 16-6, 16-10, 16-34, 16-35

H

H (Minors), Re [1996] AC 563	12-51
H Settlement, Re Representation Trustees of [2005] JRC 077.....	4-52
H Trust, In re [2007 JLR 569], [2006] JRC 057, [2006 JLR 280]	3-12, 3-29, 5-37, 8-48, 8-51,

Hacon v Olsen, Blackhurst & Dorey [1998 JLR N9B].....	15-6, 15-75, 15-77, 15-79, 15-80, 15-81, 15-90, 15-93
Hague v Nam Tai Electronics (No 2) [2008] UKPC 13	11-65
Hall v AG [1996 JLR 129]	1-9
Hallett's Estate, Re (1879) 13 ChD 696, (1880) 13 ChD 696	13-11, 13-19, 13-22, 13-31, 13-32, 13-44, 13-80, 13-93
Halley v Law Society [2003] EWCA Civ 97	6-28, 9-10, 12-20
Halton International Inc v Guernsey Ltd [2006] EWCA Civ 801	16-3
Hambledon's Will Trusts, Re [1960] 1 WLR 82.....	3-111
Hampshire Land Co (No 2), Re [1896] 2 Ch 743.....	9-34
Hardoon v Belilios [1900] UKPC 66.....	11-42
Hardwick, In the Matter of the Application of [1995 JLR 245].....	15-47
Hardwicke v Vernon (1808) 14 Ves Jr 504	5-20
Harman v Higgins and Medeva Pharma Ltd [1999 JLR N-5]	1-83, 16-53
Harris v Digital Pulse Pty Ltd [2003] NSWCA 10.....	8-9
Harris v Taylor [1914] 3 KB 580 (CA)	15-24
Harris Investments Ltd v Smith [1934] 1 DLR 748.....	2-106
Harrison's Settlement Trusts, Re [1965] 1 WLR 1492.....	10-7
Hartigan Nominees Pty Ltd v Rydge (1992) 29 NSWLR 405.....	5-28
Harvey v Oliver (1887) 57 LT 239	11-22
Haslam & Hier-Evans, Re [1902] 1 Ch 765	8-95
Hastings-Bass deceased, Re [1975] Ch 25.....	3-26, 4-2, 4-21, 4-24, 4-27, 6-35, 8-40, 9-48, 16-16
Hawksford Executors Ltd, In the Matter of the Representation of [2013 (2) JLR 357]	2-8
Hawkesley v May [1956] 1 QB 304	5-5
Hawtrey Discretionary Settlement, Re [2007] JRC 191	4-50
Hayim v Citibank NA [1987] AC 730	7-45, 12-78, 12-79
Hay's Settlement Trusts, Re [1982] 1 WLR 202	5-5
Heerema v Heerema [1985-86 JLR 293]	2-46
Heinrichs v Pantrust International SA & Ors [2016] JRC 106A	2-5, 2-8, 2-20, 2-22, 2-31, 2-32, 2-64
Heinrichs v Parkes-Heinrichs [1997 JLR N-9]	5-104
Heinl v Jyske Bank (Gibraltar) Ltd [1999] Lloyd's Rep Bank 511	12-49, 12-51
Helmsman Ltd v Bank of New York Trust Company (Cayman) Ltd [2009] CILR 490.....	2-55
Helvetic Investment Corp Pty Ltd v Knight (1984) 9 AClr 773, NSW CA	11-19
Hely-Hutchinson v Brayhead Ltd [1968] 1 QB 549	8-86, 8-90
Henderson v Henderson (1843) 3 Hare 100.....	7-36, 15-29
Henry v Geoprosco International [1976] QB 726 (CA)	15-24
Hervey, Re (1890) 61 LT 429.....	12-9
Heugh v Scard (1875) 33 LT 659	3-70
Heyman v Dobson [2007] EWHC 3503	10-13
HHH Employee Trust [2013 (1) JLR 135], [2012 (2) JLR 64], [2012] JRC 127B	3-1, 3-14, 3-60, 5-76, 5-92, 10-2, 11-9
Hickman, In re [2009] JRC 040.....	11-69, 11-70
Hiliard v Eiffe (1874) LR 7 HL 39	12-79
Hill v Spread Trustee Co Ltd [2005] EWHC 336 (Ch)	4-8, 4-12, 4-15

Hilton v Barker Booth & Eastwood [2005] UKHL 8, [2005] 1 WLR 567.....	8-35
Hilton v Guyot (1895) 159 US 113.....	15-7
Hirschfield v Philip Sinel & Co [1999] JLR 55]	1-69, 6-8, 6-20
Hitachi Capital (UK) Plc v V – 12 Finance Ltd & Ors [2009] EWHC 2432 (Comm).....	1-161
Hitch v Stone [2001] EWCA Civ 63	4-4, 4-9, 4-55
Hocking, Re (1898) 2 Ch 567, CA	5-64
Hodgson v Imperial Tobacco Ltd [1998] 1 WLR 1056	3-117
Hogg v Williamson and Strathaven Incorporated [2003] JLR N-38]	1-106, 3-54, 5-74
Holden v Oyston [2002] EWHC 819 (QB)	1-163
Holden, Re (1887) 20 QBD 43	11-7
Holder v Holder [1968] Ch 353	8-13, 8-89
Hole v Garnsey [1930] AC 472.....	4-53
Hollis (Right Reverend) v Rolfe [2008] EWHC 1747 (Ch)	9-12
Holman v Johnson (1775) 1 Cow 341	9-34
Holt v AG [2014] UKPC 4.....	14-13, 14-17
Holt's Settlement, Re [1969] 1 Ch 100.....	3-92, 3-96, 3-111
Holton's Settlement Trusts, Re (1918) 88 LJCh 444	3-70
Hood of Avalon (Lady), In the Matter of	4-45
Howard v Rhodes (1837) 1 Keen 581.....	10-9
Howe Family No 1 Trust, In re [2007] JLR 660]	4-25, 16-16
HR v JAPT [1997] PLR 99	12-66, 12-67, 12-68, 12-76, 12-78
HSBC Trustees Ltd v Reardon [2005] JRC 130	8-38, 8-48
HSU v Barclays Priavte bank & Trust Ltd Retirement Trust [2008] JLR N [37]].....	15-77, 15-81
Hulbert v Avens [2003] EWHC 76 (Ch), [2003] WTLR 387.....	8-57
Hume v AG [2006] JLR N[36]].....	5-50
Hunt v Luck [1902] 1 Ch 428	13-99
Hunter v Hunter [1938] NZLR 520	10-9, 10-32
Huntington v Attrill [1893] AC 150 (PC).....	15-11
Hurstanger Ltd v Wilson [2007] EWCA Civ 299.....	8-50
Hussien v Chong Fook Kam [1970] AC 942.....	14-12

I

IBL Ltd v Planet Financial and Legal Services Ltd [1990] JLR 294]	5-93, 5-100, 5-112
IBM United Kingdom Pensions Trust Ltd v Metcalf [2012] EWHC 125 (Ch).....	3-60
IFM Corporate Trustees v Helliwell and Mountain [2015] JRC 160	4-23, 4-42, 4-47
Illinois District Court, In re [2001] JLR 160].....	14-53
Imageview Management Ltd v Jack [2009] EWCA Civ 63	8-94, 8-95
IMK Family Trust, In re [2008] JLR 250], [2008] JCA 196	3-6, 3-46, 3-82, 9-49, 14-67, 15-6, 15-13, 15-36, 15-73, 15-77, 15-80, 15-81, 15-83, 15-91
Incat Equatorial Guinea Ltd v Luba Freeport Ltd [2010] JLR 435]	1-99, 1-129, 1-144
Inco Europe Ltd v First Choice Distribution Ltd [2000] 1 WLR 586.....	5-83
Independent Maritime Services Ltd, Re [1996] JLR 294]	1-38
Ingram v IRC [1997] 4 All ER 395, [2000] 1 AC 293	8-14, 8-39, 8-86
Insinger de Beaufort Trust (Jersey) Ltd, Re Representation [2003] JRC 097.....	3-18
Insurance Corp of Ireland v Strombus [1985] 2 Lloyd's Rep 138 (CA).....	2-45
International Power Industries NV, Re [1985] BCLC 128	5-131
Internine and Azali Trusts, In the Matter of [2006] JLR 195]	3-6, 5-13, 5-25, 5-91, 5-92, 5-97

Internine and Intertraders Trusts, In the Matter of [2005 JLR 236], [2004] JCA 158.....	5-67
Internine Trust, In re [2004 JLR N[43]]	3-43, 3-58, 4-51, 4-54
Internine Trust, In re [2004 JLR 325].....	5-11
Internine Trust, In re [2006 JLR 176].....	1-99, 1-108, 3-63, 3-80
Internine Trust, In re [2008] JRC 32A, [2008 JLR N11]	5-93
Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd [2014] GLR 371.....	7-58, 10-43, 11-4, 11-5, 11-12, 11-16, 11-17, 11-18, 11-39, 11-40, 11-43, 11-72, 11-74, 12-82
Investors Compensation Scheme, 11-39 Ltd v West Bromwich Building Society [1998] 1 WLR 913.....	4-52
Irby v Irby (No 3) (1858) 25 Beav 632	12-12
IRCV v Holmden [1968] AC 685	3-99
Isaac v Isaac (No 2) [2005] EWHC 435	10-16, 10-20, 10-35
Islamic Republic of Iran v Barakat Galleries Ltd [2007] EWCA Civ 1374.....	15-11
ITS v Susan Morris [2012] EWCA Civ 195.....	13-78
J	
J v K [2010] JRC 110.....	5-105
J v M [2002 JLR 330]	15-78
J & K & Ors [2016] JRC 110	5-103, 15-74
Jackson, Re [1933] Ch 237	4-57
Jackson (née Jackson) v Jackson (née Hurst) 1996 JJ 579.....	1-83, 16-53
Jacubs v Rylance (1874) LR 17 Eq 341	12-9, 12-12
Jaiswal v Jaiswal [2007 JLR 305].....	2-7, 2-29, 2-41
James, ex parte (1803) 8 Ves 337	8-16
James Capel (C.I.) Ltd v Koppel & Fenchurch Trust Ltd [1989 JLR 51]	2-19, 2-23, 2-35
James Roscoe (Bolton) Ltd v Winder [1915] 1 Ch 62.....	13-45, 13-47
Jarvis (Deceased), Re [1958] 1 WLR 815	8-72
Jasmine Trustees Ltd v Wells & Hind [2008] Ch 194	9-43, 9-47, 9-49
Jasmine Trustees Ltd, In re [2015] JRC 196.....	11-69, 11-76
JD Wetherspoon plc v Van de Berg & Co Ltd [2009] EWHC 639 (Ch)	12-17
JEC Ltd Brocken & Fitzpatrick Ltd [2004 JLR 289]	2-10
Jeep Trust, Re [2010 JLR N [25]]......	3-72, 10-9, 10-11, 10-13
Jennings v Mather [1901] 1 KB 108.....	11-40, 11-43
JEP v Al Thani & Ors [2002 JLR 542]	3-113, 3-116, 3-117, 3-119, 3-120, 3-150
Jersey Civil Service Association v Establishment Committee of the States	
of Jersey, unreported 19 October 1994 (RC)	11-17
Jersey Electricity Company Ltd v Brocken & Fitzpatrick Ltd [2004 JLR 289], [2004] JRC 132.....	2-109, 7-48, 12-58, 16-23
Jersey Evening Post Ltd v Al Thani [2002 JLR 542]	5-125
Jersey Financial Services Commission v AP Black (Jersey) Ltd [2007 JLR 1], [2002 JLR 294]	1-113, 1-142, 16-43, 16-61
Jersey Sports Stadium Ltd v Barclays Private Clients Intl Ltd [2013 (1) JLR 190]	1-56
Jetivia SA & Anor v Bilta (UK) Ltd & Ors [2015] UKSC 23.....	9-33, 9-34
Jewell's Settlement, Re [1919] 2 Ch 161	12-11
Jewish National Fund Inc v Royal Trust Co (1965) 53 DLR (2d) 577.....	2-106
J.J. Harrison (Properties) Ltd v Harrison [2001] EWCA Civ 1467.....	16-5, 16-9, 16-34, 16-35

Jofri Bolkiah (Prince) v KPMG [199] 2 AC 235	6-8, 6-20
John v Dodwell & Company [1918] AC 563 (PC)	7-4
Johnson v Gore-Wood & Co [2002] 2 AC 1	12-83, 12-84, 12-88, 12-94
Johnson v Reed Corrugated Cases Ltd [1992] 1 All ER 169 QBD.....	1-138
Johnson, In re [1880] 15 ChD 370	11-16, 11-58
Johnson Matthey Bankers Ltd v Shamji & Ors [1985-86 JLR N-26d].....	3-50
Jones v Atkinson [1989 JLR N2]	5-98
Jones v Kernott [2011] UKSC 53	6-33
Jones v Plane (née) Ferkin [2006 JLR 438] CA	6-31, 6-32
Jones, Re [1897] 2 Ch 190.....	3-69
Jones & Ors v Firkin-Flood & Anor [2008] EWHC 2417 (Ch)	3-13, 3-17, 3-25, 10-13
Jordan, Re [1904] 1 Ch 260	7-36
Joseph's Will Trusts, Re [1959] 1 WLR 1019.....	3-111
Joyce v Joyce [1978] 1 WLR 1170.....	16-25
J.P. Morgan Trust Co (Jersey) Ltd v Alhamrani [2007 JLR N[26]]	5-11, 5-25, 5-30, 5-36
J.P. Morgan 1998 Employee Trust [2013 (2) JLR 239]	3-1, 3-57, 3-60, 4-51, 11-9
Jyske Bank (Gibraltar) Ltd v Spjeldnaes, 23 July 1997 (unreported)	13-53
K	
K Ltd v National Westminster Bank plc [2006] EWCA Civ 1039, [2007] 1 WLR 311	14-12
K Trust, In the Matter of 31/2015 (Guernsey RC)	11-9
Kaim Todner (a firm), ex parte [1999] QB 966.....	3-113
Kain v Hutton [2007] NZCA 199.....	10-13, 10-14, 10-37
Kan v HSBC International Trustee Ltd, Poon & Ors [2015] JCA 109, [2015 (1) JLR N[31]]	3-18, 3-22, 3-29, 8-48, 8-51
Kane Trusts, Re [2004] JRC 041	3-26, 8-62
Kaplan, In re [2009 JLR 88]	14-46, 14-47, 14-49, 14-53, 14-55, 14-56, 14-58, 14-60
Kay, Re [1897] 2 Ch 518.....	7-83
Keech v Sandford (1726) Sel Cast King 61	8-9, 8-17, 8-19, 13-85
Kelly v Cooper [1993] AC 205.....	8-95
Kemp v Burn (1863) 4 Giff 348.....	3-70, 5-20
Kenneth Allison Ltd v AE Limehouse & Co [1992] 2 AC 105	1-65
Keppel v Wheeler [1927] 1 KB 577	8-94
Kershaw v Micklethwaite [2010] EWHC 506.....	10-13, 10-15
Key Trust, In re [2003 JLR 437]	3-14
Khoo Tek Keong v Ch'ng Joo Tuan Neoh [1934] AC 539, PC.....	7-81
Kilworth v Mountcashell (1864) 15 IrChRep 565	12-9
King v Serious Fraud Office [2009] UKHL 17	14-49
Kitchen v Royal Air Force Assn [1958] 2 All ER 249	7-69, 16-6
Kleanthous v Paphitis [2011] EWHC 2287 (Ch)	5-44
Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349	6-26, 9-1, 9-2
Konamaneni v Rolls Royce [2002] 1 All ER 979.....	2-32
Koonmen v Bender [2002 JLR 407], [2002] JCA 218, (2003-04) 6 ITELR 568	2-28, 2-42, 2-49, 2-50, 2-51, 2-55, 2-56, 2-58, 2-59, 2-60
Kousouros v O'Halleran & Anor [2014] EWHC 2294 (Ch).....	3-130
Krohn GmbH v Varna Shipyard [1997 JLR 194].....	2-9
Kuwait Airways Corp & Anor v Kuwait Insurance Co SAK & Ors [2000] 1 All ER 972.....	7-31, 7-34

L

L & M Trusts, In re [2003 JLR N6]	5-43
La Cloche v La Cloche [1870] UKPC 14.....	9-8
La Motte Garages Ltd v Morgan [1989 JLR 312]	6-28
La Petite Croatie Ltd v R.P. Ledo and A.K. Ledo (Née Gale) [2009 JRC 090].....	4-58
LAC Minerals Ltd v International Corona Resources Ltd (1989) 61 DLR (4th) 14	9-52
Lacey, ex parte (1802) 31 ER 1228.....	8-9, 8-50
Lancaster v Evors (1841) 4 Beav 158	12-79
Land Allotments Co, Re [1894] 1 Ch 616	16-5
Landau v Anburn Trustees Ltd [2007 JLR 250].....	1-109, 3-58, 3-63, 3-77, 3-80, 5-68, 8-52, 8-54, 8-58, 8-61, 8-62, 9-43, 11-7
Lane v Lane (née Coverdale) [1985] 86 JLR 48]	15-6, 15-13, 15-80
Larsen v Comptroller of Income Tax [2013] JCA 239	5-83
Law Society of Upper Canada v Toronto-Dominion Bank (1998) 169 DLR 453, Ont CA.....	13-48
Layton's Policy, Re [1873] WN 49	11-8
Lee v Sankey (1873) LR 15 Eq 204	16-28
Lee v South West Thames Regional Health Authority [1985] 1 WLR 845.....	3-136
Lee v Young (1843) 2 Y & C Ch 532.....	10-17
Leeds United AFC Ltd v Admatch [2011 JLR N[22]]	1-160
Leeds United Football Club Ltd v Weston & Anor [2012] JCA 088, [2012 (1) JLR N-23], [2011 JLR 749].....	1-106, 1-107, 2-27, 2-41
Le Marquand v Chiltmead Ltd [1987-88 JLR 86]	5-81
Lemery Holdings Pty Ltd v Reliance Fin Servs Pty Ltd [2008] NSWSC 1344.....	11-40, 11-76
Lescroel v Le Vesconte [2007 JLR 273].....	1-94
Letterstedt v Broers (1884) 9 App Cas 371	7-1, 10-8, 10-11, 10-13, 10-14, 10-37, 16-13
Letto v Stone (1890) 48H 473.....	16-42
Libertarian Investment Ltd v Hall [2014] 1 HKC 368 (CFA)	7-14
Lincoln v Wright (1841) 4 Beav 427.....	12-9
Lincoln Trust Co (Jersey) Ltd, Re representation of [2007] JRC 138.....	3-28, 3-125
Lindsay Petroleum Oil Co v Hurd (1874) LR 5 PC 221.....	16-10, 16-25
Lindsley v Woodfull [2004] EWCA Civ 165	8-75
Lipkin Gorman v Karpnale Ltd [1991] 2 AC 565, [1987] 1 WLR 987	6-8, 9-1, 9-2, 9-14, 9-25, 9-40, 12-56, 13-8, 13-78
Lister v Hesley Hall Ltd [2001] UKHL 22.....	12-55
Lister & Co v Stubbs (1890) 45 ChD 1.....	8-76
Lloyds Bank Private Banking (C.I.) Ltd v Cala Cristal SA [1996 JLR N20]	3-68
Liverpool City Council v Irwin [1977] AC 239	11-17
Lloyd v AG [2004 JLR N[28]].....	14-12
Lloyd's Trust Company (Channel Islands) Ltd v Fragoso & Ors [2013 (2) JLR 444], [2013] JRC 211.....	6-14, 6-21, 6-22, 8-19, 9-9, 13-8, 13-34
Lloyds TSB Bank Ltd Markandan & Uddin [2012] EWCA Civ 65.....	7-81, 7-84
Lochmore Trust, Re [2010] JRC 068	4-21, 4-22, 4-27, 4-29, 4-45
Loftus, Re [2005] EWHC 406 (Ch), [2007] 1 WLR 591	16-10
Logicrose Ltd v Southend United Football Club Ltd [1988] 1 WLR 1256.....	8-87
Lombardo Settlement, In re [2000 JLR N-67]	5-20

Londonderry's Settlement Trusts, Re [1965] Ch 918, [1964] Ch 594	3-15, 3-64, 3-70, 5-10, 5-20, 5-25, 5-34, 5-36, 5-46, 5-47, 5-49, 5-50
Longman's Settlement Trusts, Re [1962] 1 WLR 455.....	3-111
Lonrho plc v Fayed (No 2) [1992] 1 WLR 1, [1992] 1 AC 448, HL.....	6-28, 6-29, 8-1, 12-71
Lubbe v Cape plc [2000] 1 WLR 1545 (HL).....	2-43, 2-45
Lucas, Re [1981] JJ 83	5-93
Lucking's Will Trusts, Re [1968] 1 WLR 866	21-87
Lumsden v Buchanan (1865) 4 Macq 950	11-19
Lundy v AG 1996 JLR 193.....	1-16
M	
M Remuneration Trust, In the Matter of [2007] JRC 184	4-42
M Trust, Re [2012 (2) JLR 51]	5-42, 5-49, 5-97
M & L Trusts, Re [2003 JLR N6]	5-21
M & M Savant Ltd v Subhash Raja & Ors [2009] EWHC 90149 (Costs)	1-102
M & Other Trusts, In the Matter of [2012 (2) JLR 51]	3-44, 3-46, 3-47, 3-118, 3-121, 3-123, 3-130, 3-134, 3-138, 3-146, 3-147
McCarthy, ex parte [1924] 1 KB 256.....	3-117
Macdoel Investments Ltd, Sun Diamond Ltd, Durant International Corporation and Kildare Finance Ltd v Federal Republic of Brazil [2007] JLR 201]	1-43, 5-92, 5-93, 5-100
McDonald v Horn [1995] 1 All ER 961	3-60, 3-61, 3-69, 3-74
Macedonian Orthodox Community Church St Petka Inc v Diocesan Bishop of Macedonian Orthodox Church of Australia & New Zealand [2006] NZWCA 160.....	3-44, 3-138
MacFirbhisigh (Ching) & Ors v CI Trustees & Executors Ltd [2014 (1) JLR 244], [2015] JRC 233.....	1-94, 6-6, 6-31, 10-20, 16-57, 16-59, 16-60
MacKinnon, in Re [2009 JLR 387]	1-106
MacKinnon v Donaldson, Lufkin & Jenrette Secs Corp [1986] Ch 482	5-95
Mackinnon v Regent Trust Company Ltd [2005 JLR 198], [2004 JLR 477]	4-3, 4-5, 4-8, 4-9, 4-12
McLean Family Settlement, Re [2002] JRC 152	4-49
Maçon v Quérée (née Colligny) [2001 JLR 187]	1-101, 1-144
McPherson v Watt (1877) 3 AppCas 254	8-11
Macrae v Walsh (1927) 27 SR (NSW) 290.....	5-64
Macrae (née Tudhope) v Jersey Golf Hotels Ltd [1973] JJ 2313.....	7-36
Madge's Settlement, Re [1994 JLR N-16b]	4-44
Madoff Securities International Ltd v Raven [2013] EWHC 3147 (Comm).....	9-31, 9-34, 9-35, 12-22, 12-53, 12-57
Malabry Inv Ltd, Re 1982 JJ 117	1-5
Manches LLP v Interglobal Financial Ltd [2009-10] GLR 284 (Guernsey)	15-47
Manisty's Settlement Trusts, Re [1974] Ch 17	5-5
Manley v Bell [2007 JLR N-20]	1-106
Manley v Santori [1927] 1 Ch 157	6-16
Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749.....	4-52, 4-57
Maples v Maples [1988] Fam 14.....	15-72
Mara v Browne [1896] 1 Ch 209	9-43, 9-45

Marange Investments (proprietary) Ltd v La generale des Carrieres et des Mines SARL [2013] JRC 119A, [2013] (2) JLR N [21]	1-107, 1-110
Marbeck Associates, In re [2014 (1) JLR 140]	15-47
Marc Bolan Charitable Trust, In re 1981 JJ 117	11-21
Market International Insurance Co Ltd v Surety Guarantee Consultants Ltd [2008] EWHC 1135 (Comm)	8-23
Marley v Mutual Security Merchant Bank [1991] 3 All ER 198 (PC)	3-18, 3-28, 3-54, 3-125
Marley v Rawlings [2015] AC 129, [2014] UKSC 2	2-48, 4-54
Marret v Marret [2008 JLR 384] (CA)	1-106, 1-144, 6-28, 14-14
Marsden v Regan [1954] 1 WLR 423, CA	7-79, 7-80, 7-81, 7-85
Marshall Futures Ltd v Marshall [1992] 1 NZLR 316	12-66
Marston Thompson & Evershed plc v Benn [1997] WTLR 315	11-19
Martell v Consett Iron Co Ltd [1955] Ch 363	1-154
Mason, Re [1928] Ch 395, [1929] 1 Ch 1	16-33
Mauger (AC) & Son (Sunwin) Ltd v Victor Hugo Management Ltd [1991 JLR N-3]	1-99
Mayes v Gayton International [1994] CLY 3760	1-64
Maynard v Public Servs Cttee [1995 JLR 65]	16-43
Mayo Associates v Cantrade [1995] JRC 216	1-16, 1-21
Mayo Associates SA c Anagram (Bermuda) Ltd [1998 JLR 4c], [1995 JLR N-2]	3-124, 7-36
Maywal Ltd v Nautech Services Ltd [2014 (2) JLR 527]	2-8, 2-10, 2-21
MD Mezzanine SA SICA v Servus Holdco SARL [2012] EWHC 1270 (Comm)	3-130
Medcalf v Mardell [2003] 1 AC 120	16-45
Meehan v Glazier Holdings Pty Ltd (2002) 54 NSWLR 146	7-17, 7-20
Mehra v Killachand [1987-88 JLR 421]	5-98
Meldrum v Scorer (1887) 56 LT 471	12-79
Menelaou v Bank of Cyprus UK Ltd [2015] UKSC 66	13-78
Meridian Global Funds Management Asia Ltd [1995] 2 AC 500 (PC)	9-30
Metall und Rohstoff AG v Donaldson Lufkin & Jeanrette Inc [1990] 1 QB 391	12-71
M'Gachen v Dew (1851) 15 Beav 84	12-9
Michel & Gallichan v AG [2006 JLR 287]	14-8, 14-9
Midland Bank Trust Co Ltd v Green [1980] Ch 590	3-47, 13-97, 13-98
Midland Bank Trust Co (Jersey) Ltd v Federated Pension Services [1994 JLR 276]	7-2, 7-3, 7-18, 7-23, 7-67, 7-68, 7-71, 7-72, 7-73, 7-74, 7-86, 8-69, 16-6
Miller v Cameron (1936) 54 CLR 572	10-13, 10-19
Miller v Gianne [2007] CILR 18	15-13
Mills v Drewitt (1855) 20 Beav 632	16-25
Minister for Planning and Environment v Yates & Anor [2008 JLR 486]	1-151, 1-160, 1-163
Minories Finance v Arya Holdings Ltd [1994 JLR 149]	15-28, 15-29, 15-30
Minwalla v Minwalla [2004] EWHC 2823 (Fam), [2005] 1 FLR 771	2-108, 4-19, 4-55, 15-75
Mitchell v Halliwell [2005] EWHC 937	7-80
Mitsui & Co Ltd v Nexen Petroleum UK Ltd [2005] EWHC 625 (Ch), [2005] 3 All ER 511	5-93
MM v SG Hambros Trust Co (CI) Ltd [2010] JRC 037	3-12
MM Patel Settlement, Re [2003] JRC 096	4-41, 4-42
Mobil Sales & Supply Corp v Transoil (Jersey) Ltd [1981] JJ 143	6-28
Mocha Investments Ltd v Crills [1990 JLR N-10]	1-30, 7-3, 7-30, 7-36
Moffat v Apex Trust Company Ltd [2014] JRC 252	4-27
Mond v Hyde [1997] BPIR 250	5-80
Montagu's Settlement Trusts, In re [1987] Ch 264	7-72, 9-25, 9-26, 9-29, 9-40, 9-51, 13-99

Montcrieff's Settlement Trusts, Re [1962] 1 WLR 1344	3-104
Montrose Investments Ltd v Orion Nominees Ltd [2004] EWCA (Civ) 1032	9-2
Montrow International Ltd and Likouala SA, Re [2007] JRC 065	5-131, 5-132
Moody v Cox [1917] 2 Ch 71	8-35
Moody Jersey 'A' Settlement, Re [1990] JLR 264].....	4-42
Moran v Deputy Registrar for the Parish of St Helier 2007 JRC 15	1-4
Morgan and Kemp v Deputy Registrar for the Parish of St Helier [2007] JRC 15	1, 4-34
Morice v Bishop of Durham (1804) 9 Ves 399	10-23
Morris v Livie (1822) 1 Y &c Ch 380	12-9, 12-12
Moss v Integro Trust (BVI) Ltd (1997/98) 1 OFLR 427 (BVI).....	3-33
Motew v Bristol & West Building Society [1996] EWCA Civ 533	6-6
Moulin Global Eyecare Trading Ltd v Commrs of Inland Revenue [2014] HKCFAR 218.....	9-35
Mourant and Company (Trustees) Ltd & Ors v Broere [2003] JLR 509].....	3-14
Mourant and Company (Trustees) Ltd, Re Representation [2001] JLR 218]	4-52
Mubarik v Mubarak [2009] JLR N [5]], [2008] JLR 403]	1-142, 3-84, 3-89, 3-92, 3-93, 3-97, 3-104, 14-16
Muir v City of Glasgow Bank (1879) 4 App Cass 337.....	11-19
Multinational Gas & Petrochemical Co v Multinational Gas & Petrochemical Servs Ltd [1983] Ch 258	9-30
Munton, Re [1927] 1 Ch 262.....	7-67
Murad v Al Saraj [2005] EWCA Civ 959.....	6-16, 8-69, 8-72, 8-74, 8-75, 8-81
Murphy v Brentwood District Council [1991] 1 AC 398.....	12-69
Murphy (J) & Sons Ltd v Johnson Precast Ltd [2008] EWHC 3104 (TCC)	1-102
Murthy v Sivajothi [1999] 1 WLR 467 (CA)	15-22
Muschinski v Dodds (1985) 160 CLR 583	9-52
Musson v Bonner [2010] WTLR 1369	6-32
N	
N, Re [1999] JLR 86]	3-86, 3-92, 3-96
Nabaro v Axco Trustees Ltd 1997/230A (Jersey) unreported	7-5, 7-16, 7-17, 7-19
NABB Brothers Ltd v Lloyds Bank International (Guernsey) Ltd [2005] EWHC 405 (Ch).....	2-18, 2-49, 2-63
National Bank of Australasia v Falkingham & Sons [1902] AC 585	4-54
National Trustees Company of Australasia Ltd v General Finance Company of Australasia Ltd [1905] AC 373 PC	7-81, 7-83, 7-85, 7-86
National Westminster Bank plc v Jones [2001] 1 BCLC 98	4-14, 4-15
Nationwide Building Society v Balmer Radmore [1999] Lloyd's Rep PN 241	8-84
Nationwide Building Society v Davisons Solicitors [2013] EWCA Civ 1626	7-84
Nautech Services Ltd v CSS Ltd [2014 (1) JLR 361], [2013 (1) JLR 462]	2-7, 2-19, 2-21, 2-24, 5-100
Nautech Services Ltd v Island Info Tech Centre Ltd [2014 (2) JLR N[13]].....	5-100
Needler's Settlement Trusts, Re, The Times, 11 April 1959.....	3-111
Neil Ashley (1990) Settlement, In re [2003 JLR N9]	3-94, 3-96
Nelson v Greening & Sykes (Builders) Ltd [2007] EWCA Civ 1358	1-168
Nelson v Larholt [1948] 1 KB 339.....	9-8
Nelson v Stocker (1859) 4 De G & J 458.....	7-52
New, Re [1901] 2 Ch 534	9-49

New Cap Reinsurance Corp Ltd (in liquidation) v Grant [2011]	
EWCA Civ 971 [2011] BPIR 1428.....	15-54
Newgate Stud Co v Penfold [2004] EWHC 2993 (Ch),	
[2004] All ER (D) 376.....	8-13, 16-6, 16-7, 16-9, 16-35
New Media Holding Company LLC v Capita Fiduciary Group	
Ltd [2010 JLR 272]	5-95, 5-100
1900 Trustee Co Ltd v Nurnberg Co Ltd [1998 JLR N13a]	5-96
Nimmo v Westpac Banking Corporation [1993] 3 NZLR 218.....	12-67, 12-68
Nisbet and Potts' Contract, In re [1906] 1 Ch 386	9-39
Nolan v Minerva Trust Company Ltd [2014] JRC 078A,	
[2014 (2) JLR 117]	6-11, 6-28, 6-31, 6-37, 6-38, 7-4, 7-69, 7-80, 9-3, 9-10, 9-24, 9-26, 9-30, 12-13, 12-14, 12-17, 12-20, 12-23, 12-27, 12-29, 12-47, 12-49, 12-50, 12-51, 12-53, 12-61, 12-70, 12-71, 12-73, 13-8, 16-1, 16-2, 16-9, 16-13, 16-26, 16-30, 16-32, 16-33, 16-43, 16-44, 16-46
Norfolk (Duke) Settlement Trusts, Re [1982] Ch 61	8-54, 8-61
Northampton Relgional Livestock Centre Co Ltd v Cowling	
[2014] EWHC 30 (QB).....	8-50
North Shore Ventures Ltd v Anstead Holdings Inc	
[2012] EWCA Civ 11	3-15, 5-97
Northwind Yachts Ltd, In the Matter of [2005 JLR 137].....	16-55, 16-58, 16-59, 16-62
Norwich Pharmacal Co v Customs & Excise Commsr	
[1974] AC 133, [1980] 1 WLR 1275.....	1-30, 5-92, 5-93, 5-100
Nutter v Holland [1894] 3 Ch 408, CA.....	3-13

O

Oakhurst Property Developments & Ors v Blackstar (Isle of Man Ltd)	
and Church Street Trustees Ltd [2012] EWHC 1131 (Ch).....	10-50, 10-51, 10-52
Oakley v Osiris Trustees Ltd [2008] UKPC 2	2-64
Oatway, Re [1903] 2 Ch 356	13-25, 13-31, 13-32, 13-54, 13-58
OBG Ltd v Allan [2007] UKHL 21, [2008] 1 AC 1.....	6-20, 12-70
O'Brien v Jersey Evening Post Ltd [1985-86 JLR N3].....	5-93
O'Brien, In the Matter of the Representation [2003 JLR 1].....	14-55
Oceanbulk Shipping and Trading SA v TMT Asia Ltd [2010] UKSC 44	4-54
Official Solicitor v Clore 1984 JJ 811.....	1-99
Ofner, Re [1909] 1 Ch 60.....	4-55
Ogier Trustees (Jersey) Ltd v CI Law Trustees Ltd [2006] JRC 158.....	5-80, 10-41, 10-43
Ogier Trustee (Jersey) Ltd, In re [2006 JLR N 35]	16-22
Ogilvie v Allen (1899) 15 TLR 294, HL.....	4-45
Ogilvie v Littleboy (1897) 13 TLR 399.....	4-22, 4-27, 4-45
Olympia, Re [1898] 2 Ch 153.....	8-80
Omar v Foreign Secretary [2012] EWHC 1737.....	5-95
Onorati Settlement, In re [2013 (2) JLR 324]	4-27, 4-32, 4-34
Ontario Securities Commission and Greymac Credit Corp, Re (1986) 30 DLR	
(4th) 1 at 12, Ont CA, (1988) 52 DLR (4th) 767, Can SC	13-21, 13-33
Oriakhel v Vickers & Ors [2008] EWCA Civ 748	1-161
Osias Settlements, In re [1987-88 JLR 389]	3-84, 3-85, 3-92, 3-93, 3-103
Osment v Constable of St Helier 1974 JJ	14-14

O'Sullivan v Management Agency & Music Ltd [1985] QB 428	8-74
O.T. Computers [2002 JLR N[10]], [2004 JLR N[4]]	5-131
Ottley v Gilby (1845) 8 Beavan 602	5-73
Otto Poon [2011] JRC 167	15-95
Otto Poon [2014] JRC 254A.....	15-95
Overton v Banister (1844) 3 Hare 303	7-52
Owens Bank Ltd v Bracco [1992] AC 484.....	15-9, 15-36, 15-58
Owens Corning Fibreglass (UK) Pension Plan Ltd, Re [2002] PLR 323.....	3-52
Owners and/or Demise Charterers of the Dredger 'Kamal XXVI' and the Barge 'Kamal XXIV' v The Owners of the Ship 'Ariela' [2010] EWHC 2531 (Comm)	1-164

P

P v C [2002 JLR N 26]	5-100
P and R Trusts, In the Matter of [2015] JRC 196	10-2
Pacific Investments Ltd v Christiansen & others [1995 JLR 250].....	1-39
Page's Settlement, Re [1965] 1 WLR 1046.....	2-114
Pain, Re [1919] 1 Ch 38	12-8, 12-9, 12-12
Painter v Hutchinson [2007] EWHC 758 (Ch)	4-15
Pallot Ltd v Gechena Ltd [1996 JLR 241]	15-28
Pantone 485 Ltd, Re [2002] 1 BCLC 266	16-9
Papadimitriou v Quorum Management Ltd [2004 JLR N38]	7-36
Paragon Finance plc v D.B. Thakerar & Co [1999] 1 All ER 400.....	2-13, 6-1, 6-4, 8-34, 9-10, 9-43, 12-53, 16-5, 16-13, 16-26, 16-34
Paragon Group Ltd v Burnell [1991] Ch 498	1-83, 16-53
Parker v McKenna (1874-75) LR 10 Ch App 96	8-21
Parker-Tweedale v Dunbar Bank plc (No 1) [1991] Ch 12.....	12-78
Parkes v Vrioni [1999 JLR N-5].....	1-59
Parsons, Re (1890) 45 ChD 51.....	7-43
Partington v Reynolds (1858) 4 Drew 253, 62 ER 98.....	7-7, 7-16, 16-13
Parujan v Atlantic Western Trustees Ltd [2003 JLR N[11]].....	5-23, 5-50, 10-9, 10-15
Passingham v Sherborn (1846) 9 Beav 424.....	10-18
Patel v Mirza [2016] UKSC 42, [2014] EWCA Civ 1047.....	4-15, 6-32
Patel v Shah [2005] EWCA Civ 157	16-10
Patterson v Wooler (1876) 2 ChD 586.....	3-58
Pattni v Ali [2007] 2 AC 85, [2006] UKPC 51	15-4, 15-13, 15-41
Paul A Davies (Australia) Pty Ltd v Davies [1983] 1 NSWLR 440, NSW CA.....	13-51
Pauling's Settlement Trusts (No 2), Re [1962] 1 WLR 86, [1964] Ch 303, [1963] 2 Ch 576	7-52, 7-54, 7-86, 10-16, 12-3, 12-5, 16-25
Pearse v Green (1819) 1 J & W 135	5-20
Peconic Industrial Development Ltd v Lau Kwok Fai (2009) 11 ITELR 844.....	12-60, 16-5, 16-52, 16-64
Pell v Frischman Engineering Ltd v Bow Valley Iran Ltd [2007 JLR 479], [2007] JRC 105A	1-102, 6-17, 6-20, 7-31, 7-33, 7-34, 10-50, 12-71, 15-33, 6-1, 16-10, 16-25
Pemberton v Westaway (1892) 215 Ex 499	10-50
Penrose, In re [1933] Ch 793	8-36, 8-37
Perczynski (née La Rocque) v Perczynski [2005 JLR N [23]]	1-30
Perrins v Bellamy [1898] 2 Ch 521, [1899] 1 Ch 797	7-83

Perrot v le Breton (1891) 11 CR 291	1-5, 16-61
Peter Hynd 'H' Settlement, Re (2000-01) 3 ITELR 701	3-94
Petrodel Resources Ltd & Ors v Prest [2013] UKSC 34	4-9, 4-19, 8-75, 9-18, 12-67
Petroleo Brasileiro SA v Mellitus Shipping Inc [2001] 2 Lloyds Rep 203	2-109
Phipps v Boardman [1967] 2 AC 46, HL, [1965] Ch 992	8-17, 8-19, 8-74, 8-78, 9-43
Philean Trust Co Ltd v Taylor [2003] JRC 038, [2003] JLR 61]	3-33, 4-52, 4-54
Philips, In the Estate of [2009] JLR N21]	4-54
Philipson-Stow v IRC [1961] AC 727	2-95
Pilcher v Rawlins (1872) 7 Ch App 259	13-98, 13-104
Pinto's Settlement, Re [2004] WTLR 878	3-33
Pinto Voluntary Settlement, In re [2004] JLR N [11]]	4-54
Pirrwitv Al Airports Intl Ltd [2013 (1) JLR N [10]]	1-56
Pitt v Holt & Futter [2013] UKSC 26, [2011] EWCA Civ 197	1-11, 4-21, 4-22, 4-23, 4-24, 4-2, 4-34, 4-37, 4-45, 4-47, 4-48
PKT Consultants (Jersey) Ltd [1991 JLR N-5]]	13-16, 13-44
Play Ltd v Legato Assets Ltd [2006 JLR N-30].....	1-106
Polly Peck International plc v Nadir Independent, 2 September 1992, Ch D, 28 July 1992	2-18
Polly Peck International plc v Nadir (No 2) [1993] BCLC 187, [1992] 4 All ER 769.....	9-12, 9-20, 9-23
Pooley v Quilter (1858) 2 De G & J 327.....	8-24
Popat v Shonchhatra [1995] 1 WLR 908, [1997] 1 WLR 1367	8-20
Portman's Settlement Trusts, Re 11 March 1976 (unreported)	3-105
Postlethwaite, Re (1888) 37 WR 200	8-10
PP Investors, Re [2008] JRC 031	4-41
Prenn v Simmonds [1971] 1 WLR 1381	4-52, 4-54
Preston's Estate, Re [1951] Ch 878	3-62
Priddy v Rose (1817) 3 Mer 86.....	12-9
ProSwing Inc v Elta Golf Inc [2006] SCR 612	15-13
Protheroe v Protheroe [1968] 1 WLR 519.....	8-20
PSD Enterprises Ltd, Re [1998] JLR 321].....	3-36
Public Services Committee v Maynard [1996] JLR 343].....	16-41, 16-42, 16-43
Public Trustee v Cooper [2001] WTLR 901	2-52, 3-19, 3-22, 3-25, 3-29, 5-74, 8-45, 8-48, 11-30, 11-41
Public Trustee v Smith [2008] NSWSC 397, (2007-2008) 10 ITELR 1018.....	4-10
Pumfrey, Re (1882) 22 ChD 255.....	11-41
PW Trust, In re [2010] JLR 619]	3-33, 12-24

Q

Q Trusts, Re [2001] CILR 481	3-29
Quarter Master UK Ltd v Pyke [2004] EWGC 1815 (Ch)	8-75

R

R v Akhtar [2011] EWCA Crim 146, [2011] 4 All ER 4167	14-16
R v Allen [1999] STC 846	4-10
R v Banks [1997] 2 CrAppR (S) 110	14-10
R v C [2008] JRC 179	5-100
R v Da Silva [2006] EWCA Crim 1654	14-12
R v G [2006] JLR N-20]	1-113
R v Geary [2010] EWCA Crim 1925	14-11, 14-16, 14-19

R v Keith & Ors [2010] EWCA Crim 477	14-63
R v Legal Aid Board, ex parte Kaim Todner (a firm) [1999] QB 966.....	3-113
R v Seager [2009] EWCA Crim 1303	14-10
R v Sussex Justices, ex parte McCarthy [1924] 1 KB 256.....	3-117
R v Waya [2013] 1 All ER 89.....	14-54
R In the Matter of [2011] JRC 117.....	8-90
R (on the application of ABN International SA) v FSA [2010] EWCA Civ 123.....	5-81
R (on the application of Derrin Brothers Properties) v HMRC [2014] EWHC 1152 (Admin).....	5-88
R (Factortame Ltd) v Transport Secretary (No 8) [2003] QB 381	1-146
R and M Remuneration Trust, In the Matter of [2007] JRC 184, [2009 JLR N[40]]	4-50, 4-39, 4-47
R and RA Trusts, In the Matter of (25/2014) (Guernsey CA)	3-14, 3-64, 5-10, 5-51
R Trust, In the Matter of [2015] JRC 267A.....	15-84
Rabaiotti 1989 Settlement, In re [2000 JLR 173].....	1-39, 3-70, 4-7, 5-4, 5-11, 5-20, 5-21, 5-25, 5-32, 5-37, 5-39, 5-59, 5-63, 5-70, 5-97
Racz v Perrier Labesse 1979 JJ 158	1-36, 16-53, 16-54
Rae v Meek (1889) 14 App Cas 558.....	12-79
Rafferty v Philip [2011] EWHC 709 (Ch)	8-45, 10-13
Raftland Pty Ltd v Commissioner of Taxation [2008] HCA 21	4-14
Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900	2-48
Randall v Errington (1805) 10 Ves 423	8-13
Randalls Properties Ltd v Rozel Bay Hotel Ltd [2005 JLR N [33]]	1-63
Raybould, Re [1900] 1 Ch 199.....	11-20
Rayner v Bank for Gemeinwirtschaft AG [1983] 1 Lloyd's Rep 462 (CA)	15-32
RBC Trust Company (Jersey) Ltd v E & Ors [2010] JCA 231.....	3-12, 3-14, 3-15, 3-18
Reading v Attorney General [1951] AC 507	8-21
Realisable Property of R Tantular, In the Matter of [2014 (2) JLR 25]	8-15
Regal (Hastings) Ltd v Gulliver [1967] 2 AC 134.....	6-15, 8-9, 8-18, 8-19, 8-50, 8-69
Reid-Newfoundland Co v Anglo-American Telegraph Co Ltd [1912] AC 555, PC	16-28
Relfo Ltd (in Liquidation) v Varsani & Ors [2014] EWCA Civ 1451	1-161, 1-165, 8-18
REO (Powerstation) Ltd, In re [2012 (1) JLR N[13]]	5-131
Republic of Brazil v Durant [2012] JRC 211	1-11
Repus Trust, Re [2005] JRC 081	3-22
Rex Trust, In re [2013 (2) JLR 444]	8-1, 8-21, 8-77, 8-87, 8-94, 16-7, 16-34
Reynolds, Re [2008] NZCA 122 (2007–08) 10 ITCLR 1064	4-9, 4-10
Rhodes v Macalister (1923) 29 Comm Cas 19, 28.....	8-94, 8-95
Richard v Mackay (1987) 11 Tru Ll 23, 24.....	3-12
Ricketts v Ricketts (1891) 64 LT 263	12-2
Riddick v Thames Board Mills Ltd [1977] 3 All ER 677 (CA).....	3-126
Riley v Pickersgill [2002 JLR 196]	1-100, 1-156
Rio Tinto Zinc Corp v Westinghouse Electric Corp [1978] AC 547, [1977] 3 All ER 703.....	5-104, 5-112
Risdon Iron & Locomotive Works v Furness [1906] 1 KB 49.....	11-18
Roberts v Gill & Co [2008] EWCA Civ 803, [2007] All ER (D) 89 (Apr)	12-74, 12-78, 12-79, 12-81, 12-82

Roberts, Re (1978) 265 Ex 281	10-9
Robertson v Lazard Trustees Co C.I. Ltd [1994] JLR 103].....	2-97, 16-68
Robertson Research International v ABG Exploration [1999] CPLR 756	1-163
Robertson's Will Trusts, Re [1960] 1 WLR 1050	3-94
Robinson, Re [1911] 1 Ch 502.....	9-2, 16-33
Robinson Annuity Investment Trust, In the Matter of [2014] JRC 133.....	4-28, 4-32
Rolled Steel Products (Holdings) Ltd v British Steel Corporation [1986] Ch 246.....	9-11
Ross v Caunters [1980] Ch 297	12-69
Ross River Ltd v Cambridge City Football Club Ltd [2007] EWHC 2115 (Ch).....	8-21, 8-87, 8-88
Rouse's Will Trusts, Re [1959] 1 WLR 372.....	3-111
Rowley v Ginnever [1897] 2 Ch 503	11-6
Royal Bank of Scotland v Skinner [1931] SLT 382.....	9-20
Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378, PC.....	7-68, 9-21, 9-23, 9-24, 9-30, 9-36,
	12-14, 12-18, 12-25, 12-26, 12-27,
	12-30, 12-32, 12-39, 12-47, 12-61,
	12-67, 12-74, 12-78, 12-79
Rubin v Eurofinance SA [2010] EWCA Civ 895, [2011] Ch 133	15-54
Rumasa SA v W & H Trademarks (Jersey) Ltd [1985-86 JLR 308].....	1-60

S

S v L & Bedell Cristin Trustees Ltd [2005] JRC 109	3-12, 3-22, 3-29
S Settlement, In Re [1987-88 JLR N-22c].....	10-21
S Settlement, In the Matter of [2001 JLR N [37]]	3-19, 3-29, 3-114, 8-48, 8-51, 11-30, 15-92
S Settlement, In the Matter of [2011 JLR 375]	2-10
S Trust, Re [2011] JRC 117, [2011 JLR 375]	4-22, 4-27, 4-29, 9-51, 11-25
Saghira (The) [1997] 1 Lloyd's Rep 160	3-136
Sainsbury's Settlement, Re [1967] 1 WLR 476	3-94
St Mary and St Michael Parish Advisory Co Ltd Westminster Roman Catholic Diocese Trustee [2006] EWHC 762 (Ch)	10-5
Sale Hotel and Botanical Gardens Co Ltd, Re (1897) 77 LT 681	16-5
Sanne Trust Co Ltd, Re Representation of [2009] JRC 025A, 025B, [2009 JLR N[49]].....	4-36, 4-42, 4-50
Santander UK plc v RA Legal Solicitors [2014] EWCA Civ 183	7-81, 7-82, 7-85, 7-86
Satnam Investments Ltd v Dunlop Heywood & Co Ltd [1999] 3 All ER 652.....	12-17
Saunders v Vautier (1841) EWHC Ch J8, (1841) 4 Beav 115.....	3-85, 3-86, 5-37, 8-52, 10-1
Sayers v Briggs [1964] JJ 399	1-12
Schibsby v Westenholz (1870) LR 6 QB 155.....	15-8
Schmidt v Rosewood Trust Ltd [2003] UKPC 26.....	2-59, 3-6, 3-14, 3-15, 3-70, 5-4, 5-11,
	5-20, 5-29, 5-36, 5-53, 5-56, 5-59,
	5-63, 5-91, 5-97, 7-43
Schuler (L) AG v Wickman Machine Tool Sales Ltd [1974] AC 251	4-52
Schulman v Hewson [2002] EWHC 855 (Ch)	16-10
Scott v Scott (1962) 109 CLR 649	13-25
Scott v Scott [1931] AC 437	3-117
Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran [1994] 1 AC 43, [1993] 3 WLR 756.....	2-19, 2-21, 2-24, 2-30, 2-35
Seager v Copydex Ltd [1967] 1 WLR 923	6-20
Seale's Marriage Settlement [1961] Ch 574	3-92
Sea Star (The) [2001] UKHL 1.....	9-22
Seaton Trustees Ltd, In re [2009 JLR N[15]]	4-25, 8-40

Secretary of State v Aurum Marketing Ltd & Anor [2000] EWCA Civ 224.....	1-160
Secretary of State for Justice v Topland Group plc [2011] EWHC 983.....	12-19
Segbedzi v Segbedzi [2002] WTLR 83, CA	7-78
Selangor United Rubber Estates v Craddock (No 3) [1968] 1 WLR 1555, [1969] 1 WLR 1773.....	6-24, 9-9, 9-10, 9-30, 12-12
Selby v Romeril [1996 JLR 210]	6-28
Selsey (Lord) v Rhoades (1824) 2 Sim & St 41	8-16
Sempra Metals Ltd (formerly) Metallgesellschaft Ltd) v IRC & Anor [2008] 1 AC 561	7-32, 7-34
Sennar (The) (No 2) [1985] 1 WLR 490 (HL)	15-30, 15-33
Sesemann Will Trust, Re [2005 JLR 421]	4-41, 4-46
Seyfang v G.D. Searle & Co [1973] QB 148, [1973] 1 All ER 290.....	5-104
SGI Trust Jersey Ltd v Wijsmuller [2008 JLR N-22], [2005] JLR 310]	1-160, 2-28, 2-41
Shah v HSBC Private Bank (UK) Ltd [2009] EWHC 79 (QB).....	14-13
Shaker v Al-Bedrawi [2002] EWCA Civ 1452.....	8-83, 12-87
Shalson v Russo [2003] EWHC 1637, [2005] Ch 28	4-9, 4-12, 4-13, 13-32, 13-43, 13-63, 13-66, 13-76
Sharp, Re [1906] 1 Ch 793	16-10
Sharpe v San Paulo Railway Co (1873) 8 Ch App 597	12-79
Shinorvic Trust [2012 (1) JLR 324].....	9-49
Shipway v Broadwood [1899] 1 QB 369	8-21
Shirley v Channel Islands Knitwear Co Ltd [1985-86 JLR 404].....	3-146
Showlag v Mansour [1995] 1 AC 431, [1994 JLR 113].....	14-67, 15-6, 15-7, 15-14, 15-28, 15-30, 15-35, 15-36, 15-70
Sibley v Berry [1992 JLR N 4]	11-17
Sieff v Fox [2005] EWHC 1312 (Ch)	4-24, 16-16
Sims v Hawkins [2007] EWCA Civ 1175	1-167, 15-9
Sinclair v Brougham [1914] AC 398	13-26, 13-27, 13-67
Sinclair v Sinclair [2009] EWHC 926 (Ch).....	16-25
Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd [2011] EWCA Civ 347, [2012] Ch 453, [2007] EWHC 915 (Ch).....	6-21, 7-4, 7-7, 8-75, 8-76, 9-26, 9-28, 12-14, 13-11
Sinel v Goldstein [2003 JLR N-20].....	1-90, 1-91
Sinel Trust Ltd v Rothfield Investments Ltd [2003] JCA 048, [2003] WTLR 593	3-33
Singapore Airlines Ltd v Buck Consultants Ltd [2011] EWCA Civ 1542.....	3-61
Singh v Bhasin [2000] WTLR 275.....	3-49, 3-58
Sirdar Gurdyal Singh v Rajah of Faridkote [1894] AC 670 (PC).....	15-17, 15-27
Siskina (The) [1979] AC 255.....	2-8, 2-21
Skeats' Settlement, Re (1889) 42 ChD 522.....	8-41, 8-45, 10-2, 10-3, 10-24
Skinner, Re [1904] 1 Ch 289	3-70
Smith v Dresser (1866) LR 1 Eq 651	11-7
Smith v Smith (1835) 1 Y & C 338.....	12-9
Snell v Beable [2001] 2 UKPC 304.....	1-4
Snook v London and West Riding Investment Ltd [1967] 2 QB 786	4-3, 4-12
Soar v Ashwell [1983] 2 QB 390.....	9-43, 16-28
Sociedad Financiera Sofimeca & Anor v Kleinwort Benson (Jersey) Trustees Ltd & Ors [1992] JRC 125.....	12-4, 12-8
Society of England and Wales v Habitable Concepts Ltd [2010] 1449 (Ch)	12-23
Society of Lloyd's v Robinson [1999] 1 WLR 763	4-52, 4-53, 4-54
Solvalub Ltd v Match Investments Ltd [1996 JLR 361]	2-9, 15-24

Somerset, Re [1894] 1 Ch 265, CA	12-3, 12-7
Southern Commodities Property Ltd v Martin 1991 SLT 83	13-66
Southgate v Sutton [2011] EWCA Civ 637	4-50
Sovereign Trust International Ltd v WJB Chilterns Trust Company [2005] JRC 004.....	5-80
Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd [1986] 1 WLR 1072	7-46, 13-83
Speight v Gaunt (1883) 9 App Cas 1, 14	7-18
Spiliada (The) [1987] AC 460	2-27, 2-41, 2-45
Spiliada Maritime Corp v Cansulex Ltd [1986] 3 All ER 843, [1987] AC 460.....	2-19, 2-42, 2-45
Springett v Dashwood (1860) 2 Giff 521	5-20
Springfield Nominees Pty Ltd v Bridgelands Securities Ltd [1992] 110 ALR 685.....	3-125
Spurling's will Trusts, Re [1966] 1 WLR 920	3-58
Stack v Dowden [2007] UKHL 17.....	6-33
Stainton v Carron & Co (1854) 18 Beav 146	12-79
Stanway v Bush [1992] JLR 115].....	2-46
Stapleford Colliery Co, Re Barrow's Case (1880) 14 ChD 432	13-104
Staples, Re [1916] 1 Ch 322	3-34
Starglade Properties Ltd v Nash [2010] EWCA Civ 1314, [2011] 1 Lloyd's Rep FC 102.....	12-30
State of Norway's Application, Re (Nos 1 and 2) [1990] AC 723	5-104, 5-121
State of Qatar v Al Thani [1999] JLR 118]	1-7, 2-9
Steed's Will Trusts, Re [1960] Ch 407	3-84, 3-96, 3-98, 14-16
Steelux Holdings Ltd v Edmonstone (née Hall) [2005] JLR 152].....	6-28
Stevens v Premium Real Estate Ltd [2009] NZSC 15	8-81, 8-94
Stevens, Re [1898] 1 Ch 162	7-8, 7-16, 7-17, 7-19
Stone & Rolls v Moore Stephens [2009] 1 AC 1391	9-31, 9-34, 9-35
Storm Residential & Commercial Management Ltd v Sarnia Developments Ltd 2009–10 GLR 427	1-16
Strata Surveys Ltd v Flaherty [1994] JLR 69].....	1-63, 1-82
Strathmullen Trust, In the Matter of [2014 (1) JLR 309], [2014] JRC 056.....	1-30, 4-21, 4-32, 4-34, 4-45, 4-50, 4-54, 6-35, 8-54, 11-7
Stuart, Re [1897] 2 Ch 583	7-80
Stuart, Re [1940] 4 All ER 80, CA	3-65
Stuart-Hutchinson v Spread Trustee Company Ltd [2002] WTLR 1523 (Guernsey CA)	3-65, 5-25
Suco Gold Pty Ltd, Re (1983) 33 SASR 99, SA, SC.....	11-74
Sutherland, Re [2003] NSWSC 1008.....	13-48
Sutton v Insurance Corporation of the Channel Islands [2011] JLR 80].....	6-28
Swindle v Harrison [1997] 4 All ER 705	8-50, 8-82
Sybron Corporation v Barclays Bank plc [1985] 1 Ch 299	3-125, 3-126, 3-149
Symphony Group Plc v Hodgson [1994] QB 179	1-161, 1-162, 1-163
Systemcare (UK) Ltd v Services Design Technology Ltd & Anor [2011] EWCA Civ 546	1-160, 1-165, 1-168
Systems Design Ltd v President of Equatorial New Guinea 2005–06 GLR 65.....	5-95
Syvret, In re [2014 (1) JLR 71]	1-28

T

T Settlement, In re [2002 JLR 204]	3-96
Tamlin v Edgar [2011] EWHC 3949	3-28
Tang Man Sit v Capacious Investments Ltd [1996] 1 AC 514 (PC)	7-21, 8-68, 13-20

Tantular v AG [2014 (2) JLR 25], [2014] JRC 243.....	12-4, 14-43, 14-46, 14-47, 14-50, 14-51
TA Picot (CI) Ltd v Crills [1995 JLR 33]	15-29
Target Holdings Ltd v Redfers [1996] AC 421.....	7-22, 7-23, 7-26, 7-27, 8-81, 12-62
Taylor v Allhusen [1905] 1 Ch 529.....	8-36, 8-37
Taylor v Burnton [2014] EWCA Civ 21	1-103
Taylor v Davies [1920] AC 636	9-43, 16-2, 16-35
Taylor v London and County Banking Co [1901] 2 Ch 231.....	13-99
Taylor v Taylor [1990 JLR 124].....	5-98
Taylor v Walker [1958] 1 Lloyd's Rep 490.....	8-87
Teague v Trustees, Executors and Agency Co Ltd (1923) 23 CLR 252, Aus HC	5-64
Tebbs, Re [1976] 2 All ER 858	7-17, 7-18, 7-19
Templeton v Knox [2011] JRC 205	5-96
Thomas, Re [1930] 1 Ch 194	3-101
Thomas and Agnes Carvel Foundation v Carvel [2007] EWHC 1314 (Ch).....	10-9, 10-13
Thommessen v Butterfield Trusts (Guernsey) Ltd 2009-10 GLR 102	3-28, 3-74, 5-50
Thompson's Settlement, Re [1986] 1 Ch 99	8-13, 8-14, 8-45, 8-46
Thompson's Trustee in Bankruptcy v Heaton & Ors [1974] 1 WLR 605.....	8-20, 8-79
Thomson v Berkhamstead Collegiate School [2009] EWHC 2374 (QB)	1-164
Three Individual Present Professional Trustees of Two Trusts v An Infant Prospective Beneficiary of One Trust [2007] EWHC 1922 (Ch), [2007] WTLR 1631.....	5-44
Three Rivers District Council & Ors v Governor and Co of the Bank of England [2004] EWCA Civ 218, [2003] EWCA Civ 474, [2003] 2 AC 1.....	3-129, 3-137, 12-50, 12-51, 16-6, 16-43, 16-44, 16-46
Tiger v Barclays Bank Ltd [1952] 1 All ER 85.....	5-80
Tilley's Will Trusts, Re [1967] Ch 1179.....	13-21, 13-64, 13-85
Tinsley v Milligan [1994] 1 AC 340.....	4-15, 6-32
Tintin Exploration Syndicate Ltd v Sandys (1947) 177 LT 412	16-5
Tito v Waddell (No 2) [1977] Ch 106	8-12, 8-13, 8-15, 8-16, 8-39, 8-86
T. J. Moralee, In the Matter of the Estate of [2012 (1) JLR 180].....	9-8
Tod v Barton [2002] EWHC 265 (Ch).....	2-90, 2-106
Todd v Moorehouse (1874) LR 19 Eq 69.....	11-8
Toland Trust, Re [2005] JRC 142.....	3-31
Tomes v Coke-Wallis [2002] JRC 131A	15-10
Toothill v HSBC Bank plc [2008 JLR 77].....	15-10
Total Spares and Supplies Ltd & Anor v Antares SRL & Ors [2006] EWHC 1537 (Ch)	1-160
Tournier v National Provincial and Union Bank of England [1924] 1 KB 46.....	5-13
Towers v Premier Waste Management Ltd [2011] EWCA Civ 923.....	8-69
Towndrow, Re [1911] 1 Ch 662	12-9, 12-11, 12-12
Townley v Sherborne (1633) 1 Bridge 35, 123 ER 1181	7-11
Transvaal Lnads Co v New Belgium (Transvaal) Land & Development & Co [1914] 2 Ch 488	8-90
Trant v AG [2007 JLR 231]	9-38
Travis v Illingworth (1865) 62 ER 652	9-50, 11-6
Travis v Milne (1851) 9 Hare 141	12-79
Trepca Mines, Re [1963] Ch 199	1-146, 1-154
Tribe v Tribe [1996] Ch 107	4-15, 6-32
Trilogy Management Ltd v YT Charitable Foundation (Intl) Ltd [2012] JCA 204	4-51, 10-36
Trilogy Management Ltd v YT Charitable Foundation (Intl) Ltd [2012 (2) JLR 330]	1-108, 3-8, 3-58, 3-60, 3-62, 3-63, 3-64, 3-65, 3-122, 3-129

Trilogy Management Ltd v YT Charitable Foundation (Intl)	
Ltd [2012] JRC 093	3-8, 4-51, 10-20
Trilogy Management Ltd v YT Charitable Foundation (Intl) Ltd	
[2013 (2) JLR 265]	3-1, 3-49, 3-60, 4-51, 11-24
Trilogy Management Ltd v YT Charitable Foundation (Intl)	
Ltd [2013 (2) JLR N 14], [2013] JRC 147	3-73, 3-74, 3-75
Trilogy Management Ltd v YT Charitable Foundation (Intl)	
Ltd [2014 (2) JLR N31]	16-13
Trilogy Management Ltd v YT Charitable Foundation (Intl)	
Ltd [2014] JRC 182	3-122, 3-141, 3-151
Trilogy Management Ltd v YT Charitable Foundation	
(Intl) Ltd [2014] JRC 214	4-51, 7-1, 10-9, 10-14, 10-15, 10-19, 10-21, 10-28, 10-40
Trilogy Management Ltd v YT Charitable Foundation (Intl) Ltd	
[2015 (2) JLR 15]	5-32
Trustee 1 v AG [2014] (CA Bda 3 Civ).....	5-46
Trustees, Executors and Agency Co Ltd v Margottini [1960] VR 417	5-64
Trustor AB v Smallbone (No 2) [2001] 1 WLR 1177	8-75
Trusts of Leeds City Brewery Ltd's Debenture Stock Trust Deed, Re (1921) [1925] Ch 532.....	7-67
Tsang Yue Joyce v Standard Chartered Bank (Hong Kong)	
Ltd [2010] HKCFI 981, [2010] 5 HKLRD 628	12-79
TSB Bank v Robert Irving & Burns [1999] Lloyd's Rep IR 528, [2000] 2 All ER 826 (CA)	3-130
Tucker, Re [1987-88 JLR 473]	5-81
Turino Consolidated Ltd Retirement Trust, In re [2008 JLR N27]	3-82, 3-86, 5-37, 5-77
Turner v Hancock (1882) 20 ChD 303.....	3-58, 3-69
Turner v Maule (1850) 15 Jur 761.....	10-9
Turner, Re [1897] 1 Ch 536	7-80, 7-81, 7-83
Turpin, ex parte (1832) 1 D & C 120	12-9
Twinsectra Ltd v Yardley [2002] UKHL12, [2002] AC 164,	
[1999] Lloyd's Rep bank 438,	12-47, 6-28, 6-31, 6-37, 12-14, 12-47, 12-48

U

UBS Trustees (Jersey) Ltd v Ismail [2003] JRC 147	3-14
Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch)	8-49, 8-69, 8-75, 12-23, 12-49, 12-51
United Capital Corp Ltd v Bender [2006] JRC 004A	1-83, 2-63
United Capital Corp Ltd v Bender [2006] JCA 094	16-5
United Capital Corp Ltd v Bender [2006 JLR 1]	1-88, 2-7, 2-10
United Capital Corp Ltd v Bender [2006 JLR N [7]], [2006] JRC 034A.....	7-34, 8-75, 12-53, 13-22
United Capital Corp Ltd v Bender [2006 JLR 242]	2-12, 2-15, 2-16, 2-18, 2-22, 2-31, 2-63
United Capital Corp Ltd v Bender & Koonmen [2005 JLR 401].....	3-126

V

Valetta Trust, In the Matter of [2012 (1) JLR 1], [2011] JRC 227.....	1-26, 1-146, 1-147, 1-150, 1-153, 12-75
Van der Linde v Van der Linde [1947] Ch 306	4-42, 4-44
Vandervell v IRC [1966] Ch 261, [1967] 2 AC 291 (HL)	6-31, 6-34
Vandervell's Trusts (No 2), Re [1974] Ch 269	6-31, 6-34
Van Gruisen's Will Trusts, Re [1964] 1 WLR 449	3-96
Vaughton v Noble (1864) 30 Beav 34.....	12-9

Vautier, Re [2000] JLR 351	4-54
Vervaek v Smith [1981] Fam 77	15-72
VGM Holdings Ltd, Re [1942] Ch 235	12-12
Vibert, In the Matter of the Representation of [1987-88] JLR 96]	4-56
Viberts v Golder [1995 JLR 297]	7-31
Vickery, Re [1931] 1 Ch 572	7-67
Victor Hanby Associates Ltd and Hanby v Oliver [1990 JLR 337]	5-97, 5-98
Vieira v Kordas [2013] JRC 251	5-68
Vilsmeier v AI Airports International Ltd and PI Power International Ltd [2014] JRC 257	12-66
Virani v Virani [2000 JLR 203].....	1-36, 1-86, 2-21, 2-32, 16-53
Virgin Atlantic Airways v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd) [2013] UKSC 47.....	15-29
Viscount v AG [2002 JLR 268]	5-13
Viscount v Wadman (1972) JJ 2085	8-79, 11-3
Volaw & Ors v Comptroller of Taxes & States of Jersey [2015] JRC 244	5-83, 5-85
Volaw Trust and Corporate Services Ltd and Larsen v Office of the Comptroller of Taxes [2013] JRC 095.....	5-83, 5-85
Volaw Trust and Corporate Services Ltd v Larsen [2013] JRC 148C	5-83
Volaw Trustees Ltd v Trustcorp (Jersey) Ltd [2013] JRC 028	5-80
Von Lorang v Administrator of Austrian property [1927] AC 641	15-12
VR Family Trust, In re [2009 JLR 202]	8-17, 8-36, 8-37, 8-95
VR Family Trust v Van Rooyen [2009] JRC 109	10-1, 10-7, 10-22, 10-23, 10-27, 10-26, 10-31, 10-39
VTB Capital plc v Nutrtek International Corp & Ors [2013] UKSC 5	2-24

W

W Dennis & Sons v West Norfolk Farmers Mature and Chemical Cooperative Company Ltd [1943] 1 ChD 220.....	3-130
Waddington Ltd v Chan Chun Hoo Thomas [2008] HKCFA 86.....	12-89
Wade v Poppleton & Appleby [2003] EWHC 3159 (Ch).....	8-95
Wadman v Dick [1993 JLR 63].....	5-104, 5-107, 5-121
Wakelin v Read [2000] PLR 319.....	12-40
Walker v Egerton-Vernon [2014 (1) JLR 182]	16-43
Walker v Hawksford Trust Company Jersey Ltd [2014] (1) JLR 182	16-1
Walker v Stones [2001] QB 902.....	7-69, 12-41, 12-87, 12-92, 12-94
Walker & Delarose Trustee Ltd v Egerton-Vernon & Ors [2014 (1) JLR 182]	16-22, 16-48
Wallace's Settlement, Re [1968] 1 WLR 711	3-94
Wallersteiner v Moir (No 2) [1975] QB 373.....	3-74, 12-66
Walmsley, Re (1983) JJ 35	5-81
Warner v Equity Trust (Jersey) Ltd [2008 JLR N [1]]	5-131
Wassell v Leggatt [1896] 1 Ch 554	16-28
Waterman's Will Trusts, Re [1952] 2 All ER 1054	7-86
Watson, Re (1904) 49 SJ 54.....	3-70, 5-20
Watt v Barnett (1878) 3Q BD 363	1-82
Weatherford Global Products Ltd v Hydropath Holdings Ltd & Ors [2014] EWHC 3243 (TCC)	1-161
Webb, Re [1894] 1 Ch 73 (CA).....	7-8
Webster v Sanderson Solicitors [2009] EWCA Civ 830	12-74, 12-89
Wells v Wells [1962] 1 WLR 397 874.....	7-12, 8-59

West v Lazard Bros & Co (Jersey) Ltd [1987–88 JLR N22], [1993 JLR 165]	4-7, 5-7, 5-20, 7-14, 7-22, 7-23, 7-24, 7-26, 7-27, 7-34, 7-46, 7-69, 7-72, 8-69, 8-80, 10-9, 10-11, 12-4, 12-7, 16-3, 16-6, 16-21
Westbond International Bank Ltd v Cantrust (C.I.) Ltd [2004] JRC 111.....	3-47, 3-121, 3-146, 3-151
Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 669.....	6-1, 6-3, 6-12, 6-23, 6-26, 6-29, 6-31, 8-1, 9-10, 12-14, 13-8, 13-10, 13-26
Wester v Borland [2007] EWHC 2484 (Ch).....	10-43, 11-41
Western, etc, Building Society v Ruckridge [1905] 2 ChD 472	1-60
Westminster Bank Ltd's Declaration of Trust, Re [1963] 1 WLR 820.....	3-107, 5-64
Westminster Corporation v St George's Hanover Square [1909] 1 Ch 592.....	3-64
Westminster Property Management Ltd, Re [2002] EWHC 520 (Ch)	16-9
Weston, Re [1900] 2 Ch 164	12-11
Weston's Settlement, Re [1969] 1 Ch 223, CA, [1970] Ch 560	3-92, 3-94, 3-96
Whigham's Settlement Trusts, Re [1971] 1 WLR 83	3-106
Whightwick's Will Trusts, Re [1950] Ch 260.....	7-83
White v Jones [1995] 2 AC 207, HL	12-69
White v Lady Lincoln (1803) 8 Ves Jr 363.....	5-20
Whitehouse, Re [1982] Qd R 196.....	10-9
Whiteside v Whiteside [1950] Ch 65, CA	4-42, 4-44
Whittall, Re [1973] WLR 1027	3-98, 3-105
Whyte v Whyte [2005] EWCA Civ 858	15-22
Wigley & Ors v Dick [1989] JLR 318]	5-112, 5-119, 5-122
Wiley (as Trustee of the Bankrupt Estate of Fuller) v Fuller [2000] FCA 1512.....	4-11
Wilkes Annuity Investment Trust, In the Matter of [2015] JRC 200.....	4-27, 4-32
William Makin & Son Ltd, Re [1993] OPLR 171	8-45
Williams v Allen (No 2) (1863) 32 Beav 650	12-9
Williams v Central Bank of Nigeria [2012] EWHC 74 (QB), [2013] EWCA Civ 785, [2014] UKSC 10	2-25, 12-14, 16-2, 16-6, 16-10, 16-30, 16-34
Williams v Stevens (1866) LR 1 PC 352.....	8-79, 11-3
Williams, Re [2009] JLR N[16]	5-131, 5-133
Williams and Clark, In the Matter of the Representation of [2012] JRC 076.....	5-131
Williams & Glyn's Bank v Astro Dinamico [1984] 1 WLR 428	15-22
Williamson v Barbour (1877) 9 ChD 529.....	7-8
Wills Trust Deeds, Re [1964] Ch 219	8-36
Wimbourne (Viscount), ex parte [1983] JJ 17	1-12, 4-54, 8-41, 11-56
Windeatt's Will Trusts, Re [1969] 1 WLR 692	3-92
Winterthur Swiss Insurance Company & Anor v AG (Manchester) Ltd & Ors [2006] EWHC 839 (Comm).....	3-133, 3-135
Winton Investment Trust, In re [2007] JLR N[56].....	4-25
Wisniewski v Central Manchester Health Authority [1998] PIQR P324.....	9-37
Woodland-Ferrari v UCL Group Retirement Benefits Scheme [2002] EWHC 1354 (Ch), [2003] Ch 115.....	7-67
Woodyatt v Gresley (1836) 8 Sim 180.....	12-9
Wrays v Waray [1901] P 132.....	1-84
Wright v Morgan [1926] AC 788.....	8-7, 8-9, 8-13, 8-14, 8-39
Wright v Rockway Ltd [1994] JLR 321	2-27

Wright v Snowe (1848) 2 De G & Sm 321	7-52
Wright v Wilkin (1858) 6 ER 643.....	5-115
Wrightson, Re [1908] 1 Ch 789.....	10.8, 10-11, 10-13
WW and XX, Re [2011] JRC 231	9-49
Wynne v Tempest (1897) 13 TLR 360.....	7-81

X

X v A [2000] 1 All ER 490.....	10-43
X's Settlement, In re [1994 JLR N-6]	11-21
X Trust, Re [2012 (2) JLR 260]	3-75, 7-44, 11-34, 12-78

Y

Y Trust, In re [2011 JLR 464], [2011] JRC 135	3-12, 3-18, 3-22, 3-26, 4-44, 8-48, 8-51, 11-41
Y Trust, In re [2011] JLR N[34]]	3-58
Y Trust, In re [2014 (1) JLR 199].....	3-24, 3-29, 5-14, 8-48
Yashvina Parujan v Atlantic Western Trustees Ltd [2003] JRC 045.....	10-9
Ybanez v BBVA Privanza Bank (Jersey) Ltd [2007 JLR N-45].....	1-91, 3-22
Yeatman v Yeatman (1877) 7 ChD 210	12-79
Young v Harris (1891) 65 LT 45	16-28
Young v Murphy [1996] 1 V 279	12-76, 12-78

Z

Z v Y & Ors [2-14] JRC 170.....	6-31, 6-34
Z Trusts, In the Matter of [1997] CILR 248 (Cayman).....	10-24
Z Trusts, In the Matter of [2015 (1) JLR N13], [2015] JRC 031.....	8-55, 11-4, 11-5, 11-12, 11-13, 11-40, 11-72, 11-76
Z Trusts, In the Matter of [2015] JRC 196C	9-35, 10-2, 11-65, 11-66, 11-67, 1-69
Z Trusts, In the Matter of [2016] JRC 048	7-78, 7-83, 9-43, 9-44, 9-48, 9-50

TABLE OF LEGISLATION AND LEGISLATIVE-TYPE INSTRUMENTS

Statutes

1601

Charitable Uses Act (43 Eliz I, c4).....1-22

1771

Code of.....1-25n 85, 1-147, 12-75

1835

Loi sur la procédure devant la Cour Royale1-25n 85

1862

Loi sur la procédure devant la Cour Royale1-16

Loi sur les saisies en vertu d'ordres provisoires.....1-43

1865

Judiciary and the Legislature (Jersey) Law

Art 9(5A)(5B)1-17

1893

Trustee Act

s 40(1).....12-75

s 45.....12-8

1925

Trustee Act9-47 n 4

s 28.....13-101

s 30(1).....7-11

s 30(2).....11-3

s 31.....2-111

s 32.....2-111

s 33(1)(i)3-91

s 33(1)(ii)3-91

s 40.....9-45, 10-4 n 19, 10-40 n 140

s 57(1).....3-100

s 61.....7-77, 7-79

s 62.....12-3, 12-4, 12-12

1928

Variation of Trusts Act

s 1.....3-83

1930

Loi constituant Le Département du Vicomte.....1-19

1933

Foreign Judgments (Reciprocal Enforcement) Act15-44

s 2(3).....15-62

s 4(1)(a).....	15-58
s 8(1).....	15-72
1935	
Law Reform (Married Women and Tortfeasors) Act	
s 6.....	7-48, 12-58, 16-23
1948	
Royal Court (Jersey) Law	
Art 12.....	1-15, 1-52
Art 12(1).....	1-15
Art 13.....	1-14, 1-25
Art 13(3).....	1-24
Art 15.....	1-16
Art 16.....	1-24
Schedule 1, Art 15	4-52
1949	
Matrimonial Causes (Jersey) Law	
Art 27	15-78
Art 43.....	1-25
1954	
Interpretation (Jersey) Law	
Art 1.....	1-24, 4-54
Art 17(2)(a) [previously Art 19(2)(a)]	7-72
Art 17(2)(c) [previously Art 19(2)(c)]	7-72
1956	
Civil Proceedings (Jersey) Law	
Art 2(1).....	1-96, 1-154, 1-157, 3-57
1958	
Deputy Bailiff (Appointment and Function) Law	1-15
Art 4.....	1-52
Art 7.....	1-58
Variation of Trusts Act.....	2-114, 2-116
s 1	3-83, 15-73
s 1(1)(b)	3-89
s 1(1)(d)	3-91
1960	
Judgments (Reciprocal Enforcement) (Jersey) Law.....	15-44–15-72
Art 1(1).....	15-3
Art 2(1).....	15-45
Art 2(2).....	15-52
Art 3.....	15-47
Art 3(2).....	15-72
Art 3(2)(b)	15-47
Art 3(3).....	15-50
Art 4(1).....	15-45
Art 4(1)(a)–(b)	15-56
Art 4(2).....	15-46, 15-49, 15-65
Art 4(6).....	15-50
Art 6.....	15-74
Art 6(1)(a).....	15-57
Art 6(1)(a)(ii)	15-66

Art 6(1)(a)(iv).....	15-58
Art 6(1)(b)	15-14, 15-15-68, 15-59
Art 6(1)(iii)–(vi)	15-67
Art 6(2).....	15-51, 15-54, 15-72
Art 6(2)(a).....	15-23, 15-52
Art 6(2)(a)(i).....	15-66
Art 6(2)(a)(ii)	15-66
Art 6(2)(a)(iii)	15-66
Art 6(2)(a)(iv)–(v).....	15-55
Art 6(2)(b)	15-53
Art 6(2)(c).....	15-66
Art 6(2)(iv).....	15-19, 15-21
Art 6(3).....	15-51, 15-66
Art 7(1).....	15-50
Art 7(2).....	15-60
Art 7(3).....	15-50, 15-60
Art 9(1).....	15-34, 15-70, 15-72
Art 9(2)(b)	15-14
Art 9(3).....	15-60
Art 10.....	15-44
Law Reform (Miscellaneous Provisions) (Jersey) Law	
Art 2.....	1-14, 16-1, 16-57
Art 2(1).....	16-31, 16-61
Art 3.....	2-109, 7-48, 16-23
Art 3(1)(c).....	12-58
Service of Process and Taking of Evidence (Jersey) Law	
Art 3.....	1-57, 5-103-5-134
Art 3(1).....	5-104
Art 4.....	5-116
Art 4(3).....	5-104, 5-121
Art 4(4).....	5-104, 5-112, 5-121
Art 4A(3).....	5-120
Art 6.....	5-129
Art 7.....	5-111 n 236
Art 48.....	5-125, 5-131
Art 49.....	5-131-5-134
1961	
Court of Appeal (Jersey) Law.....	
Art 7(2).....	1-14, 1-26
Art 9(2).....	1-47
Art 13(1)(c)(iii)	1-12
Art 137.....	1-144 n 373
Art 14.....	1-9
Art 16.....	1-110, 1-158n 402
Income Tax (Jersey) Law	
Art 137.....	5-120
Art 149.....	14-9
Trustee Ordinance (as amended by Trustee (Amendment) Act 2003 (BVI))	
1965	
Departments of the Judiciary and the Legislature (Jersey) Law	
Art 6.....	1-17
Art 9(3).....	1-22

Art 9(6).....	1-19
Art 21(1)(a).....	8-3
Art 21(4)(b)(ii)	8-10
Art 26.....	8-6
1969	
Mental Health (Jersey) Law	3-87
Art 43(15).....	3-86
Art 43(17).....	10-6
Art 43(17)(c).....	3-86
Art 43(17)(d)	3-86
Art 43(18).....	10-6
1973	
Matrimonial Causes Act	2-83, 2-114, 2-117, 15-77
s 24(1)(c).....	3-97, 4-19, 15-73, 15-75, 15-78, 15-80
1975	
Evidence (Proceedings in Other Jurisdictions) Act.....	5-103, 5-131
1977	
Administration of Justice Act	
s 4(2)(b) (i)(4), Sch 5, pt 1	15-62
Unfair Contract Terms Act	7-71
1978	
Civil Liability (Contribution) Act	2-11, 7-48, 12-58, 16-23
s 1	12-58
s 6(1).....	12-58
1980	
Limitation Act.....	16-5
s 10.....	16-24
s 21.....	8-12, 16-5
s 21(1).....	16-10
s 21(1)(a)–(b)	16-2, 16-6
s 21(3).....	16-17, 16-33
s 32.....	16-37
s 32(1)(c).....	16-16
1981	
Senior Courts Act	
s 51(1).....	1-158
s 51(3).....	1-158, 1-168
1982	
Civil Jurisdiction and Judgments Act	
s 33.....	15-52
1983	
Security Interests (Jersey) Law	3-87
1984	
Foreign Limitation Periods Act	
s 3.....	15-33, 15-72
Trusts (Jersey) Law.....	1-3, 1-5, 1-16, 1-44, 2-127, 16-55, 16-59
Art 1(1).....	1-46, 2-5, 3-82, 3-7, 3-16, 3-47, 3-86, 4-43, 4-54, 7-2, 7-43, 7-58, 10-45, 11-11, 12-63, 13-13, 16-38, 16-40
Art 1(2).....	16-50
Art 2.....	2-12, 2-73, 9-47, 11-7, 16-62

Art 3.....	2-73
Art 4.....	2-5, 2-69, 2-98, 2-104, 4-19
Art 4(1).....	2-99
Art 4(1)(a).....	2-100
Art 4(1)(a)-(c).....	4-19
Art 4(1)(b)	2-106
Art 4(1)(c).....	2-105
Art 4(3).....	2-103
Art 5.....	2-5, 2-11, 2-12–2-13, 2-15, 2-28, 2-31, 2-68, 4-19, 4-52
Art 5(a).....	2-22
Art 5(c).....	2-22 n 52
Art 5(d)	2-5n 11
Art 6.....	2-28, 3-82, 4-27, 11-11, 15-74
Art 7.....	2-12
Art 9.....	2-46, 2-91, 2-108, 2-115, 4-19, 11-25, 15-2, 15-13, 15-35, 15-73–15-98
Art 9(1).....	2-68, 4-27, 15-74, 15-78, 15-86
Art 9(1)(a).....	4-52
Art 9(1)(d)	5-72
Art 9(1)(e).....	15-76
Art 9(1)(f)	15-76
Art 9(3).....	2-97
Art 9(3A).....	2-68
Art 9(4).....	2-83, 2-115, 2-116, 3-97, 15-9, 15-47, 15-81, 15-84–15-86, 15-91, 15-94, 15-97
Art 9A.....	2-82, 4-7, 4-17, 5-76, 7-58, 7-63, 8-36–8-37
Art 9A(2).....	4-7, 4-10, 10-1
Art 9A(2)(d).....	4-18
Art 9A(2)(d)–(h)	4-18
Art 9A(2)(h).....	4-18
Art 9A(3).....	7-63
Art 10.....	4-1, 4-10
Art 10(1).....	3-53
Art 11.....	2-73, 11-7
Art 11(2)(a)(iii)	1-10, 2-97, 6-33, 9-13, 11-66, 13-13
Art 11(2)(a)(iv).....	11-67
Art 11(2)(b)(ii)	3-94
Art 12.....	4-2, 6-37, 10-23, 10-27, 11-67, 14-30
Art 12(4)(b)(ii)	8-75
Art 13.....	10-23
Art 13(1).....	10-23
Art 13(3).....	10-23
Art 15.....	1-16, 2-112, 6-35
Art 15(2).....	1-11
Art 15(4).....	1-16
Art 16(1).....	10-21
Art 17.....	1-16
Art 18.....	10-5
Art 19.....	10-1, 11-52, 14-57
Art 21.....	7-1-7-2, 7-58, 8-14, 16-57

Art 21(1).....	7-26, 7-59
Art 21(1)(a).....	8-1
Art 21(1)(b)	8-1
Art 21(3).....	7-59
Art 21(4).....	6-14, 7-62, 7-66, 8-1, 8-7, 8-11, 8-12, 8-17, 8-69, 10-24, 13-34
Art 21(4)(a).....	8-51
Art 21(4)(a)(1)–(iii)	8-1
Art 21(4)(b)	8-17, 8-49
Art 21(4)(b)(1)–(iii)	8-13
Art 21(4)(b)(ii)	8-10, 8-75
Art 21(7).....	10-25
Art 21(8).....	10-25
Art 22.....	7-47
Art 24.....	7-58, 9-47
Art 24(1).....	2-112, 3-100–3-101, 7-14, 9-11
Art 24(1)(b)(i)	8-52
Art 25.....	3-101n 286, 7-13, 7-50, 9-47
Art 25(2).....	7-50
Art 25(3).....	7-50
Art 25(4).....	8-23
Art 26.....	7-75, 8-6, 8-55, 11-3–11-4, 11-38, 11-64
Art 26(1).....	8-52
Art 26(1A).....	8-60
Art 26(1)(c).....	8-60, 11-7
Art 26(2).....	1-108 n 324, 3-58, 7-13, 8-52, 8-79, 11-3, 11-20
Art 29.....	1-39, 5-11–5-17, 5-97
Art 29(a)–(c).....	5-18, 5-32
Art 29(b).....	5-34
Art 29(d).....	3-13, 5-70–5-71
Art 30.....	7-57, 7-72
Art 30(1).....	7-22, 7-66
Art 30(2).....	12-53
Art 30(3).....	7-28, 7-72
Art 30(4).....	7-22
Art 30(5).....	7-22, 7-47, 16-7
Art 30(5)(a)–(b)	12-1, 12-12 n 36
Art 30(7).....	7-51, 7-53
Art 30(8).....	7-36, 7-47, 16-23
Art 30(9).....	7-22
Art 30(10).....	7-66, 7-67, 12-21
Art 31.....	13-101
Art 31(1).....	6-19, 8-32, 11-16
Art 31(1)(c).....	14-40
Art 31(2).....	11-16
Art 31(3).....	8-14, 8-86
Art 32.....	11-11, 11-16, 11-17–11-19, 11-39, 11-58–11-59, 11-74, 12-82
Art 32(1).....	3-32, 11-39
Art 32(1)(a).....	11-13–11-14, 11-16, 11-17, 11-20, 11-26, 11-45, 11-46, 11-48, 11-71–11-72, 11-73

Art 32(1)(b)	11-15, 11-16, 11-20, 11-46, 11-73
Art 32(2).....	3-32, 6-23, 11-16
Art 33.....	2-13, 2-16, 2-17, 6-2-6-3, 7-34, 13-8, 13-13, 13-34
Art 33(1).....	2-12
Art 33(2).....	6-23
Art 33(3).....	2-12
Art 33(4).....	2-13
Art 34(1).....	10-41, 10-45
Art 34(2).....	8-22, 10-41, 10-54, 14-14
Art 34(2A).....	11-4
Art 34(3).....	10-11, 10-41, 10-49
Art 42.....	1-22, 5-75, 6-35
Art 42(3).....	6-35
Art 45.....	5-7, 7-49, 7-55, 7-77-7-78, 7-79, 7-80, 7-87, 7-88, 9-46, 9-50
Art 45(1)(a).....	7-78
Art 46.....	7-51, 12-1, 12-2-12-6, 12-7, 12-8, 12-9, 12-12
Art 47.....	1-39, 2-116, 3-4, 3-5, 3-21, 3-82-3-112, 3-138, 15-78, 15-81
Art 47(1).....	3-92, 3-95, 3-96, 3-97, 3-100, 3-101, 3-102, 3-107, 3-111, 3-112, 3-113, 3-136, 3-138, 9-49
Art 47(1)(a).....	3-86-3-89, 3-105
Art 47(1)(a)-(c).....	3-96
Art 47(1)(a)-(d).....	3-85, 3-93
Art 47(1)(b)	3-89, 3-98, 3-104, 3-105, 3-107
Art 47(1)(b)-(d)	3-103
Art 47(1)(c).....	3-86, 3-90, 3-98, 3-107
Art 47(1)(d)	3-91, 3-98, 3-103, 3-104, 3-110
Art 47(1)-(2)	3-83, 3-88, 3-95
Art 47(2).....	3-91
Art 47(3).....	3-88, 3-95, 3-100, 3-101, 3-102, 3-113, 8-61, 16-38
Art 47(4).....	3-111
Art 47A.....	1-22, 1-39, 3-111
Art 47A-H.....	11-25
Art 47B-I	4-27-4-33
Art 47B(2)	4-28
Art 47B-7	1-11 n 33
Art 47B-J.....	4-28
Art 47C-J.....	2-28
Art 47D-J	1-39, 3-30, 16-16
Art 47E	4-28, 4-29, 4-32, 4-33, 4-55
Art 47E-I	4-24-4-26
Art 47E(1)-(2).....	4-28
Art 47F.....	4-25, 4-28, 4-30, 4-35, 4-50
Art 47F(1)	4-30
Art 47F(2)	4-30
Art 47G.....	4-28, 4-29, 4-32, 4-33, 4-55
Art 47H.....	4-28, 4-30, 4-35, 4-50
Art 47H(4)	16-16
Art 47I	1-22, 3-26
Art 47I(3)	4-31
Art 47I(4)	4-31, 16-16

Art 47J	16-16
Art 47J(a)	4-31
Art 47J(b)	4-31
Art 50.....	3-7
Art 51.....	1-22, 1-39, 3-6-3-10, 3-16-3-18, 3-28, 3-30, 3-50-3-81, 3-88, 3-98, 3-105, 3-112, 3-113, 3-115, 3-119, 3-125, 3-128, 3-129, 3-134, 3-138, 3-147, 3-320, 4-2 n 3, 4-15, 5-49, 5-51, 5-97, 5-101, 8-59, 9-47, 9-48, 9-49, 10-3, 10-6, 11-21, 12-77, 12-99, 15-13, 15-81, 15-95
Art 51(1).....	3-6, 3-11, 3-39-3-43, 3-52, 3-97, 8-12 n 45
Art 51(2).....	3-11, 3-12
Art 51(2)(a)(i).....	3-13, 3-17, 4-51, 12-54
Art 51(2)(a)(i)-(ii)	3-12-3-13, 11-69
Art 51(2)(a)(ii) 1172	3-13, 3-33, 8-48, 10-1, 10-3, 10-7, 10-21, 10-37, 11-32
Art 51(2)(a)(iii)	3-14-3-15
Art 51(2)(b)	3-34
Art 51(3).....	3-11, 3-50, 3-102, 7-44, 10-8, 10-25
Art 53.....	1-96, 1-108, 3-22, 3-57, 3-62, 11-27, 11-36
Art 54.....	10-19, 11-57, 13-13
Art 54(1).....	11-57
Art 54(2).....	11-56, 11-57
Art 55.....	9-12, 9-13, 9-28, 13-3, 13-9, 13-82, 13-95-13-96, 13-99, 13-102
Art 56.....	12-64-12-65, 16-55
Art 57.....	4-48, 12-65, 16-2, 16-5
Art 57(1).....	8-19, 12-60, 12-65, 13-17, 16-2-16-10, 16-25, 16-26, 16-27, 16-28, 16-29, 16-30, 16-33, 16-34, 16-61, 16-62, 16-64
Art 57(1)(a).....	16-6-16-8, 16-15, 16-30, 16-34, 16-36
Art 57(1)(b)	16-3, 16-9-16-10, 16-33, 16-34, 16-35
Art 57(2).....	8-12, 12-61, 16-2, 16-11-16-25, 16-31, 16-38, 16-61
Art 57(2)(a).....	16-20, 16-47, 16-50
Art 57(2)(a)-(b)	16-50
Art 57(2)(b)	16-21, 16-47, 16-50, 16-66
Art 57(3).....	16-38, 16-40, 16-42, 16-52
Art 57(3A).....	16-47
Art 57(3B)	16-22, 16-47-16-51
Art 57(3C)	16-18, 16-43, 16-52, 16-62, 16-63
Art 57(4).....	16-2
Art 69(1)(a)(iii)	3-14
1985	
Companies Act	
s 459.....	10-18
s 727	7-82
1986	
Bankers' Books Evidence (Jersey) Law.....	5-102, 5-130, 14-61
Art 5.....	5-130
Art 6.....	14-2
Art 6(1).....	5-130
Art 6(3).....	1-43

1987	
Recognition of Trusts Act	2-71, 2-72, 2-104, 2-107
s 1(2).....	2-72
s 2(2).....	2-65
Schedule (Hague Trusts Convention).....	2-65
1988	
Drug Trafficking Offences (Jersey) Law.....	14-2, 14-8, 14-56
1989	
Trusts (Amendment) (Jersey) Law.....	7-72
Trusts (Guernsey) Law.....	16-50
1990	
Bankruptcy (Désastre) (Jersey) Law	5-102, 11-48, 12-9n 22
Art 1(1).....	11-49, 11-65, 11-66
Art 4(2).....	11-69
Art 8.....	1-18, 12-8
Art 8(2).....	11-55, 11-61
Art 8(3).....	11-61
Art 14.....	12-8
Art 17.....	11-76
Art 17(1).....	3-36, 3-38
Art 17(2).....	3-36
Art 17(3).....	3-36
Art 17(3)(d)	3-36, 3-38
Art 17(4).....	3-36
Art 17(5).....	3-36
Art 17(7).....	3-36
Art 17A(9).....	3-38
Art 24.....	10-6
Art 24(4).....	11-52
Art 26.....	12-66
Art 26(h)	11-63
Art 32.....	11-73
Art 38.....	11-52
Art 44.....	9-35, 11-53, 11-67
Art 45.....	9-35
Art 49.....	5-131
Art 49(2).....	5-131
1991	
Companies (Jersey) Law.....	8-88, 11-48
Art 1(1).....	11-49, 11-66
Art 18.....	9-11
Art 47.....	16-55
Art 72.....	1-66, 1-76
Art 72(c).....	1-66
Art 74.....	12-66, 16-56
Art 74(1)(a).....	16-57
Art 74(1)(b)	16-57, 16-59
Art 75.....	8-6, 8-11, 8-92
Art 76.....	8-6, 8-92
Art 76(1).....	8-69

Art 76(2).....	8-93
Art 76(3).....	8-93
Art 83.....	1-66, 1-67
Art 141.....	1-39
Art 143.....	1-39
Art 149.....	11-63
Art 159(4).....	11-52
Art 163(2).....	11-63
Art 165.....	11-60
Art 176-176B.....	11-76
Art 177.....	11-53, 11-67
Art 186.....	11-74
Art 212.....	7-82
Art 213.....	1-39
Investigation of Fraud (Jersey) Law.....	14-2
Trusts (Amendment No 2) (Jersey) Law.....	2-69
Preamble.....	2-70
Trusts (Hague Convention) Act	2-66
1995	
Powers of Attorney (Jersey) Law.....	3-87
1996	
Interest on Debts and Damages (Jersey) Law.....	7-30, 15-65
Art 2(1).....	7-34
Art 2(4).....	7-30
Trusts (Amendment No 3) (Jersey) Law 4-2 n 3	
Trusts of Land and Appointment of Trustees Act	
s 19.....	10-1
1998	
Financial Services Commission (Jersey) Law	
Art 7.....	8-3
Financial Services (Jersey) Law	12-52
Art 2.....	14-32
Art 2(3).....	8-52, 12-27
Art 7.....	11-54
Art 9.....	8-52
Art 9(4)(e).....	11-54
Art 19(3).....	12-52
Art 19(4).....	12-52
Probate (Jersey) Law.....	11-69
Stamp Duties & Fees (Jersey) Law (Part 1)	1-34, 1-46, 1-51, 1-143
1999	
Law Reform (Disclosure and Conduct before Action) (Jersey) Law.....	1-56, 5-95
Art 2.....	5-92
Proceeds of Crime (Jersey) Law (Appointed Day) Act	14-8
Proceeds of Crime (Jersey) Law.....	12-54, 14-3, 14-23
Part 1 (Introductory)	
Art 1.....	14-47
Art 1(1)	14-7, 14-8, 14-35
Art 1(2)	14-10
Art 1(2A).....	14-7, 14-10

Art 2(1)	14-46
Art 2(1)(a).....	14-46
Art 2(1)(b)	14-46
Art 2(1)(b)(ii).....	14-53
Art 2(1)(b)(iii).....	14-50
Art 2(9)	14-46, 14-53
Part 2 (Confiscation Orders).....	14-41-14-58
Art 3(8)	14-41
Art 4(1)	14-41
Art 5(5)(a).....	14-41
Art 5(5)(b)	14-41
Art 5(6)	14-41
Art 15.....	14-47
Art 15(1)–(1A).....	14-48
Art 15(5)(a).....	14-56
Art 16(1)	14-46
Art 16(4)	14-46, 14-49
Art 16(4) as modified	14-46
Art 16(7)	14-55
Art 17.....	14-49
Art 19.....	14-58
Art 23.....	14-49
Part 3 (Money Laundering)	
Arts 29-34D.....	14-2
Art 29.....	14-7
Art 29(1)	14-12
Art 29(1)(b)	14-12, 14-14-21
Art 29(2)	14-7
Art 29(2)(a)–(b)	14-8
Art 29(2)(c).....	14-8
Art 30.....	12-23, 14-5, 14-6, 14-12, 14-14, 14-19, 14-20, 14-22
Art 30(1)	14-5, 14-17, 14-18
Art 30(3)	7-64, 14-5, 14-8, 14-15, 14-17, 14-18, 14-21, 14-31, 14-40
Art 30(3)(b)	14-34
Art 30(6)	14-14
Art 31.....	14-5, 14-12, 14-18-14-19, 14-20
Art 31(1)(c).....	14-40
Art 31(2)	14-7, 14-19
Art 32(1)	14-20
Art 32(2)	14-21
Art 32(3)	14-20, 14-21
Art 32(4)	14-40
Art 32(4)(a).....	14-20
Art 32(4)(b)	14-20
Art 32(5)	14-20 n 60
Art 32(7)	14-21
Art 33(6)	14-14
Art 33(7)(a).....	14-14
Art 33(7)(b)	14-14

Art 33(7)(c).....	14-14
Art 34A-34D	14-35
Art 34A.....	14-35, 14-36, 14-38
Art 34A(1A).....	14-37
Art 34A(2).....	14-37
Art 34A(3).....	14-36
Art 34A(5)(a).....	14-38
Art 34A(5)(b).....	14-38
Art 34A(6).....	14-38
Art 34A-D.....	14-5
Art 34B(1).....	14-37
Art 34B(2).....	14-37
Art 34D.....	14-37, 14-40
Art 34D(5)	14-37
Art 34D(6)-(7)	14-38
Art 34D(8)(a).....	14-37
Art 35.....	14-5, 14-21, 14-22, 14-39
Art 35(1)	14-39
Art 35(2)	14-39
Art 35(4)	14-39
Art 35(4)(b)	14-39
Art 35(6)(a)-(b)	14-39
Art 35(7)	14-39
Art 36(1)	14-37
Art 37(4)	14-3
Art 39(1)(c).....	14-46
Part 4 (Miscellaneous)	
Art 40.....	14-2
Schedule 1	14-8, 14-9, 14-41, 14-43
Schedule 2	14-3, 14-36, 14-37, 14-39
2000	
Human Rights (Jersey) Law	1-3, 3-119, 5-85
Art 1.....	14-54
Art 4.....	1-24, 14-54
Schedule 1, Art 6(1).....	3-10
Petty Debts Court (Miscellaneous Provisions) (Jersey) Law	
Art 1.....	11-36, 11-68
Terrorism Act	
s 14.....	14-26
Trustee Act.....	3-100, 8-52
Part II (Investment)	
s 3.....	2-112
Part V (Remuneration).....	8-6, 8-52
s 30(1).....	11-3
Schedule 4(II)(1)	7-11
2001	
Criminal Justice (International Co-operation) (Jersey) Law	14-2
2002	
Proceeds of Crime Act	14-2, 14-8, 14-58 n 180
s 10.....	14-41

s 75.....	14-41
s 329.....	14-14
s 330.....	14-38
s 330(3A).....	14-38
s 336(7).....	14-22
Terrorism (Jersey) Law	14-2, 14-8, 14-23–14-33
Art 1(3).....	14-24
Art 2.....	14-24
Art 2(2)(a)–(f).....	14-25
Art 3.....	14-23, 14-26
Art 3(1).....	14-23
Art 3(2).....	14-26
Art 4.....	14-27
Art 4(3).....	14-27
Art 6(1)(c).....	14-28
Arts 15–18.....	14-37
Art 15.....	14-5, 14-29, 14-33, 14-36
Art 15(2)(a).....	14-32
Art 15(2)(c).....	14-31
Art 15(3)(a).....	14-30
Art 16.....	14-5, 14-29, 14-33, 14-36
Art 16(2).....	14-33
Art 16(4).....	14-33
Art 16(5).....	14-33
Art 17.....	14-29
Art 17(2).....	14-33
Art 19.....	14-35
Art 21.....	14-35
Schedule 1	14-28
2005	
Mental Capacity Act.....	3-87
s 12.....	3-87
2006	
Bankruptcy (Désastre) (Amendment No 5) (Jersey) Law	3-36
Companies Act	
s 1157.....	7-82
Trusts (Amendment No 4) (Jersey) Law.....	2-112, 6-35, 12-64, 15-17 n 62, 15-73 n 158, 15-77 n 170, 15-80 n 180
2007	
Civil Asset Recovery (International Co-operation) (Jersey) Law.....	4-6, 14-59–14-70
Part 1 (Introductory).....	14-59
Art 1(1)	14-59, 14-63
Part 2 (Evidence)	14-60
Art 3(2)	14-62
Art 3(2)(a).....	14-61
Art 3(9)	14-61
Art 3(10)	14-61
Art 4(1)	14-62
Art 4(2)	14-62
Art 4(3)	14-62

Art 4(4)–(5)	14-62
Art 5.....	14-61
Part 3 (Enforcement).....	14-63
Art 6.....	14-61
Art 6(5)	14-63
Art 6(6)	14-63
Art 7.....	14-63
Art 7(6)	16-63
Art 9.....	14-65–14-66
Art 9(b)	14-65, 14-68
Art 10.....	16-64
Art 10(2)	14-69
Art 10(3)	14-69
Art 10(4)	14-69
Art 11(6)(a).....	14-70
Art 11(6)(b)	14-70
Art 11(6)(d)	14-70
Art 11(7)–(8).....	14-70
Art 11(9)	14-70
Trusts (Guernsey) Law	
s 12(2).....	10-23, 10-24
s 12(9).....	10-25
s 26.....	5-15
s 26(1)(b)(iii)	5-75
s 26(2).....	5-75
s 38.....	5-32
s 42.....	11-11
s 69(1)(a)(iii)	3-14
s 76.....	16-50
2008	
Proceeds of Crime (Cash Seizure) (Jersey) Law.....	2-8, 14-2
Proceeds of Crime (Supervisory Bodies) (Jersey) Law.....	12-52, 14-38
Art 22(4).....	12-52
2009	
Income Tax (Amendment No 31) (Jersey) Law	14-9
2010	
Wills and Succession (Amendment) (Jersey) Law	2-97
2011	
Charities Act	
s 115.....	3-54
Terrorist Asset-Freezing (Jersey) Law	14-34
Art 3.....	14-32
2012	
Security Interests (Jersey) Law	10-41
Trusts (Amendment No 5) (Jersey) Law.....	8-86, 15-47, 15-73 n 158, 15-83–15-86, 16-42, 16-52, 16-55 n 151
2013	
Trusts (Amendment No 6) (Jersey) Law	1-39 n 123, 4-27, 4-34–4-35
2014	
Charities (Jersey) Law.....	3-54
Art 40(1).....	1-22

Proceeds of Crime and Terrorism (Miscellaneous Provisions) (Jersey) Law	14-2
Art 23.....	14-5
20XX	
Trusts (Amendment No 7) (Jersey) Law (draft)	4-1, 5-15, 15-78 n 175
Secondary legislation	
1749 Order in Council (2 November 1749) (role of procureur).....	1-22
1983	
Evidence (Proceedings in Other Jurisdictions) (Jersey) Order	14-2 n 7
1992	
Companies (Standard Table) (Jersey) Order.....	5-54
1993	
Order in Council (28 April 1993) (Hague Trusts Convention (1985)).....	2-64
2000	
Financial Services (Trust Company Business (Exemptions)) (Jersey) Order.....	11-16, 12-63
Financial Services (Trust Company and Investment Business (Accounts, Audits and Reports)) (Jersey) Order	
Art 4.....	16-20
Maintenance Orders (Facilities For Enforcement) (Jersey) Law.....	15-15
Trust Company Business (Exemptions) (Jersey) Order.....	14-3
2008	
Bankruptcy (Désastre) (Jersey) Order	5-131
Money Laundering (Jersey) Order.....	14-3
Art 15(6).....	14-34
Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations	14-42
Art 1(1).....	14-43
Art 23.....	14-49
Schedule 2	14-44
2014	
Proceeds of Crime and Terrorism (Tipping Off—Exceptions) (Jersey) Regulations	14-39
EU legislation	
Council Regulation (EC) No 44/2001 (22 December 2000) as amended	
by Regulation (EU) No 1215/2012.....	15-44
Council Regulation (EC) No 2580/2001 (27 December 2001).....	14-34
Rules of Procedure	
Bankruptcy (Désastre) Rules 1991/2006.....	1-25, 11-69
Children Rules 2005.....	1-13, 1-25
Civil Procedure Rules 1998 (UK) (CPR)	1-26, 1-29, 1-56, 1-95
Part 3.....	1-90, 1-97
Part 7, r 71.2(6)	3-15
Part 8.....	1-37
Part 19, r 19-7.....	3-53
Part 31	
r 31.14.....	3-122 n 331
r 31.17	5-100
Part 34.....	5-103
Part 38.....	10-20
Part 64, r 64.2(a)	12-54

PD 3E.....	1-97
PD 6	2-36
PD 6A.4.1(2)	1-65
PD 6B.3.1(18).....	1-161, 1-167
PD 34, r 6.....	5-103
PD 40A	7-6
PD 46A	3-110
PD RC 05/02.....	5-130
PD RC 05/04.....	5-97, 5-98
PD RC 05/06.....	7-33
PD RC 05/09.....	15-65
PD RC 05/10.....	1-50
PD RC 05/17.....	5-131
PD RC 05/23.....	1-50, 1-90
PD RC 05/31.....	1-90
PD RC 09/01.....	1-96, 1-98, 1-113, 1-115, 1-136, 1-138, 1-139, 1-140
PD RC 09/02.....	1-110, 1-113, 1-139
PD RC 09/03.....	1-113, 1-140
PD RC 10/05.....	1-50
PD RC 13/02.....	1-115
PD RC 15/01.....	2-21, 2-34
PD RC 15/03.....	1-96
PD RC 15/04.....	1-38
Court of Appeal (Civil) (Jersey) Rules 1964.....	1-26
r 17.....	1-78
Judgments (Reciprocal Enforcement) Rules 1961.....	1-25, 15-44
r 2(2).....	15-61
r 2(3).....	15-61, 15-65
r 3.....	15-61
r 4.....	15-62
r 4(2).....	15-62, 15-72
r 5.....	15-64
r 7.....	15-63
r 7(3).....	15-60
r 7(5).....	15-69
r 9(1)(a).....	15-63
r 9(1)(b).....	15-63
r 10.....	15-64
r 11.....	15-69
r 12.....	15-65
Matrimonial Causes (General) (Jersey) Rules 1979.....	1-25, 1-59
Matrimonial Causes Rules 2005.....	1-13, 1-25
Royal Court (General) Rules 1969 <i>et seq.</i>	1-24
Royal Court Rules 1963–2004	1-23–1-26
Royal Court Rules 1994 (RCR 1994)	
7(c).....	1-167
Royal Court Rules 2004 (RCR)	
Part 1 (Interpretation)	
r 1/1(1)	1-14

r 1/3	1-112, 5-113
r 1/5	1-50, 1-90, 1-112
Part 3 (Service of Documents)	
r 3/2	1-13
r 3/6	1-16
r 3/7	1-41
Part 4 (Parties to Proceedings)	
r 4/1	1-60
r 4/1(1)	1-6
r 4/1(1)-(2)	7-37
r 4/1(3)	7-37
r 4/1(4)	1-90
r 4/2	5-5, 5-65, 11-73
r 4/2(2)	1-6, 3-54
r 4/3	1-77, 12-82
r 4/3(4)	1-77
r 4/4	3-45, 3-51, 3-53, 7-39, 12-82
r 4/4(1)	3-53, 7-41
r 4/4(2)	3-53
r 4/4(3)	7-39
r 4/4(4)	7-41
r 4/5	11-34, 11-73, 12-74, 12-82
r 4/5(1)	7-38, 7-39
Part 5 (Service of Documents).....	
r 5/2(1)	1-58
r 5/2(2)	1-58
r 5/4	1-46, 1-53, 1-74, 1-77, 1-78, 1-81, 2-4
r 5/5	1-17, 1-72, 1-78, 2-4
r 5/6	1-58
r 5/6(1)	1-58
r 5/6(1)(b)	1-63
r 5/6(1)(c)	1-64
r 5/6(1)(d)	1-65
r 5/6(2)	1-60, 1-69
r 5/6(2)(a)	1-69
r 5/6(2)(a)-(d)	1-61
r 5/6(2)(b)	1-60
r 5/6(2)(h)	1-66
r 5/6(3)	1-63, 1-72
r 5/6(4)	1-64
r 5/6(4)(b)	1-64
r 5/6(4)(c)	1-64
r 5/6(4)(d)	1-64
r 5/6(5)	1-64
r 5/7	1-75, 1-76
r 5/8	1-76
r 5/10	1-57, 1-65, 1-80, 1-82, 1-83
r 5/10(4)	1-84
r 5/11	1-68

r 5/13	1-36, 1-73, 1-81, 1-87
r 5/14	1-87
r 5/15	1-57, 1-63
r 5/17	1-36, 1-57, 1-59, 1-63
r 7/1	15-34
Part 6 (Procedure and Pleadings)	
r 6/2	1-27
r 6/4	16-53
r 6/4(1)	1-57, 16-53
r 6/4(2)	1-57, 16-53
r 6/5	1-34, 2-32
r 6/6	1-89
r 6/6(1)	1-35, 1-60
r 6/6(1)–(2)	1-60
r 6/6(2)	1-6, 1-35, 1-61, 1-69
r 6/6(4)	1-89
r 6/6(5)	1-60
r 6/6(6)	1-89
r 6/6(8)	1-89
r 6/6(9)	1-89
r 6/6(10)	1-89
r 6/7	1-35, 1-46, 1-48
r 6/7(3)	2-41
r 6/7(4)	2-39
r 6/7(7)	1-89
r 6/7(8)	2-40
r 6/7(9)	2-4, 2-40, 15-23, 15-24
r 6/8	7-36
r 6/8(1)	7-51
r 6/9(2)	1-90
r 6/10	2-10
r 6/10(1)(b)	12-59
r 6/10(1)(c)	12-59
r 6/11	1-90
r 6/11(1)	7-36
r 6/11(2)	1-90
r 6/12	1-94, 12-79
r 6/13	1-69, 12-79
r 6/13(1)(d)	15-10, 15-34
r 6/15	1-90
r 6/16	5-4, 5-97
r 6/17 3-122 n 331	5-4, 5-67, 5-91, 5-97-5-98
r 6/17(2)	5-98
r 6/17(3)	5-98
r 6/17(3)(g)	5-116
r 6/18	5-92
r 6/20	3-54
r 6/20(8)	1-77, 5-113
r 6/24	1-48
r 6/25(2)	1-91

r 6/26	1-92
r 6/26(2)	1-92
r 6/26(3)	1-92
r 6/26(11)	1-92
r 6/26(12)	1-90
r 6/26(13)	1-91, 1-92
r 6/26(14)–(16)	1-92
r 6/28	1-90
r 6/29	1-50, 1-93
r 6/29(9)	1-92
r 6/30	1-90
r 6/31	10-20, 12-79
r 6/34	1-41, 3-51
r 6/36	2-10, 7-36, 7-40
r 6/36(a)	12-75
r 6/36(b)	7-36, 12-74, 12-81
r 6/36(b)(1)	12-82
r 6/36(b)(ii)	1-167
r 6/37	1-41, 3-51
r 6/38	1-25
Part 7 (Summary Judgment and Disposal of Case on Point of Law)	15-10
r 7/1	15-34
r 7/1(5)	1-53
r 7/2	15-34
r 7/5	1-90
r 7/8	1-21, 1-44, 1-48, 1-90, 4-52, 4-52 n 164
r 7/8 (<i>needs checking</i>)	3-7, 3-16
Part 8 (Interim Payments)	1-48, 7-6
r 8/1(4)	1-53
Part 10 (Proceedings at the Trial)	
r 10/5	1-90
r 10/6	1-88, 2-7
r 10/7	1-55, 1-88
Part 11 (Proceedings subsequent to Trial)	
r 11/3	15-65
Part 12 (Costs)	1-96–1-97, 1-104, 3-76, 3-80, 11-36
r 12/3	11-9
r 12/3(3)	1-107
r 12/3(3)(1)(b)	1-108, 3-80
r 12/3(8)	1-113
r 12/4	1-106, 3-81
r 12/5	1-106, 1-108, 3-62, 3-76, 3-80, 3-81
r 12/7	1-99
r 12/8	1-143
r 12/8(2)	1-113
r 12/10(1)	1-112
r 12/10–12/12	1-113
r 12/11	1-112
r 12/11(1)	1-112

Part 15 (Appeals from Administrative Decisions)	
r 15/2(1)	1-48
Part 20 (Miscellaneous)	
r 20/1(1)	1-43
r 20/1(2)	1-46
r 20/1(3)	1-46
r 20/1(4)	1-50
r 20/1(5)	1-49
r 20/2	1-48
r 20/4	1-69
r 20/5	1-31, 1-43, 2-33, 5-96
r 20/5(1)	1-28
r 20/9(1)	1-5
Schedule 1.....	1-14, 1-20, 1-21, 1-44, 1-83, 2-23
Schedule 2.....	1-87
Schedule 3.....	1-19, 1-41, 1-92
RSC 1999	1-26
Ord 7.....	1-37
Ord 11.....	1-26
Ord 43.....	7-6
Ord 62.....	1-137
Ord 65, r 4	1-83
Ord 65, r 5	1-58, 1-60, 1-62
Ord 79.....	5-103
Service of Process (Jersey) Rules 1994	1-25, 1-85, 2-5 n 8
Part 3 (Service outside Jersey)	
r 6.....	1-80
r 7	2-5 n- 8, 2-7-2-18, 2-21, 2-30-2-31, 2-36, 5-103, 5-105
r 7(b)	2-9, 2-33
r 7(c)	2-10
r 7(d)(iv)	2-60
r 7(j).....	2-10, 2-16, 2-22, 2-31, 3-45
r 7(m)	15-34
r 7(q).....	2-13, 2-14-2-18, 2-31, 9-2
r 9.....	2-34
r 10.....	1-80
r 11.....	1-87
r 11(d)	1-86
r 11(e)	1-80, 1-86
r 13.....	1-87
Part 4 (General)	1-57, 16-53
r 16(2).....	1-86

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Jersey as a Jurisdiction in which to Litigate Trust Disputes

I. Introduction

The Bailiwick of Jersey is the largest part of all that now remains of the Duchy of Normandy.¹ It first became a possession of the English Crown in 1066 following the Norman Conquest of England as a result of which the English and Norman possessions of William I (the Conqueror) and Duke of Normandy became amalgamated and would remain so for another 138 years. The portion of the Duchy on the continental mainland was annexed by Philip Augustus into the Kingdom of France in 1204 (with Henry III relinquishing the English Crown's claim to those territories in the Treaty of Paris of 1259).² Jersey and the other Channel Islands of neighbouring Guernsey, Sark, Herm, Jethou, Brecqhou, Alderney and the smaller surrounding islets were retained as possessions of the English Crown but were jurisprudentially left to develop independently of Normandy; forming neither part of mainland Normandy, the Kingdom of France nor the Kingdom of England.³ Jersey has never been absorbed into the common law legal system of England and Wales and is not part of the United Kingdom, having been a self-governing territory for over 800 years, enjoying virtual total autonomy over its taxation, legal system and domestic affairs.⁴ Jersey enjoys a special constitutional relationship with the British Crown (but not the British Parliament) which has persisted down the centuries to the present day.

Jersey is one of three Crown Dependencies that surround Great Britain, alongside the neighbouring Bailiwick of Guernsey and the Isle of Man in the Irish Sea. It is not part of the United Kingdom's territory, nor is it accurately described as a colony or a United Kingdom or British Overseas Territory.⁵ Jersey's formal constitutional relationship with the United

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¹ A polity that existed between 911 AD and the French Revolution that grew out of territory granted as a fief by King Charles III of West Francia to Rollo, a leader of the Vikings, under the Treaty of Saint-Clair-sur-Epte covering the Cherbourg peninsular and land to the east in the northern-central coastal region of modern France.

² The separation of the Channel Islands from mainland Normandy had occurred over 50 years prior in 1204.

³ S Nicholle, *The Origins and Development of Jersey Law: An Outline Guide*, 5th edn (St Helier, Jersey and Guernsey Law Review Ltd, 2009); R Southwell, 'The Sources of Jersey Law' (1997) 1 *Jersey Law Review* 221; A Binnington, 'Frozen in Aspic? The Approach of the Jersey Courts to the Roots of the Island's Common Law' (1997) 1 *Jersey Law Review* 21–27.

⁴ P Bailhache, *A Celebration of Autonomy 1204–2004: 800 Years of Channel Islands' Law* (St Helier, Jersey Law Review Ltd, 2005).

⁵ Royal Commission on the Constitution 1969–1973, *Report*, vol 1 (Cmnd 5460, 1973) para 1347, at 408; see *Pereira Roque v Lieutenant Governor* [1998] JLR 246] at 250, note 4.

Kingdom is described as a possession of the British Crown.⁶ Acts of the Parliament of the United Kingdom do not apply to Jersey unless the Act expressly applies to Jersey or applies to Jersey by necessary implication and only then with the agreement of the Insular Authorities by the legislation being transmitted and registered by Jersey's unicameral parliament known as the States Assembly by an Order in Council. By long-established constitutional convention the United Kingdom Parliament does not seek to legislate for the island to the extent that the convention has long since crystallised into a principle of Jersey's constitutional law. Neither do the decisions of British courts (other than the Privy Council, but only when sitting as a final court of appeal from Jersey) have any formal binding legal effect within Jersey.

- 1-3** Jersey is not recognised as a state for the purposes of international law. Jersey is not a part of European Union and is not subject to EU law, save to a limited extent not relevant to this text, described in Protocol 3 of The Treaty of Rome.⁷ Formally, the United Kingdom is responsible for Jersey's international relations and the British Crown signs international treaties on its behalf.⁸ For an international treaty to apply to Jersey, the Bailiwick must be mentioned expressly either in the treaty or in an instrument of ratification if it is to extend to it. The government of the United Kingdom has a long established practice that when the UK ratifies a treaty, it does so on behalf of the United Kingdom of Great Britain and Northern Ireland and such (if any) of the Crown Dependencies and UK overseas territories as wish the treaty to apply to them. There is settled constitutional practice that the government of the United Kingdom will consult the States of Jersey before agreeing the territorial application of its international agreements. Further, Jersey operates a dualist system in relation to the impact of international treaties and conventions such that while a treaty may notionally apply to Jersey, the treaty will not become part of the island's domestic law unless and until the States legislates to achieve this effect.⁹

II. Jersey's Legal System

- 1-4** Jersey's legal system has its roots in Norman customary law but has also been influenced in varying degrees over the centuries by English law and French law.¹⁰ Jersey is a customary,

⁶ Ministry of Justice, 'Background briefing on the Crown Dependencies: Jersey, Guernsey and the Isle of Man', available at: www.justice.gov.uk/downloads/about/moj/our-responsibilities/Background_Briefing_on_the_Crown_Dependencies2.pdf. Jersey has equally, and perhaps with more appropriate nuance been described as a 'peculiar' of first the English and subsequently British Crown, better reflecting the island's particular loyalty to the person of the Sovereign.

⁷ Act of Accession 1972, Protocol No 3 (UK Treaty Series 1 (1973); 249 Cmnd 5179).

⁸ n 5.

⁹ eg Human Rights (Jersey) Law 2000, expressly incorporating the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4 November 1950 into Jersey's domestic legal system. The Hague Convention on the Law Applicable to Trusts and on their Recognition was impliedly incorporated into Jersey's domestic trust and conflict of laws rules by harmonising the Trusts (Jersey) Law 1984 with the provisions of the Convention, see Ch 2.

¹⁰ Nicholle, *The Origins and Development of Jersey Law* (n 3) para 11.7; Report of the Civil Commissioners (1861).

rather than a common law, jurisdiction.¹¹ The distinction results from a different conceptual foundation to the basis upon which rules of law are considered binding. The pronouncements of judges in common law systems are binding because they are handed down by judges, whose authority to make them is recognised by the constitution as a legitimate source of lawmaking. Jersey's rules of law derive their legitimacy from long usage and settled acceptance of a practice rather than because the Royal Court states them as a rule of law.¹² Long usage can cause a particular practice to effectively crystallise into a rule of law if it is repeatedly accepted by the Royal Court as the way people conduct their affairs. Where there is doubt or disagreement as to a particular practice the Court will look for factual evidence of usage in its determination.¹³

There is little customary law based either upon the *Ancienne Coutume de Normandie* or the later 1583 'official redaction' of Norman customary law by the then French king Charles VII, known as the *Coutume Reformee* that is relevant to Jersey's law of trusts¹⁴ although some elements of the litigation process do have their roots in the island's customary law.¹⁵ Trusts first appeared with any degree of regularity in Jersey's jurisprudence during the nineteenth century.¹⁶ Today, Jersey's law of trusts is governed principally by the Trusts (Jersey) Law 1984, as amended. While the Royal Court may look to the *Ancien Régime* of France, particularly the *Coutume de Normandie* in some areas of its law, it will generally look to England and Wales and the other leading common law jurisdictions, both onshore and offshore, for guidance on matters pertaining to trust law in the absence of any relevant local decision.¹⁷ Although some areas of Jersey's commercial law, such as the law of contract, are much influenced by Norman and *Ancien Norman* law principles, it is not a heresy to draw upon English and Commonwealth jurisprudence in these fields which may be regarded as useful and persuasive authority if they can be reconciled with those principles. However,

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¹¹ *Snell v Beable* [2001] 2 UKPC 304 at [17]: 'the word custom may be used in a variety of senses in the legal context. Broadly speaking, custom may be said to be the product of generally accepted usage and practice. It has no formal sanction or authority behind it other than the general consensus of opinion within the community'. This was contrasted with the notion of a *coutume* as follows: 'as the different systems of French customary law became codified by Royal Authority they acquired the status of coutumes. The means that they had official status, so that nothing that they contained could be abrogated except by statute'; at [18].

¹² *ibid*, per Lord Hope.

¹³ *Moran v Deputy Registrar for the Parish of St Helier* 2007 JRC 151.

¹⁴ H Brown, 'Customary Law Background to Trusts in Jersey' in *The Jersey Law of Trusts*, 4th edn (London, Key Haven, 2013).

¹⁵ Of which the most famous is probably *La Clameur de Haro* by which an immediate do-it-yourself injunction can be raised by a person in possession of land in order to restrain a wrong which disturbs him in that possession by (1) falling to his knees, (2) removing his hat, (3) clasping his hands together and (4) crying to the sky '*Haro! Haro! Haro! A l'aide mon Prince. On me fait tort!*'; H Pissard, *Le Clameur de Haro dans le droit normand* (Caen, 1911).

¹⁶ The Report of the Commissioners appointed to inquire into the Civil, Municipal and Ecclesiastical Laws of the Island of Jersey, together with Minutes of Evidence (1861) stated that the creation of trusts by an act between living persons was not expressly forbidden, but trusts of private individuals, unconnected with public objects, were 'absolutely unknown' (Report, at XXV). See also *Godfray v Godfray* (1865) 3 Moo PC NS 316 (a decision of the Privy Council) and *Perrot v Breton* (1891) 11 CR 29 (a decision of Royal Court sitting in the Superior Number).

¹⁷ *The Estate of Father Amy* [2000] JLR 80] at [93]: 'The court therefore has a choice. In the absence of local authority, it must look for guidance elsewhere [...] the court's sole duty is to declare the law of Jersey and it must do so for the community of the 21st century. To insist on adopting some rule laid down or derived from principles laid down several centuries ago, if they are clearly inappropriate for modern times, would in my judgment be an unsatisfactory way of proceeding and is not required by authority.'

the better, modern, view is that in matters of contract, Jersey law starts from the principles set out in the French customary law texts and the later writings of Poingdestre and Le Geyt.¹⁸ In trust matters Jersey will often look to judgments of English and Commonwealth courts as being persuasive, particularly in the absence of any Jersey authority.¹⁹ Local legislation is enacted by the States Assembly.²⁰ The sources of law in Jersey are in both French and English (although since the 1950s the permissive working language of the Royal Court and legal system has been English).²¹

A. Jersey's Legal Profession

- 1-6** Jersey's legal profession is composed of advocates and solicitors (sometimes referred to 'members of the Chambre des Écrivains'), only the former having rights of audience before the island's courts. There is no tradition of an independent bar along the lines of the English chambers model in Jersey, with the vast majority of advocates practising as members of firms.²² While the Royal Court does recognise litigants to appear in person before it,²³ in order to bring or defend proceedings that have any international flavour before the Royal Court it is usually necessary to instruct a Jersey advocate.²⁴ Legal practitioners qualified to exercise rights of audience before courts in jurisdictions outside Jersey, however senior, currently have no rights of audience to appear before the Bar in the island's courts.

B. Precedent in Jersey

- 1-7** Owing to the customary rather than common law foundations to its law, Jersey law does not strictly adhere to the principle of *stare decisis* as understood by courts in common law jurisdictions, under which courts follow statements of legal principles laid down in earlier cases decided on similar facts and issues.

The peculiar feature of the English doctrine of precedent is its strongly coercive nature. English judges are sometimes obliged to follow a previous case although they have what would otherwise be good reasons for not doing so. In other words, a precedent may be binding and not merely persuasive in England because *stare decisis* is, generally speaking, a hard-and-fast rule in this country. It is a great deal more than a mere maxim of judicial conduct to be followed if other things are more or less equal....This rigid adherence to the principal of *stare decisis* on the part of the English judges is rendered all the more significant by the vast scope of case-law in England. Some branches of our law are almost entirely the product of the decisions of the judges whose reasoned judgments have been reported in various types of law reports for close on 700 years. Other branches of our

¹⁸ D Fairgrieve, Comparative Law in Practice: Contract Law in a Mid-Channel Jurisdiction (Oxford, Hart Publishing, 2016).

¹⁹ *Re Malabry Invs Ltd* 1982 JJ 117.

²⁰ Assent to local statutory law is effected through the Privy Council in London.

²¹ RCR 2004 r 20/9(1):'anything done or written in English in connection with any cause or matter in the Court is as valid and effectual as if done or written in French'.

²² A list of Jersey advocates can be obtained from The Law Society of Jersey.

²³ RCR 2004, r 4/1(1).

²⁴ RCR 2004, r 4/2(2) requires a plaintiff to give an address for service within Jersey, which is a practical impossibility where the plaintiff is not a Jersey resident and no advocate is instructed. A similar rule applies in respect of defendants/respondents under RCR 2004, r 6/6(2).

law are based on statutes, but, in many instances, case-law has played an important part in the interpretation of those statutes.²⁵

In contrast to adherence to the principle of *stare decisis*, the position in Jersey was described 1-8 as follows:

Although the Judicial Committee of the Privy Council is our ultimate court of appeal, Jersey is not, and never has been a colony to which the corpus of English law has been exported. The original source of Jersey law was the *Très Ancien Coutumier* followed by the *Grand Coutumier* of Normandy. In 1861 the Royal Commissioners appointed to enquire into the Civil, Municipal and Ecclesiastical Laws of the Island recorded (Report, Pt. I, at iii) that—

'from a very early period ... [Jersey has] ... retained [its] ancient Norman Law, except so far as it has in the course of time been modified or corrupted by subsequent enactments or usages. It was indeed contended before us, that the common law of England has been introduced into Jersey. We do not see any proof of this...'

Since 1861 the influence of English law in some areas has been more pervasive, but we do not consider that this influence has changed the fundamental jurisprudence (in the English sense) of the Island.²⁶

The practical position is that while the Royal Court is not bound by any rule to do so, it usually follows its own decisions unless it considers a prior authority to have been wrongly decided or to follow it would give rise to a practical injustice.²⁷ The Jersey Court of Appeal is not bound by the decisions of the Royal Court although the Royal Court is bound by the Jersey Court of Appeal and Judicial Committee Privy Council on appeal from Jersey (only), unless such earlier decision has been invalidated by subsequent legislation or some compelling change in circumstances.²⁸ The Judicial Committee of the Privy Council provides the final tier of domestic appeal, with leave to appeal from the Court of Appeal being required.²⁹ As a general rule, the Privy Council will not grant leave to appeal except on questions of great or general public importance or the appeal raises serious issues of personal status or involves property of considerable value.³⁰ Decisions of the UK Supreme Court, formerly the House of Lords, the Court of Appeal of England and Wales and the Judicial Committee of the Privy Council in appeals from other jurisdictions are at most only persuasive in Jersey, the degree of persuasiveness depending upon a number of considerations including the similarity between the law of Jersey and that other jurisdiction.³¹

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C. Equity in Jersey

Owing to Jersey's own historical circumstances the basis upon which the Royal Court can be said to have a distinct equitable jurisdiction akin to that developed over the centuries by 1-10

²⁵ *State of Qatar v Al Thani* [1999 JLR 118] at 124.

²⁶ *ibid*, at 125.

²⁷ *AG v Hall* [1995 JLR 102]; *In re Barker* [1985–86 JLR 186].

²⁸ *State of Qatar v Al Thani* (n 25).

²⁹ Court of Appeal (Jersey) Law 1961, Art 14.

³⁰ *Esnouf v AG for Jersey* (1883) 8 AppCas 304 at 308; *Akar v AG of Sierra Leone* (1969) 3 All ER 384 PC.

³¹ *Hall v AG* [1996 JLR 129].

England's dualist approach to law and equity in the Court of Chancery, is doctrinally uncertain. The modern English law concept of the trust or *use*, that began to be enforced by the Court of Chancery in the early fifteenth century was founded upon the Lord High Chancellor's equitable jurisdiction to prevail against the conscience of the owner of property as viewed through the eyes of the common law. Not infrequently the property the subject of the *use*, was land. It remains a feature of Jersey law that a trust of immovables, ie land within Jersey, is a legal impossibility³² and so the development of the trust in Jersey, has, necessarily, come into being via another route than that developed in England and Wales.

- 1-11** Not all the principles that were developed by the English Court of Chancery, and since developed by the Chancery Division, Court of Appeal and House of Lords (now Supreme Court) have permeated into Jersey's law.³³ A consequence of this has been a number of instances in which the Royal Court has chosen to 'go its own way' in developing trust law in Jersey, free from what it regards to be the constraints of the rules of English precedent or what it otherwise perceives as unnecessary historical baggage.³⁴ It cannot therefore be assumed that the Royal Court's equitable jurisdiction is an exact mirror of England's.
- 1-12** While in practice Jersey is a jurisdiction that recognises and gives effect to equitable concepts and remedies, the precise nature of the Royal Court's equitable jurisdiction has not been definitively settled. There are a number of cases in the annals of the Royal Court that appear to equate 'equity' as being closer to the French law concept of '*equité*' (literally translated as justice, sometimes as fairness or even the benevolent construction of a statute) than the 'equity' as a term of art as developed by the English Chancellors.³⁵

The Royal Court is a Court of equity in the widest sense is clear...But that does not mean that the Royal Court has any wider powers than the former Chancellors of the Court of Chancery...Moreover, the conditions in the English Courts which gave rise to the system of law known as equity were not mirrored in the history of the Royal Court. It may well be that 'equity' in Jersey inclines more to the French '*équité*' than its English counterpart...although as I have said, the Royal Court has declared itself a Court of Equity, that does not mean to say that all the principles developed in the English Court of Chancery must necessarily apply. The more so is this the case when that Court is interpreting a number of English statutes and cases based on English Trust Law. Nevertheless, the Royal Court gives relief to someone who is threatened with a wrong which is, of course, an equitable remedy. As the Court said in *Sayers v Briggs* (1964 J.J. 399, at 401):

"The Court also believes that it has inherent power to prevent a wrong from being committed before it is done"³⁶

³² Now codified in the Trusts (Jersey) Law 1984, Art 11(2)(a)(iii).

³³ In some notable instances, Jersey has legislated to abolish certain principles of trust law that persist in England eg Art 15(2) of the Trusts (Jersey) Law 1984 (abolishing the rules of perpetuity and excessive accumulation).

³⁴ *Republic of Brazil v Durant* [2012] JRC211 at [219] in the context of discussing the scope of tracing assets: 'the appropriate way for the courts of this jurisdiction to address the subject is, we suggest, not by reference to any pre-conceptions of what is or is not conceptually possible or arguably supported by English authority, but, once again, as a matter of evidence'. Jersey has enacted a legislative equivalent to the jurisdiction formerly existing in English common law known as 'the Rule in *Re Hastings Bass*'; see Trusts (Jersey) Law 1984, Art 47B-7J; cf *Pitt v Holt & Futter v Futter* [2013] UKSC 26.

³⁵ Court of Appeal (Jersey) Law 1961, Art 9(2) although neither the Bailiff nor the Deputy Bailiff regularly sit in the Court of Appeal.

³⁶ *Ex parte Viscount Wimbourne* [1983] JJ 17.

D. The Royal Court of Jersey

The Royal Court is Jersey's principal, superior court of record. It has original and unlimited jurisdiction³⁷ over both civil and criminal matters and is a creature of the island's customary law, tracing its existence back to the thirteenth century. It is equivalent to the High Court of Justice in England and Wales and most Commonwealth jurisdictions or the Court of Session in Scotland. The Royal Court has four divisions: the Héritage, Probate, Family and Samedi Divisions³⁸—dealing with land, succession, family disputes and all other matters respectively. Trust disputes are generally commenced and determined in the Samedi Division although trust disputes may arise in the context of matrimonial litigation commenced in the Family Division or under a will, administered in the Probate Division. In practice, other than the Family Division and Probate Division which have their own procedural rules,³⁹ in civil causes the composition of the Royal Court in each division is the same. Each division of the Royal Court has power to transfer proceedings between its divisions.⁴⁰

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The Royal Court sits either in the Inferior or Superior Number.⁴¹ The Inferior Number is comprised of the Bailiff and at least two Jurats. The Superior Number (which very rarely sits in relation to civil disputes save as a rule-making body, but more frequently in criminal matters as a sentencing court) is comprised of the Bailiff and no less than five Jurats.⁴² 'The Court', as defined in the Royal Court Rules 2004, means any division of the Royal Court sitting in the Inferior Number, the Bailiff (including the Deputy Bailiff or a Commissioner sitting alone) or the Judicial Greffier sitting alone, as Master of the Royal Court, without Jurats.⁴³ Decisions of the Inferior Number can be appealed, if from the Greffier to the Royal Court sitting in the Inferior Number or, if from the Inferior Number to the Jersey Court of Appeal,⁴⁴ with the Bailiwick's ultimate appellate court being the Judicial Committee of the Privy Council in London. The principal judges of the Royal Court are the Jurats and the Bailiff. The executive functions of the Royal Court are performed by the Viscount and the Judicial Greffier, both of whom also exercise some judicial functions, as described below.

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E. The Bailiff

The Royal Court is presided over by the Bailiff, who is the island's Chief Justice and president of and *ex officio* member of the Jersey Court of Appeal. The office of Bailiff is an

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³⁷ The maxim '*la cour est tout-puissant*' is sometimes deployed to describe the reservoir of power retained by the Court as part of its inherent jurisdiction to regulate proceedings conducted before it.

³⁸ Confusingly named as it has for many years now sat on a Friday.

³⁹ Matrimonial Causes Rules 2005, Children Rules 2005, Probate (General) Rules 1998.

⁴⁰ RCR 2004, r 3/2.

⁴¹ The Superior Number of the Royal Court in civil matters is primarily a rule-making body; Royal Court (Jersey) Law 1948, Art 13; Law Reform (Miscellaneous Provisions) (Jersey) Law 1960, Art 2.

⁴² Royal Court (Jersey) Law 1948, Art 16.

⁴³ RCR 2004, r 1/1(1) save in respect of those matters reserved in RCR 2004, Sch 1, which are excluded from the Judicial Greffier's jurisdiction and is not deemed to constitute 'the Court' in respect of those matters.

⁴⁴ Created by the Court of Appeal (Jersey) Law 1961.

ancient one that carries a number of significant extra-judicial functions including president (speaker) of the States Assembly (the island's unicameral parliament), 'civic head' of the island and Deputy Governor in the absence of the Lieutenant Governor.⁴⁵ The office of Bailiff may be executed by the Deputy Bailiff.⁴⁶ To facilitate the caseload of the Royal Court the Bailiff has power to appoint any number of Commissioners; part-time judges, to sit and execute the office of Bailiff when either the Bailiff or Deputy Bailiff is unavailable.⁴⁷ Commissioners are often appointed to deal with particularly long cases where owing to the Bailiff and Deputy Bailiff's other commitments on their time, or for other reasons such as a conflict, it is otherwise inappropriate for the Bailiff or Deputy Bailiff to sit. The judicial functions of the Bailiff, Deputy Bailiff and each of the Commissioners are identical.⁴⁸ Where reference is made to the Bailiff in this text, it is a reference to any of those capable of exercising the Bailiff's judicial functions. The Bailiff and Deputy Bailiff remain the only de jure permanent trial judges in the island although it has been the practice to appoint at least one Commissioner as a de facto third permanent presiding judge to handle the Royal Court's burgeoning caseload.⁴⁹ The Royal Court also has a permanent judge to deal with interlocutory matters in civil cases only: the Master of the Royal Court.⁵⁰

F. The Jurats

- 1-16** The office of Jurat in Jersey⁵¹ is documented from the early years of the thirteenth century in a document known as the 'Constitutions of King John', issued in 1204 in which King John decreed that the Island should elect '*duodecim optimatos juratos*'—their twelve best sworn men to keep the pleas'. There are only 12 Jurats in office at any one time. The Bailiff and two Jurats constitute the Inferior Number of the Royal Court.⁵² The Inferior Number tries all contested civil actions.⁵³ The respective functions of the Bailiff and the Jurats are set out Royal Court (Jersey) Law 1948.⁵⁴ The Bailiff may sit alone to determine questions of law

⁴⁵ See Lord Carswell, 'Report into Review of the Crown Officers' (6 December 2010).

⁴⁶ A post created by the Deputy Bailiff (Appointment and Function) Law 1958, the Deputy Bailiff is also an *ex officio* member of the Jersey Court of Appeal.

⁴⁷ The powers of a Commissioner are the same as those exercisable by the Bailiff sitting in the Inferior Number; see Royal Court (Jersey) Law 1948, Art 12.

⁴⁸ Royal Court (Jersey) Law 1948, Art 12(1).

⁴⁹ Reference is sometimes seen in the older cases to a Lieutenant Bailiff, an office to which the Bailiff may appoint an individual under his customary law powers. Since the introduction of the office of Deputy Bailiff in 1958 to permanently share the Bailiff's workload and deputise for him as necessary, the role of the Lieutenant Bailiff in Jersey as a trial judge has diminished. However, the office still exists and is generally today an honorary position held by the most senior serving Jurat. The Lieutenant Bailiff may preside over the Royal Court as required by the Bailiff but not being legally trained, their role being confined to non-contentious business, such as the passing of contracts for the sale of land before the Court.

⁵⁰ See Judicial Greffier below.

⁵¹ The office of Jurat is not peculiar to Jersey but is widely known in continental Europe.

⁵² Loi (1862) sur la procédure devant la Cour Royale, Art 2. Where the matter is for determination by the Bailiff alone, the Inferior Number can also be properly constituted by the Bailiff alone; see RCR 2004, r 3/6.

⁵³ Any reference to 'the Court' in the Trusts (Jersey) Law 1984 means the Inferior Number (ie the Master has no jurisdiction to determine any question for the Court under that statute).

⁵⁴ Royal Court (Jersey) Law 1948, Art 15.

and procedure and has power to award costs, including awarding security for costs.⁵⁵ Matters of law include the admissibility of evidence and the determination of ancillary facts in relation to admissibility.⁵⁶ The Bailiff enjoys a limited jurisdiction to make findings of facts when they are intertwined with predominantly issues of law where this has been so certified by the Judicial Greffier, with whose assessment the Bailiff agrees.⁵⁷ In all other matters falling outside of these limited exceptions, the Jurats are the sole tribunal of fact (in accordance with the Bailiff's directions on questions of law and procedure) and determine the quantum of any pecuniary award sought in proceedings. An exercise of discretion by the Royal Court, ie what decision should follow from the primary facts, is generally a collegiate matter for the Bailiff and Jurats⁵⁸ unless the Bailiff is otherwise authorised to reach a decision, for example if the matter is one of procedure and therefore deemed to be an issue of law. In all causes and matters, the Bailiff has a casting vote should the Jurats be unable to agree as to their decision on the facts.⁵⁹

G. The Viscount

The Viscount is the executive or enforcement officer of the Royal Court and is supported in the execution of her⁶⁰ duties by a Deputy Viscount and Viscount Substitutes (any of whom may execute the office of Viscount) and an administrative department, the Département du Vicomte.⁶¹ Over the centuries the Viscount has accumulated a number of disparate functions of which the most relevant for the purposes of this text are:

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1. to effect personal service of documents and process in civil proceedings within the island;⁶²
2. the execution and enforcement of Acts of the Royal Court within the island;
3. the execution of Acts of the Royal Court for an *arrêt*, *arrêt entre mains* and *saisie*;⁶³
4. the collection and enforcement of fines; and
5. as the conduit for the service of foreign civil proceedings on those within the island.

The Viscount is also responsible for the administration of the affairs of individuals and companies declared *en désastre* (a form of Jersey insolvency procedure)⁶⁴ whose property (in the case of individuals) and powers in relation thereto (whether individual or corporate) vest in

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⁵⁵ *Mayo Associates v Cantrade* [1995] JRC 216, a jurisdiction shared concurrently with the Master.

⁵⁶ *Lundy v AG* 1996 JLR 193.

⁵⁷ Royal Court (Jersey) Law 1948, Art 17.

⁵⁸ See the Guernsey Court of Appeal decision in *Storm Residential & Commercial Management Ltd v Sarnia Developments Ltd* 2009-10 GLR 427, in Guernsey the exercise of discretion appears to be for the Jurats alone.

⁵⁹ Royal Court (Jersey) Law 1948, Art 15(4).

⁶⁰ The current incumbent is the first female to occupy the office of Viscount in its 800-year history.

⁶¹ Appointed under the Departments of the Judiciary and the Legislature (Jersey) Law 1965, Art 6 or 9(5A)(5B).

⁶² RCR 2004, r 5/5.

⁶³ Which are respectively (1) a customary law jurisdiction for an order for the arrest and sale of property; (2) an arrest of property in the hands of a third party such as bank; and (3) an order for the arrest of a person pending the payment of a liquidated debt.

⁶⁴ As to which see A Dessain, M Wilkins and E Shorrock, *Jersey Insolvency and Asset Tracking*, 5th edn (London, Key Haven, 2016).

the Viscount upon the making of a declaration of *désastre*.⁶⁵ The Viscount is not therefore just a court officer but also has the potential to become an active participant in litigation where an insolvent person is a party to litigation. The Viscount also serves as curator of last resort for impecunious incapacitated persons and may represent them in proceedings before the Royal Court.

H. The Judicial Greffier

- 1-19** The Judicial Greffier is the chief administrative officer (ie the clerk) of the Royal Court and Court of Appeal. The Greffier is supported by a department known as the Judicial Greffe the function of which, in some respects, is shared with the Département du Vicomte as a de facto court service for the island.⁶⁶ The powers and functions of the Judicial Greffier do not have to be exercised personally but may be exercised by any sworn member of the Judicial Greffe including the Deputy Judicial Greffier, the Assistant Judicial Greffier or any Greffier Substitute.⁶⁷ The Master of the Royal Court (referred to in schedule 3 to the Royal Court Rules 2004) is in fact a Greffier Substitute before whom the vast majority of interlocutory applications are determined.
- 1-20** Like the Viscount, the Judicial Greffier has become a repository of a number of different functions.⁶⁸ The services provided in support of the Samedi Division of the Royal Court that are relevant for the purposes of this text are:⁶⁹
1. the listing of actions pending before the Royal Court;
 2. the determination of interlocutory summonses in pending actions;⁷⁰
 3. the taxation of costs ordered in proceedings before the Royal Court;
 4. the registration of foreign judgments (including Foreign Maintenance Orders) that are sought to be recognised or enforced in Jersey;⁷¹ and
 5. the holding of monies paid into court.
- 1-21** The Judicial Greffier sitting as Master of the Royal Court, alone without Jurats, can constitute the Royal Court and may therefore exercise the jurisdiction of the Royal Court when sitting in the Inferior Number save where a statute or Schedule 1 to the RCR 2004 expressly excludes that jurisdiction.⁷² Accordingly, the Greffier has power to grant leave

⁶⁵ Désastre Law 1990, Art 8. In this respect the Viscount is Jersey's equivalent to the office of Official Receiver.

⁶⁶ Loi (1930) constituant Le Département du Vicomte.

⁶⁷ Art 9(6) of the Departments of the Judiciary and the Legislature (Jersey) Law 1965, as amended.

⁶⁸ While separate and distinct offices and functions, the same person may occupy both offices simultaneously.

⁶⁹ www.gov.je/Government/NonexecLegal/JudicialGreffie/Sections/Pages/SectionServices.aspx.

⁷⁰ Those not excluded by RCR 2004, Sch 1.

⁷¹ See Ch 15.

⁷² eg the Judicial Greffier has no jurisdiction to determine a question of law or construction under RCR 2004, r 7/8. Save in respect of those matters in Sch 1, the Greffier and the Inferior Number therefore share a concurrent jurisdiction. This is effectively a delegation of jurisdiction by the Inferior Number. That delegation is significant in relation to appeals of orders of the Greffier, which are made to the Inferior Number. While the case law on the precise nature of that appeal is unsatisfactory, it is tolerably clear that the Inferior Number reserves to itself the right to hear the argument before the Greffier *de novo*, subject to it having 'close regard' to the decision of the Greffier (who is recognised as having a particular expertise in respect of interlocutory matters). See also n 53.

to serve proceedings out of the jurisdictions, grant applications for summary judgment, strike out pleadings, order further and better particulars, grant leave to amend pleadings, grant security for costs, extend or abridge time limits and give directions for the progress of proceedings.⁷³ The Greffier's jurisdiction is not limited to hearing and determining non-contentious matters.⁷⁴ While the Inferior Number is able to hear interlocutory summonses, as a matter of practice, the vast majority are heard before the Greffier, provided jurisdiction exists notwithstanding the concurrent jurisdiction.⁷⁵ The Judicial Greffe also houses the island's probate, intellectual property and land registries.

I. The Law Officers

Her Majesty's Attorney General for Jersey and Her Majesty's Solicitor General for Jersey, comprise the principal officers of the Law Officers' Department. While the bulk of the Law Officer's duties are concerned with the States' legal business and criminal proceedings on the island and as a conduit with the Royal Court and other jurisdictions for rendering international mutual legal assistance, the Attorney General has an important role in litigation before the Royal Court concerning charities.⁷⁶ Nowhere in the island's statute books are the powers of the Attorney General in relation to charities codified.⁷⁷ The Charities (Jersey) Law 2014, which for the first time creates a charities commissioner to oversee the application of a new test to entities sought to be registered as charities in Jersey,⁷⁸ expressly provides that it does not derogate from any power or function of the Attorney General that existed independently of the 2014 Law (under customary law or otherwise), in respect of Jersey charities or of acts for charitable purposes.⁷⁹ The Attorney General therefore retains all the historical duties and powers of his office as representative of the Crown that require or enable him to act in the public interest in relation to charities. Additionally, he has had various powers and standing to participate in proceedings under the Trusts (Jersey) Law 1984.⁸⁰

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⁷³ *Finance & Economics Committee v Bastion Offshore Trust Co Ltd* [1994 JLR 370] at 382; and *Benest v Kendall* [1992 JLR N 2] (power to strike out).

⁷⁴ *Cooper v Lieutenant Governor* [2001 JLR 325], although the Greffier may refer any question back to the Inferior Number for determination.

⁷⁵ *Mayo Associates v Cantrade* (n 55).

⁷⁶ In practice, many of the functions of the Attorney General are discharged by the Solicitor General; see the Departments of the Judiciary and the Legislature (Jersey) Law 1965, Art 9(3).

⁷⁷ Order in Council of 2 November 1749 provides: 'And His Majesty doth hereby declare that the Procureur [Attorney General in the English parlance] is the superior Officer and the proper Person to Commence and Carry on all Criminal Prosecutions and all Suits Relating to the King's Revenue and all others (sic) Suits in which the King's Interest is concerned; That he is likewise the proper Person to be made a Party in all Adjunct Cases.'

⁷⁸ The Charitable Uses Act 1601 (known as the Statute of Elizabeth) (43 Eliz I, c4) was for over 4 centuries the foundation of what was understood to be a charity under Jersey law.

⁷⁹ Charities (Jersey) Law 2014, Art 40(1).

⁸⁰ Arts 42 (failure of trust or lapse of interest), 47A (cy-pres and variation of charitable objects), 47I (applications to set aside a transfer or disposition of property to a trust due to mistake or to set aside the exercise of fiduciary powers in relation to a trust or trust property in relation to a trust containing charitable trusts, powers or provisions) and 51 (locus to application for directions).

J. Jersey's Rules of Civil Procedure—General Points

- 1-23** Jersey's civil procedure shares a number of common features with that of England and Wales and other common law jurisdictions. Despite Jersey's historical and geographical proximity to France, the Royal Court adopts an adversarial, rather than an inquisitorial approach to its civil proceedings.⁸¹ Jersey's rules of pleading, summary disposal, evidence and trial process will be familiar to civil practitioners familiar with the common law tradition and it is not proposed to dwell at length on these aspects of Jersey's civil procedure.
- 1-24** Litigation before Jersey's Royal Court is regulated by a set of procedural rules; the Royal Court Rules 2004 (as amended) ('RCR'). The Royal Court (Jersey) Law 1948, states that rules of court may be made by the Superior Number,⁸² with the advice and assistance of the Royal Court Rules Committee, for regulating and prescribing the procedure and practice to be followed in the Royal Court.⁸³ Rules, and the supporting practice directions, are amended or revoked from time to time by subsequent rules and are laid before the States as soon as may be after they are made, who may resolve that they be annulled. The Royal Court Rules 2004 constitute an enactment for the purposes of Article 1 of the Interpretation (Jersey) Law 1954 which must be read, so far as is possible, so as to be compatible with the European Convention of Human Rights.⁸⁴ The Royal Court (General) Rules were first introduced in 1963. These rules are accredited to the work of F de Lisle Bois, the then Deputy Bailiff. Since 1963 the Rules have been significantly amended or replaced on a number of occasions, most notably in the form of the Royal Court Rules 1968, the Royal Court Rules 1992 and the Royal Court Rules 2004 (as amended), the current version. Together, the Royal Court Rules 2004 and accompanying practice directions are considerably shorter than the equivalent procedural rules prevailing in England and Wales. There is currently no Jersey equivalent of the White Book, comprising a consolidated set of rules and body of commentary and guidance for practitioners. That dearth of guidance can make the rules, when read in isolation, appear somewhat Spartan, with a number of apparent gaps in the practice of the Court.⁸⁵ In large measure those apparent gaps are filled by a combination of established practice and experience of the island's legal profession, case law and in some instances ad hoc assistance from the Court itself.
- 1-25** The Royal Court Rules 2004 are not the only source of rules for proceedings before the Royal Court with discrete procedural regimes governing discrete corners of the Royal Court's jurisdiction.⁸⁶ However, for the purposes of this text, the RCR 2004 are in large

⁸¹ With one possible exception, in relation to trust proceedings, being its supervisory jurisdiction in relation to trusts in which the court may and does adopt a more, albeit informally, inquisitorial approach.

⁸² That is to say, an assemblage of the Bailiff and at least 5 Jurats. See the Royal Court (Jersey) Law 1948, Art 16.

⁸³ Art 13(3).

⁸⁴ Human Rights (Jersey) Law 2002, Art 4.

⁸⁵ eg. For example, there is no rule or official guidance as to the appropriate form or content of originating process before the Royal Court.

⁸⁶ Other rules that apply are the Matrimonial Causes Rules 2005 (previously the Matrimonial Causes (General) (Jersey) Rules 1979) pursuant to Art 43 of the Matrimonial Causes (Jersey) Law 1949, the Children Rules 2005, the Bankruptcy (Désastre) Rules 2006 (formerly 1991) and certain other procedural codes which apply by virtue of various other enactments including, by way of example only, the Code of 1771 and Loi (1835) sur la procédure devant la Cour Royale.

part the rules with which practitioners need concern themselves. As will be appreciated from looking at the RCR 2004, some provisions are outside the scope of this text.⁸⁷ Further procedural rules relevant to trust litigation have been made pursuant to the power in Article 13, including the Service of Process (Jersey) Rules 1994,⁸⁸ and the Judgments (Reciprocal Enforcement) Rules 1961.⁸⁹

The former Rules of the Supreme Court as they stood at 1999, before the coming into force of the Civil Procedure Rules 1998, are still sometimes consulted by Jersey practitioners given the similarity (and in some cases near identical wording) between certain parts of those rules and Jersey's own rules.⁹⁰ However, as 1999 recedes further from memory, reference to the RSC in interpreting the equivalent provisions in the RCR must be regarded with increased caution. Jersey's procedure rules are not to be treated as being frozen in aspic at the date the RSC were abandoned in England and Wales and there have been developments both in terms of rules and practice on both sides of the Channel in the intervening years which must be taken into account. Jersey's *ancien* customary law is now rarely of everyday practical application to civil procedure in trust litigation. That said, the Court has been known on some occasions to consult the writers or commentators on Jersey and Norman customary law on matters of substantive law and practice.⁹¹ Jersey's Court of Appeal, unlike the Royal Court, is a creature of statute.⁹² The Court of Appeal has its own procedural rules, separate from the Royal Court Rules 2004.⁹³

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III. Commencing Proceedings in Jersey

Civil proceedings before the Royal Court are commenced in one of three ways; by simple summons, by Order of Justice⁹⁴ or by way of Representation. The RCR 2004 contain very little guidance on the form or contents of any of these forms of originating process and provide little practical assistance as to whether a summons, Order of Justice or Representation is the appropriate form of originating process for a particular given dispute.

1-27

⁸⁷ By way of example only, RCR 2004, r 6/38; Procedure on certain applications under the Sex Offenders (Jersey) Law 2010, Part 9 Provisional Damages, Part 13 Division Of Estates & Dower, Part 14 Vues, Part 15 Appeals From Administrative Decisions, Part 16 Applications For Judicial Review, Part 18 Registration Of Title, Hypothecs, Etc., Procedure On Caveats, Etc., Part 19 Orders For Election Of Procureur Du Bien Public.

⁸⁸ See Ch 2 for rules as to service out of the jurisdiction.

⁸⁹ See Chapter 15 for rules as to the enforcement of foreign judgments in Jersey

⁹⁰ Service of Process Rules 1994 broadly mirror the former RSC Order 11.

⁹¹ eg Hemery & Dumaresq, *A Statement of the Mode of Proceeding and of Going to Trial in the Royal Court of Jersey* (1789); Le Geyt, *Priviléges, Loix et Coutumes de L'Isle de Jersey* (1953); Le Gros, *Droit Coutumier de Jersey* (1943); see AG v De Carteret [1987–88 JLR 626]. See consultation of Le Geyt, *La Constitution, Les Lois et les Usages de Jersey* (1846 edn); Poingdestre, *Lois et Coutumes de l'Île de Jersey* (1928 edn) and Pothier, *Traité des Champart* (1821 edn), *Traité des Obligations* (1821 edn) in *In the Matter of the Valletta Trust* [2012 (1) JLR 1].

⁹² Court of Appeal (Jersey) Law 1961.

⁹³ Court of Appeal (Civil) Rules 1964, as amended.

⁹⁴ RCR 2004, r 6/2.

A. Orders of Justice

- 1-28** An Order of Justice has a combined function as both a form of originating process and a pleading, the Jersey equivalent to the particulars of claim in English civil procedure. An Order of Justice is required to be signed by the plaintiff's advocate and where the Order of Justice contains injunctive relief, must be signed by the Bailiff.⁹⁵ The vast majority of disputes alleging a breach of trust or other duty owed by trustees are commenced by way of Order of Justice. In cases where an injunction has been sought and obtained ex parte, until the return date confirming or discharging the injunction, the Order of Justice also serves as the Court's order.
- 1-29** Other than one notable exception in relation to injunctions, the RCR contain no rules or guidance that certain types of proceedings must or should to be commenced using an Order of Justice. In practice, the customary rule as to whether an Order of Justice is the appropriate form of originating process is whether the matter in dispute can be pleaded as a cause of action, properly so called, ie the vindication of a the plaintiff's substantive rights. Many forms of relief that are capable of being granted by the Royal Court, in answer to a trust dispute before it, arise from the Royal Court's inherent discretionary jurisdiction to intervene in and supervise the administration of trusts, and, as such, is not easily analysed as a cause of action properly so called and is more appropriately commenced by way of Representation.
- 1-30** An Order of Justice is usually the appropriate form of originating process for the following types of proceedings before the Royal Court involving trusts:
1. claims for breach of trust or breach of other duty owed by a trustee;⁹⁶
 2. claims for reconstitution of the trust fund;
 3. claims between co-trustees for a contribution;
 4. claims for an account against a trustee;
 5. claims for an account from a third party as if a constructive trustee in respect of knowing receipt or dishonest assistance;
 6. claims brought by or against the trustee by or against a third party to the trust;⁹⁷
 7. claims for injunctive relief (including orders under the Royal Court's Mareva and Anton Piller jurisdictions) by or against a trustee;
 8. claims for an *arrêt* or *saisie* by or against a trustee;
 9. claims for pre-action disclosure under the Court's *Norwich Pharmacal and Bankers Trust*⁹⁸ jurisdiction;

⁹⁵ *ibid*, r 20/5(1). Where the plaintiff is a litigant in person, the Bailiff may sign the Order of Justice before it can be served; see *In re Syvret* [2014] (1) JLR 71].

⁹⁶ A claim in respect of breach of trust is not rendered a claim for a liquidated debt or sum, and therefore capable of being commenced by summons, merely because a sum is specified in the prayer for relief. Claims for breach of trust should be commenced by way of Order of Justice'; see *Mocha Investments Limited v Crills* [1990 JLR N-10].

⁹⁷ Which is strictly not a trust dispute properly so called but merely a civil action against or by a party that happens to be a trustee.

⁹⁸ *Norwich Pharmacal Co v Customs & Excise Commrs* [1974] AC 133, principles discussed in *Federal Republic of Brazil v Citibank NA* [2006 JLR 478].

10. claims asserting a proprietary beneficial interest in property, by or against a trustee;
11. claims to set aside a disposition into trust on grounds of sham, mistake, duress, fraud, undue influence or some like vitiating factor;⁹⁹
12. orders for the removal and/or replacement of a trustee;¹⁰⁰
13. applications for the Court to remove and/or replace an enforcer of a non-charitable purpose trust;
14. applications for the Court to remove and/or replace a protector or other power holder;¹⁰¹
15. claims by beneficiaries for the disclosure of documents or information from the trustee;
16. claims for *Pauline* relief;¹⁰² and
17. claims seeking the enforcement or recognition of a foreign judgment at customary law in cases falling outside the scope of the Judgments (Reciprocal Enforcement) (Jersey) Law 1960.¹⁰³

i. Commencement of Proceedings by way of Order of Justice

Where an Order of Justice does not plead injunctive relief, it is sufficient for it to be signed by the plaintiff's advocate before sending it, alongside a summons, to the Viscount's Department who will effect personal service on the defendant.¹⁰⁴ The summons should action the defendant to appear at the Royal Court at a specific time and date to witness the confirmation of the Order of Justice. This is usually at the first Friday sitting of the Samedi Division following service. An Order of Justice containing injunctive relief follows a different procedural path and must be submitted to the Bailiff's Chambers and be signed by him before being delivered to the Viscount for personal service.¹⁰⁵

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Because an Order of Justice requires personal service by the Viscount¹⁰⁶ and especially in cases where injunctive relief is sought on an ex parte basis, a plaintiff effectively loses control of the timetable for commencing an action when depositing the Order of Justice with the Viscount's department for service. The fact of a looming prescription date should be brought to the attention of the Bailiff's Chambers and Viscount's Department.¹⁰⁷ Once served, the expiration of prescription is effectively paused until the date and time listed in

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⁹⁹ *In re Bhandher* [1997 JLR N-16B]; *Perczynski (née La Rocque) v Perczynski* [2005 JLR N [23]] unless the matters forming the factual matrix upon which the setting aside is sought are set out in the Representation with sufficient clarity; eg *In the Matter of the Strathmullen Trust* [2014 (1) JLR 309].

¹⁰⁰ Whether an action for an order for removal is best commenced by an Order of Justice or by Representation is, in practice and on the authorities, very finely balanced. It is common to see such relief sought in actions commenced by either form of originating process. The jurisdiction to remove a trustee is part of the Court's inherent jurisdiction to intervene in the administration of a trust and as such is not strictly a cause of action. Given that, and the greater latitude afforded to the drafting of a Representation, it is often the preferred choice for many practitioners.

¹⁰¹ *ibid.*

¹⁰² See *In re Esteem Settlement* [2002 JLR 53].

¹⁰³ As to which see Ch 15.

¹⁰⁴ As to the form of summons, see RCR 2004 Sch 2.

¹⁰⁵ RCR 20/5 Note also that by the same rule, any solicitor who applies to the Bailiff for an Order of Justice containing an interlocutory injunction must give a written undertaking to the Bailiff that he or she has instructed an advocate in relation to the proceedings.

¹⁰⁶ See rules for personal service below at para 1-77.

¹⁰⁷ As to prescription, see Ch 16.

the summons for the defendant served with the Order of Justice to appear before the Court. If, once served, the proceedings are not properly tabled, time will begin to run again and the defendant will need to be re-summoned and the action re-tabled.

- 1-33** There is no case law as to the consequences of a failure by the Viscount to serve proceedings before the expiration of prescription. Where depositing the order of justice for service by the Viscount is mandatory by virtue of a statute, rule or practice and a failure to serve results in the claim becoming time barred, a plaintiff may be able to rely upon the principle of *empêchement* under which prescription is postponed until after the Viscount has effected service of the proceedings. Once the Order of Justice is served the plaintiff is responsible for tabling the action.

ii. Tabling the Action

- 1-34** Tabling is the act of notifying the Royal Court that the plaintiff intends to proceed with its action. Once tabled, the action is listed for the date and time given in the summons served on the defendant, which usually coincides with the next Friday sitting of the Samedi Division. Tabling (except in proceedings commenced by Order of Justice containing injunctive relief), is the first point in the course of proceedings at which the dispute is brought to the Royal Court's attention. Unlike the current practice in England and Wales, there is no equivalent of 'issuing' a claim with an administrative number with the Court before service of the particulars of claim on the other parties. To table the action, the plaintiff must deposit the Order of Justice, the requisite court stamps¹⁰⁸ and the *billet*¹⁰⁹ with the Greffier by midday on the Thursday preceding the usual Friday sitting of the Samedi Division. The Greffier shall place the action on a list known as 'the Table'¹¹⁰ which is a public list of the new civil cases before the Samedi Division.
- 1-35** If a defendant wishes to defend the action for which they are summoned, provided they are able to or deemed to provide an address for service in Jersey,¹¹¹ the defendant should request that the action will be placed on a list (known as the Pending List) while it is prepared for trial.¹¹² This is also the usual procedure where the defendant wishes to set aside the proceedings or service of the proceedings, seek a declaration that the proceedings have not been properly served, discharge an order granting leave to serve the proceedings out of the jurisdiction, or seek a declaration that the Court has no jurisdiction over that party in respect of the subject matter of the claim or the relief or remedy sought in the proceedings.¹¹³

¹⁰⁸ Part 1 of the Stamp Duties & Fees (Jersey) Law 1998 (as amended).

¹⁰⁹ An example of a *billet* is found at app I.

¹¹⁰ RCR 2004, r 6/5.

¹¹¹ RCR 2004, r 6/6(2) provides that if a defendant fails to give an address for service in Jersey, but has at any time been legally represented in relation to the proceedings, the address for service shall be deemed to be the address of the defendant's last advocate or solicitor.

¹¹² RCR 2004, r 6/6(1).

¹¹³ *ibid*, r 6/7.

iii. Failure to Table

If the plaintiff fails to table the action, there is no mechanism for the action to be listed, and will be deemed to have been discontinued.¹¹⁴ It follows that if the plaintiff still wishes to bring its action, it must re-serve and re-table a fresh Order of Justice. An Order of Justice that is not tabled for the date to which the defendant is summonsed cannot simply be recycled with the same originating document purported to be served and re-tabled.¹¹⁵ Commencing proceedings, particularly where the expiry of prescription is in prospect, requires careful timetabling. The summons and the Order of Justice to be served by the Viscount must state the date and time at which the defendant is to appear to witness the confirmation of the Order of Justice. There must be gap of at least four clear days between the date of service of that summons and the Friday hearing in the Samedi Division.¹¹⁶ The Royal Court may not give judgment in default in any action unless applied for by the plaintiff and the court is satisfied that the summons was validly served and in due time; and the *billet* was tabled in due time.¹¹⁷

1-36

B. Representation

A Representation is a form of originating process by which the Court's attention is brought to a particular issue or set of facts upon which the party bringing the Representation ('the Representor') seeks relief in the form of either a determination or direction. A Representation is broadly the Jersey equivalent of the RSC originating summons, now succeeded by a CPR Part 8 Claim Form.¹¹⁸ As a form of originating process, a Representation is of a wholly different character to an Order of Justice. A Representation is directed at bringing a matter of controversy to the Court's attention rather than alleging facts which, if proved, will amount to a cause of action against a defendant and for which the party bringing the action is entitled to relief.

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There are few hard-and-fast rules as to what a Representation needs to contain. At its least, a Representation must contain a narrative setting out the grounds on which the Representor seeks his relief and unlike an Order of Justice¹¹⁹ is usually supported by an affidavit. It is not a valid criticism that a Representation fail to allege facts which if proven would amount to a cause of action and entitle a party to injunctive, proprietary or pecuniary relief.¹²⁰

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To commence an action by Representation is useful in circumstances where the relief sought will only affect the Representor. A Representation is often used as a means of seek-

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¹¹⁴ *Racz v Perrier Labesse* 1979 JJ 158.

¹¹⁵ *Virani v Virani* [2000] JLR 203].

¹¹⁶ RCR 2004, r 5/15, ie if the plaintiff intends to table the action for a Friday hearing, service must be effected, at least by the close of business on the preceding Friday in order to afford sufficient time.

¹¹⁷ RCR 2004, r 5/17.

¹¹⁸ RSC Ord 7. However the comparison with the CPR pt 8 procedure is not exact as a Representation, unlike pt 8, may contain issues of factual controversy. In Jersey the Representation emerged from an older form of proceeding, the remonstrance, which was, and the Representation remains, a convenient form of originating process where it is unclear how many parties ought to be joined to ensure the court feels able to grant the relief sought.

¹¹⁹ Save in the case of an Order of Justice containing injunctive relief, as made express in PD RC 15/04 in relation to Mareva/freezing relief.

¹²⁰ *Re Independent Maritime Services Ltd* [1996] JLR 294] at 303–04.

ing early direction from the Court in relation to how the Representor should proceed in a matter. A Representation is often used where there is no prescribed means of bringing a matter before the Court. In practice, the Representation is often used in proceedings under particular enactments, for example under Companies (Jersey) Law 1991¹²¹ but the Trusts (Jersey) Law 1984 contains no direction on the form of originating process to be used. The authors would suggest that a Representation is the appropriate form of originating process for the following types of proceedings involving trusts:

1. applications by the trustee, beneficiary or any person having connection with the trust under Article 51 of the Trusts (Jersey) Law 1984 for directions on any question concerning the execution or administration of the trust, the exercise of any power, discretion or duty vested in the trustee, the appointment or removal of a trustee, enforcer or protector, the trustee's remuneration or a question as to the conduct of the trustee;¹²²
2. applications by trustees for Beddoe relief;
3. applications for construction and/or the rectification of documents;¹²³
4. applications under Article 47 of the Trusts (Jersey) Law 1984 for an order consenting to the variation of a trust on behalf of minors, unborn or unascertained beneficiaries;
5. applications under Article 47A of the Trusts (Jersey) Law 1984 under the Court's cy-près and equivalent jurisdiction for non-charitable purpose trusts;
6. applications under Articles 47D to 47J of the Trusts (Jersey) Law 1984 (the Court's power to reverse dispositions into and out of trust and the exercise of fiduciary powers on grounds of equitable mistake and/or defective decision-making);¹²⁴
7. applications to register a foreign judgment under the Judgments (Reciprocal Enforcement) (Jersey) Law 1960;¹²⁵
8. applications to bring an alleged breach of an injunction (commenced by Order of Justice) to the Court's attention;
9. applications for an order that a party be held in contempt for disobedience of a court order;¹²⁶
10. orders for the removal and/or replacement of a trustee;¹²⁷

¹²¹ eg ibid in relation to Art 213 of the Companies (Jersey) Law 1991, which provides that on application made by any person appearing to the Court to be interested, the Court may make an order declaring the dissolution of a company void and give such directions and make such provisions as seem just. See also *Pacific Investments Ltd v Christiansen & others* [1995 JLR 250], a Representation is the most appropriate form of relief for an application under Arts 141 and 143 of the Companies (Jersey) Law 1991 (Art 141 provides that an application may be made for an order under Art 143 on the ground of unfair prejudice).

¹²² Art 51 is the statutory expression of the Court's inherent jurisdiction over every aspect of the administration of trusts. As such, this expansive jurisdiction encompasses a vast array of different forms of relief that may be commenced by Representation, many of which are not capable of being neatly analysed as causes of action properly so called.

¹²³ *Trilogy Management Ltd v YT Charitable Foundation (Intl) Ltd* [2013 (2) JLR 265].

¹²⁴ By the Trusts (Amendment No 6) (Jersey) Law 2013 Jersey enacted this statutory regime to replicate the separate but closely aligned rules of equitable mistake and the rule that had become known as 'the rule in *Re Hastings Bass*'.

¹²⁵ As to which, see Ch 15.

¹²⁶ Although a recent unreported decision of the former Bailiff has indicated that contempt proceedings may be commenced by way of summons as an application within the main proceedings.

¹²⁷ Whether an action for an order for removal is best commenced by an Order of Justice or by Representation is, in practice and on the authorities, very finely balanced. It is common to see such relief sought in actions commenced by either form of originating process. The jurisdiction to remove a trustee is part of the Court's inherent

11. applications for the Court to remove and/or replace an enforcer of a non-charitable purpose trust;
12. applications for the Court to remove and/or replace a protector or other power holder;¹²⁸ and
13. claims by beneficiaries for the disclosure of documents or information from the trustee.¹²⁹

It follows that until the Court gives directions as to how the Representation is to proceed there is only one party to the proceedings: the party bringing the Representation known as the Representor. At the presentation of the Representation, the Court should be invited to make orders convening such other parties that appear to have an interest in the proceedings and effecting service upon them. The Court will usually name a return date at which the Court will then give further directions depending on the issues raised for determination in the Representation. It is the responsibility of the Representor to serve the Representation in accordance with the convening orders.

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i. Commencement of Proceedings by Representation

Proceedings by ex parte representation should be commenced by depositing the Representation (and any supporting documentation) with the Bailiff's Judicial Secretary and with a copy to the Judicial Greffe at least 24 hours before the hearing at which the Representor wishes the matter to be presented to the Court.¹³⁰ The first hearing of the Representation will be the regular Friday afternoon sitting of the Samedi Division (with the exception of breaches of injunctions).¹³¹ A Representation, unlike an Order of Justice, is not formally tabled. However, consistent with the procedure for tabling an Order of Justice, a Representation and any supporting documents¹³² should be lodged with the Judicial Greffe by midday on the Thursday prior to the first Samedi Court hearing at which the Representation is sought to be presented. Representations are called on by the Greffier after the passing of hereditary contracts but before the adjourned and new actions commenced by Order of Justice. This is a public hearing. It is not uncommon, particularly in Representations that seek relief and the intervention of the Royal Court under its inherent supervisory jurisdiction in relation to trusts, that privacy may be a concern and the Representor may request that the case be placed *bas de la liste* and heard when the court has been cleared.¹³³ At that first Samedi Court hearing it is incumbent upon the Representor to set out what the

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jurisdiction to intervene in the administration of a trust and, as such, is not strictly a cause of action for which removal is a remedy to which the plaintiff is entitled if his case is made out. Given the numerous bases upon which a trustee may be sought to be removed, and the greater latitude afforded to the drafting of a Representation it is often the preferred choice for many practitioners.

¹²⁸ *ibid.*

¹²⁹ Again such relief arises from the Court's inherent supervisory jurisdiction, see the Trusts (Jersey) Law 1984, Art 29; *In re Rabaiotti 1989 Settlement* [2000 JLR 173], see Ch 5.

¹³⁰ RCR 2004, r 6/34, meaning at latest midday on the preceding Thursday.

¹³¹ *ibid.* r 3/7. An application for a party to be convened to answer for an alleged breach of an injunction may be heard by the Bailiff alone and may be made in chambers at any time.

¹³² Such as a supporting affidavit and exhibits or an affidavit in support of an application for service of the Representation out of the jurisdiction, as to which see Ch 2.

¹³³ As to privacy orders, see Ch 3.

Representation is about and to obtain initial directions as to how it is to proceed. Where other parties' interests are affected by the relief sought in the Representation, it will be appropriate to seek orders convening those parties to the proceedings. Where those parties are overseas, it will be necessary for the Representor to make an oral application for service of the proceedings out of the jurisdiction.¹³⁴ By r 6/37 RCR 2004, the procedure to be followed in proceedings commenced by Representation is extremely flexible and is at the Court's discretion.¹³⁵

C. Summons

- 1-42** The third form of originating process, although in practice never encountered when commencing trust litigation (or any litigation of value or complexity other than a claim for the payment of a liquidated sum), is by way of summons.

i. Interlocutory Summonses

- 1-43** In the context of trust litigation, a summons is only usually encountered either as a means of obtaining *inter partes* interlocutory relief within proceedings already commenced by way of Order of Justice or Representation or to obtain directions as to the future case management of those proceedings.¹³⁶ In contrast with the procedural rules governing the commencement of proceedings before the Royal Court, where there is no formal court involvement until the matter is formally brought before the Samedi Court, the vast majority of interlocutory applications in trust disputes in Jersey are commenced by way of service of a summons, a process which does mandate the Court's early intervention.¹³⁷ That said, the following categories of proceeding, which might otherwise be considered as 'interlocutory' in that they occur before trial, are required to be commenced by way of free-standing proceedings commenced by Order of Justice:

1. All forms of prohibitive and mandatory injunctive relief¹³⁸ including Mareva/freezing injunctions¹³⁹ and Anton Piller/search orders,¹⁴⁰ and *ordres provisoires* including an *arrêt entre mains*¹⁴¹ and *saisie*.¹⁴²

¹³⁴ As to what is required in any such application, see Ch 2.

¹³⁵ There are no template directions as to how a Representation should proceed. A form of summons for directions is annexed to the RCR 2004 in Sch 3. The Court may apply these directions and any other rules of procedure that would otherwise apply to a claim commenced by Order of Justice by virtue of RCR 2004, r 6/37, with appropriate adaptation to fit the issues in the representation.

¹³⁶ RCR 2004, 20/1(1).

¹³⁷ *ibid*. The limited exceptions being that an application to court alleging breach of an injunction or an *arrêt* (prior to its confirmation) is commenced by way of Representation.

¹³⁸ Which incidentally must be signed by the Bailiff, see RCR 2004, r.20/5.

¹³⁹ PD RC15/04.

¹⁴⁰ PD RC15/05.

¹⁴¹ Routier, *Principes Généraux du Droit Civil et Coutumier de la Province de Normandie* 2nd edn (1748) at 394.

¹⁴² Loi (1862) sur les saisies en vertu d'ordres provisoires, Art 7.

2. Third party disclosure orders (including applications under the Court's *Norwich Pharmacal*¹⁴³ and *Bankers' Trust* jurisdictions, but not under the Bankers' Books Evidence (Jersey) Law 1986).¹⁴⁴

Subject to limited exceptions in the Royal Court Rules,¹⁴⁵ the Inferior Number of the Royal Court and the Greffier share a concurrent jurisdiction to hear and determine interlocutory applications commenced by summons. In practice, this jurisdiction is effectively delegated from the Inferior Number to be exercised by the Greffier, sitting as Master, alone and without Jurats. In respect of interlocutory matters, the Greffier performs a similar function to that of a Master in the Chancery Division of the English High Court.

Only the following summonses can be validly served by a party, without the countersignature of the Bailiff's Judicial Secretary or the Greffier's Judicial Secretary (as appropriate):

1. a simple summons used as a form of originating process in and of itself;
2. a summons requiring a party to appear before the Royal Court to witness the confirmation of an Order of Justice;
3. a summons requiring a party who has been convened to appear before the Royal Court on the return date of a Representation commenced ex parte.

Every other summons¹⁴⁶ must bear the signature of the advocate whose summons it is, and the countersignature of either the Bailiff's Judicial Secretary (for summonses to be heard before the Inferior Number) or the Master's Secretary (for summonses to be heard before the Master) as well as the payment of the appropriate value of court stamps, before the summons can be validly served.¹⁴⁷ The Secretary's countersignature will not be given until a date has been listed or 'fixed' for the hearing of the summons.

Jersey's Royal Court does not have a central listing office for hearings. Instead, the Judicial Greffe and the Bailiff's Chambers (under the respective auspices of the Greffier's Judicial Secretary and Bailiff's Judicial Secretary) serve as the respective listing officers for hearings before Master and the Royal Court. The Judicial Greffe also has a separate listing office function for hearings before the Court of Appeal.¹⁴⁸ An application for an interlocutory order by summons comprises two stages: first, the arrangement of an appointment to fix a date for the hearing of the summons (known as a 'date-fix') and, secondly, the hearing of the summons itself.

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¹⁴³ *Federal Republic of Brazil v Citibank NA* (n 98); *Macdoel Investments Ltd v Federal Republic of Brazil* [2007 JLR 201].

¹⁴⁴ Art 6(3) which must be commenced by summons.

¹⁴⁵ See the RCR 2004, Sch 1. Note too that any application under the Trusts (Jersey) Law 1984 may only be heard before the Inferior Number; see the definition of 'court' in Art 1(1), as may any determination on a question of law or construction; see RCR 2004, r 7/8.

¹⁴⁶ A summons challenging the jurisdiction of the court under RCR 2004, r 6/7. A summons challenging jurisdiction must, by its nature, be fixed for a hearing in the same way as any other interlocutory summons. A summons challenging jurisdiction can only be determined by the Inferior Number, see RCR 2004, Sch 1.

¹⁴⁷ RCR 2004, r 20/1(2) and (3) and pt 1 of the Stamp Duties & Fees (Jersey) Law 1998 (as amended). See RCR 2004, r 5/4 as to the circumstances in which personal service of a summons is required. In all other cases, service may be effected by ordinary service.

¹⁴⁸ Court Of Appeal (Jersey) Law 1961, Art 7(2).

- 1-48** The first question is whether the subject matter of the summons falls to be determined before the Greffier or the Royal Court. This will determine who is required to countersign the summons. Schedule 1 of the RCR 2004 sets out the matters in respect of which reference in the rules to ‘the Court’ does not include the Greffier and consequently these matters are excluded from the Master’s jurisdiction and must be commenced by way of summons sent to the Bailiff’s Chambers for signature by the Bailiff’s Judicial Secretary.¹⁴⁹
- 1-49** Summonses for interlocutory relief are not formally tabled in the same way as actions commenced by Order of Justice which are arranged around the Friday sitting of the Samedi Division. The Royal Court may hear a summons on any day on which the Court sits.¹⁵⁰

ii. Fixing a Date for the Hearing of a Summons before the Greffier or Royal Court

- 1-50** The date-fix procedure before the Royal Court and Greffier are essentially the same, save that:
1. there is a non-refundable charge for fixing a date for a hearing before the Royal Court which is not due for hearings before the Greffier;¹⁵¹
 2. the value of the court stamps that must be paid on the summons is different;¹⁵²
 3. the date-fix appointment is conducted by the Bailiff’s Judicial Secretary rather than the Greffier’s;
 4. the minimum number of clear days’ notice to the other parties of a date-fix appointment is four days for an appointment before the Bailiff’s Judicial Secretary but only two days when before the Greffier’s Judicial Secretary;¹⁵³ and
 5. the minimum number of clear days between the service and the hearing of the summons is four days for a hearing before the Royal Court but only two days before the Greffier.¹⁵⁴
- 1-51** First, the applicant must informally enquire of the Greffe or the Bailiff’s Judicial Secretary (as the case may be) and the other parties as to the parties’ and Court’s availability for a date-fix appointment and a date for a hearing of the summons. Not all parties to the proceedings need to be convened to the summons, only parties between whom there is a *lis* need be summonsed. For date-fix appointments before the Greffier Substitute, the party applying for a date to be fixed for the hearing of the summons (‘the applicant’) is required, not less than two clear days before so doing, to notify in writing the other parties to the summons of the applicant’s intention to make the application and of the date and time at which the applicant intends to apply.¹⁵⁵ For date-fix appointments before the Bailiff’s

¹⁴⁹ The key exclusions for the purposes of this text being disputes as to jurisdiction (r 6/7); the determination of a preliminary issue (r 6/24); the determinations of a question of law or construction (r 7/8); an order for an interim payment (pt 8); and notice of fixing an appeal and appeals from the Greffier (r 15/2(1) and r 20/2).

¹⁵⁰ RCR 2004, r 20/1(5).

¹⁵¹ RC PD 10/05.

¹⁵² Pt 1 of the Stamp Duties & Fees (Jersey) Law 1998 (as amended). At the time of going to press the fee for a hearing of a summons before the Greffier for each half-day is £200 and £300 before the Inferior Number.

¹⁵³ RCR 2004, r 6/29 subject to a successful application to abridge time; see PD RC 05/23.

¹⁵⁴ RCR 2004, r 20/1(4) although note the Court’s power to abridge time under r 1/5; for the procedure for an abridgement of time see PD RC 05/23.

¹⁵⁵ PD RC 05/10.

Judicial Secretary, the requirements are the same, substituting the notice period of two clear days with four.

While a date-fix appointment can, if it is contested, be determined by the Bailiff sitting alone,¹⁵⁶ a hearing of an interlocutory summons before the Royal Court, if it involves any question of fact, will require at least two Jurats. As there are only 12 Jurats at any one time, not allowing for illness or absence, the Court (sitting in the Inferior number) can only deal with a maximum of six matters at once.¹⁵⁷

If the date for the hearing of a summons can be agreed between the parties, it is not necessary to proceed with a formal date-fix appointment; the court will simply fix the date by consent without the attendance of the parties. However, where no agreement can be made on the date for a hearing of the summons, it is necessary for the court to fix a date and the following procedure applies:¹⁵⁸

1. The applicant seeking a date to be fixed for a hearing of a summons must give no less than two clear days' notice to the other parties in writing of the date and time of the date-fix appointment.¹⁵⁹
2. At the date-fix appointment, the parties usually attend by an intermediary (an advocate is not necessarily required) on the relevant Judicial Secretary who, having consulted the court's diary, will attempt to coordinate with counsel to fix a date for a hearing of the summons.
3. Where the date proposed to be fixed by the Judicial Secretary is unacceptable to a party, the date-fix appointment can be renewed before a judge at a hearing in chambers.¹⁶⁰
4. When a date has been fixed for the hearing of the summons, the application is required to serve the summons on all other parties summonsed in the usual way.¹⁶¹ Subject to contrary provision elsewhere in the RCR,¹⁶² or an order permitting the abridgement of

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¹⁵⁶ Including for these purposes the Deputy Bailiff or any of the Commissioners (see the Royal Court (Jersey) Law 1948, Art 12 and the Deputy Bailiff (Appointment & Functions) (Jersey) Law 1958, Art 4).

¹⁵⁷ If the Royal Court is required to sit, as it not infrequently does, in the Superior Number this can have a dramatic impact on the Court's capacity (remembering that the Royal Court exercises a universal jurisdiction to hear criminal, public, family as well as civil law matters). Further, even allowing for the fact that the Court of Appeal does not sit permanently, when it does sit, it does impact on the Court's physical capacity. The Royal Court House contains only 3 permanent courtrooms, with a fourth only available when it is not in use as the States' Assembly chamber. It is not without precedent in the modern era for the Royal Court to sit outside the Royal Court House where the physical capacity available within the Victorian building is insufficient for the Court's requirements.

¹⁵⁸ RC PD 05/10. There is no equivalent practice direction pertaining to the procedure for a date-fix appointment before the Bailiff's Judicial Secretary, however, the procedure is the same.

¹⁵⁹ 4 clear days in the case of a date-fix before the Bailiff's Judicial Secretary.

¹⁶⁰ This is known as a 'contested date-fix' and is generally only necessary in cases of urgency or if it is not otherwise possible to fix a date by consent. A hearing date fixed by agreement before the Judicial Secretary cannot usually be vacated by a party unilaterally applying to renew the date-fix appointment before the judge. A party is expected to elect at the appointment either to accept the date fixed by agreement or to renew it before the judge. If a party subsequently becomes unhappy with the date fixed by agreement, the appropriate procedure is, in the absence of consent, to summons the other parties to a hearing to vacate the fixed date and fix a new one. That summons must go through its own date-fix procedure.

¹⁶¹ See RCR 2004, r 5/4 as to the circumstances in which personal service of a summons is required. In all other cases, service may be effected by ordinary service.

¹⁶² eg an applicant for the hearing of a summons for directions must give at least 2 clear days' notice between service of the summons and the hearing; for hearings before the Royal Court, it is at least 4 clear days, for the hearing of a summons for summary judgment or strike out application it is at least 10 clear days.

time, the applicant must give a set number of clear days' notice between service of the summons and the hearing to which it relates. That is at least two clear days for hearings before the Master and four clear days for hearings before the Royal Court.¹⁶³

iii. Abridgements of Time

- 1-54 If the party issuing the summons wishes to truncate the time he is required to give the other parties for either the date-fix appointment and/or service of the summons before the hearing, he must make a supporting application by letter to the Bailiff's or Master's Secretary (as the case may be) setting out the case for urgency alongside the draft summons, copied to the other parties.¹⁶⁴ That letter usually accompanies the summons and must set out the reasons why an abridgement of time should be given. The letter must be copied to the other parties to the summons to give them opportunity to object to the abridgement of time. If a party wishes to object to the request for an abridgment of time he must notify the appropriate Judicial Secretary forthwith upon receipt of the applicant's letter, failing which the application will be considered. Where there is an objection, the objecting party is usually given opportunity to attend, to make submissions in this regard unless the Court considers that the nature of the particular application for abridgement does not require such an opportunity to be given. The parties are to give notice and make arrangements between themselves to attend and make their representations. The time and date of the hearing to consider such representations will be fixed by the Bailiff or the Master having regard to the urgency of the matter and to the availability of a judge. The parties are expected to make themselves available to attend when directed, however short the notice. If a party fails to attend, the judge will proceed on the determination of the application for abridgment in the absence of such party. The Bailiff or Master will determine the application for an abridgment of time and the parties are notified as to the time and date on which they are required to attend for the date-fix appointment and/or of the truncated period between service of the summons and the hearing.

D. Commencing Proceedings Using the Wrong Form of Originating Process

- 1-55 Non-compliance with the rules, including commencement by way of the wrong form of originating process (notwithstanding the Royal Court Rules do not exhaustively state how proceedings are to be commenced) does not render the proceedings void unless the court so directs although proceedings may be set aside, amended or otherwise dealt with as the Court thinks fit under RCR 10/6.¹⁶⁵ Were a plaintiff, for example, to commence an action

¹⁶³ eg an applicant for the hearing of a summons for directions must give at least 2 clear days' notice between service of the summons and the hearing; for hearings before the Royal Court, it is at least 4 clear days, for the hearing of a summons for an interim payment or summary judgment it is at least 10 clear days; see RCR 2004, rr 8/1(4) and 7/1(5) respectively.

¹⁶⁴ RC PD 05/23. Assumes the other parties to the summons do not consent to the abridgment of time, where there is consent, no formal abridgment application is required.

¹⁶⁵ RCR 2004; r 10/7.

for breach of trust by way of Representation rather than by way of Order of Justice, the more liberal approach to pleading matters in Representations may lead to the action being struck out for pleading insufficient facts to make out a cause of action or prompt the court to make an order for further or better particulars.

E. Pre-Action Conduct and Pre-Action Disclosure

Jersey's civil procedure rules do not provide a formal mechanism for pre-action disclosure in trust litigation outside the *Norwich Pharmacal/Bankers Trust* jurisdiction.¹⁶⁶ Neither do the Royal Court Rules mandate the parties to attempt compliance with any form of formal pre-action protocol with a view to settling their dispute. While no formal procedure exists, the failure to engage in at least an attempt at pre-action settlement is likely to impact on the Court's general discretion as to costs at the close of proceedings.¹⁶⁷ In practice, pre-action conduct is increasingly an area in which Jersey practitioners look to England as a source of good practice, irrespective that the Royal Court Rules 2004 contain no formal requirement to that effect. Service of proceedings should usually be preceded by a letter before action.¹⁶⁸

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F. Service of Process

Jersey has complex rules concerning the service of court process by which proceedings are commenced. A person is not a party to proceedings until properly served.¹⁶⁹ Part 5 of the Royal Court Rules 2004 is concerned with service of process within the jurisdiction by way of summons requiring a defendant or party cited in an Order of Justice to appear before the Royal Court. Part 5, other than Rules 5/10,¹⁷⁰ 5/15,¹⁷¹ 5/16¹⁷² and 5/17¹⁷³ apply to all summonses whether they are served within or outside the jurisdiction. The substantive law and procedure as to service outside the jurisdiction is dealt with as a discrete topic in Chapter 2.¹⁷⁴ The service of originating process has the effect of commencing an action as at that moment of service. The party served is thereby convened as a party to the proceedings and must

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¹⁶⁶ The Law Reform (Disclosure and Conduct before Action) (Jersey) Law 1999 applies only to claims in respect of damages for personal injuries or death. As an action by way of an Order of Justice is required to commence an application for discovery of documents under the *Norwich Pharmacal* jurisdiction, it is strictly a misnomer to describe the process as one of pre-action discovery.

¹⁶⁷ *Cole v States Police (Chief Officer)* [2008] JLR N [47]; *Dalemont Ltd v Senatorov* [2013 (2) JLR N [35]]; *Pirrwigz v AI Airports Intl Ltd* [2013 (1) JLR N [10]]; *Jersey Sports Stadium Ltd v Barclays Private Clients Intl Ltd* [2013 (1) JLR 190].

¹⁶⁸ See Civil Procedure Rules 1998, Pre-Action Protocols, Practice Direction—Pre-Action Conduct, Annex A, Guidance on pre-action procedure where no pre-action protocol or other formal pre-action procedure applies.

¹⁶⁹ *Davies & Christin v Riley* 1975 JJ 443; *Anagram v Mayo* [1994] JLR 181].

¹⁷⁰ Substituted service.

¹⁷¹ Summons for appearance before other divisions of the Royal Court.

¹⁷² Grounds for declaring summons invalid.

¹⁷³ Judgment by default.

¹⁷⁴ Service of foreign process within Jersey and the service of Jersey process and documents outside the jurisdiction are the subject of a special statutory regime, the Service of Process and Taking of Evidence (Jersey) Law 1960 and the Service of Process Rules 1994, pts 2 and 4 respectively. See Ch 2 para 2-32.

attend the Court on the date to which he is summoned either in person or through an advocate, in default of which judgment may be entered against him. Prescription is suspended upon service of proceedings.¹⁷⁵ However, suspension of prescription ceases, and time again begins to run again against the plaintiff, where proceedings are not tabled and are deemed discontinued.¹⁷⁶ Service may be effected in one of three ways: ordinary service, personal service or substituted service. There is no alignment between the three methods of service and the three forms of originating process.

i. Ordinary Service

1-58 Rule 5/6 RCR 2004, which governs ordinary service within the jurisdiction, is lifted almost word for word from the former RSC Ord 65, r 5. Ordinary service is the method of service appropriate for any document in any cause or matter unless any enactment, rule or court or order otherwise expressly provides.¹⁷⁷ When ordinary service is the permitted method of service for a document, service may alternatively be effected by personal service.¹⁷⁸ In practice, ordinary service is limited to commencement of actions by simple summons (which are largely outside the scope of this text) and service of interlocutory summonses. Rule 5/6(1) provides the manner in which ordinary service may be effected, either:

1. by leaving it at the proper address of the person to be served;
2. by post;¹⁷⁹
3. by fax; or
4. in such other manner as the Court may direct.

1-59 Service is effected if one of the methods of ordinary service can be shown to have been carried out or the document can be shown to have reached the person to be served, for example if the person appears at court to answer a summons to witness confirmation of an Order of Justice. A document will not have been served by post if it is returned undelivered despite being properly addressed, prepaid and posted to the proper address.¹⁸⁰ The Royal Court will not entertain an application for judgment in default unless the Court is satisfied that ‘the summons was validly served in due time’ at which point the party seeking judgment should make disclosure of all relevant facts so as to ensure the Court is not misled.¹⁸¹

a. Proper Address

1-60 In a somewhat circular definition, an address is a person’s ‘proper address’, if that person has given that address for service.¹⁸² A plaintiff must himself provide a proper address for

¹⁷⁵ RCR 2004, r 6/4(1).

¹⁷⁶ *ibid*, r 6/4(2).

¹⁷⁷ *ibid*, r 5/2(1).

¹⁷⁸ *ibid*, r 5/2(2).

¹⁷⁹ Interpretation (Jersey) Law 1958, Art 7 provides that unless the contrary intention appears, service by post shall be deemed to be effected by properly addressing, prepaying and posting a letter containing a document. Jersey’s postal service does not operate a delivery service based upon a class of postage. This simplifies the process of calculating the date of deemed service of a document.

¹⁸⁰ *Parkes v Vrioni* [1999 JLR N-5] decided under the Matrimonial Causes(General) (Jersey) Rules 1979, registered letter found to have been received by person but sent back unopened.

¹⁸¹ RCR 2004, r 5/17.

¹⁸² *ibid*, r 5/6(2).

service or its claim may be struck out.¹⁸³ A defendant must also provide a proper address for service if he wishes to be permitted to defend an action.¹⁸⁴ If the Court is satisfied a party will not receive notice of any documents sent to or left at that address, the defendant's Answer may be struck out.¹⁸⁵ If there is no address for service, the proper address in the case of an individual is that person's usual or last known address.¹⁸⁶ It is the authors' view that this rule is not to be used by plaintiff, who knows or suspects a party has left Jersey to live abroad, to effect service at the last known address for the defendant in Jersey. It is more appropriate, in those circumstances, to seek leave to serve out of the jurisdiction and propose substituted service abroad. In ordering substituted service on a person out of the jurisdiction, the manner of service ordered by the court may be by substitution effected within the jurisdiction.¹⁸⁷ Under RSC Ord 65, r 5 'address' included both a domestic and a business address and the words 'usual or last known address' should be construed disjunctively so that service may be affected at either place.¹⁸⁸ Rule 5/6(2)(c) provides that in the case of individuals suing or being sued in the name of a firm, the proper address for service is the principal or last known place of business of a firm in Jersey. The 'principal place of business' is where the general superintendence and management of the business is carried out, ie where central management and control actually abides.¹⁸⁹

A person must be ordinarily served at their proper address unless that person has no address for service, in which case the proper address is as deemed by RCR 5/6(2)(a)–(d), being:

1-61

1. in any case, the business address of the advocate or solicitor (if any) who has undertaken in writing to accept service on behalf of that person in the proceedings in connection with which service of the document in question is to be effected;¹⁹⁰
 2. in the case of an individual, that person's usual or last known address;¹⁹¹
 3. in the case of individuals suing or being sued in the name of a firm, the principal or last known place of business of the firm in Jersey; or
 4. in the case of a body corporate, the registered or principal office of the body.
- b. RCR 5/6(1)(a)—‘Leaving it at the Proper Address’

There is English authority on RSC Ord 65, r 5 to the effect that service is good if a document is left with a person resident at the proper address or within or through a letter-box

1-62

¹⁸³ *ibid*, r 4/1.

¹⁸⁴ *ibid*, r 6/6(1)–(2). If the defendant fails to give an address for service in Jersey, but has at any time been legally represented in relation to the proceedings, the address for service shall be deemed to be the address of the defendant's last advocate.

¹⁸⁵ *ibid*, rr 6/6(1) and 6/6(5).

¹⁸⁶ *ibid*, r 5/6(2)(b).

¹⁸⁷ *Western, etc, Building Society v Rucklidge* [1905] 2 ChD 472.

¹⁸⁸ There is no Jersey authority to support this proposition although it was the acceptable practice under RSC Ord 65; see *Berry v Farrow* [1914] 1 KB 632.

¹⁸⁹ *Rumasa SA v W & H Trademarks (Jersey) Ltd* [1985–86 JLR 308]; cf *Davies v British Geon Ltd* [1957] QB 1, [1956] 3 All ER 389 (CA).

¹⁹⁰ RCR 2004, r 6/6(2).

¹⁹¹ Note there is no requirement that the defendant has to still be living at that address at the date the summons is deemed to be served.

at that address. Service is not good if the proper address is a block of flats or offices and the document is left with a concierge, or similar individual, and not at the individual flat or office. The emphasis in the leading English authority of the time (that may not be followed in Jersey) was to the effect that the proceedings must be brought to the attention of the defendant and that mere delivery at the proper address was insufficient.¹⁹²

c. RCR 5/6(1)(b)—‘Post’

- 1-63** Service by post includes ordinary, registered and recorded delivery post. Within the island, Jersey’s postal service does not operate a delivery service based upon a class of postage. This simplifies the process of calculating the date of deemed service of a document.¹⁹³ It may be undesirable to require the party to be served to sign for the document as this will permit the party to be served an opportunity to refuse delivery. As to the deemed dates of service by post see Table 1.1. There is no collection or delivery of letters on public holidays and Sundays. There is a rebuttable presumption that service has been effected if proof is given that a letter containing the document has been properly addressed, prepaid and posted when the matter is tabled.¹⁹⁴ The presumption of service by post is rebuttable and will yield if there is proof to the contrary.¹⁹⁵ Note also that judgment in default cannot be entered if the Court is not satisfied the summons was both validly served and in due time.¹⁹⁶ Service is deemed to be effected when a document is served in accordance with the rules and if a defendant is temporarily away from his address, for example on holiday, and returns to find that judgment has been found against him, he is not entitled, simply by reason of his temporary absence, to have the judgment set aside.¹⁹⁷ A judgment in default based on the assumption that a document has been served because it has been properly addressed, prepaid and posted to the proper address and not returned undelivered is regular, and the judgment can only be set aside upon a reasonably arguable defence on the merits.¹⁹⁸

d. RCR 5/6(1)(c)—‘by Fax’

- 1-64** Service by fax is now rarely used since electronic communications became routinely made by email. Ordinary service may be effected by fax in accordance with rule 5/6(4) RCR 2004, which provides for service by fax between parties acting by a Jersey solicitor or advocate and the party served has indicated in writing to the advocate or solicitor serving the document willingness to accept service by fax at a specified fax number and the document is

¹⁹² *Forward v West Sussex County Council* [1995] 1 WLR 1469.

¹⁹³ As to which see below.

¹⁹⁴ Interpretation (Jersey) Law 1954, Art 7.

¹⁹⁵ RCR 2004, r 5/6(3).

¹⁹⁶ *ibid*, r 5/17. Note that that the number of ‘clear days’ required between the service of a summons and the date on which the summonsed party is to appear to answer it are not standardised across the Royal Court Rules. Except where provision is otherwise made, a summons for appearance before any division of the Court must be served at least 4 clear days before the day on which the defendant is required to appear; See RCR 2004, r 5/15.

¹⁹⁷ *Cooper v Scott-Farnell* [1969] 1 WLR 120, although the Court may consider the strength of the defence and the reasons for default in an application to set aside default judgment; *Berry Trade Ltd v Moussavi* [2003 JLR N [51]]; *Randalls Properties Ltd v Rozel Bay Hotel Ltd* [2005 JLR N [33]].

¹⁹⁸ *Strata Surveys Ltd v Flaherty* [1994 JLR 69]; *Randalls Properties Ltd v Rozel Bay Hotel Ltd* (n 197).

transmitted to that number. It follows that where one party is not legally represented, service by fax may not be used. The inscription of a fax number on the writing paper of an advocate or solicitor is sufficient to indicate willingness to accept service by fax unless that advocate or solicitor states otherwise in writing.¹⁹⁹ Service is effected by transmission of the document to the business address of such advocate or solicitor at the number he has specified²⁰⁰ and by sending a copy of the document to that advocate or solicitor by one of the other prescribed methods of ordinary service as soon as is practicable, failing which the document is deemed not to have been served.²⁰¹ By rule 5/6(5), where a fax is transmitted on a business day before 5 pm, it is, unless the contrary is shown, deemed to be served on that day and otherwise is served on the next business day. It is therefore important that a copy of the transmission confirmation receipt is retained and the time on a fax machine is accurate. A party seeking to preclude service by fax, must give proper notice to the party from which the ability to serve by fax is being withdrawn.²⁰²

e. Service by Email

1-65

The RCR do not formally recognise the ability of parties to effect routine ordinary service of any document, including originating process, by email. However, service of correspondence and other documents not mandated to be served personally (such as summonses) are in practice routinely served by email, with a hard copy by post or by hand. This is so despite there being no Jersey equivalent of CPR Part 6 PD 6A.4.1(2) by which an email address set out on the writing paper of the solicitor acting for the party to be served or an email address set out on a pleading or a response to a claim filed with the Court may be taken as a sufficient written indication that that party accepts service by email. Under rule 5/6(1)d RCR 2004, the Court retains power to order that ordinary service of a document may be effected in such other manner as it may direct. It is not uncommon for the court to authorise substituted service by email under rule 5/10 RCR 2004 where an email address is available and the Court is satisfied that the email address belongs to the party to be served giving rise to a reasonable inference that they will receive what is sent. Parties are also free to reach their own agreement as to service even if outside the Royal Court Rules 2004 which could encompass an agreement to accept service by email.²⁰³

f. Service on Corporate Bodies

1-66

Aside from ordinary service under rule 5/6 RCR 2004, a document may be served on any company incorporated under the Companies (Jersey) Law 1991 or its predecessor laws by leaving it at or sending it by post to the registered office of the company.²⁰⁴ A Jersey company's registered office can be obtained from the publicly accessible Registry maintained

¹⁹⁹ RCR 2004, r 5/6(4)(c).

²⁰⁰ ibid, r.5/6 (4)(b) and (c).

²⁰¹ ibid, r.5/6(4)(d).

²⁰² *Mayes v Gayton International* [1994] CLY 3760.

²⁰³ *Binet v Foot* [2008 JLR 172] at [15]: 'The Rules are there to serve the administration of justice, not to act as an impediment'; see also *Kenneth Allison Ltd v AE Limehouse & Co* [1992] 2 AC105.

²⁰⁴ Companies (Jersey) Law 1991, Art 72; RCR 2004, r 5/6(2)(h).

by the Jersey Financial Services Commission.²⁰⁵ Where a company was incorporated under any of the Companies (Jersey) Laws 1861 to 1968 (now repealed) and has no registered office to which proceedings may be left or posted to then service may be effected by post in any of the applicable ways listed in Article 72(c) of the 1991 Law:²⁰⁶

1. in the case of a public company which is in compliance with the requirements of Article 83 of the Companies (Jersey) Law 1991 to any person who is shown on the register kept in accordance with that article as a director or secretary of the company at the address entered in that register;
2. in any other case to any person shown as a member of the company in the register of members or in the latest annual return delivered to the registrar under Article 71 of the Companies (Jersey) Law 1991 at the person's address entered in that register or, as the case may be, in that return; and
3. where no annual return has been delivered to the registrar in compliance with Article 71 of the Companies (Jersey) Law 1991 to any person whose name appears as a subscriber in the company's memorandum at the person's address shown in the memorandum.

1-67 Article 83 Companies (Jersey) Law 1991 requires a company to keep at its registered office a register of its directors and secretary. Notwithstanding that recourse to this provision is only necessary where a public company does not have a registered office at which the register can be inspected, the legislation provides that the register shall be available to inspection by any person on payment of a fee not exceeding a published maximum. A copy of a company's register of members can only be obtained on payment of a fee not exceeding the published maximum and in the case of a public company accompanied by a declaration under Article 46 of the 1991 Law. The company is obliged to comply within 10 days after the receipt of the payment and the declaration by making the copy of the register of members available at the place where the register is kept, for collection by that person during business hours. A Jersey company's annual returns are available from the JFSC Registry upon payment of a small fee. A Jersey company's memorandum of association is publicly available from the JFSC Registry for the payment of a small fee. It should be noted that these additional statutory provisions are permissive and not mandatory.²⁰⁷

g. Service on a Company Registered under a Foreign Law

1-68 Where a plaintiff seeks to serve process on a company within the jurisdiction, that is not incorporated under the law of Jersey, and it cannot be ordinarily served under rule 5/6 RCR 2004 or by means of personal service within the jurisdiction,²⁰⁸ the plaintiff must seek the Court's permission to serve proceedings out of the jurisdiction.²⁰⁹ A plaintiff may also seek

²⁰⁵ www.jerseyfsc.org/registry/.

²⁰⁶ The number of Jersey companies that have no registered office is extremely small. All JFSC Regulated Trust Company Businesses must have a registered address in Jersey.

²⁰⁷ *In Barra Hotel Ltd v AG* [2000] JLR 370].

²⁰⁸ eg where there is no Director, Manager, Secretary or other similar officer thereof, or the corporation does not have a registered office in the island. See para 1-78 below.

²⁰⁹ As to which, see Ch 2.

leave to serve an overseas corporate principal through a Jersey resident agent in the circumstances set out in rule 5/11 RCR 2004.

h. Service on a Party's Advocate or Solicitor

The address for service of a defendant who fails to provide an address for service, but has at any time been legally represented in the proceedings, will be deemed to be the address of his last advocate or solicitor on the record.²¹⁰ Rule 6/6(2) is not satisfied merely by his advocate's putting in an Answer, since the terms of rule 5/6(2)(a) RCR 2004 make it clear that an advocate or solicitor willing to accept service on behalf of a defendant without an address for service should give an undertaking in writing to that effect. An Answer lacking such an undertaking is incomplete and may be struck out either at the discretion of the Court in the exercise of its inherent jurisdiction or under rule 6/13 RCR 2004.²¹¹ In practice, a defendant's advocate will usually insert at the foot of the defendant's Answer a section headed 'Defendant's address for service' followed by the address of the advocate or solicitor. A party may change his advocate or solicitor at any stage of proceedings but until notice of any such change is filed by the new advocate or solicitor and copies of the notice are served on every other party to the proceedings (not being a party in default), the former advocate or solicitor shall be taken to be the advocate or solicitor of the party.²¹² Accordingly, service of a document on the advocate or solicitor will be good service on the party until notice is served on every other party to the proceedings. Rule 20/4 applies not only to a party who changes his advocate, but also to a party who withdraws instructions from his advocate without instructing another. Service is effective on a solicitor or advocate who is on the record for a party, even where that solicitor or advocate is no longer instructed by the party (because he cannot be removed from the record until the new advocate or solicitor files and serves on all parties a notice of acting).²¹³ The advocate on the record for a party remains the party's advocate in substance, not merely in form, even if in reality he ceases to act for the party, until notice is given of his replacement and he continues to have obligations and liabilities in that regard.²¹⁴

1-69

i. Deemed Dates for Ordinary Service of Documents

Jersey's process rules provide for a deemed date of service of documents depending on the form of ordinary service used. Public holidays must be discounted for the purposes of day counting. The working presumption of a deemed date service will also yield to positive evidence that service was not in fact effected on the deemed date.

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²¹⁰ RCR 2004, r 6/6(2).

²¹¹ *In re Goddard Trustees* [1990 JLR N-2].

²¹² RCR 2004, r 20/4.

²¹³ *Cridland (t/a Classic Trading Co) v Declercq* [1992 JLR 34].

²¹⁴ *Hirschfield v Philip Sinel & Co* [1999 JLR 55].

Table 1.1: Deemed dates and times for the ordinary service of documents

Method of Service	Deemed date of service	Example
Posted to an address in Jersey	Second day after the day on which it was posted, except days on which there is no collection or delivery of letters.	Posted on Monday 1 October. Deemed arrival on Wednesday 3 October. Posted on Thursday 24 December. Deemed arrival will be on Tuesday 29 December.
Faxed before 5pm	Deemed served on the same day.	Fax transmitted at 1.30pm on Monday 1 October. Deemed served on 1 October.
Faxed after 5pm	Deemed served on the next business day.	Fax transmitted at 5.03pm on Monday 20 December. Deemed served on Tuesday 21 December Fax transmitted at 5.01pm on Friday 24 December. Deemed served on Wednesday 29 December

j. Public Holidays

- 1-71 It is only possible to be served by fax on a business day.²¹⁵ It is not possible to be served by fax on either a Saturday or a Sunday. The following are statutory public holidays in Jersey²¹⁶ and therefore not ‘business days’: 1 January, Good Friday, Easter Monday, the first Monday in May, 9 May, the last Monday in May, the last Monday in August, 25 December, 26 December. Public holidays falling on a weekend, except for the annual Liberation Day celebration on 9 May, falling on a Saturday or Sunday, are substituted for the next business day, eg if Christmas Day and Boxing Day fall on a Saturday and Sunday respectively, the following Monday and Tuesday are public holidays and as such are not deemed to be business days for the purposes of service.²¹⁷
- 1-72 A document posted on a public holiday will not be deemed to have been collected until the next collection day. Likewise a document that would otherwise be deemed to be delivered on a public holiday by virtue of rule 5/6(3) RCR 2004 will not be deemed to have been delivered until the next delivery day. Rule 1/4 provides an automatic extension of time if the time prescribed by the rules for doing any act before the Greffier, or at the offices of the Viscount or the Greffier, expires on a day on which those offices are or are required (by virtue of it being a public holiday) to be closed and, by reason thereof, cannot be done on that day. By virtue of this rule, the act will be deemed to have been done on time if done on the next day on which those offices are open. This rule is significant in respect of tabling an action if the Thursday prior to the usual Friday session of the Samedi division is a public holiday. The rule also has general effect if the deadline for doing any act before the Greffier

²¹⁵ Monday, Tuesday, Wednesday, Thursday and Friday are business days (subject to Jersey’s public holiday legislation which can make what would otherwise be a weekday into a public holiday and therefore not a business day).

²¹⁶ Public Holidays & Bank Holidays (Jersey) Act 2010.

²¹⁷ *ibid.*

or at the Viscount's Department or Greffe expires on a Sunday or public holiday by virtue of any judgment, order or direction. This rule only applies if an act cannot be done *by reason of* the Court offices being closed. The rule reflects the customary law position: a period of prescription which expires on a day on which the offices are closed and the Viscount accordingly is unable to serve the same under rule 5/5 RCR 2004, is likely to amount to an *empêchement de fait* and time is extended to the next day on which the offices are open and proceedings capable of being served.

k. Proving Ordinary Service

Ordinary service is usually proved by an affidavit of service compliant with rule 5/13 RCR 2004. The *billet* that is filed when tabling the action must set out the contents of the record of service.

1-73

ii. Personal Service

Virtually all trust disputes are commenced by personal service of the Order of Justice or a Representation, which may be effected on an individual or a corporation. Where service of any document is mandated to be by way of personal service pursuant to rule 5/4 RCR 2004 within the jurisdiction, then service is effected through the Viscount. Where service is effected outside the jurisdiction, it is incumbent upon the party serving the document to make their own arrangements for personal service in the territory in which the party is to be served and have those arrangements approved by the Royal Court as part of any application to serve out.²¹⁸

1-74

a. Personal Service on an Individual

Personal service of an Order of Justice is effected by the Viscount leaving a copy of the Order of Justice and the summons to witness the confirmation of the Order of Justice at a specific date and time, with the person to be served.²¹⁹ An individual personally served with a copy of an Order of Justice is also permitted to be shown a copy of the original at the same time as they receive their copy. Personal service of any other document is effected by physically leaving it with the person to be served.

1-75

b. Personal Service on a Corporation

Personal service on a corporation may be effected by serving it in accordance with rule 5/7, above, on any director, manager, company secretary or other similar officer of the corporation, or by leaving it at or delivering it to the registered office of the corporation.²²⁰

1-76

²¹⁸ As to the principles and procedure for service out of the jurisdiction, see Ch 2.

²¹⁹ RCR 2004, r 5/7.

²²⁰ *ibid*, r 5/8; Companies (Jersey) Law 1991, Art 72.

c. When Personal Service is Required

1-77 Personal service is mandatory in the circumstances set out in rule 5/4 RCR 2004; that is to say the following summonses for appearance before the Royal Court must be served personally if they are:

1. to witness the confirmation of an Order of Justice;²²¹
2. for the payment of the amount of a judgment on pain of imprisonment (*à peine de prison*);
3. to appear before the Héritage division;
4. to reply to an action in criminal or quasi-criminal proceedings brought by the Attorney General;
5. an application for the grant of leave to enforce a judgement or order against a party represented by another in representative proceedings;²²² or
6. to summons a witness to give evidence before the Royal Court.²²³

d. Effecting Personal Service

1-78 Where personal service is required by rule 5/4 RCR 2004, service must be effected by the Viscount (in practice usually a Viscount Substitute rather than the Viscount herself) rather than by personal service on the recipient by the plaintiff or his legal representatives directly. Service through the Viscount is also required:

1. in an action resulting from the raising of the *Clameur de Haro*;
2. in the case of a summons:
 - i. to witness the confirmation of an *arrêt*,
 - ii. to appear in court in pursuance of an Order of Justice regarding the appointment of an administrator or a guardian,
3. to reply to an appeal the determination of which, or to a reference the determination of which, is within the competence of the Court;²²⁴
4. to serve any notice or other document for the purposes of Part 2 of the Court of Appeal (Jersey) Law 1961.²²⁵

1-79 Where the document or process is not required to be personally served by the Viscount but the plaintiff wishes to serve personally anyway, service may still be effected on a voluntary basis through the Viscount.

e. Personal Service out of the Jurisdiction

1-80 The Viscount will not personally serve proceedings outside the territorial jurisdiction of the Royal Court. Where personal service is required to be effected on a defendant outside

²²¹ This is the summons that is served, alongside the Order of Justice, by the Viscount at the commencement of proceedings, see para 1-31 above.

²²² RCR 2004, r 4/3(4); as to representative proceedings, see RCR 2004, r 4/3.

²²³ *ibid*, r 6/20(8).

²²⁴ *ibid*, r 5/5 RCR.

²²⁵ Court of Appeal (Civil) (Jersey) Rules 1964, r 17.

Jersey, it falls to the plaintiff to have made arrangements and obtained the leave of the court to serve the defendant by a particular method (usually via a local firm of lawyers or process servers) in the foreign jurisdiction.²²⁶ Where leave is given to serve a summons out of the jurisdiction and efforts to personally serve proceedings abroad have been without success the plaintiff should make a written application, supported by an affidavit setting out the circumstances in which service as ordered has failed, to the Master for an order for substituted service.²²⁷ This process can be truncated, and an order for substituted service be obtained in advance of it becoming apparent that personal service will be impractical.²²⁸

f. Proving Personal Service

Personal service by the Viscount within the jurisdiction is proven by a record of service signed by the Viscount Substitute. The Viscount's record of service, signed by the officer who serves the process, should state the means, place and date of service and state the means of knowledge of the identity of the person served.²²⁹ Where personal service is effected by the plaintiff (ie other than in the cases set out in rule 5/4 RCR 2004), the serving party will be responsible for indorsing the original documents with the appropriate wording as proof of service or may swear an affidavit of service stating the place, date time and means of service and stating the means of knowledge of the identity of the person served. Proof of service, alongside a copy of the served summons, *billet* and Order of Justice must be lodged with the Judicial Greffe when the action is tabled.

1-81

iii. Substituted Service

Rule 5/10 provides that in cases where personal service is required but on an ex parte application it appears to the Court to be impractical to effect personal service (or for any other reason the Court considers it appropriate) it can order substituted service. Substituted service may be ordered of 'any document' and can therefore extend even to orders enforceable by committal. If substituted service is effected it is equivalent to personal service and judgment thereon will be regular even if in fact the defendant has no actual knowledge of the proceedings. A defence on the merits would be necessary so as to set aside any judgment.²³⁰

1-82

An application for substituted service is usually made in writing to the Judicial Greffier and must be accompanied by an affidavit that evidences why personal service is impractical or that substituted service is otherwise practical.²³¹ As non-contentious business, the Greffier has jurisdiction to order substituted service.²³² An order for substituted service is not to be sought merely to prevent an action being prescribed and the Court has no power to extend a prescription period if personal service would result in the claim being time barred.²³³

1-83

²²⁶ Service of Process Rules 1994, rr 10 and 6.

²²⁷ RCR 2004, r 5/10.

²²⁸ Service of Process Rules 1994, r 11(e).

²²⁹ See the requirements in RCR 2004, r 5/13.

²³⁰ *Watt v Barnett* (1878) 3Q BD 363 at 366; *Strata Surveys Ltd v Flaherty* [1994 JLR 69].

²³¹ RCR 2004, r 5/10.

²³² Definition of 'Court' in RCR 2004, r 5/10 includes the Greffier; see RCR, Sch 1.

²³³ *Harman v Higgins* [1999 JLR N-5]; *Jackson (née Jackson) v Jackson (née Hurst)* 1966 JJ 579; *Paragon Group Ltd v Burnell* [1991] Ch 498.

The word ‘impracticable’ does not mean impossible but there must be sufficient material from which a court can conclude that reasonable efforts have been made to effect personal service and it can therefore be said that personal service is impracticable. Thus, evidence that a defendant had appeared to be away from his usual residence on one occasion before personal service was attempted is usually insufficient to satisfy the test. There must be evidence of what enquiries had been made as to where the defendant might be or when he might be back and whether he could have been served on his return.²³⁴ The approach of the English courts, in interpreting the analogous rule,²³⁵ has been that substituted service should not be ordered if the writ is not likely to reach the defendant or come to the defendant’s knowledge although it is not always essential to show that it will. An application for substituted service must be supported by an affidavit stating the facts on which the application is founded.²³⁶ The application in the first instance should be made *ex parte* on affidavit to the Greffier. Save in exceptional circumstances, the affidavit should be made by the party seeking to serve, setting out in detail the facts relied upon to support the claim that every reasonable line of enquiry has already been tried but without success. It is insufficient to lodge an affidavit simply saying in general terms that all enquiries have been made or that the petitioner or respondent knows of no means of getting in contact with the respondent or other party concerned.²³⁷ Because personal service, where it is required by rule 5/4 RCR 2004, is effected by the Viscount, the details as to what steps the Viscount took and why personal service was ineffective should be included in the affidavit supporting the application for substituted service. Where personal service has been attempted in circumstances where the Viscount was not required to serve personally (leaving it to the serving party), then the authors suggest the following steps as appropriate:²³⁸ Two calls should be made to the defendant’s residence (if known) otherwise to the defendant’s business address (again if known). If the defendant has left the address, this should be stated in the affidavit. A copy of the documents sought to be served should be left at the address in a sealed envelope, addressed to the defendant. The two calls should be made on separate weekdays at reasonable hours. The second call should be made by appointment by letter sent by ordinary post, giving not less than two clear days’ notice, enclosing a copy of the document sought to be served at the first call and offering the defendant an opportunity to make a different appointment. On keeping the appointment the serving party’s process server should seek an indication whether the defendant had received communications sent to him. The affidavit for substituted service should deal with the foregoing and state whether the letter of appointment was returned or not and with any Answer exhibited. The affidavit should also state whether the defendant is within or without the jurisdiction (or believed to be so). If there is evidence of deliberate evasion of service this should be stated and the facts supporting evasion deposed. The affidavit should also state and evidence how the proposed method of substituted service will probably come to the knowledge of the defendant. In order to assist in an appropriate order being made, the affidavit should specify the kind of substituted service sought and may provide alternatives.

²³⁴ *Araham v Perry* [2005] JRC150A.

²³⁵ RSC 1999, Ord 65, r 4.

²³⁶ *United Capital Corporation Limited v Benders & Ors* [2006] JRC 004A.

²³⁷ Practice Direction—FD05/6 r 9(8) & 9(11).

²³⁸ These steps are based upon the notes in RSC Ord 65/4/6 1997.

a. Method of Substituted Service

The usual method to effect substituted service is by letter although rule 5/10(4) RCR 2004 is very wide and service may be effected by any method the Court considers just. The Court may order service by other means either on their own or in combination with others, including service by email. Very rarely will the Court permit substituted service by advertisement and only then if there is good reason to believe the advertisement will be seen by the defendant.²³⁹

1-84

b. Orders for Substituted Service

The template for an order of the Royal Court for substituted service out of the jurisdiction is in Form 6, scheduled to the Service of Process Rules 1994.²⁴⁰ This template can be used, with appropriate modifications, for an order for substituted service within the jurisdiction. The documents in support of the application for substituted service and the order should be served alongside the documents to be served.

1-85

c. Substituted Service out of the Jurisdiction

Leave must first be obtained for service out of the jurisdiction before substituted service can be applied for.²⁴¹ An order for substituted service on a defendant's advocate within the jurisdiction does not imply leave to serve a defendant who is known to be outside the jurisdiction.²⁴² An application for substituted service out of the jurisdiction must be supported by an affidavit stating the facts on which the application is founded and the grounds on which service out is sought. Where leave is given under the Service of Process Rules 1994 to serve a summons in a foreign country whose government is willing to act as a channel for the service of process and efforts to serve a document in that country have been without effect, upon an ex parte application the Bailiff may make an order for substituted service in the form of Form 6 to the Service of Process Rules.²⁴³ This process can be truncated, and an order for substituted service obtained in advance of it becoming apparent that personal service will be impractical.²⁴⁴ Prescription of an action ceases to run on the making of the order for substituted service out of the jurisdiction.²⁴⁵ Prescription will run again if the service that is effected is invalid, the action is discontinued (including deemed discontinuance by a failure to table) or the defendant is discharged from the action.²⁴⁶

1-86

d. Proving Substituted Service

The means of proving that substituted service was effected differs depending on whether substituted service is effected inside the jurisdiction or outside (and in which case whether

1-87

²³⁹ *Cook v Dey* (1876) 2 ChD 218; *Wrays v Wray* [1901] P 132.

²⁴⁰ With appropriate modifications, this template can be used for an order for substituted service within Jersey.

²⁴¹ *Virani v Virani* [2000] JLR 203]. For the principles and procedure to obtain leave to serve out of the jurisdiction, see Ch 2.

²⁴² *Virani v Virani* (n 241).

²⁴³ Service of Process Rules 1994, r 11(d).

²⁴⁴ *ibid*, r 11(e).

²⁴⁵ *ibid*, r 16(2).

²⁴⁶ *ibid*.

via r 13 or r 11). Substituted service within the jurisdiction must be proved by a record of service in the form in Schedule 2 to the RCR 2004 and must state the person by whom, the means by which, the place at which and the day on which service was effected. In the case of a document sent by post, the record of service must state the day on which the document was posted and not the day on which the document was served.²⁴⁷ In the rare cases of substituted service by advertisement, the record of service must either set out the advertisement or include a copy; in both cases the name of the paper and date of the advertisement must be stated. Where substituted service is to be effected out of the jurisdiction, service in a Convention country under rule 13 of the Service of Process Rules 1994 is proven by transmission, through diplomatic channels, of an official certificate to the Bailiff, establishing the date and fact of service of the documents. Service in a non-Convention country under rule 11 is proven by transmission of an official certificate or declaration upon oath, transmitted through diplomatic channels by the government of the foreign state or court of the foreign state to the Bailiff. Provided that it certifies or declares the document to have been personally served, or to have been duly served upon the defendant in accordance with the law of such foreign country, or words to that effect, it shall be deemed to be sufficient proof of such service. In practice, substituted service is rarely effected in accordance with the Hague Service Convention which often suffers from delay.

G. Consequences of a Failure to Serve in an Authorised Manner

- 1-88** A defendant is not a party to proceedings until properly served.²⁴⁸ However, the court has discretion to overlook defects in service, and non-compliance with the rules does not render a proceeding void unless the Court so directs but the Court may set aside a proceeding in whole or in part as irregular, or amend or deal with it as it sees fit.²⁴⁹ The following cases provide guidance on the considerations taken into account by the Court in exercising its discretion. In *Davies & Christin v Riley*,²⁵⁰ the plaintiff was required by the rules of court to inform the defendant of the outcome of a hearing at which he was absent. The plaintiff did not do so but the Greffier did attempt to inform the defendant's advocates who had undertaken to accept service. The Court of Appeal held that the defendant may have been notified of the hearing but it was not certain and accordingly the rules had not been complied with and the order was set aside. In *Anagram v Mayo*,²⁵¹ the plaintiff served an Order of Justice containing an injunction which in terms of the order would become effective immediately on being served on the defendants' Jersey advocates. The Royal Court held that an application for service-out was required and accordingly service had not been properly effected. Despite this, the defendants sought further and better particulars of the Order of Justice. The Royal Court held that although the defendants were not properly served, they were

²⁴⁷ RCR 2004, rr 5/13 and 5/14.

²⁴⁸ *Davies & Christin v Riley* (n 169); *Anagram v Mayo* (n 169).

²⁴⁹ RCR 2004, r 10/6.

²⁵⁰ [1975] JJ 443.

²⁵¹ [1994] JLR 181].

aware of the proceedings and affected by the service in that it brought into effect interim injunctions binding on them and were therefore sufficiently made a party for the Court to exercise its jurisdiction over them. In *Virani v Virani*,²⁵² an action was effectively served out of the jurisdiction without leave and the Royal Court dismissed the action as improperly served even though it had come to the attention of the defendant. In *United Capital Corporation Ltd v Bender*,²⁵³ leave was granted to serve an Order of Justice outwith the jurisdiction and the Royal Court held that it was not served in accordance with the order. However, the defendant had received full notice of the nature and content of the claim from his advocates in Jersey and had been able to prepare detailed arguments. The Royal Court held that it has discretion under rule 10/6 RCR 2004 to treat proceedings as void, set aside wholly or in part, or amend or deal with them as it thinks fit and the defendant would be treated as having been validly served since there would be no prejudice to him. Proceedings would not generally be defeated by a mere technicality and the Court would consider the substance and justice of an individual case. In the event that an order for substituted service is made on an ex parte basis and the Court subsequently determines that the evidence supporting that application was deficient, the Court has power to rectify any error in the application for substituted service, deem service to have been effected and, if appropriate, penalise the party in default by costs under rule 10/7 RCR 2004. It may, of course, decide not to do so, declare that a party has not been validly served and require personal service.²⁵⁴

H. Timings for the Exchange of Pleadings

A defendant or respondent who wishes to defend an action placed on the pending list must, within 21 days of the date on which the action was placed on the pending list, or of the delivery of the particulars of claim, as the case may be, file an Answer to the action.²⁵⁵ Time for the filing of an Answer does not begin to run until any challenge to the jurisdiction of the Royal Court under rule 6/6 RCR 2004 has been dismissed or abandoned.²⁵⁶ The failure to file an Answer within time gives the plaintiff grounds to apply for an order for judgment in default.²⁵⁷ The plaintiff is at liberty (but not obliged to) file a reply within 21 days of the delivery of the Answer.²⁵⁸ Unless the Answer contains a counterclaim, which, if defended, will itself merit an Answer (known as a rejoinder), no subsequent pleading may be filed except by leave of the Court.²⁵⁹ If the Answer contains a counterclaim, the defendant may, within 21 days of the delivery of the reply, file a rejoinder.²⁶⁰

1-89

²⁵² [2000 JLR 203].

²⁵³ [2006 JLR 1].

²⁵⁴ eg *Araham v Perry* (n 234). See also *Ashbourne Marketing Limited v Alfred Mosca and Yankee Exports* 1999/10A (unreported)

²⁵⁵ RCR 2004, r 6/6(4).

²⁵⁶ ibid, r 6/7(7).

²⁵⁷ ibid, r 6/6(6).

²⁵⁸ ibid, r 6/6(8).

²⁵⁹ ibid, r 6/6(9).

²⁶⁰ ibid, r.6/6(10).

IV. Case Management and Directions for Trial

- 1-90** The Royal Court Rules 2004 have no equivalent of the menu of case and cost management powers found in CPR Part 3, which are instead disbursed throughout the rules and are reflective of the Court's inherent and unlimited jurisdiction to regulate proceedings before it. Neither does the Royal Court have a system to allocate proceedings to a particular track with default directions. For each matter that comes before it, the Royal Court has power to do any of the following as part of its case management powers:
1. extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired);²⁶¹
 2. adjourn or bring forward a hearing;²⁶²
 3. require a party or a party's legal representative to attend the Court;
 4. receive evidence in the form of affidavit with cross-examination being conditional on leave and placing limits on the length of oral submissions;²⁶³
 5. direct that part of any proceedings (such as a counterclaim) be dealt with as separate proceedings;²⁶⁴
 6. stay the whole or part of any proceedings or judgment either generally or until a specified date or event;²⁶⁵
 7. consolidate proceedings;²⁶⁶
 8. try two or more claims on the same occasion;
 9. direct a separate trial of any issue;
 10. decide the order in which issues are to be tried;
 11. order a further and better statement of particulars;²⁶⁷
 12. admit or exclude an issue from consideration;
 13. order security for costs against a plaintiff;²⁶⁸
 14. sanction a party for non-compliance by way of costs, strike out or dismissal;²⁶⁹
 15. dismiss or give judgment on a claim after a decision on a preliminary issue;²⁷⁰ or
 16. take any other step or make any other order for the purpose of managing the case

- 1-91** The Royal Court has formally set itself the objective of disposing of civil actions in an efficient, timely and cost-effective manner.²⁷¹ In furtherance of these objectives, the Bailiff has

²⁶¹ *ibid*, r 1/5; for the procedure for an abridgement of time see PD RC 05/23.

²⁶² *ibid*, r 10/5.

²⁶³ *Sinel v Goldstein* [2003] JLR N-20].

²⁶⁴ RCR 2004, r 6/9(2) (relating to counterclaims specifically) and RCR 2004, r 6/11(2) (de-consolidation of proceedings).

²⁶⁵ Under its inherent jurisdiction. Note the power under RCR 2004, r 6/28 (stay to allow for the settlement of proceedings).

²⁶⁶ *ibid*, r 6/11.

²⁶⁷ *ibid*, r 6/15.

²⁶⁸ *ibid*, r 4/1(4).

²⁶⁹ *ibid*, r 6/26(12).

²⁷⁰ *ibid*, rr 6/30, 7/5, 7/8.

²⁷¹ PD RC 05/31; see also *In re Esteem Settlement* [2000] JLR N-41]; *Sinel v Goldstein* (n 263); and *Ybanez v BBVA Privanza Bank (Jersey) Ltd* [2007] JLR N-45].

indicated the wish of the Royal Court to ensure that existing actions progress as quickly as is reasonably practicable. All parties and their advisors should seek to have actions disposed of within 12 months of their commencement wherever possible. The Judicial Greffier has been given instruction to implement appropriate means to achieve these objectives. Rule 6/25(2) RCR 2004 provides that if three years after an action has been set down it has not been completed the Court may give notice of its intention to dismiss that action. Rule 6/26(13) allows the Court to consider dismissing an action if a summons for directions has not been issued within two months of the close of pleadings. The Deputy Judicial Greffier and the Master have initiated a system whereby, once an action that comes before the Royal Court has been placed on the pending list, it will be reviewed after six months to ensure that appropriate progress has been made. If that is not the case then the Court will, of its own volition, institute such appropriate case management steps as it considers necessary. This could include the use of its powers under rule 6/26(13) RCR 2004 in respect of any action which has become dormant.

A. Standard Procedure for Directions

The procedure for applying for directions as to how an action on the pending list (ie an action that has not had judgment in default entered or that has not been struck out or the subject of an application for summary judgment) should proceed is set out in rule 6/26 RCR 2004. While this procedure is not expressly said to apply to actions commenced by way of Representation, it, and the model directions to which it relates can be applied *mutatis mutandis* to proceedings by Representation as much as proceedings commenced by Order of Justice. The procedure is as follows:

1-92

1. Within one month after the close of pleadings, the plaintiff must issue a summons for directions to be heard at least 14 days, and no more than 42 days, thereafter in the form (or substantially in the form) prescribed in RCR Schedule 3.²⁷² This procedure exists with a view to providing an occasion for the Court to consider the preparations for trial so that all matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with; and such directions may be given as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof.
2. If the plaintiff fails to issue a summons for directions, the defendant or any other party to the action may do so or apply for an order to dismiss the action.²⁷³ However, on an application by a party to dismiss the action the Court may either dismiss the action on such terms as it considers just or deal with the application as if it were a summons for directions.²⁷⁴ In deciding whether to dismiss the Court will consider the following matters (not sequentially or disjunctively):²⁷⁵
 - i. Has the plaintiff otherwise prosecuted the action with reasonable diligence or are there examples of other significant failures to progress the claim expeditiously?

²⁷² RCR 2004, r 6/26.

²⁷³ *ibid*, r 6/26(2).

²⁷⁴ *ibid*, r 6/26(3).

²⁷⁵ *Lescroel v Le Vesconte* [2007 JLR 273]; *B v M-R* [2007 JLR N-48].

- ii. Is the plaintiff's failure to issue a summons for directions otherwise excusable?
 - iii. Is it just for the plaintiff to be allowed to continue the action?
3. Any party to whom the summons for directions is addressed must apply at the hearing of the summons for any order or directions which that party desires (and is capable of being dealt with on an interlocutory application) and must, not less than seven days before the hearing of the summons, serve on the other parties a notice specifying those orders and directions in so far as they differ from the orders and directions asked for by the summons.²⁷⁶
 4. If two months have elapsed from the time limited for filing pleadings and no summons has been issued pursuant to any of the foregoing provisions of this rule, the Court may of its own motion, after giving not less than 28 days' notice in writing to all parties to the action, order that the action be dismissed, and the Court may make such consequential order as to costs or otherwise as it thinks fit.²⁷⁷ A person who was a party to an action dismissed pursuant to paragraph (13) may apply to the Court for the action to be reinstated.²⁷⁸
 5. On the hearing of a summons for directions, the Court shall consider whether:
 - i. it is possible to deal then with all matters which must or can be considered on the hearing of the summons for directions; or
 - ii. it is expedient to adjourn the consideration of all or any of those matters.
 6. On the rare occasions, when the summons for directions first comes to be heard, the Court considers that it is possible to deal with all the said matters, it shall deal with them forthwith and shall endeavour to secure that all other matters which must or can be dealt with on interlocutory applications and have not already been dealt with are also dealt with there and then.
 7. If, as is more usual, the Court considers that it is expedient to adjourn consideration of all or any of the matters which must be considered at the directions hearing, the Court will deal forthwith with such of those matters as it considers can conveniently be dealt with and will endeavour to secure that all other matters which must or can be dealt with are dealt with at a resumed hearing of the summons for directions or by agreement between the parties.
 8. At the directions hearing, the Court will endeavour to secure that the parties make all admissions and all agreements as to the conduct of the proceedings which ought reasonably to be made by them and may record in its act any admissions or agreements so made, and any refusal to make any admission or agreement.²⁷⁹
 9. The Court may at any directions hearing require a party or that party's advocate or solicitor to give any information or produce any document. Where such information or document are not given or produced, the Court may (1) record the facts in its act with a view to such order, if any, as to costs as may be just being made at the trial; or (2) order that the whole or any part of the pleadings of the party concerned be struck

²⁷⁶ RCR 2004, r 6/26(11) provides a mechanism for a party that fails to apply for the orders it seeks in the first directions hearing, to apply at a subsequent hearing if there has been an adjournment.

²⁷⁷ *ibid*, r 6/26(13).

²⁷⁸ *ibid*, r 6/26(14)–(16).

²⁷⁹ With a view to such order, if any, as to costs as may be just being made at the trial.

out, or order that the action or counterclaim be dismissed on such terms as appear to the Court to be just.²⁸⁰

The Court will usually direct, as per the model set of directions in Schedule RCR 2004, that the action be placed on the hearing list and will usually direct a date by which an application must be made for a date for a final hearing. In any event, any party may apply by way of summons to the Bailiff in chambers for a date to be fixed for a hearing of the action.²⁸¹

1-93

B. Applications to Amend Proceedings Once Served

Once served, a party may amend his pleadings at any point but may only do so with the leave of the Court on such terms as to costs or otherwise as may be just, or the consent of the other parties to the litigation.²⁸² Applications to amend are made by summons to the Judicial Greffier with an affidavit and skeleton argument in support enclosing a copy of the draft proceedings showing the proposed amendments in coloured ink.²⁸³ The principles upon which an amendment will be granted are as follows:²⁸⁴

1. Whether to allow an amendment is, in all cases, a matter of the Court's discretion.²⁸⁵
2. It is desirable that all relevant matters in dispute between parties should be resolved and leave to amend should therefore be granted if there would be no prejudice to the other party which could not be compensated for by an award of costs.²⁸⁶
3. A party should be given leave to amend its pleadings provided that (1) it seeks to do so in good faith; and (2) there has been no oversight on its part sufficient to justify leave being denied.²⁸⁷
4. An amendment should not be permitted if it would infringe the rules of pleading or introduce a claim so hopeless that it would be liable to be struck out.²⁸⁸
5. Amendments that plead a new cause of action should be refused if the cause of action is arguably prescribed unless new claim arises from substantially same facts as original²⁸⁹
6. There is a heavy duty on an applicant for a late amendment to show:²⁹⁰
 - i. why the matters now sought to be pleaded were not pleaded before;²⁹¹
 - ii. what is the strength of the new case;
 - iii. why an adjournment arising from the amendment (to allow the other parties to plead in response) should be granted, if one is necessary;

1-94

²⁸⁰ RCR 2004, r 6/29(9) preserves a party's absolute defence to the production of documents protected by legal privilege and no sanction may be applied where such a defence is legitimately relied upon.

²⁸¹ *ibid*, r 6/29.

²⁸² *ibid*, r 6/12.

²⁸³ The order of colours to be used for successive amendments is: (1) red, (2) green, (3) violet and (4) yellow.

²⁸⁴ *MacFirbhisigh v CI Trustees & Executors Ltd* [2014 (1) JLR 244]; *Crociani v Crociani* [2015 (2) JLR N [4]].

²⁸⁵ *Crociani v Crociani* (n 284); *Blenheim Ltd v Morgan* [2003 JLR 598].

²⁸⁶ *Cunningham v Cunningham* [2009 JLR 227] at [16]–[19], affirmed in *MacFirbhisigh v C.I. Trustees & Executors Ltd* (n 284) at [27]–[30].

²⁸⁷ *Abdel Rahman v Chase Bank (C.I.) Trust Co Ltd and Ors* [1993 JLR N-6c].

²⁸⁸ *Cunningham v Cunningham* (n 286) at [15]–[19], *Bagus Invs Ltd v Kastening* [2010 JLR 355] (amendment refused on the basis that the cause of action was prescribed).

²⁸⁹ *Bagus Invs Ltd v Kastening* (n 288); *Alhamrani v Alhamrani* [2007 JLR 44].

²⁹⁰ *MacFirbhisiph v C.I. Trustees & Executors Ltd* (n 284) at [27]–[30].

²⁹¹ *Brown v Barclays Bank plc* 2002 JLR N [1].

- iv. how any adverse effects on the other party including the effects of any adjournment, any additional discovery, witness statements or experts reports, or other preparation for trial can be remedied; and
 - v. why the balance of justice should come down in favour of the party seeking to change its case at a late stage of the proceedings.
7. A late amendment to plead an allegation of fraud should only be allowed in exceptional circumstances.²⁹²

V. Litigation Costs

- 1-95** A whole text could be written on the subject of litigation costs alone. For the purposes of this section of this particular text we are concerned only with the landscape of Jersey's regime for the taxation (assessment) of costs. This section includes rules relating to the recoverability and assessment of a trustee's costs in proceedings before the Royal Court but the substantive law on the entitlement of trustees to an indemnity for their litigation costs as a matter internal to the trust is a discrete and separate topic and is dealt with elsewhere.²⁹³ As with many aspects of its civil procedure, as regards litigation costs, Jersey broadly adheres to principles which will be familiar to practitioners familiar with the English position prior to the enactment of the Civil Procedure Rules 1998.
- 1-96** The legal costs incurred by a party involved in proceedings before the Royal Court usually comprise one or more of (1) advocate's fees; (2) court fees and (3) allowable disbursements (such as independent counsel or experts). The client is responsible to his advocate for his legal costs (this is largely governed by the retainer), but, if involved in proceedings, a party may seek an order of the Royal Court to recover some of those costs from the other party. The power to award costs is derived from Article 2(1) of the Civil Proceedings (Jersey) Law 1956. This gives the Court (in this instance meaning the Bailiff (or any Commissioner) sitting alone without Jurats) power to order a party to pay another party's costs 'of and incidental to all proceedings'. The recovery of costs in trust litigation before the Royal Court is governed by Article 53 of the Trusts (Jersey) Law 1984, Part 12 of the Royal Court Rules 2004 and the accompanying practice directions.²⁹⁴ Jersey adheres to the indemnity principle, which is to say that whatever the basis of taxation, the receiving cannot recover more from the other party than he has expended to pay his own advocates.²⁹⁵
- 1-97** The Royal Court has expressed itself on innumerable occasions, that it is desirable to ensure the costs of legal proceedings are kept in proportion to the matter in dispute. Any consideration of Part 12 should have this objective in mind. That being said, Jersey has not yet

²⁹² *Blenheim Ltd v Morgan* (n 285) at [19]–[21].

²⁹³ See Ch 3 and Ch 11.

²⁹⁴ RC 15/03 ('Taxation Of Costs In Civil Proceedings By Summary Assessment In Interlocutory Proceedings'), RC 13/02 ('Taxation Of Costs Factor 'A' Rates Per Hour'), RC 09/01 ('Taxation Of Costs Awarded On The Standard Basis In Civil Proceedings'), RC 09/02 ('Taxation Of Costs Awarded On The Indemnity Basis Of Civil Proceedings').

²⁹⁵ *Boyd v Pickersgill And Le Cornu* [2000] JLR 310].

embarked down the path, as has been done in England and Wales, of a formal process of cost management and control throughout the proceedings as a discrete component of the Court's case management powers.²⁹⁶

A. Costs Incidental to the Proceedings

'Costs incidental to all proceedings' has been explained as being all costs necessary and reasonable to conduct of proceedings in Jersey, including matters relevant to parallel foreign proceedings, if not recovered abroad.²⁹⁷ The illustrative list of attendances, items of work, suggested in the PD RC 09/01,²⁹⁸ may arise out of or be incidental to the proceedings.

1-98

i. Recovering the Cost of Foreign Lawyers

Provided it is reasonable to instruct English lawyers concerning Jersey litigation, the proportionate costs of doing so will be allowed as a cost incidental to the proceedings.²⁹⁹ This is recognised particularly in complex trust litigation where the assistance and advice of specialist Chancery counsel has been recognised to be appropriate.³⁰⁰ The implication being that where the matter is, in the Court's view, within the competence of Jersey advocates then the cost of instructing English lawyers will not be reasonably incurred and allowable as a disbursement.³⁰¹ Further, an English lawyer's bill of costs must contain sufficient detail to be properly considered by the paying party and the Greffier may require more detail before taxing those costs.³⁰²

1-99

ii. Recovering an After the Event Insurance (ATE) Premium

An order that a party pay 'the costs of the action on the standard basis' was narrower in meaning than the power conferred by Article 2(1) of the 1956 Law.³⁰³ In the case it was decided that the ATE premium was not part of the 'costs of the action' as it was not sustained as a result of work done or disbursements incurred in the furtherance of the action.³⁰⁴ Further, although it was not necessary to decide the matter, an ATE insurance premium could not be regarded as a cost 'incidental to' the proceedings. Moreover, the recovery of the premium did not satisfy the 'necessity' test required for the exercise of the inherent jurisdiction

1-100

²⁹⁶ CPR, pt 3 II, CPR PD 3E—Costs Management.

²⁹⁷ *Abdel Rahman v Chase Bank (C.I.) Trust Co Ltd* [1993] JLR N-4], affirming *Grindlays Bank plc v Corbett* [1987-88 JLR N-2].

²⁹⁸ PD RC 09/01, Taxation of Costs Award on the Standard Basis in Civil Proceedings, pt A, see below.

²⁹⁹ *Incav Equatorial Guinea Ltd v Luba Freeport Ltd* [2010] JLR 435]. Note the restrictions on the allowable costs of doing so in r 12(7) RCR 2004. See *Abdel Rahman v Chase Bank (CI) Trust Co Ltd* [1990] JLR 136], affirming recoverability of fees of foreign lawyers in cases involving questions of foreign law.

³⁰⁰ *In Re Internine Trust* [2006] JLR 176].

³⁰¹ *Official Solicitor v Clore* 1984 JJ 811 A.C. Mauger & Son (Sunwin) Ltd v Victor Hugo Management Ltd [1991] JLR N-3].

³⁰² *Incav Equatorial Guinea Ltd v Luba Freeport Ltd* (n 299).

³⁰³ *Riley v Pickersgill* [2002] JLR 196].

³⁰⁴ *ibid.*

of the Court. The implication from *Riley* is, therefore, that without statutory intervention, an ATE premium is not currently a recoverable item of cost in Jersey litigation.

B. The Court's Discretion as to Costs

- 1-101** The award of costs is at the discretion of the Court. The relevant principles in relation to awards of costs are:³⁰⁵
1. whether to award costs, in what amount and on what basis are at the discretion of the Court;
- costs should follow the event unless the Court believed the circumstances required some other action;
- that general rule did not cease to apply simply because the successful party unsuccessfully raised issues or made allegations, but where this had caused a significant increase in the length or cost of the proceedings he might be deprived of the whole or part of his costs; and
- where the successful party raised issues or made allegations improperly or unreasonably, the Court could not only deprive him of his costs but might order him to pay the whole or a part of the unsuccessful party's costs.
- 1-102** As a general rule, the successful party in litigation will normally be awarded their costs. However, the Court has wide discretion and can order otherwise. The principle that costs follow the event is not sacrosanct and the Court has discretion to make different cost orders to reflect the outcome of different issues in the litigation making a strict winner takes all approach in the litigation, overall, inappropriate.³⁰⁶ The practice in England in the recent past has been a move away from issue-based orders to a percentage or proportion-based orders in an effort to curtail the practical difficulties (and necessary extra costs incurred) in a detailed taxation of having to examine each item claimed in a bill of costs through the prism of the issues in the case.³⁰⁷ The Court may deprive even a successful party of some or all of its costs if an increase in the length of the proceedings were caused by that party raising unsuccessful issues improperly or unreasonably.³⁰⁸

C. Common Costs Orders

- 1-103** The following is an illustrative list of the cost orders commonly made by the Royal Court which may make any order it chooses under its discretion as to costs.

³⁰⁵ *Maçon v Quérée (née Colligny)* [2001 JLR 187].

³⁰⁶ *Pell v Frischmann Engr Ltd v Bow Valley Iran Ltd* [2007 JLR 479].

³⁰⁷ *M&M Savant Limited v Subhash Raja and others* [2009] EWHC 90149 (Costs) and *J Murphy and Sons Ltd v Johnson Precast Ltd* [2008] EWHC 3104 (TCC).

³⁰⁸ *Cornick v Le Gac* [2003 JLR N-46].

Table 1.2: Common costs orders and their meaning

Order	Effect of Order
Costs/Costs in any event/ Costs on the usual terms	The party in whose favour the order is made is entitled to his costs in respect of the part of the proceedings to which the order relates, whatever other costs orders are made in the proceedings. ³⁰⁹
Costs in the cause/Costs in the application	The party in whose favour the Court makes an order for costs at the end of the proceedings is entitled to his costs of the part of the proceedings to which the order relates. ³¹⁰
Costs reserved	The Court postpones taking its decision about these costs to a later occasion. If it does not make a later order, the costs will be costs in the case/cause. ³¹¹
Plaintiff's/Defendant's costs in the cause/ application	<p>If the party in whose favour the costs order is made is awarded costs at the end of the proceedings, that party is entitled to his costs of the part of the proceedings to which the order relates. If any other party is awarded costs at the end of the proceedings, the party in whose favour the costs order is made is not liable to pay the costs of any other party in respect of the part of the proceedings to which the order relates.</p> <p>Again, this cost order is self-contained and should not be upset, whatever other costs orders are made in the proceedings.</p>
Costs thrown away	<p>Where, for example, a judgment or order is set aside, or the whole or part of any proceedings are adjourned, the party in whose favour the costs order is made is entitled to the costs which have been incurred as a consequence. This includes the costs of:</p> <ul style="list-style-type: none"> (i) Preparing for and attending any hearing at which the judgment or order which has been set aside was made. (ii) Preparing for and attending any hearing to set aside the judgment or order in question. (iii) Preparing for and attending any hearing at which the Court orders the proceedings or the part in question to be adjourned. <p>Any steps taken to enforce a judgment or order which has subsequently been set aside.</p>
Costs of and caused by	Where, for example, the Court makes this order on an application to amend a statement of case, the party in whose favour the costs order is made is entitled to the costs of preparing for and attending the application and the costs of any consequential amendment to his own statement of case.

(continued)

³⁰⁹ Such orders are to be regarded as self-contained and should not be undermined on assessment. If the Court wishes to make an order which was affected by the fate of the action, it can do so by ordering costs in the case or costs reserved. See *Arya Holdings Ltd v Minories Fin Ltd* [1993 JLR N-5]. See also *Business Environment Bow Lane Limited v Deanwater Estates Limited* [2009] EWHC 2014.

³¹⁰ *Taylor v Burnton* [2014] EWCA Civ 21 said that such orders, so far as English practice, are now rarely made; at [43]: 'Whereas in times gone by "costs in cause" orders or "claimants costs in cause" orders were commonly made on interim applications, nowadays they are more rarely made, and the winner of an interim application will commonly be awarded his costs there and then, regardless of what happens at the trial'.

³¹¹ Note that there is some case law to the effect that an order for costs reserved is similar to costs in the case; see *Catch a Ride Ltd & Anor v Gardner & Ors* [2014] EWHC 209 (Ch).

Table 1.2: (continued)

Order	Effect of Order
Costs here and below	The party in whose favour the costs order is made is entitled not only to his costs in respect of the proceedings in which the Court makes the order but also to his costs of the proceedings in any lower court.
No order as to costs/Each party to pay his own costs	Each party is to bear his own costs of the part of the proceedings to which the order relates whatever costs order the Court makes at the end of the proceedings. ‘No order for costs’ is appropriate when the Court regards it as unrealistic to identify which of the parties was overall the successful party. ³¹²
Order silent as to costs	Each party is to bear his own costs of the part of the proceedings to which the order relates.

D. The Basis of Taxation

1-104 Part 12 RCR 2004 provides for the basis for taxation. Costs are taxed on either the standard basis or the indemnity basis. An award on the latter basis is closer to complete recovery. However, on both bases, the Court will not allow costs that have been unreasonably incurred, or that are unreasonable in amount and neither will it permit recovery in breach of the indemnity principle.

i. Standard Basis of Taxation

1-105 If costs are ordered to be assessed on the standard basis the Greffier will only allow all costs to be recovered which are (1) reasonable in amount and (2) reasonably incurred. The receiving party has the burden of proving the reasonableness and proportionality of the amount it claims. Any doubt the Greffier may have as to whether the costs were reasonable incurred and reasonable in amount is resolved in favour of the paying party.³¹³

ii. Indemnity Basis of Taxation

1-106 On a taxation of costs on the indemnity basis all costs sought to be recovered are allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the Greffier may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party.³¹⁴ The accepted interpretation of this direction is that costs are presumed to be reasonable unless the paying party can prove beyond doubt that they are not. Indemnity costs are usually ordered only in exceptional circumstances and often have a penal character, being typically ordered as an expression of the Court’s displeasure in compensating one party

³¹² *Taylor v Burnton* (n 310).

³¹³ RCR 2004, r 12/4.

³¹⁴ *ibid*, r 12/5.

following another party's wrongful conduct of proceedings.³¹⁵ The following principles apply as whether the Court will make an award of costs on the indemnity basis:³¹⁶

1. There had to be 'some special or unusual feature in the case' to justify such an award.³¹⁷
2. A court may make an indemnity costs order only where there has been some culpability, some abuse of process such as deceit, underhand or unreasonable behaviour, abuse of court procedures, or the submission of voluminous and unnecessary evidence.³¹⁸
3. The Court has rejected a submission that an indemnity costs order should only be considered where the actions of the paying party are malicious or vexatious.³¹⁹

In respect of an award of costs generally, it is a question of what would be fair and reasonable in all the circumstances.³²⁰ The question specifically in relation to whether the costs award should be on the indemnity basis will always be whether there is something in the conduct of the action by one of the parties or the circumstances of the case which takes it out of the norm in a way that justifies an order for indemnity costs, recognising that there will usually be some degree of unreasonableness.³²¹ No costs award can offend the indemnity principle; the receiving party can never recover more than they have actually spent in the course of the proceedings.³²² While 100 per cent recovery of costs is rare, the indemnity basis of assessment can take a party nearer a complete recovery than the standard basis.³²³ If the Court does not make any order about the basis for assessment, the presumption is for costs to be assessed on the standard basis.³²⁴ It follows, therefore, that indemnity costs have to be asked for at the time of the order for costs.

1-107

iii. Taxation and Trustee's Costs

An order for costs on the indemnity basis is a separate question from the indemnity in respect of a trustee's entitlement to recoup reasonable expenses incurred by it on behalf of the trust from the trust fund. The trustee's entitlement to its indemnity is dealt with in Chapter 11. As a general rule, a trustee is not to be left personally out of pocket for costs reasonably incurred on behalf of the trust and the trustee has a right to fully indemnify itself

1-108

³¹⁵ The examples of indemnity costs awarded to signify the Court's displeasure are innumerable. In the context of trust litigation the following are an illustrative collection: (breach of fiduciary duty by a trustee) *In Re MacKinnon* [2009 JLR 387]; (contempt of court by breach of an injunction) *Play Ltd v Legato Assets Ltd* [2006 JLR N30]; (unreasonable refusal by trustee to disclose documents to a beneficiary) *Hogg v Williamson* [2003 JLR N38]; (unreasonable failure to engage in mediation) *Café de Lecq Ltd v RA Rossborough (Insurance Brokers) Ltd* [2012 (2) JLR 115]; (material non-disclosure leading to setting aside an injunction) *Manley v Bell* [2007 JLR N20].

³¹⁶ *Leeds United Football Club Limited v Weston and Another* [2012] JCA 088.

³¹⁷ *Dixon v Jefferson Seal Ltd* [1998 JLR 47].

³¹⁸ *Marett v Marett* [2008 JLR 385].

³¹⁹ *C v P-S* [2010 JLR 645].

³²⁰ *Leeds United FC Ltd v Weston* (n 316).

³²¹ *Dalemont Ltd v Senatorov* (n 167) applying *C v P-S* (n 319).

³²² *Boyd v Pickersgill & Le Cornu* (n 295).

³²³ In practice, the award of indemnity costs in Jersey usually results in a taxed recovery of approximately 90% of the costs claimed; see *Marange Investments (Proprietary) Ltd v La Generale des Carrières et des Mines SARL* [2013] JRC119A at [53] per Clyde-Smith.

³²⁴ RCR 2004, r 12/3(3).

from the trust assets for such costs. Such costs may include the cost of litigation. Article 53 of the Trusts (Jersey) Law 1984 regulates the Court's power to order the costs and expenses of and incidental to an application to the Court to be raised and paid out of the trust property or to be borne and paid in such manner and by such persons as the court thinks fit. Where the trustee maintains a neutral position in non-hostile proceedings for the proper construction and administration of the trust, the trustee is usually entitled to a full indemnity from the trust assets for all costs reasonably incurred with no express order for costs or costs on the indemnity basis being required.³²⁵ On the occasion that the Court orders that other parties, such as beneficiaries, to proceedings are entitled to their costs from the trust fund, those costs must be the subject of taxation.³²⁶ It follows that where the trustee is neutral in litigation, on a taxation (ie quantification) of a trustee's costs and expenses, the Greffier should not apply the indemnity basis under rule 12/5 RCR 2004, which procedure was specifically designed for taxation of awards of costs in hostile litigation, nor should the Greffier embark on an assessment of the Factor A and Factor B rates.³²⁷ As guidance to the Greffier the Court in *Alhamrani* set down the following principles:

1. the scales applicable on a normal taxation were not relevant to a taxation of a neutral trustee's entitlement to recover his costs and expenses from the trust fund;
2. a trustee's duty included an obligation to consider whether the charges of a particular lawyer or firm of lawyers were appropriate both to the nature of the problem and the size of the trust fund;
3. when considering legal costs, the Greffier should concentrate on whether a particular matter was one upon which it was reasonable to spend time and whether the degree of time spent was reasonable; and
4. the test was not whether the Greffier considered that the costs were incurred at the correct level, but whether they were reasonably incurred.

- 1-109** It follows that a beneficiary does not have an automatic right to seek the taxation of the costs and expenses of a neutral trustee.³²⁸ However a beneficiary may invoke the statutory and supervisory jurisdiction of the Court in respect of the costs and expenses of a neutral trustee by raising a complaint, question or doubt about the reasonableness of those costs which cannot be struck out or seen as obviously bad on their face. A trustee does not have *carte blanche* to use the trust fund for the payment of legal, professional or other fees, costs or expenses in an unreasonable, improper, immoderate or disproportionate way. Where costs or expenses were not reasonably incurred or the trustee acted in breach of trust or duty, the Court has a discretion to override the principle that a trustee is entitled to a full indemnity by ordering

³²⁵ *In re Internine Trust* (n 300); *Alhamrani v J.P. Morgan Trust Co (Jersey) Ltd* [2007] JLR 527]. See trustee's statutory right of indemnity under the Trusts (Jersey) Law 1984, Art 26(2).

³²⁶ *Trilogy Management Limited v YT Charitable Foundation (International) Limited* [2012] (2) JLR 330]. Note also that in contrast to the trustee's right to a full indemnity, taxation on that basis in respect of other parties would not necessarily result in full reimbursement.

³²⁷ See *Alhamrani v J.P. Morgan Trust Co (Jersey) Ltd* (n 325), where the application of Factor A and Factor B in a detailed taxation of a trustee's costs and expenses under RCR 2004 r 12/3(1)(b) was disapproved as being inappropriate. As to the trustee's right of indemnity generally in respect of the costs of litigation on behalf of the trust, see Ch 11.

³²⁸ *Landau v Anburn Trustees Ltd* [2007] JLR 250].

that the neutral trustee was not entitled to recover its costs.³²⁹ Once such a complaint, question or doubt is properly raised by a beneficiary, the Court will decide how it should best be resolved. The procedures to be employed must necessarily be flexible. Normally, questions as to the reasonableness of a particular expense or of the amounts charged can be expected to be resolved by the Greffier but that procedure is not a taxation of the trustee's costs properly so called.³³⁰ A question as to an alleged breach of trust can be expected to require determination by the Court itself. Even in a taxation or an assessment of reasonableness by a Greffier, he is to be at liberty to refer any point of principle, difficulty or importance to the Court, should that seem appropriate, or the Court may, on application by any of the parties, order that a particular point be resolved by the Court rather than the Greffier.

iv. Orders for an Interim Payment of Costs on Account

The Court has an inherent power to order an interim payment of costs on account before taxation in order to enable a party to obtain a money award in costs as soon as possible. Under Article 16 of the Court of Appeal (Jersey) Law 1961, a concurrent jurisdiction exists to order interim costs on account before the Court of Appeal.³³¹ Orders for costs on account are a rough and ready affair and the Court will not descend into conducting a taxation or detailed review of the successful party's costs. The amount of costs ordered on account is usually 50 per cent of the headline figure claimed.³³² The recent authorities have emphasised that an immediate payment of costs on account should be a percentage of the amount the receiving party is likely to recover on taxation calculated on a conservative basis to avoid any real risk of over-payment.³³³ If costs are awarded on the indemnity basis, the determination of the amount of the interim payment on account is usually based on the lawyers' charge out fees.³³⁴ On an application for costs on account on the standard basis, court and the paying party should be supplied with a summary of the costs sought setting out the fixed Factor A rates claimed and an appropriate percentage Factor B 'uplift' to the time of the fee earners, in addition to the disbursements. The Jersey Court of Appeal in *Crociani* rejected the submission that a costs summary in this format did not allow any useful response to be made by the paying party.³³⁵

1-110

E. Taxation Procedure

Once the Court has made an award of costs and ordered the basis upon which they are to be paid, if the Court has not already fixed the amount of costs to be recovered, the amount

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³²⁹ *Alhamrani v J.P. Morgan Trust Co (Jersey) Ltd* (n 325).

³³⁰ *Landau v Anburn Trustees Ltd* (n 328).

³³¹ *Crociani, Foortse, BNP Paribas Jersey Trust Corporation Ltd & Appleby Trust (Mauritius) Ltd v Crociani & Ors* [2014] JCA 095.

³³² *Centre Trustees (C.I.) Ltd v van Rooyen* [2009] JLR N [29]]; see also *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 779 (Ch).

³³³ *Crociani v Crociani* (n 331); the emphasis appears to be on the use of 'conservative'; eg in *Dick v Pantrust International SA & Ors* [2016] JRC069, costs were awarded on the indemnity basis in the sum of £500,000 with only £100,000 paid on account, the balance to be taxed if not agreed.

³³⁴ *Marange Invs (Pty) Ltd v La Generale des Carrières et des Mines SARL* 2013 (2) JLR N [21], see PD RC 09/02.

³³⁵ *Crociani v Crociani* (n 331) at 25; also *Dalemont Limited v Senatorov and Others* (n 167).

to be paid will be determined by the Greffier who is responsible for the taxation (assessment) of costs if an amount cannot be agreed between the parties. Once an order for costs has been granted, steps are usually taken to seek settlement of the receiving party's costs on an inter-parties, without prejudice save as to costs, basis. The taxation process is regarded as a process of last resort.

- 1-112** The commencement of taxation is the responsibility, in the first instance, of the receiving party who has three months (two months in the case of orders relating to an interlocutory matter not already summarily taxed by the Greffier) to commence taxation of costs relating to the determination in the main proceedings.³³⁶ Within seven days of commencing taxation proceedings the receiving party must notify the paying party who has 28 days in which to respond and file objection to the receiving party's bill of costs. The receiving party then has a further 21 days within which to file replies to those objections before the Greffier will commence taxation.³³⁷ If taxation proceedings are not commenced by the receiving party within the prescribed period, the paying party may instead commence proceedings, on such terms as the Greffier deems appropriate. In doing so the paying party is entitled to their costs. If the paying party fails to submit objections within the 28 days allowed under RCR r 12/11(1), they are deemed to have no objections to the bill and the Greffier will proceed to tax the bill. After the expiration of 14 days following the receipt of the receiving party's replies or following the date on which replies were due (it may be that the receiving party does not file replies), the Greffier will proceed to tax the bill of costs unless either a hearing is required or the bill has been provisionally taxed.³³⁸
- 1-113** In taxing costs the Greffier is bound by the terms of the costs order and cannot make contradictory decisions in the assessment.³³⁹ The Royal Court has a discretion to summarily fix costs rather than submit them to the Greffier for taxation if it considers it fair to do so in the circumstances of the case and there is sufficient evidence available in order for it to summarily fix costs, which are likely to be less than would be recovered if submitted for taxation.³⁴⁰ The Court may also fix costs and not submit them to taxation in cases of misconduct during the course of the litigation.³⁴¹ Royal Court Rules 12/10–12/12 set out the procedure by which taxation proceedings before the Greffier are commenced. The rules are supplemented by three practice directions:
1. For taxation of costs on the standard basis, see PD RC 09/01.
 2. For taxation of costs on the indemnity basis, see PD RC 09/02.
 3. For taxation of costs by summary assessment in interlocutory applications, see PD RC 09/03.

³³⁶ RCR 2004, r 12/10(1).

³³⁷ ibid, r 12/11.

³³⁸ The time limits specified in pt 12 in relation to costs are subject to the usual 'Reckoning periods of time rules' at RCR 2004, r 1/3 and also the power to extend and abridge time by RCR 2004, r 1/5.

³³⁹ Subject to a limited exception, being the Greffier's power to order that the costs of the taxation be paid other than in accordance with the usual practice; see RCR 2004, r 12/8(2).

³⁴⁰ *Jersey Financial Services Commission v AP Black (Jersey) Ltd* [2007 JLR 1].

³⁴¹ *R v G* [2006 JLR N-20].

i. Standard Basis Taxation Procedure

The amount of costs to be allowed on taxation (whether on the standard or indemnity basis) is (subject to any Rule or Order of the Court fixing the costs to be allowed) at the discretion of the Greffier. In exercising his discretion with regard to the total sum of costs to be awarded, the Greffier must have regard to all the relevant circumstances, and in particular to the following factors:³⁴²

1. the complexity of the item of cost or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;
2. the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor or advocate;
3. the number and importance of the documents (however brief) prepared or perused;
4. the place and circumstances in which the business involved is transacted;
5. the importance of the cause or matter to the client;
6. where money or property is involved, its amount or value; and
7. any other fees and allowances payable to the solicitor or advocate in respect of other items in the same cause or matter, but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question.

The final taxed figure in a standard taxation of a bill of costs is the product of adding together (1) a direct cost component ('Factor A') and (2) a component for care and conduct ('Factor B'). Factor A is intended to cover the salary and the appropriate share of the general overheads of each fee earner. The particular elements that are found to constitute the average direct costs of that category of average fee earner and the methodology employed therein are determined by the Superior Number with the advice and assistance of a committee specially constituted for that purpose.³⁴³ The Factor A rate does not correspond to the actual billed costs of the receiving party, which represent the maximum the receiving party can be awarded, and in fact the Factor A rate is likely to fall some way below the actual billed rate. Factor B is intended to reflect all the relevant circumstances of the case and in particular the matters set out in PD RC 09/01. The Factor B uplift is intended to reflect those imponderable factors, for example general supervision of subordinate staff, for which no direct time charge can be substantiated, and the element of commercial profit. Accordingly, the allowances to be made for different items may, in the discretion of the Greffier, be allowed at different rates. In particular, it is anticipated that, save in unusual circumstances, the rate appropriate to Items 1, 2 and 5 for care and conduct will be less than the rate appropriate to paragraphs Items 3 and 4 for general care and conduct.

The relationship between the Factor A rate and the Factor B uplift in a standard taxation is as follows. The application of the Factor A rate alone is likely to lead to a shortfall between the allowable hourly rate for particular grades of fee earner and their actual billed rate. This

³⁴² PD RC 09/01, para 2.

³⁴³ See PD RC 13/02 for the current Factor A rates; these are updated periodically.

divergence becomes particularly acute the more senior (and commensurately expensive) the fee earner. Conversely, for those areas of work to which the Factor B uplift is routinely applied, the more senior the fee earner, the more ‘value’, relative to those more junior fee earners, the fee earner is likely to bring to those more imponderable aspects of the litigation. The Factor B uplift on top of the Factor A rate therefore leads to an increase in the overall recoverable amount. The Factor B uplift is designed to ensure an efficient distribution of billable work to the appropriate grade of fee earner. However the impact of the Factor B uplift may in some instances lead to a result whereby the recoverable amount for the purposes of taxation exceeds the amount actually billed. In order to ensure there is no breach of the indemnity principle, the recoverable amount must be capped at the actual amount billed, notwithstanding that the strict application of the Factor B uplift would entitle the receiving party to more.

- 1-117** The recoverable costs incidental to all proceedings will be comprised of individual items of costs falling within Part A, Part B or Part C below.³⁴⁴ Each item in Part A (other than an item relating only to time spent in travelling and waiting) may include an allowance for general care and conduct having regard to such of the circumstances referred to above as may be relevant to that item.³⁴⁵

Table 1.3: Table of work done to be included in a bill of costs

Part A:	<p>The doing of any work which was reasonably done arising out of or incidental to the proceedings, including, by way of illustration only:-</p> <ol style="list-style-type: none"> 1. <i>The Client</i>: taking instructions to sue, defend, counterclaim, petition, cross-petition, appeal or oppose etc, attending upon and corresponding with Client; taking and preparing proofs of evidence; 2. <i>Witnesses</i>: interviewing and corresponding with witnesses and potential witnesses, taking and preparing proofs of evidence and, where appropriate, arranging attendance at Court; 3. <i>Expert Evidence</i>: obtaining and considering reports or advice from experts and plans, photographs and models; where appropriate arranging their attendance at Court; 4. <i>Inspections</i>: inspecting any property or place material to the proceedings; 5. <i>Searches and Enquiries</i>: making searches at offices of public records and elsewhere for relevant documents; searches in the Company Records maintained by the Financial Services Commission and similar matters; 6. <i>Special Damages</i>: obtaining details of special damages and making or obtaining any relevant calculations; 7. <i>Other Parties</i>: attending upon and corresponding with other parties or their advocates or solicitors;
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(continued)

³⁴⁴ PD RC 09/01, para 3.

³⁴⁵ ibid, para 2.6.

Table 1.3: (continued)

	<p>8. <i>Discovery</i>: perusing, considering or collating documents for affidavit or list of documents; attending to inspect or produce for inspection any documents required to be produced or inspected by order of the Court; considering and collating documents in response to questionnaires for further disclosure;</p> <p>9. <i>Documents</i>: preparation and consideration of pleadings and affidavits;</p> <p>10. <i>Authorities</i>: research, consideration and preparation of relevant cases, statutes, textbook extracts and others authorities;</p> <p>11. <i>Court Bundle</i>: preparation, photocopying, paginating and compiling court bundles or other documents;</p> <p>12. <i>Hearing Preparation</i>: consideration and preparation for trial or hearing;</p> <p>13. <i>Negotiations</i>: work done in connection with negotiations with a view to settlement;</p> <p>14. <i>Interest</i>: where relevant, the calculation of interest;</p> <p>15. <i>Notices</i>: preparation and service of miscellaneous notices, including notices to witnesses to attend court.</p>
Part B:	The general care and conduct of the proceedings.
Part C:	Travelling and waiting time in connection with the above matters.

a. Format of a Bill of Costs

A bill of costs submitted for taxation should be in either Form 1 or Form 2.³⁴⁶ In practice, Form 2 is designed for a straightforward bill of costs such as those following an interlocutory matter. Form 1 should be used in more complex, lengthy pieces of litigation where itemised lists of individual items of cost become unwieldy. The format of a bill of costs and its appropriateness for a particular piece of litigation will often be determined by a professional tax draftsman.

1-118

Form 1

Where Form 1 is used the bill should commence with a headnote that mirrors the headnote of the pleadings. Pending or *Sine die* numbers should be shown, where applicable, and the names of the legal practices representing each party, who are parties entitled to be heard at these taxation proceedings, should also be included. This should be followed by the details of the receiving and paying parties and the Act of Court under which the bill of costs is drawn. The first entry under the headnote should contain a brief narrative setting out the factors on which the receiving party relies in support of care and conduct (ie the 'Factor B' uplift) claimed in his bill if that claimed is above the base Factor 'B' percentage (as to the

1-119

³⁴⁶ Annexed by way of illustration only. A costs draftsperson will assist in compiling a bill of costs in the appropriate format. The costs of the draftsperson is itself a recoverable cost as part of the taxation exercise provided it is reasonable and proportionate to have used one, which in the majority of trust litigation of any complexity, it will be.

guidance on which see below). All unusual or exceptional factors should be identified. If, Form 2, is adopted, this statement in support of Factor B should be in greater detail and listed by area. The second entry under the headnote should set out the status of the fee earners concerned and the expense rates ie 'Factor A' claimed for each.³⁴⁷ The third entry under the headnote should set out the care and conduct rates, ie 'Factor B' claimed for the following key events in the litigation:

1. Item 1: Interlocutory attendances³⁴⁸
2. Item 2: Conferences
3. Item 3: Attendances at Trial or Hearing³⁴⁹
4. Item 4: Preparation
5. Item 5: Taxation of Costs³⁵⁰

1-120 The bill should then set out in chronological order all the relevant events that constitute a chargeable item and the amount claimed should be shown against it. Where any event has occasioned a disbursement, the amount claimed for that disbursement should be shown. All chargeable items and disbursements inserted within the bill should be numbered consecutively. This number should be set out in a separate column located on the far left hand side of the bill. Finally, every bill shall be signed by the advocate or Jersey solicitor submitting the bill prior to lodging for taxation. The signature implies that the bill has been checked by an appropriately qualified person, the bill is complete, and accepts responsibility for the factual accuracy of the bill. For bills of costs set out in Form 1, Interlocutory Attendances, Conferences and Attendance at Trial or Hearing should show separately under those headings the time engaged and the allowances claimed for care and conduct and for the time engaged in traveling and waiting. Also the general work of preparation is to be placed after all the other items save only costs in respect of taxation which is to be the last item.

1-121 For bills of costs set out in Form 1, costs claimed for preparation should be divided into three parts: A, B and C:

1. *Part A* Set out the work done and the amount claimed for it in the following separate sections:
 - i. Attendance on and correspondence with the plaintiff
 - ii. Attendance on and correspondence witness
 - iii. The Greffier
 - iv. The Defendant's advocate
 - v. Documents
 - vi. Authorities
 - vii. Court bundle
 - viii. Hearing preparation

³⁴⁷ The maximum prescribed rates that can be claimed under Factor A are set down in practice directions periodically updated by the Superior Number of the Royal Court.

³⁴⁸ ie attending the hearing of any summons or other application at Court, in chambers, the Judicial Greffe or elsewhere.

³⁴⁹ ie attending the trial or hearing of a cause or matter, or an appeal or to hear a deferred judgment.

³⁵⁰ ie preparing the bill, responding to notified objections or questions and, if applicable, preparing for and attending the taxation.

Each section or sub-section should contain a breakdown of the work comprised in it and should have its separate subtotal. At the foot of the last of these sections there should be shown a total Part A figure.

Part B Set out the amount claimed for general care and conduct on the basis of the guidance³⁵¹ as a separate monetary amount which should also be expressed as a percentage of the total Part A figure. This part should include a statement identifying those factors in PD RC 09/01, paragraph 2 (above) which are relied on in relation to the assessment of the claim for general care and conduct.

Part C In this part, an amount should be claimed for time engaged in travelling and waiting without the Factor B uplift in connection with the work comprised in Part A only. Details should be given showing to which part of that work the claim or claims relate. The section subtotals and the totals of Parts A, B and C figures referred to above should be shown in the narrative column of the bill. The aggregate of those figures should be shown in the costs column.

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1-123

Form 2

Bills of Costs set out in Form 2 should show separately (1) the time claimed; (2) the status of the fee earner; (3) the Factor B area, namely:

1-124

1. Item 1: Interlocutory attendances
2. Item 2: Conferences
3. Item 3: Attendances at trial or hearing
4. Item 4: Preparation
5. Item 5: Taxation of costs

Travelling time will be allowed in respect of each item at the full amount of the appropriate expense rate. Waiting time will be similarly allowed but neither travelling nor waiting time will attract any allowance for care and conduct.

1-125

- b. Specific Matters of Taxation

Correspondence

Letters (including facsimile and email) and telephone calls will in general be allowed on a unit basis of six minutes (ie 1 unit) each, the charge being calculated by reference to the appropriate expense rate. The unit charge for letters will include perusing and considering the relevant letters in and no separate charge should be made for incoming letters. The Greffier may allow an actual time charge for letters of substance and for telephone calls which properly amount to an attendance, providing details of the work done are provided and the date and time taken has been recorded.

1-126

³⁵¹ See below.

Time Sheets

- 1-127 Properly kept, detailed and contemporaneous time records are helpful in support of a bill provided they explain the nature of the work as well as recording the time involved. However, they cannot be accepted as conclusive evidence that the time recorded either has been spent or if spent, is 'reasonably' chargeable.

Statements of Accounts

- 1-128 Accounts should accompany the bill of costs for all payments claimed (other than court fees or minor out of pocket disbursements) and should, when appropriate, be accompanied by details showing the work done, the time spent, by whom and when, and the computation of the charge. This should include details of all accounts, both sent and pending, to be paid by their client.

Bills of Costs of Foreign Lawyers

- 1-129 Bills of costs submitted by lawyers outside the jurisdiction (including counsel) should include within the bill sufficient detail to enable the paying party to properly consider that claimed.³⁵² In this regard, counsel's fees should be broken down identifying the work undertaken and the corresponding cost. In appropriate cases the Greffier may request further information.

Travelling Expenses

- 1-130 Where travelling expenses are claimed they should be shown as a disbursement and details supplied. Local travelling expenses will not be allowed.

The Cost of Communications

- 1-131 The cost of postage, couriers, outgoing telephone calls, fax and telex messages is in general part of the lawyer's normal overhead expense and should already be factored in as part of the Factor A component of the bill of costs. The Greffier has a discretion to allow such a disbursement in unusual circumstances or where the cost is unusually heavy. In these circumstances the lawyer must show that this cost could not reasonably be supposed to have been taken into account when the expense rate was ascertained.

Copies of Documents

- 1-132 The making of copies of documents is part of the lawyer's normal overhead expense. The Greffier may in his discretion make an allowance for copying in unusual circumstances or when the documents copied are unusually numerous in relation to the nature of the case. Where this discretion is invoked the number of copies made, their purpose, and the charge claimed should be set out in the bill. If copies have been made out of the office the cost

³⁵² See *Incat Equatorial Guinea Ltd v Luba Freeport Ltd* (n 299).

should be shown as a disbursement. If made in the office, a charge equivalent to the commercial cost should be claimed. A charge based on the time expended by a member of the lawyer's staff will not be allowed.

No details of the work done need be provided for preparing the bill of costs, responding to notified objections or questions and, if applicable, preparing for and attending the taxation; but on taxation the party entitled to the costs must justify the amount claimed.³⁵³

1-133

c. Documents in Support of Taxation

Proceedings for the taxation of costs should commence by writing to the Judicial Greffier and filing the following requisite documents at the Judicial Greffe, as required by RCR 12/10:

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1. a copy of the Act of Court containing the relevant costs order;
2. if more than one bill is to be submitted a statement of the name of every party entitled to submit a bill in the taxation proceedings;
3. a statement providing the names of all the parties who are entitled to be heard in the taxation proceedings;
4. a bill of costs in either form to be found in the Appendices, as specified in Practice Direction 09/01, signed by the advocate dealing with the matter; and
5. all documents required to support each item contained within the bill to be assessed.³⁵⁴

The following supporting documentation should be compiled and either submitted at the same time or made available upon the Greffier's request:

1. work done under 'Preparation' in the above table under Part A (9),(10),(11) and (12) (if using Form 1) or in the case of a bill of costs set out in Form 2, should include within the bill the following information:
 - i. the date when the work was done;
 - ii. a description of the work;
 - iii. the status of the fee earner who did the work; and
 - iv. how long the work took;
2. a copy of the indexes to Court bundles relied on by both sides. If an agreed bundle was submitted this should be noted;
3. copies of accounts referred to above,³⁵⁵
4. copies of documents in support of disbursements referred to under travelling expenses and the cost of communications above;³⁵⁶
5. if bills of costs by lawyers outside the jurisdiction are claimed, full documentation in support as required (see above);³⁵⁷
6. office time records as referred to above.;³⁵⁸

³⁵³ In general, the drawing of a bill of costs is not advocates' work and should be delegated to a costs draftsperson.

³⁵⁴ In practice, the Greffier will only request these documents when he is ready to tax the bill.

³⁵⁵ Para 1-130 above.

³⁵⁶ Para 1-132 above.

³⁵⁷ Para 1-131 above.

³⁵⁸ Para 1-129 above.

1-135 The Greffier may request that the receiving party submit their office files to assist with taxation. If this request is made, it is the responsibility of the lawyer submitting the office files to ensure that everything necessary to justify the bill of costs is included. In particular, the lawyer may wish to identify specifically documents referred to in the bill of costs or on which he relies in support of the sum claimed for care and conduct. The files should be delivered to the Judicial Greffe within seven days after receiving notice of the same, unless in all the circumstances of the matter a longer time period has been allowed.

d. Guidance on Factor B Uplift

1-136 PD RC 09/01 paragraph 2 set out the basis for the determination of Factor B in civil cases. The Greffier should have regard to (1) all the circumstances of the case; (2) those particular matters set out in RC 09/01,³⁵⁹ and (3) the submissions of both sides on taxation, setting out their contentions in support of or in opposition to the Factor B claimed in the receiving party's bill of costs. The specified format for the layout of the bill of costs provides that the bill should contain up to five items, namely:

- a) 1. Item 1: Interlocutory attendances
- b) 2. Item 2: Conferences
- c) 3. Item 3: Attendances at Trial or Hearing
- d) 4. Item 4: Preparation
- e) 5. Item 5: Taxation

1-137 A Factor B rate is determined for each item in the bill as a percentage of the Factor A total cost incurred. The Factor B uplift was a feature of taxation of costs in England and Wales for many years prior to the CPR.³⁶⁰ As Jersey has adopted many of the principles and practices found under the English system of taxation, the determination of Factor B, case law on taxation matters under the English system may offer some assistance in identifying an appropriate Factor B uplift for a particular set of facts in Jersey. The actual Factor B allowable on taxation will, of course, flow from the exercise of judicial discretion on the facts of the particular case.

1-138 The following cases are listed in PD RC 09/01 in the guidance to Factor B and may assist the legal practitioner in arriving at an appropriate Factor B, although they are now of considerable vintage and no longer reflect the approach to costs in the jurisdiction in which they were originally decided.

1. In respect of Item 1, 2 and 5 (Interlocutory attendances, Conferences and Taxation respectively) the starting norm is a 35 per cent uplift. This starting refers to a 'run of the mill' straightforward action.³⁶¹ This figure will increase above 35 per cent so as to reflect all the circumstances of the case that take it out of the ordinary category. While 35 per cent may have been the starting point, Brooke J, allowed 50 per cent for one

³⁵⁹ PD RC 09/01, para 5.1.

³⁶⁰ RSC Ord 62, app 2. Practice Direction (No 2 of 1992) para 62/C/1.

³⁶¹ *Brush v Bower Cotton & Bower* [1993] 4 ALL ER 741 QBD.

element of interlocutory work. Many actions concerning trusts will contain issues of specific or technical difficulty, the assessment of volumes of documents and consideration of issues of law. Whether a particular case is different in kind from the category of cases that can be termed straightforward will depend on the facts of each case. The party drawing the bill of costs should set out those matters in support when claiming above the starting point of 35 per cent.

2. In respect of Item 3 (Attendances at Trial or Hearing) it is to be noted that the separate functions of counsel and a solicitor do not exist in Jersey which operates a fused profession. A Jersey advocate has an all-embracing role encompassing the work of both solicitor and counsel. In recognition of this role and the additional responsibility thereof, for 'Attendance at trial or Hearing', this is assessed on the same basis as preparation (Item 4), ie an uplift of upward of 50 per cent.
3. In respect of Item 4 (Preparation) the starting point for 'run of the mill' cases the uplift starts at 50 per cent with the uplift rising above 50 per cent to reflect a number of possible factors including the complexity of the case, the particular need for special attention by the lawyer with conduct and any additional responsibilities which a solicitor may have undertaking towards the client and others.³⁶² That particular case was a personal injury action but the dicta of the decision is not limited to such actions. It was said that only a small percentage of personal injury cases results in an allowance over 70 per cent. As one gets higher and higher above 75 per cent, more and more it should be said that a case should be approaching the exceptional.³⁶³ To justify an uplift of 100 per cent or even one closely approaching 100 per cent there must be some factor or combination of factors which mean that the case approaches the exceptional. A figure above 100 per cent would seem to be appropriate only when the individual case, or cases of the particular kind, can properly be regarded as exceptional, and such cases will be rare.³⁶⁴ A heavy 'test' case that seeks to establish or develop a new point of legal principle may justify a higher Factor B uplift.³⁶⁵ In *Re a company K1989* (C No 4081),³⁶⁶ a commercial case in the Chancery Division concerning an action and counterclaim seeking relief against trustees, indemnity costs were awarded. 60 per cent Factor B was claimed. The decision in *Johnson* above suggested an uplift starting at 50 per cent as being appropriate for ordinary cases. Lindsay J upheld the 60 per cent claimed and said:

until 14th March, 1991, this case required less attention than would have 'an ordinary case'. The trustees needed to collect no evidence. They had no case to prove or disapprove. They had to make discovery but there was nothing exceptional about that. On the other hand, the sheer bulk of the documents, 80 files as it became, would have introduced its own difficulties and anxieties.

Lindsay J noted that he had a small doubt about the unreasonableness of the uplift claimed, but as this was an award of indemnity costs those doubts were resolved in favour of the paying party.

³⁶² *Johnson v Reed Corrugated Cases Ltd* [1992] 1ALL ER 169 QBD, per Evans J.

³⁶³ [1993] 4 ALL ER 741 QBD, per Brooke J.

³⁶⁴ *Johnson v Reed Corrugated Cases Ltd* (n 362), per Evans J.

³⁶⁵ *ibid.*

³⁶⁶ 26 July, 1993, Unreported.

ii. Indemnity Basis Procedure for Taxation

- 1-139** A bill of costs on the indemnity basis should be set out in the form annexed to PD 09/01 and should consist of such items as are specified in paragraph 3 of PD RC 09/01 as appropriate.³⁶⁷ Taxation on the indemnity basis does not require the separation into Factor A and Factor B rates, it is sufficient that the bill specify the hourly rate claimed for each fee earner.³⁶⁸

iii. Summary Assessment in Interlocutory Applications

- 1-140** If an interlocutory hearing before the Greffier lasts a day *or less*, after making an award of costs of the subject of the hearing, the Greffier will consider whether to tax the costs so ordered by way of summary assessment at the end of that hearing. If the Greffier so decides, PD 09/03 applies. Each party who seeks an order for costs must prepare a written statement of the costs (following as closely as possible the format specified in Appendix A to PD RC 09/01 and signed by the party or his legal representative) showing separately in the form of a schedule:
1. the number of hours to be claimed;
 2. the hourly rate to be claimed;
 3. the grade of fee earner;
 4. the amount and nature of any disbursement to be claimed; and
 5. any claim for a Factor B uplift.

- 1-141** The statement of costs must be filed with the Greffier and copies served on any party against whom the order for costs is sought. The statement of costs should be filed and served at least 24 hours before the date fixed for the interlocutory hearing. The Greffier will take into account a party's failure to comply with these requirements in making an order for costs, which may impact the costs of any further hearing or detailed assessment that may be necessary as a result of the failure to comply. The Greffier may tax either on the standard or indemnity basis on a summary assessment.

- 1-142** The Royal Court has power to make a summary award of costs, although such an order is unusual. The Court may be persuaded to make a summary assessment where the scope of the work is limited and the Court could make an informed and confident judgment as to costs as set out in the bill of costs.³⁶⁹

iv. Interlocutory Applications Disposed of by Consent

Where the parties agree an order by consent without a hearing, where one party is to pay another party's costs, the parties should agree a figure for costs to be inserted in the consent order. Alternatively, the consent order should specify if costs are to be 'in the cause' or

³⁶⁷ PD RC 09/02, para 1.4.

³⁶⁸ PD RC 09/02, para 1.3.

³⁶⁹ *Mubarik v Mubarak* [2009 JLR N [5]], citing *Jersey Financial Services Commission v A.P. Black (Jersey) Ltd* [2007 JLR 1].

there is to be ‘no order as to costs’.³⁷⁰ If the parties cannot agree the costs position then they should arrange to appear before the Greffier for him to assess costs. Unless good reason can be shown for the failure to agree an order and the amount of costs, no costs will be allowed for that appearance.

v. Costs of Taxation

The usual rule is that the receiving party is entitled to its costs of the taxation proceedings. If it appears to the Greffier that, having regard to all the circumstances of the taxation proceedings, some other order should be made as to the whole or any part of the costs of those proceedings, the Greffier has, in relation to the costs of the taxation proceedings only, the same powers as the Court has in relation to costs.³⁷¹ Once a bill of costs has been taxed the Greffier will request Court stamps in settlement of his fees charged at a rate of £60 per half hour.³⁷²

1-143

vi. Appealing Costs Decisions

Appeals of costs orders are circumscribed by the fact that costs orders are discretionary. An appeal from taxation by the Greffier to the Royal Court is only to be allowed in cases where (1) there has been a serious procedural irregularity in the conduct of the taxation; (2) the Greffier has taking into account irrelevant matters or has failed to take into account relevant ones; or (iii) where the decision is otherwise wrong.³⁷³ Appeals from the Royal Court to the Court of Appeal on a costs decision are rare and the Court of Appeal will not ordinarily interfere unless the Royal Court has itself considered improper matters or not considered proper matters, misdirected itself as to the appropriate principles or there has been a change of circumstances since the Royal Court’s decision warranting a different decision.³⁷⁴

1-144

VI. Funding Solutions: Litigation Funding and After the Event Insurance

This section is dedicated to Jersey’s developing jurisprudence and practice in relation to the funding of litigation. Funding trust litigation may be of particular importance to beneficiaries who, perhaps by reason of a breach of trust, for which they are seeking recovery, are of limited means.

1-145

³⁷⁰ See Table 1.2.

³⁷¹ RCR 2004, r 12/8.

³⁷² Stamp Duties & Fees (Jersey) Law 1998.

³⁷³ *Incat Equatorial Guinea Ltd v Luba Freeport Ltd* (n 299).

³⁷⁴ *Flynn v Reid* [2012 (2) JLR 226]; *Maçon v Quérée (née Colligny)* [2001 JLR 187]; *Marett v Marett* [2008 JLR 384]. Note also that the Court of Appeal (Jersey) Law 1961, Art 13(1)(c)(iii) requires the leave of the Royal Court to appeal a costs decision.

A. Maintenance and Champerty

- 1-146** Maintenance is the improper support of litigation in which the supporter has no legitimate concern, without just cause or excuse. Maintenance most usually occurs where a third party funds litigation, though assignments of causes of action, may also ‘savour of maintenance’. Champerty is an aggravated form of maintenance. It occurs when the maintaining party pays some or all of the costs of a party in return for a share of the proceeds of the action or suit.³⁷⁵ The rules prohibiting maintenance and champerty are based on the public interest in protecting the purity of justice.³⁷⁶ The classic definition of the public policy behind the rules is that of Lord Denning MR in the English case of *Re Trepca Mines*:

The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses³⁷⁷

- 1-147** It is only relatively recently that the Jersey’s Royal Court has dealt substantively with the concept of champerty in the context of the modern practice of third party litigation funding. The outcome of two recent cases, *In the Matter of the Valletta Trust*³⁷⁸ and *Barclays Wealth Trustees (Jersey) Limited and Barclays Wealth Fund Managers (Jersey) Limited v Equity Trust (Jersey) Limited and Equity Trust Services Limited*³⁷⁹ has been to refine what sort of arrangement is likely to fall foul of the rules against champerty but to otherwise affirm that Jersey retains a prohibition on arrangements which provide for a share of the proceeds of litigation and that such arrangements may be held to be unenforceable on the grounds of champerty if they are contrary to public policy.³⁸⁰ An assignment of a cause of action in which proceedings have already been commenced by service of originating process is unenforceable as champertous.³⁸¹ Considerable care must be taken to ensure that a funding agreement falls squarely within the permissible margin afforded to such agreements by the Jersey case law.

B. Funding Arrangements with Lawyers

- 1-148** A funding arrangement between a party and his lawyers is likely to be held to be champertous and unenforceable under Jersey law on the grounds that such an arrangement gives rise to an unacceptable conflict of interest between the advocate’s duty to the court and his own interest.³⁸² Contingent fee agreements (under which a lawyer contracts with his client for a percentage of any proceeds) and conditional fee agreements (under which the

³⁷⁵ *R (Factortame Ltd) v Transport Secretary (No 8)* [2003] QB 381.

³⁷⁶ *Re The Valletta Trust* [2011] JRC 227.

³⁷⁷ [1963] Ch 199.

³⁷⁸ [2011] JRC 227.

³⁷⁹ [2013 (2) JLR 22].

³⁸⁰ [2011] JRC 227.

³⁸¹ [2013 (2) JLR 22]; Code of Laws 1771: ‘personne ne pourra contracter pour choses ou matières en litige’ [‘no person may contract for things or matters in litigation’].

³⁸² [2011] JRC 227 at [24].

lawyer bears the cost of running the litigation in exchange for their fee plus an additional percentage as a success fee) are therefore unenforceable under Jersey law.

C. Third Party Litigation Funding

Third party litigation funding—the practice whereby a stranger to the litigation contracts with a party to finance all or part of a party's legal costs as the case progresses in exchange for taking an agreed share of the recovery or settlement proceeds but nothing if the action fails—is a relatively new phenomenon in Jersey litigation. Unfortunately, there is a dearth of relevant case law in Jersey that precisely delineates 'safe' funding arrangements from those that are champertous. Further refinement of the law is likely to be cautious, incremental and will likely look to England and Wales, where the practice of litigation funding has become more developed in recent years.

The practical benefit of third party litigation funding is clear, particularly in a trust context. A beneficiary seeking to bring hostile proceedings against a trustee is often faced with a financial institution with considerable resources at its disposal. The Royal Court is mindful of the issue of access to justice which has been a prominent feature in the rationale for the acceptance of third party funding into Jersey litigation.³⁸³ Permitting an arrangement whereby the beneficiaries (who may be seeking restoration of the trust fund and are without private resources to fund litigation themselves) to outsource the cost of bringing proceedings, is a way of levelling the playing field between well financed trustees and impudent beneficiaries.³⁸⁴

i. Types of Funding Arrangement

Litigation funding arrangements can be broadly divided between 'pure' funding arrangements and professional or 'for profit' arrangements. The significance of the distinction between a 'pure' and 'for profit' arrangement is that a court is less likely to make a third party adverse costs order against a 'pure funder'.³⁸⁵ A 'pure' funder funds an action on the basis that, if the claim succeeds, they will recover only the contribution that they have made. A pure funder has no control over the management of the litigation and will not profit from it. There are few examples in Jersey case law of the Royal Court considering a 'pure' funding arrangement but the enforceability of a pure funding arrangement is unlikely to be challenged because it does not tend to excite the Court's suspicion that the purity of the litigation is being corrupted by the funder for its own ends.

Where a third party funds litigation in the hope of making a profit from it, the rules against maintenance and champerty are clearly potentially relevant. The vast majority of third

1-149

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³⁸³ *Barclays Wealth Trustees (Jersey) Limited and Barclays Wealth Fund Managers (Jersey) Limited v Equity Trust (Jersey) Limited and Equity Trust Services Limited* [2013 (2) JLR 22] at [42]–[63].

³⁸⁴ In *The Valetta Trust*, the beneficiaries did not have sufficient funds to bring a claim against the former trustee and the only asset of the trust in the hands of a newly appointed trustee was the claim for breach of trust against its predecessor.

³⁸⁵ *Planning and Environment Minister v Yates and Anor* [2008 JLR 486].

party litigation funding arrangements are of this latter ‘for-profit’ character. However, the policy imperative of encouraging access to justice means that these arrangements are less likely to be struck down by the courts as offending the rules against maintenance and champerty than was previously the case. Nevertheless, if the funder attempts to exercise any concerted degree of control over the litigation, or stands to recover disproportionate sums from the proceeds by way of profit, the Court can hold the agreement to be unenforceable.

ii. Factors for the Court to Take into Account in Upholding a Third Party Funding Agreement

- 1-153 The Royal Court will be prepared to uphold a funding agreement that facilitates access to justice by impecunious litigants, subject to appropriate safeguards to ensure that justice is not corrupted by the arrangement. The decision in *Valetta* arose out of a Beddoe hearing.³⁸⁶ The arrangement in question was between a funder and a trustee appointed to pursue its predecessor for a breach of trust claim. No party was arguing that the agreement was unenforceable,³⁸⁷ however the case being the first of its kind, the Royal Court took the opportunity to set out what it thought were the key touchstones that did not make the agreement champertous. Whether a particular funding arrangement falls foul of the rule against maintenance and champerty will depend on its terms and all the circumstances but based on the existing Jersey and English authorities, the following factors are likely to have a magnetic significance:

1. *The extent to which the funder controls the litigation.* The courts recognise that the funder will inevitably exercise some control over proceedings, otherwise the risk of funding the litigation would be too great. The funder is permitted to insist that the funded party conduct the litigation in accordance with the reasonable advice of their lawyers.³⁸⁸ However, control that goes beyond this is more likely to give rise to a finding that the funding agreement is champertous. Examples of excessive control might include:
 - i. taking or influencing strategic decisions;
 - ii. seeking to interfere in the solicitor/client relationship; or
 - iii. controlling or meddling in settlement negotiation.

The applicable principles as to whether the funder has exercised an unacceptable level of control in the litigation will overlap considerably with the principles governing the circumstances in which the court may order costs against the funder as a non-party.

2. *The level of communication between the funded party and the solicitor.* Where communications between the funded party and the solicitor on the record are limited, or where there is no solicitor/client relationship between the funded party and that solicitor, the arrangements are more likely to fall foul of the rules (see *Clairs Keeley (a Firm) v Treacy*).³⁸⁹ Ideally, the solicitor should be independent of the funder, and alive to the possibility of abuse or conflict of interest.

³⁸⁶ As to Beddoe applications in Jersey, see Ch 3.

³⁸⁷ Although the later decision in *Barclays Wealth Trustees* was the subject of full argument and a champertous agreement was held to be unenforceable, whether it is also void or voidable was left at large.

³⁸⁸ *Re The Valetta Trust* (n 376).

³⁸⁹ [2003] WASCA 299.

3. *The prejudice likely to be suffered by a defendant if the claim fails.* A funding agreement under which the funder is not liable to meet any adverse costs order against the funded party is like to be considered unacceptable. If the funder is to have a commercial stake if the litigation succeeds, it must also be 'on risk' to meet the other side's costs if the claim fails. It is for this reason that a funding arrangement will also cover the cost of ATE insurance as well.³⁹⁰
4. *The extent to which the funded party is provided with information about, and is able to make informed decisions concerning, the litigation.*
5. *The amount of profit that the funder stands to make.* In *Factortame*, the Court took the view that the 8 per cent payable to the firm of accountants funding the litigation was not excessive. In *Valetta*, the Royal Court approved an agreement under which the funder was entitled to a maximum of 50 per cent of the proceeds of the litigation or three times the plaintiff's legal costs whichever was the greater. Fifty per cent probably represents the limit of what the Royal Court will be prepared to approve. Where the funded party is no longer in a position to benefit from a successful outcome, the court is more likely to find that the agreement is champertous.
6. *Whether or not there is a risk of inflaming costs and damages.* This is, obviously, more of a risk in the context of contingency fee agreements which are not permitted under Jersey law.
7. *Whether or not there is a risk of distorting evidence.* It is extremely unlikely that an agreement whereby expert witnesses were paid on a contingency basis could ever be upheld as valid: the risk that the evidence would be distorted is too great.
8. *Whether or not the funder is a professional funder and/or is regulated.* In *Factortame*, the accountants providing the funding were of a reputable and regulated profession. Unregulated funders are likely to be scrutinised with more care. A voluntary Code of Conduct for Litigation Funders was introduced in November 2011 in England and Wales. In both the *Valetta* and *Barclays Wealth Trustees* cases the funder, Harbour Litigation Investment Funding LLP, was a member of the Association of Litigation Funders of England and Wales and a signatory to the voluntary Code of Conduct for Litigation Funders.

iii. Consequences of a Champertous Funding Arrangement

If a funding agreement is found to be champertous, the consequences are as follows:

1-154

1. The agreement itself is unenforceable as a matter of public policy. Whether the agreement is void *ab initio* or voidable is unclear.³⁹¹ The funder will be unable to enforce the agreement against the funded party (meaning, in the case of solicitors, that fees and expenses will not be recoverable, either under the agreement or even on a *quantum meruit* basis).³⁹²

³⁹⁰ As to which see below.

³⁹¹ [2013 (2) JLR 22] at [44]; Pothier's *Traité des Obligations* (1821 edn) vol 1, para 43 provides: 'Lorsque la cause pour laquelle l'engagement a été contracté est une cause qui blesse la justice, la bonne foi ou les bonnes mœurs, cet engagement est nul, ainsi que le contrat qui le renferme.' [When the cause for which the commitment was made is a cause that hurts justice, good faith or morals, this commitment and the contract that contains it is nothing].

³⁹² *Re Trepca Mines Ltd (No 2)* [1963] Ch 199.

2. The claim to which the agreement pertains is not to be automatically struck out unless it amounts to an abuse of process.
3. As a result of the indemnity principle,³⁹³ a successful funded party will be unable to recover costs from its opponent because it will be under no enforceable liability to its funder.
4. The fact that litigation is funded under an unenforceable agreement does not amount to a defence to the substantive claim for which funding was sought.³⁹⁴
5. The existence of an unenforceable funding agreement will not provide grounds for the stay or strike out of the proceedings, unless the circumstances independently give rise to grounds for saying that the proceedings are an abuse of process.³⁹⁵
6. The circumstances of the case may give rise to grounds justifying a third party costs order under Article 2 of the Civil Proceedings (Jersey) Law 1956,³⁹⁶ against the third party funder, although it appears the Royal Court has power to make such an order irrespective of whether or not the agreement is unenforceable. The availability of this power is referred to in *Barclays Wealth Management*³⁹⁷ so as to provide solace to a successful party who is unable to obtain an order for costs against a funded party because that party cannot enforce the agreement that the funder pays its adverse costs. In the leading English Court of Appeal case of *Arkin v Borchard Lines Ltd and Ors*,³⁹⁸ approved in *Valetta*, the funder was held to be liable for costs up to the amount of its own contribution even though the arrangement was not held to be champertous but the Court made it clear that, if the agreement had been champertous, the funder's liability for costs could have been unlimited.

iv. After the Event Insurance

- 1-155** After the Event, or ATE insurance is an insurance policy taken out by a plaintiff after a dispute has arisen to protect against the risk of an order for adverse costs if the litigation is lost. Owing to the risk that a professional litigation funder might be required to meet the funded party's adverse costs, it is often used in combination with third party litigation funding to protect the funder from the risk of an adverse third party costs order being made against it in the event the proceedings are lost.³⁹⁹
- 1-156** The tactical advantage to a plaintiff of informing the defendant about his ATE cover (other than being personally free of the risk of an adverse costs order) is limited to implicitly indicating that the plaintiff has had the benefit of a commercially minded third party assess the claim to be worth proceeding with. The cost risk to an opponent of an ATE premium would be of considerable tactical advantage to a beneficiary in trust litigation. A trustee is unlikely to obtain Beddoe relief in hostile litigation directed towards it,⁴⁰⁰ and (if the

³⁹³ *Boyd v Pickersgill and Le Cornu* (n 295).

³⁹⁴ *Martell v Consett Iron Co Ltd* [1955] Ch 363.

³⁹⁵ [2013 (2) JLR 22] at [51] although no indication is given as to when an agreement would amount to an abuse of process.

³⁹⁶ As to the Court's jurisdiction to grant such an order see para 1-159 below.

³⁹⁷ [2013 (2) JLR 22] at [62].

³⁹⁸ [2005] EWCA Civ 655.

³⁹⁹ See below on third party cost orders against funders.

⁴⁰⁰ See categories of claim for which Beddoe relief may be granted.

litigation is defended) the trustee exposes itself to a costs order of even greater magnitude if the litigation is lost and to which it is not entitled to be indemnified from the trust fund. There is unchallenged Jersey authority to the effect that the ATE premium is not a ‘costs of the action’ and is therefore not an item of recoverable cost which the Court may award to against the losing party to litigation.⁴⁰¹ Given the ATE premium can be a significant percentage of the overall quantum of an adverse cost award, its non-recoverability deprives a plaintiff of a significant tactical advantage. *Riley v Pickersgill* is over a decade old, is only the decision of a Master rather than the full Royal Court, and is in any event obiter. Given ATE is one of a package of measures, including third party funding, that facilitates access to justice, following the strong policy statement in *Valleta*, the rationale that underpins the non-recoverability of the premium may be ripe for revision.

v. Non-Party Cost Orders

The jurisdiction of the Royal Court to order costs against a third party funder, as a non-party, has not yet been fully refined. Article 2(1) of the Civil Proceedings (Jersey) Law 1956 provides:

1-157

Subject to the provisions of this Part and to rules of court made under the Royal Court (Jersey) Law 1948, the costs of and incidental to all proceedings in the Royal Court shall be in the discretion of the court and the Court shall have full power to determine by who and what extend the costs are to be paid.

Section 51(1) and 51(3) Senior Courts Act 1981 which is in similar terms to Article 2(1), provides that ‘the costs incidental to all proceedings [...] shall be in the discretion of the court [...and] the court shall have full power to determine by whom and to what extent the costs are to be paid’. In terms, section 51 does not specifically provide for a power to order costs against a non-party but in the House of Lords in *Aiden Shipping v Interbulk Ltd (The Vimeira) (No 2)*⁴⁰² held that the section did in fact provide for such a power. *Aiden Shipping* was cited with approval in the Jersey decision of *Drake v Gouveia and Anor*:

1-158

In our judgment, the principles laid down in *Aiden Shipping* [...] are equally applicable in Jersey. The words ‘by whom’ in art. 2(1) of the Civil Procedure (Jersey) Law 1956 are wide enough to embrace any non-party whom the court, in the exercise of its discretion, considers ought justly to be ordered to pay the costs. No doubt this is a jurisdiction which ought to be exercised sparingly and with caution. Nonetheless, particularly in these days, when the costs of litigation threaten to make the courts inaccessible in practice to sections of the community, it is a power which the court should use in appropriate circumstances in order to ensure that litigants are not unfairly treated [...] the issue for determination was the question by whom the costs should, in accordance with reason and justice, be paid.⁴⁰³

*Dymocks Franchise Systems (NWS) Pty Ltd v Todd and Ors*⁴⁰⁴ summarises the principles upon which the Court exercises its jurisdiction regarding costs against non-parties. These

1-159

⁴⁰¹ *Riley v Pickersgill* [2002 JLR 196]; see para 1–102.

⁴⁰² [1986] 1 AC 965.

⁴⁰³ [2000] JLR 411 [418]; the Court of Appeal has a similar power under the Court of Appeal (Jersey) Law 1961, Art 16; see *Channel Islands Knitwear Co Ltd v Hotchkiss* [2001 JLR 570].

⁴⁰⁴ [2004] UKPC 39.

principles were followed in *Arkin*, which was approved by the Royal Court in *Valetta*. Neither of these authorities is strictly binding in Jersey but given the relative infancy of both litigation funding and the ancillary issue of costs against funders in the event the funded claim fails in Jersey, the Royal Court is likely to look to England for steer as to how it might develop its law.

a. Principles

- 1-160** The risk to a funder in the award of a non-party costs order turns on the issue of to what extent the funder has control over the litigation. Generally the jurisdiction to order costs against a non-party will not be exercised against a pure funder.⁴⁰⁵ Where however the non-party not only funds but also substantially controls or at any rate is to benefit (in the sense of profit rather than recoupment of outlay) from the proceedings, he will usually be liable to pay the costs if the action is unsuccessful.⁴⁰⁶ In *Arkin*, it was held that a professional, for-profit funder who financed part of the costs of the litigation should be liable for the other side's costs but capped to the same extent. In *Arkin*, the funding arrangement was not held to be champertous and the decision was expressly said to be confined to these cases. It follows that where the arrangement is champertous, the funder will be potentially liable for the entire costs of the action. That a non-party acted without impropriety and on legal advice does not prevent an order being made against him, although impropriety or the pursuit of speculative litigation would of course support making an order.⁴⁰⁷ While the general rule is that costs follow the event, the question of costs is a matter of discretion for the Court. What may be sufficient to justify an exercise of the discretion in one case should not be treated as a necessary factor for the exercise of the discretion in a different case.⁴⁰⁸ It is not necessary for the non-party to be made exclusively liable for costs or liable for all the applicant's costs. An order may be limited to part of the costs only; this solution is particularly appropriate where there is an issue as to the extent to which costs were incurred and *caused* by the funder. Although the Court has jurisdiction to make a non-party order even where the conduct complained of has not caused the applicant to incur the costs sought to be recovered, the English cases where the Court has exercised its discretion to make the order in the absence of causation have been rare and the consensus from the Court of Appeal in a number of judgments appear to be that where there is no causation (going to the issue of the funder's control of the litigation) a third party order is not usually appropriate.⁴⁰⁹

⁴⁰⁵ *Planning and Environment Minister v Yates and Anor* (n 385).

⁴⁰⁶ *Dymocks Franchise Systems (NSW) Pty Ltd v Todd and others* (n 404) at [25], *Arkin* (n 398) and *Leeds United AFC Ltd v Admatch* [2011] JLR N[22]] (where it was held just and reasonable to award costs against a company director if the company was dormant, had no assets and no interest in proceedings and conducted the proceedings solely for the director's personal benefit).

⁴⁰⁷ *Dymocks Franchise Systems (NSW) Pty Ltd v Todd and others* (n 404) at [33]; *SGI Trust Jersey Ltd v Wijsmuller* [2008] JLR N 22].

⁴⁰⁸ *Secretary of State v Aurum Marketing Ltd and Anor* [2000] EWCA Civ 224.

⁴⁰⁹ *Byrne v South Sefton Health Authority* [2001] EWCA Civ 1904 at [35]; *Total Spares and Supplies Ltd and Anor v Antares SRL and Ors* [2006] EWHC 1537 (Ch) at [54]; *Systemcare (UK) Ltd v Services Design Technology Ltd and Anor* [2011] EWCA Civ 546.

b. Procedure for Seeking an Order for Costs against a Non-party

The non-party must be (1) added as a party to the proceedings for the purpose of costs only⁴¹⁰ and (2) given a reasonable opportunity to attend a hearing at which the Court will consider whether to make an order for costs against the non-party. It is not necessary that the non-party be joined as a party to the proceedings from the outset; it is sufficient for the receiving party to make an application by way of summons in the course of the usual costs arguments at the end of proceedings. It appears, that the Court has jurisdiction to make a non-party order, even when all arguments over costs between the parties have been dealt with by the Court and an *inter partes* costs order has been made. A non-party costs order is 'in the strictest sense supplemental to the judgment already pronounced and sealed and in no way varies it'.⁴¹¹ This raises the possibility of seeking a non-party costs order only when enforcement of a costs order against a named party to the proceedings has failed. While there is no procedural requirement to do so it is prudent to warn the proposed respondent of an intention to issue a summons for an order for costs against the third party funder as soon as possible.⁴¹² There are a number of competing English (but no Jersey) authorities on the importance of giving notice. It has been suggested that a failure to warn as soon as the possibility arises can be fatal to an application.⁴¹³ However, in later and higher English authority in *Farrell and another v Direct Accident Management Services Ltd and Anor*⁴¹⁴ it was held that it was insignificant that early notice was not given. In ordering a non-party to pay costs, on the indemnity basis the English High Court has held⁴¹⁵ that there was no binding requirement to give notice of the application, on the basis of what the Court had seen and the views it had formed of the non-party's character, it was satisfied that it was 'positively unlikely' that he would have done anything different from continuing to defend the claim and pursuing the counterclaims, even if had been warned of the application. *Hitachi Capital (UK) Plc v V-12 Finance Ltd and Ors*⁴¹⁶ provides a reminder of the need to notify third parties that costs orders are to be sought against them (referring to the discussion on this in *Oriakhel v Vickers and Ors*)⁴¹⁷ and a warning that the Court can take account of a failure to give notice, although in the case a non-party order was granted. Referring to the competing authorities on notice, the Court drew the following distinction: first, where the failure to give notice 'creates a trap for the unwary', there is a clear cause for concern but where a non-party 'plays "hardball" with the assistance of experienced solicitors', there is no reason why a failure to warn should provide a technical obstacle to doing justice.

1-161

⁴¹⁰ Where the third party funder is overseas, an application to serve out of the jurisdiction needs to be made in accordance with the principles discussed in Ch 2. In the absence of a specific gateway applicable to costs, cf CPR PD 6B.3.1(18), r 7(c) ('necessary or proper party') is likely to be the most appropriate gateway.

⁴¹¹ *Dymocks Franchise Systems (NSW) Pty Ltd v Todd and others* (n 404) at [17].

⁴¹² *Symphony Group Plc v Hodgson* [1994] QB 179 at [193].

⁴¹³ See *Equitas Ltd and another v Horace Holman & Co Ltd and another* [2008] EWHC 2287 (Comm).

⁴¹⁴ [2009] EWCA Civ 769, affirmed in *Relfo Ltd (In Liquidation) v Varsani & ors* [2014] EWCA Civ 1451.

⁴¹⁵ *Weatherford Global Products Ltd v Hydropath Holdings Ltd and Ors* [2014] EWHC 3243 (TCC).

⁴¹⁶ [2009] EWHC 2432 (Comm).

⁴¹⁷ [2008] EWCA Civ 748.

c. Applications to Trial Judge

- 1-162** The application for a third party costs order is made by way of summons usually to be heard before the trial judge.⁴¹⁸ The fact that the judge may have already expressed views on the conduct of the non-party constitutes neither bias nor the appearance of bias.⁴¹⁹ It seems that the summons should be served on all other parties as well as the non-party respondent to the application.⁴²⁰

d. Summary Procedure

- 1-163** The liability of a non-party to pay the costs of an action can be dealt with summarily if the non-party had close proximity to or direction of the proceedings, for example as a funder to the litigation. Ordinarily, however, a non-party who has not funded an action and had no personal interest in it would not be liable for the costs incurred by the unsuccessful party without a full hearing on the merits.⁴²¹ The judge's findings of fact in the main action may be admissible, provided that the connection of the non-party with the original proceedings was so close that he will suffer no injustice if the evidence is admitted.⁴²² The fact that the procedure is a summary procedure should not preclude the making of the order in a complex case.⁴²³ The costs of an action can easily outweigh the sums otherwise in dispute and, if justice requires those costs to be borne by a non-party, the fact that a substantial hearing is required should not get in the way. Were it otherwise, there would be the ludicrous result that the more complex (and, therefore, expensive) a case is, the less likely it is that a non-party order would be made.

e. Ancillary Orders

- 1-164** In some cases it may be appropriate to use the application for a non-party costs order as a forum to obtain ancillary orders for discovery of documents for the purposes of determining the application for the non-party costs order. In the English case of *Thomson v Berkhamsted Collegiate School*,⁴²⁴ Blake J granted requests for ancillary orders for disclosure, in the context of an application for costs against non-parties. The Court held that, before considering whether the ancillary orders sought in the case were necessary, the starting point should be to consider the likelihood of a third-party costs order being made. If the case for a non-party order was weak, it was inherently improbable that an order would be made. Conversely if the case was 'overwhelming', it was unlikely that ancillary orders (for example, for disclosure, inspection or cross-examination) would be necessary.

⁴¹⁸ *Symphony Group Plc v Hodgson* (n 412) at [193] (with any necessary application for service of the summons made for service out of the jurisdiction made to the Judicial Greffier). The Judicial Greffier also has jurisdiction to make a third party costs order concurrent with the Bailiff; see *Drake (née Neville) v Gouveia* [2000 JLR 411].

⁴¹⁹ *Equitas Ltd and another v Horace Holman & Co Ltd and Anor* (n 413).

⁴²⁰ *Comminos v Prudential Assurance Co Ltd (The Ikarian Reefer)* [2000] 1 All ER 37 at [47].

⁴²¹ *Minister for Planning and Environment v Yates and Anor* (n 385).

⁴²² *Symphony Group Plc v Hodgson* (n 412) at [193].

⁴²³ Non-party applications should not be confused with wasted costs applications; in this respect see *Robertson Research International v ABG Exploration* [1999] CPLR 756 but cf *Holden v Oyston* [2002] EWHC 819 (QB) at [8].

⁴²⁴ [2009] EWHC 2374 (QB).

The following issues are also likely to be of significance in deciding whether ancillary orders are required:

1. The strength of the application for a non-costs order unassisted by the disclosure sought.
2. The potential importance of the documents sought, including whether they were likely to clarify issues relevant to the exercise of the Court's discretion or, alternatively, if they may lead to satellite litigation.
3. Whether, on a summary assessment, it was obvious that the documents would be subject to legal professional privilege.⁴²⁵
4. Whether the likely effect of any order the Court wanted to make would be proportionate and just in all the circumstances.

It remains a matter of controversy whether an application for ancillary orders for disclosure can be made to enable a party to bring an application for a non-party costs order. In the English case of *Systemcare (UK) Ltd v Services Design Technology Ltd and Anor*, Lloyd LJ criticised the claimant for putting the proverbial cart before the horse and said that 'If a section 51 application cannot be made on the documents already available it should not normally be made at all'.⁴²⁶ However, in another English decision, *Germany v Flatman*,⁴²⁷ Eady J granted orders for the claimants' solicitors to give disclosure of information on how the two joined claims had been funded. In each case, the defendants had successfully resisted a personal injury claim and obtained an order for costs, but had little prospect of recovering anything from the claimants. The same firm of solicitors had represented the claimants under a conditional fee arrangement, but without after the event insurance. The defendants suspected that the solicitors had funded the claims to some extent by defraying disbursements, but did not have the evidence to support an application for a non-party costs order. In *Relfo Ltd (In Liquidation) v Varsani & Ors*,⁴²⁸ the English Court of Appeal rejected appeals of non-party costs orders based upon grounds that the judge should not have ordered freezing injunctions to aid enforcement of the non-party orders. The Court of Appeal held he was entitled to exercise his discretion as he did regarding the freezing orders. The judge was entitled, in the light of the egregious dishonesty which he found established in the trial, to attempt to ring-fence whatever assets there might be to meet the orders he made.

1-165

f. Points in Considering a Non-party Costs Order against a Third Party Litigation Funder

One of the greatest difficulties for a party seeking a non-party costs order against a litigation funder is discovering whether the litigation is being funded at all and by whom. The arrangement is essentially a private one between the funder and the funded party. It is

1-166

⁴²⁵ See *The Owners and/or Demise Charterers of the Dredger 'Kamal XXVI' and the Barge 'Kamal XXIV' v The Owners of the Ship 'Ariela'* [2010] EWHC 2531 (Comm) as an example of the extended application of the fraud exception to communications between a solicitor and an 'innocent' client who is being used by a fraudster to perpetrate a crime in order to circumvent the issue of privileged in documents.

⁴²⁶ [2011] EWCA Civ 546.

⁴²⁷ [2011] EWHC 2945 (QB).

⁴²⁸ [2014] EWCA Civ 1451.

sensible to ask one's opponent how the litigation is being funded. If the opponent refuses to tell you, an application can be made by summons for an order for disclosure by the opponent and his solicitors, but not usually until the proceedings have concluded. The application should be on notice, supported by an affidavit setting out the basis on which it is believed that the matter is being funded by a third party (for example, evidence of the litigating party's lack of funds). When serving the other parties, it is prudent to inform them that no liability is accepted for any costs incurred by them, as opposed to the respondent to the application. This should encourage them not to participate in the application at all. The respondent should be invited to consent to the application that he be joined to the proceedings. If he does, directions for the conduct of the substantive application (such as the provision of affidavits) will probably be capable of agreement, the first-stage order having been made by consent and the Court can be asked simply to list the substantive application for an agreed date. If the respondent does not consent to be joined, the application should be listed simply as one for joinder of the non-party and directions for the hearing of the substantive application. The directions to be sought will include directions for:

1. The exchange of evidence.
2. Any disclosure sought (for which grounds should be stated in the supporting affidavit).
3. The preparation of bundles.
4. The listing of the substantive hearing.

1-167 In anything other than the simplest litigation, both the application for joinder of the non-party and the substantive application for the order for costs against the non-party should usually be made to the trial judge, who will have been immersed in the detail of the litigation, rather than the Master. At all times, the parties should be mindful of the proportionality of the costs in doing so as against what can be obtained. Parties and their legal advisors should be well advised of the dangers in terms of costs of litigating about comparatively small sums in a manner that was only commensurate with much larger issues. Litigation ought to be proportionate to the need for reasonable remedies, not an exercise in attrition.⁴²⁹ If there are grounds to seek security for costs and if such an application is likely to succeed it may be better to proceed down that path rather than seek costs against a third party funder after the event. A party who fails to seek security where there were obvious grounds to do so takes a risk which can be taken into account by the Court in its discretion whether to order costs against a funder and may be of significant sway in what is a highly discretionary exercise of the Court's jurisdiction. In a situation like that in *Valetta*, where the trust and beneficiaries are otherwise impecunious save for the cause of action against a previous trustee, the trustee should seek the Court's blessing of a funding agreement as part of any Beddoe application. The litigation funder is likely to be out of the jurisdiction and will usually have otherwise been joined to the proceedings. Where the respondent to the application for a non-party costs order is out of the jurisdiction, an application will need to be made to serve-out a summons applying for him to be joined as a party under rule 6/36(b)(ii) RCR 2004. Jersey does not have an equivalent of CPR PD 6B.3.1(18)—the jurisdictional gateway through which a claim may be made by a party to proceedings for an

⁴²⁹ *Sims v Hawkins* [2007] EWCA Civ 1175.

order that the court exercise its power to make a costs order in favour of or against a person who is not a party to those proceedings. RCR 7(c) of the 1994 rules provides the appropriate gateway: the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto.

g. The Effect of the Order for Costs against a Non-party

An order that a non-party should pay costs is enforceable like any other order. If the costs have not been taxed between the parties when the order is made, the non-party will be a party to the taxation in the conventional way. If the costs of the litigation have been taxed between parties before the order is made, the non-party should not, in principle, be bound by the amount of costs so assessed, as he has not had an opportunity to challenge that amount. It is sensible to deal with this issue when the order against the non-party is made. Ordinarily, the non-party should be served with a bill of costs and given an opportunity to challenge it by points of dispute in the usual way. It has not yet been determined whether Jersey's Royal Court has an equivalent power to that identified in *Nelson v Greening & Sykes (Builders) Ltd*⁴³⁰ under section 51(3) of the Senior Courts Act 1981 to order a non-party to pay a sum of costs which have already been taxed in its absence. The precise approach will depend on the facts.⁴³¹ In *Nelson*, it was held appropriate because the non-party had been acting in tandem with Mr Nelson and there was 'a more than sufficient degree of identification' between them in the conduct of these proceedings to make it just to order the non-party to pay the costs. The Court had power to 'determine by whom and to what extent the costs are to be paid' and Lawrence Collins LJ did not think that the phrase 'to what extent' was limited to issues of proportion and he rejected the submission that it did not extend to quantum.

1-168

⁴³⁰ [2007] EWCA Civ 1358.

⁴³¹ See the factors militating against an order that the non-party pay costs that had been assessed as asked under a default costs certificate in *Systemcare (UK) Ltd v Services Design Technology and another* (n 409).

2

Conflict of Law Issues in Jersey Trust Litigation

I. Introduction

The conflict of laws is concerned with a situation in which a legal matter has connections with the legal system of more than one jurisdiction. Owing to the island's status as a preeminent financial centre, some cross-border element is a very common feature in Jersey trust litigation. It would not be unusual, for example, to have a settlor domiciled in Guernsey establish a trust governed by Jersey law over the shares of companies registered in the British Virgin Islands, vested in trustees located in the Cayman Islands with beneficiaries in Canada and Monaco.

2-1

There are essentially three key considerations for any practitioner engaged in a Jersey trust dispute.

2-2

1. In what circumstances will the Royal Court have jurisdiction to hear and decide cross-border trust litigation?
2. Which jurisdiction's law will the Royal Court apply to determine the dispute on the merits?
3. When will the Jersey court recognise and give effect to a judgment made overseas?

This chapter is dedicated to (1) and (2) with the recognition and enforcement of foreign judgments and orders discussed in Chapter 15.

2-3

II. Jurisdiction

A. Jurisdiction Based on Service within the Jurisdiction

The Royal Court will have jurisdiction over any defendant who is properly served with an appropriate form of originating process.¹ The Royal Court's jurisdiction will be automatic if service is properly effected within the Bailiwick of Jersey.² Indeed as in England, the

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¹ See Ch 1 for discussion on the various forms of originating process in Jersey.

² See Ch 1 for discussion of service of legal process within the jurisdiction.

jurisdiction of the Royal Court, whether service is within or without the Bailiwick, is based upon effective service of process. Proof of service is evidenced either by way of an affidavit of service (in cases where ordinary service is permitted) and (within the jurisdiction) by the Viscount's official record of service, where personal service is required.³ The Royal Court will also have jurisdiction if a defendant, wherever located, submits to proceedings in Jersey,⁴ although a defendant will not be treated as having submitted to the jurisdiction of the Royal Court if his only participation in the proceedings is to contest the Royal Court's jurisdiction.⁵

i. Jurisdiction Conferred by other Means

- 2-5 The Royal Court will also have *prima facie* jurisdiction (subject to a successful challenge to the jurisdiction of the Court) if the trust instrument confers jurisdiction on the courts of Jersey.⁶ The Royal Court will also have *prima facie* jurisdiction over a trust in the following circumstances:⁷
1. the trust is a Jersey trust,⁸ wherever the location of the trustee, the trust assets or the beneficiaries;
 2. the trustee of a foreign trust⁹ is resident in Jersey;
 3. any property of a foreign trust is situated in Jersey;¹⁰ or
 4. the administration of any trust property of a foreign trust is carried on in Jersey.¹¹

ii. Consequences of Submission to the Jurisdiction of a Foreign Court

- 2-6 Trustees of a Jersey trust, who submit to the jurisdiction of a foreign court in accordance with its own conflicts of laws rules, expose themselves personally and the trust assets situated within that jurisdiction to the process of the foreign court.¹² Such assets may be exposed anyway, if under the relevant foreign procedural rules the trustee can be brought within the foreign court's jurisdiction regardless of whether or not the trustee submits voluntarily. Submitting to the jurisdiction of a foreign court *may*¹³ lead, not only to recognition and

³ As to when personal service as opposed to ordinary service is permitted, see RCR 2004, rr 5/4 and 5/5.

⁴ As to which generally, see Ch 15.

⁵ RCR 2004, r 6/7(9).

⁶ *Crociani v Crociani* [2014] (1) JLR 426], affirmed on appeal in *Crociani v Crociani* [2014] (2) JLR 508] (PC).

⁷ Trusts (Jersey) Law 1984, Art 5.

⁸ Meaning a trust whose proper law is the law of Jersey; Trusts (Jersey) Law 1984, Art 1(1). As to the determination of the proper law of a trust under Jersey law, see Art 4, discussed at para 2-98 below. Where the trust specific jurisdiction rules in Art 5 of the Trusts (Jersey) Law do not apply, recourse must be had to the ordinary rules for jurisdiction. These are contained in the Royal Court Rules 2004, pt 5 (for service on the defendant within Jersey), and the Service of Process Rules 1994 (for service on the defendant outside Jersey, excluding para 7(j)).

⁹ Meaning a trust whose proper law is the law of some jurisdiction other than Jersey; Trusts (Jersey) Law 1984, Art 1(1).

¹⁰ This is satisfied if the trustee holds shares in a Jersey registered company; *Re Representation Friedman & Asiastrust Limited* [2006] JRC 187 at [2] (restricted).

¹¹ There are no reported decisions on the precise scope of this provision. In *Heinrichs v Pantrust International SA & Ors* [2016] JRC 106A, Art 5(d) was sought to be relied upon on the basis that a Dutch registered company had a Jersey director and a Dutch resident director but on the facts it was held that the appointment of the Jersey director did not constitute administration of trust property in Jersey.

¹² As to whether, in submitting to the process of a foreign court, the trustee has exposed itself and the trust assets to enforcement of that foreign process in Jersey, see the discussion of the Art 9 'firewall' provisions in Ch 15.

¹³ *ibid.*

enforcement in Jersey of foreign judgments on personal claims against the trustees, but also to a recognition and enforcement against the trust assets, potentially to the detriment of the beneficiaries. Jersey has a well-developed corpus of authority as to the consequences following the trustee's decision to submit (or not to submit) to the jurisdiction of the Family Division of the English High Court and whether the outcome of those proceedings is as a consequence capable of recognition and enforcement against them and the trust in Jersey.¹⁴ The Royal Court may be hesitant to recognise or enforce a foreign court order against a trustee of a Jersey trust even if the trustee has submitted to the foreign jurisdiction, since such an order is generally regarded as an exorbitant exercise of jurisdiction.¹⁵ Trustees of a Jersey trust who receive service or notice of proceedings from a foreign court are well advised to do nothing until they have (promptly) obtained appropriate legal advice; and it may well be appropriate for them to apply to the Royal Court for directions as to how, if at all, they should respond to the foreign proceedings.

B. Jurisdiction Based on Service out of the Jurisdiction

A large proportion of Jersey trust litigation, particularly claims concerning the recovery or restoration of trust property, have an international element that requires that the proceedings be served out of the jurisdiction in order to bring all the proper parties before the Royal Court. A defendant who cannot be served within the jurisdiction must be served (and such service not subsequently set aside) outside Jersey in order for the Royal Court to be able to exercise any jurisdiction over them. Jersey has long recognised the distinction between service as of right and where the plaintiff requires leave to serve-out.¹⁶ A plaintiff who seeks leave to serve proceedings out of the jurisdiction must seek leave of the Court before service-out can be effective to join the overseas defendant to the Jersey proceedings.¹⁷ For a plaintiff, an application to serve out comprises a two-stage process:¹⁸

2-7

1. the proceedings to which it is sought to join the defendant must fall within at least one of the jurisdictional gateways in rule 7 of the Service of Process Rules 1994; and
2. the Court is satisfied that Jersey, rather than any other jurisdiction, is, using the Latin maxim, *forum conveniens*, ie Jersey is clearly the most appropriate place in which to bring the claim to which it is sought to add the overseas defendant.

i. Jurisdictional Gateways

Permission to serve-out cannot be given save through one of the 'gateways' specified in rule 7 of the 1994 Rules. Each cause of action to which a defendant outside Jersey is sought to be

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¹⁴ *C.I. Law Trustees Limited v Minwalla & Ors* [2005 JLR 359] at [19]–[21]; *In re H Trust* [2006 JLR 280]; *In re A & B Trusts* [2007 JLR 444].

¹⁵ *Compass Trustees v McBarnett & Ors* [2002 JLR 312]; *C.I. Law Trustees Limited v Minwalla & Ors* (n 14) at [14]–[18] and [27].

¹⁶ *Gheewala v Compendium Trust Co Ltd* [2003 JLR 627], per Lord Walker at [28]; and *Jaiswal v Jaiswal* [2007 JLR 305].

¹⁷ Service of Process Rules 1994, r 5. The Court has a discretion whether to treat proceedings commenced by improper service as void under RCR 2004, r 10/6; *United Capital Corporation Limited v Bender* [2006 JLR 1].

¹⁸ *Nautech Services Limited v CSS Limited* [2014 (1) JLR 361] at [39].

joined must fall within at least one of the gateways. It is not sufficient that only one or some of the causes of action falls within a gateway: leave will not be given for those that do not fall within the gateway identified.¹⁹ The gateways that are conceivably relevant to a Jersey dispute either *under* or *against* a trust are as follows:

- (a) relief is sought against a person domiciled within the jurisdiction;²⁰
- (b) an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of the doing of or failure to do that thing);
- (c) the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto;
- (d) the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which –
 - (i) was made within the jurisdiction,
 - (ii) was made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction,
 - (iii) is by its terms, or by implication, governed by Jersey law, or
 - (iv) contains a term to the effect that the Royal Court shall have jurisdiction to hear and determine any action in respect of the contract;
- (e) the claim is brought in respect of a breach committed within the jurisdiction of a contract made within or out of the jurisdiction, and irrespective of the fact, if such be the case, that the breach was preceded or accompanied by a breach committed out of the jurisdiction that rendered impossible the performance of so much of the contract as ought to have been performed within the jurisdiction;
- [...]
- (h) the claim is brought to construe, rectify, set aside or enforce an act, deed, will, contract, obligation or liability affecting land situate within the jurisdiction;
- (i) the claim is made for a debt secured on immovable property or is made to assert, declare or determine proprietary or possessory rights, or rights of security, in or over movable property, or to obtain authority to dispose of movable property, situate within the jurisdiction;
- (j) the claim or application is brought within the terms of Article 5 of the Trusts (Jersey) Law 1984;
- (k) the claim is made for the administration of the movable estate of a person who died domiciled within the jurisdiction or for any relief which might be obtained in any such action;
- (l) the claim is brought in a probate action;
- (m) the claim is brought to enforce any judgment or arbitral award;
- [...]
- (o) the claim is made under the Proceeds of Crime (Cash Seizure) (Jersey) Law 2008;
- [...]
- (q) the claim is brought for money had and received or for an account or other relief against the defendant as constructive trustee, and the defendant's alleged liability arises out of acts committed, whether by the defendant or otherwise, within the jurisdiction.

¹⁹ *The Siskina* [1979] AC at 255, per Lord Diplock, affirmed in *Maywal Limited v Nautech Services Limited* [2014 (2) JLR 527]; *Heinrichs v Pantrust International SA & Ors* (n 11).

²⁰ Jersey's recognition of the concept of domicile largely follows that prevailing at common law in England and Wales; *In The Matter Of The Representation Of Hawksford Executors Limited* [2013 (2) JLR 357]. This gateway means effectively that anyone born in Jersey with either a Jersey domicile of origin, a Jersey domicile of dependence or a Jersey domicile of choice, even if resident outside the island, is amenable to the jurisdiction of the Royal Court.

ii. Rule 7(b): Injunctive Relief

The Royal Court had jurisdiction to grant free-standing²¹ interlocutory and post-judgment injunctive relief, including Mareva/freezing relief, against a defendant who is out of the jurisdiction in support of either Jersey or foreign proceedings with ancillary orders for disclosure.²²

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iii. Rule 7(c): A Necessary or Proper Party

The rule contains two requirements. The first is that the claim is brought against a person duly served within or out of the jurisdiction. The second is that the person to be served out of the jurisdiction is a necessary or proper party to the action. Any application requires careful consideration of the position of the defendant who has already been served; and of the nature of the claim and the relevance of the party to be served overseas to the claim.²³ A claim by a defendant against a third party for a contribution falls within the scope of the rule.²⁴ A person will be a necessary or proper party if their rights are affected by the *lis* between the existing parties to the proceedings.²⁵ The Court will be alive to the risk of rule 7(c) being abused by serving an anchor (but otherwise minor defendant) in the jurisdiction in order to bring the real claims against those outside the Bailiwick.²⁶ It will be persuasive if the claims sought to be brought against the person outside Jersey arise from the same underlying factual matrix with common factual and legal issues so as to raise the risk of an irreconcilable judgment if the person is not joined.²⁷ If the Court is satisfied that a third party should be joined under rr 6/10 or 6/36 RCR 2004 it is highly likely for justice to require they be joined as a party to the proceedings.

2-10

iv. Rule 7(j): Trusts

Article 5²⁸ of the Trusts (Jersey) Law applies only to litigation *under* a trust and has no application to litigation which is external to the trust relationship, for example a legal dispute in which the trustee becomes embroiled in the course of its administration of the trust, eg a contractual dispute or a dispute between a third party and companies owned by the trust.

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Article 7 of the Trusts (Jersey) Law 1984 provides that a trust may come into existence in any manner and, in particular, may arise by conduct. The Royal Court has held that Article 5

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²¹ ie without the need for substantive Jersey proceedings.

²² *Solvalub Ltd v Match Invs Ltd* [1996] JLR 361; *Krohn GmbH v Varna Shipyard* [1997] JLR 194]; *State of Qatar v Al Thani* [1999] JLR 118]; *Dalemont Ltd v Senatorov* [2012 (1) JLR 108], [2012 (1) JLR 168].

²³ *Maywal Limited v Nautech Services Limited* (n 19) at 36.

²⁴ *Crill Canavan v Mackinnon* [2013] JRC192A but Jersey law, outside fairly narrow parameters at customary law concerning parties who are jointly liable, only recognises the possibility of a contribution claim in respect of tortfeasors, see Art 3 Law Reform (Miscellaneous Provisions) (Jersey) Law 1960 cf Civil Liability (Contribution) Act 1978. See also *JEC Ltd v Brocker and Fitzpatrick Ltd* [2004] JLR 289] at [18].

²⁵ *In the Matter of the S Settlement* [2011] JLR 375] (application to set aside a disposition into trust on grounds of mistake); *Maywal Limited v Nautech Services Limited* (n 19); *Crociani v Crociani* [2016] JRC085 at [44]; *United Capital Corporation v Bender* (n 17) (party sought to be joined was holding assets which were the subject of a tracing claim).

²⁶ *United Capital Corp v Bender* (n 17).

²⁷ *ibid.*

²⁸ Discussed above at para 2-5.

of the Trusts (Jersey) Law applies to so-called ‘constructive trusts’.²⁹ Article 33(1) provides that, where a person (referred to in the article as a ‘constructive trustee’) makes or receives any profit, gain or advantage from a breach of trust, that person ‘shall be deemed to be a trustee of that profit, gain or advantage’.³⁰ Article 33(3) provides that a constructive trustee ‘shall deliver up the property of which the person is a constructive trustee to the person properly entitled to it’. Since Article 2 of the Trusts (Jersey) Law 1984 provides that a trust exists not only where a person actually holds or has vested in him property for the benefit of any person but also where he is deemed to do so, it is clear that a constructive trust is a trust within the meaning of Article 5.

- 2-13** The factual circumstances in which a constructive trust can arise are innumerable and the terms of Article 33 itself make clear that it does not provide an exhaustive definition. It is far from clear that all categories of constructive trusts come within the scope of Article 5. Article 33 clearly encompasses a ‘category 1’ constructive trustee.³¹ *Bender* was concerned with a so-called ‘category 1’ constructive trusteeship. The scope of ‘constructive trustee’ in Article 33 suggests a knowing recipient would come within the definition of a constructive trustee under the article as one who ‘makes or receives any profit, gain or advantage from a breach of trust’. Whether a dishonest assistant would likewise be treated as a constructive trustee for the purposes of Article 5 is unclear. A dishonest assistant does not necessarily ‘make or receive any profit, gain or advantage from a breach of trust’ although he is under a duty to account as though he were, or deemed to be, a constructive trustee.³² While Article 33(4) states in terms that it is not exhaustive of the circumstances under which a person may be or become a constructive trustee, whether that article applies to a dishonest assistant must be open to doubt. However, a claim in dishonest assistance (and knowing receipt where a proprietary claim is no longer viable) would certainly fall within rule 7(q) as claims for an account or other relief against the defendant as constructive trustee.

v. Rule 7(q): Liability as a Constructive Trustee, Claims for Restitution and ‘other Relief’

a. A Claim for Money Had and Received

- 2-14** There is little reported authority in Jersey in which the action for money had and received, has received judicial attention. The English analysis on money had and received draws attention to it being an action at common law. As has already been discussed, Jersey is neither a common law jurisdiction nor is the strict divide between law and equity observed. It has yet to be established whether the Court would accept an argument that the Jersey equivalent of an action for money had and received is an action in restitution for unjust enrichment, as outlined in the case of *Flynn v Reid*.³³

²⁹ *United Capital Corp Limited v Bender* [2006 JLR 242] at [54]–[64].

³⁰ However, this is by no means an exhaustive definition of the circumstances in which a constructive trust may be said to arise under Jersey law, see Ch 6.

³¹ See *Paragon Finance plc v D.B. Thakerar & Co* [1999] 1 All ER 400 at 409.

³² See Ch 12.

³³ [2012 (1) JLR 370] at [93]–[107].

b. A Claim for an Account or other Relief against the Defendant as Constructive Trustee

We have already discussed that Article 5 of the Trusts (Jersey) Law has been held to encompass constructive trusts. It is unclear whether rule 7(q) encompasses every category of constructive trustee. *Bender* confirms that claims based on accessory liability, which do not in themselves give rise to proprietary remedy, fall within rule 7(q), thereby covering actions for dishonest assistance and knowing receipt (which are properly to be characterised as an action for an account *as if a constructive trustee*).³⁴ An action for inconsistent dealing³⁵ would also appear to come within the definition of constructive trust for the purposes of the jurisdictional gateway.

What is the relationship between rule 7(j) and rule 7(q)? Given any claim or application in which the Royal Court has jurisdiction under Article 5 of the Trusts Law is already a gateway through which the Court may serve-out under rule 7(j), it might be thought there are should be no overlap between the categories of constructive trust covered by Article 5³⁶ and the categories of constructive trustee in rule 7(q). However, *Bender* is clear that constructive trust claims were not excluded from rule 7(j) merely because rule 7(q) applied to constructive trusts. The fact that rule 7(q) applies, in terms, to constructive trusts does not justify the conclusion that rule 7(j) should be read as applying only to express trusts. The Court in that case envisages circumstances in which a constructive trustee would fall within the terms of rule 7(j) but outside the terms of rule 7(q). For example, a foreign constructive trust may have been created by reason of acts taking place out of Jersey. The property of such a trust may be in Jersey. In that case, rule 7(j) would apply, but not rule 7(q).³⁷ The meaning of constructive trust in rule 7(q) and Article 33 are aligned so the definition of constructive trustee in rule 7(q) is not therefore wider than the meaning given to the term 'constructive trustee' in *Bender*.³⁸

Rule 7(q) includes claims for 'other relief', and appears to envisage the possibility of a claim against a *constructive trustee* which is neither a proprietary claim nor a claim for an account. This is potentially wide enough to include, what has become known in England as a *Diplock* claim (ie a claim against an innocent receiver of property imbued with a trust) and a claim for equitable recoupment even though a defendant to such an action is not necessarily termed a constructive trustee within the meaning of Article 33, which would throw the decision in *Bender*, that the two definitions are aligned, into doubt.

The defendant's alleged liability must 'arise out of acts committed within the jurisdiction' but rule 7(q) seems clear that the relevant acts need not be committed by the defendant; all that is required is some link between acts committed within the jurisdiction and the defendant.³⁹ It was a matter of controversy in English law for some years as to whether *all* the acts upon which liability is founded are needed to have been committed within the

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³⁴ *United Capital Corp Limited v Bender* (n 29) at [64].

³⁵ See Ch 6.

³⁶ *United Capital Corp Limited v Bender* (n 29).

³⁷ *ibid.*

³⁸ *ibid.* at [63].

³⁹ *NABB Brothers Ltd v Lloyds Bank International (Guernsey) Ltd* [2005] EWHC 405 (Ch) at [66] and [79]–[88], which reviews the previous rule and the decisions on it.

jurisdiction.⁴⁰ In *Polly Peck International plc v Nadir*,⁴¹ Knox J said that his own preference was for the construction which did not require all the acts constituting the constructive trust to have been committed within the jurisdiction. To construe the then prevailing English equivalent of Jersey's rule 7(q) so as to require *all* the acts constituting the constructive trust to have been committed within the jurisdiction would empty it of very nearly all its practical utility when one has regard to the prevalence of foreign corporations whose officers are very likely to be resident abroad and therefore only likely to acquire the necessary knowledge to establish the claimed constructive trust by events occurring abroad. The Jersey Court of Appeal has rejected the proposition that in order to come within the scope of the rule even a substantial part of the acts which give rise to the alleged liability took place in Jersey.⁴² Practically, and in a jurisdiction like Jersey where litigation arises from acts that have connections to multiple jurisdictions, it would be anomalous if jurisdiction over an overseas entity used by a fraudulent fiduciary to receive the proceeds of fraud committed within the jurisdiction depended upon whether or not the entity maintained a Jersey bank account into which the proceeds were paid. Given the strong policy objective of Jersey's authorities in safeguarding the island's financial industry against fraud, a broad construction of rule 7(q) would be facilitative of this purpose.

C. Standard and Burden of Proof

- 2-19** Where leave is sought to serve-out, the burden falls to the plaintiff to satisfy the Court of two matters before the Court can proceed to consider whether Jersey is clearly the most appropriate forum:⁴³
1. that the plaintiff has a good arguable case that the proceedings come within the jurisdictional gateway; and
 2. that there is a serious issue to be tried on the merits of each cause of action said to fall within one or more of the jurisdictional gateways.
- 2-20** While the vast majority of trust proceedings that require an application for leave to serve the proceedings out of the jurisdiction will clearly fall within at least one of the gateways set out above there remains the possibility (which has come to the fore in recent years as Jersey's trust law remedies have needed to adapted to ever more sophisticated factual and legal situations) for a dispute to arise as to whether a particular claim, as pleaded, falls squarely within a gateway.⁴⁴

i. A Good Arguable Case

- 2-21** The plaintiff must show that he has a good arguable case that each claim pleaded against a defendant falls within one of the jurisdictional gateways in rule 7. It is not sufficient that

⁴⁰ *ibid.*

⁴¹ *Independent*, 2 September 1992, Ch D, 28 July 1992.

⁴² *United Capital Corp Limited v Bender* (n 29) at 70.

⁴³ *James Capel (C.I.) Limited v Koppel* [1989] *JLR* 51; *Nautech Services Limited v CSS Limited & Ors* (n 18); *Spiliada Maritime Corp v Cansulex Limited* [1986] 3 All ER 843 at 858c, per Lord Goff; *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 43.

⁴⁴ *Heinrichs v Pantrust International SA & Ors* (n 11).

only one of a number of causes of action falls within a particular gateway: leave will be refused (or the Court will decline to accept jurisdiction if service is challenged) for those that do not.⁴⁵ The affidavit in support must state clearly which gateway is relied upon.⁴⁶ At this stage in proceedings, the plaintiff does not have to prove a good arguable case on the merits of the proposed action.⁴⁷ Surmounting the ‘good arguable case’ threshold requires establishing that it is more than merely arguable that the claim as pleaded comes within one of the gateways relied upon by the plaintiff but the threshold is not so high as to require proof on the balance of probabilities, ie the threshold somewhere between being merely arguable and the civil standard of being more likely than not. Whether the plaintiff can establish a good arguable case is normally decided on affidavits and without full disclosure and/or cross-examination of witnesses. The Court must be concerned not to appear to express some concluded view as to the merits, eg as to whether the contract existed or not.⁴⁸

Jersey has on occasion applied the so-called ‘Canadian Trust gloss’⁴⁹ namely, whether the plaintiff has shown that it has *much* the better (or at least the *better*) of the argument on the underlying merits in an application to serve out of the jurisdiction.⁵⁰ The effect of the gloss is to require the plaintiff to satisfy a good arguable case ‘plus’ test. Where there is a stark factual dispute that goes both to liability and whether the claim falls within a jurisdictional gateway, a difficulty arises because there is a risk that an enquiry as to who has *much* the better of the argument will lead to the Court forming a view, at the interlocutory stages, on the merits of an issue properly to be resolved at trial, when more extensive evidence will have become available.⁵¹ In the decisions in *Crociani, Dick and Heinrichs* the issue was whether the case was within rule 7(j) gateway, in particular Article 5(a) of the Trusts (Jersey) Law 1984 in circumstances where the proper law of the trust had purported to have been changed from Jersey to the proper law of another jurisdiction where the purported exercise of that power was, in the proceedings, subject to a challenge as being a fraud on the power and therefore void.⁵² In those cases, it has been held that the Court is entitled to enquire whether, on the basis of the written evidence relied upon by the plaintiff, the plaintiff has the better of the argument on the issue of the proper law of the trusts to allow the Court to take jurisdiction under Article 5(a).⁵³

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⁴⁵ *The Siskina* (n 19) at 255, per Lord Diplock, affirmed in *Maywal Limited v Nautech Services Limited* (n 19).

⁴⁶ *Virani v Virani* [2000] JLR 203; *Nautech Services Limited v CSS Limited* (n18). This is also a requirement specified in the practice direction governing applications for service-out in PD RC 15/01, para 1(2).

⁴⁷ Although where it is able to do so, the secondary consideration as to whether there is a serious issue to be tried may become otiose; see para 2-24 (below).

⁴⁸ *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* (n 43).

⁴⁹ Derived from the judgment of Waller LJ in *Canada Trust and Others v Stolzenberg and Others* (No 2) [1997] EWCA 2592; see *UCC v Bender* [2006] JCA094 at [31].

⁵⁰ *Dick v Pantrust International SA & Ors* [2015] JRC208; *Heinrichs v Pantrust International SA & Ors* (n 11); *Crociani v Crociani* (n 6) at 442–43.

⁵¹ *Antonio Gramsci Shipping Corp and others v Recoletos Ltd and others including Aviars Lembergs* [2012] EWHC 1887 (Comm).

⁵² n 50 above, although in *Dick* there were obviously Jersey *situs* assets capable of satisfying Art 5(c) of the Trusts (Jersey) Law 1984. In *Heinrichs*, the issue was material as all the remaining trust assets were located outside Jersey.

⁵³ It is to be noted that in each case there was no opposing cogent evidence that the power to change the proper law was properly exercised. While it has not been determined, the ‘better of the argument’ test suggests that where the Court is presented with an apparently evenly balanced case as to whether, on the merits, the plaintiff has a good arguable case that the claim falls within a gateway, the Court would err on the side of caution and decline to allow service-out.

- 2-23 If the applicability of the pleaded facts to a jurisdictional gateway depends on a question of law or construction, there is usually no room for the application of the test of good arguable case.⁵⁴ Where no controversial or developing area of law is in play, the Court will usually have to determine the question on the application.⁵⁵

ii. A Serious Issue to be Tried

- 2-24 The plaintiff must also demonstrate that there is a serious issue of fact or law to be tried on the merits in respect of each cause of action for which leave to serve-out is sought. It is not the practice of the Royal Court at an interlocutory hearing that is often heard only on affidavits and before disclosure of evidence to try and determine issues of fact in assessing whether there is a serious issue to be tried.⁵⁶ The onus is on the plaintiff and the defendant is entitled to put the plaintiff to proof (to the standard of a serious issue to be tried and not the balance of probabilities) of its case.⁵⁷ It is of course open to the defendant to show that the evidence of the plaintiff is incomplete or plainly wrong.
- 2-25 The arbitrage between the different standards of proof (as between whether there is a serious issue to be tried on the merits and whether there is a good arguable case that a jurisdictional gateway has been engaged) was considered in the English case of *Cecil and Ors v Bayat and Ors*,⁵⁸ which has not yet been considered in Jersey. In that case, Hamblen J observed that it is necessary to consider whether an ingredient for a cause of action is also part of what must be established for jurisdictional purposes. If so, the lower standard of proof (ie serious question to be tried) is subsumed into the higher standard of a good arguable case, and the separate question of whether there is a serious issue to be tried on the merits becomes irrelevant.⁵⁹ The logic in this position is that respective thresholds of good arguable case and serious question to be tried are directed at different issues. The former is concerned with whether the cause of action pleaded comes within one of the gateways; the latter is concerned with whether that cause of action as pleaded is sound. Where the ingredients of a cause of action are established to the standard of a good arguable case, to then go on to consider whether the same ingredients give rise to a serious question to be tried is, at best, a waste of time.

D. *Forum conveniens*

- 2-26 In addition to satisfying the Court that there is a good arguable case that the proposed claim falls within at least one of the gateways in rule 7, the plaintiff has the burden of satisfying

⁵⁴ Note that the Master of the Royal Court does not have jurisdiction to determine a question of law or construction under Sch 1 of the RCR 2004 and so an application for service-out based on this issue would have to be lodged with the Judicial Greffe for the attention of the Bailiff rather than the Master.

⁵⁵ *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 at [84]–[86] and *James Capel (C.I.) Limited v Koppel And Fenchurch Trust Limited* (n 43).

⁵⁶ *Nautech Services Limited v CSS Limited* (n 18) at [39], per Bailhache DB; *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* (n 43).

⁵⁷ *VTB Capital plc v Nutritek International Corp and others* [2013] UKSC 5.

⁵⁸ [2010] EWHC 641 (Comm).

⁵⁹ This truncated approach appears to have been approved of in *Williams v Central Bank of Nigeria* [2012] EWHC 74 (QB) (and not overturned on appeal, [2013] EWCA Civ 785, which was the subject of appeal to the Supreme Court but not on this point).

the Court that Jersey, rather than any other jurisdiction, is clearly the most appropriate forum or *forum conveniens* in which to bring the proceedings.

i. Relevant Principles

The Royal Court has approved and adopted the relevant principles in a forum application as being those stated in *The Spiliada*.⁶⁰ The overarching question for the Court is this: in which forum can the case be tried more suitably for the interests of all parties and for the ends of justice?⁶¹ That question applies as equally to applications to serve-out as it does to applications for a stay of Jersey proceedings on grounds of *forum non conveniens*.⁶² A plaintiff must show not only that Jersey is the appropriate forum but that it is *clearly* the appropriate forum although the plaintiff does not have to show that justice cannot be achieved in an alternative forum or cannot be achieved save at excessive cost, delay or inconvenience.

In deciding which jurisdiction is ‘most suitable’, the Court must consider to which jurisdiction the action (meaning the issues in the action) has the most real and substantial connection⁶³ by reference to the following connecting factors: convenience, expense, the availability of witnesses, the availability of documents and other evidence, the location of any assets in dispute, the governing law of any relevant transaction, whether trusts and/or companies involved in the dispute are administered within or without the jurisdiction⁶⁴ and the place where the parties reside or carry on their business.⁶⁵ It has also been stated that the Court is looking for connecting factors to the jurisdiction which can include the governing law of the issues.⁶⁶ The jurisdiction in which a company is incorporated is *prima facie* the *forum conveniens* for an action against a director of that company for breach of fiduciary duty, regardless of where the alleged breach was committed or loss was sustained.⁶⁷ It was asserted in *Re A Trust, B v C*⁶⁸ (no argument having been taken) that the Royal Court has jurisdiction under Article 5 to decide whether a transfer of property to trustees of a Jersey law governed trust should be set aside as having been made under a mistake on the basis that the transfer was governed by Jersey law. Where the purported exercise of a power to change the proper law of a Jersey trust to the law of another jurisdiction is subject to a challenge the Court has jurisdiction to determine whether the exercise of that power should be set aside on the basis of the formal and/or substantive defect in its purported exercise on the basis that its exercise was governed by principles of Jersey trust law.⁶⁹ Where the application is under Jersey’s statutory codification of the principles by which a transaction can be set aside under mistake or the *Hastings Bass* principle in Articles 47C-J, the Court must have jurisdiction under Article 5. It should be noted that the jurisdiction that exists under

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⁶⁰ [1987] AC 460; *Gheewala v Compendium Trust Company Limited and Ors* (n 16); *Nautech Services Limited v CSS Limited* (n 18).

⁶¹ *Brazil (Federal Republic) v Durant Intl Corp* [2010 JLR 421]; *Leeds United FC Ltd v Weston* [2011 JLR] 749; *Wright v Rockway Ltd* [1994 JLR 321].

⁶² As to applications for a stay on grounds of *forum non conveniens*, see para 2-41 below.

⁶³ *SGI Trust Jersey Ltd v Wijsmuller* [2005 JLR 310].

⁶⁴ *Koonmen v Bender* [2002 JLR 407].

⁶⁵ *Gheewala v Compendium Trust Co Ltd* [1999 JLR 154].

⁶⁶ *Federal Republic of Brazil v Durant* (n 61) at [19].

⁶⁷ *SGI Trust Jersey Ltd v Wijsmuller* (n 63).

⁶⁸ [2009] JRC 245 at [21].

⁶⁹ *Dick v Pantrust International SA & Ors* (n 50).

Article 47C-J may not be exercised in respect of trusts that do not have Jersey law as their governing law.⁷⁰

- 2-29** The determination of *forum conveniens* is an exercise of evaluation and not a general discretion.⁷¹ The Court of Appeal will only overturn the Royal Court on a forum application if it took account of irrelevant factors; failed to take account of relevant factors; or its conclusion was otherwise unreasonable.⁷²

ii. Relationship between the Jurisdictional Gateways and whether Jersey is the forum conveniens

- 2-30** *Seconsar Far East Ltd v Bank Markazi Iran*⁷³ considered the relationship between the standard of proof on the existence of the cause of action and the principle of *forum conveniens*; the two elements are separate and distinct. A particularly strong case on the merits cannot compensate for a weak case as to whether Jersey is clearly the most appropriate forum for the dispute. Neither can a very strong connection with Jersey as a forum justifying service-out if the claim is weak on the merits, if a stronger case on the merits would otherwise be required. The need to establish Jersey as *forum conveniens* springs from an anxiety that great care should be taken in dragging a foreigner before the Royal Court. Only if the Court has power to serve-out within rule 7 and it is also established that Jersey is clearly the most appropriate forum is there no good reason why any particular degree of cogency should be required in relation to the merits of the plaintiff's case.
- 2-31** Rule 7 is drafted to be read disjunctively but proceedings may fall at the same time within more than one of the gateways. Thus a claim for a constructive trust falls within the definition of trust for the purpose of rule 7(j) as coming within Article 5 of the Trusts (Jersey) Law 1984 as well as rule 7(q).⁷⁴ But if proceedings fall within one or more of the gateways it is not permissible to give leave to serve-out on another cause of action which does not fall within the gateway relied upon. It has been held that where leave to serve out of the jurisdiction is based on only one cause of action it cannot be treated as permission based on some other cause of action; nor, if a claim has been put forward on one legal basis, can the plaintiff subsequently justify permission on another legal basis. Thus having permission for one claim cannot be used as an anchor for the plaintiff to then serve-out other proceedings for which no jurisdictional gateway has been established or permission sought.⁷⁵

E. Applications for Leave to Serve Proceedings out of the Jurisdiction

- 2-32** The procedure for seeking leave to serve proceedings before the Royal Court out of the jurisdiction differs depending upon the type of originating process used. Where the proceedings are commenced by Representation, orders for service out of the jurisdiction

⁷⁰ Trusts (Jersey) Law 1984, Art 6.

⁷¹ *Jaiswal v Jaiswal* (n 16).

⁷² *ibid.*

⁷³ [1994] 1 AC 438 at [456].

⁷⁴ *United Capital Corp Ltd v Bender* (n 29).

⁷⁵ *Heinrichs v Pantrust International SA & Ors* (n 11), where part of the claim was held to amount to a cause of action in contract and where r 7(j) had been relied upon by the representors.

should be included in the prayer of the Representation itself. Rule 9 of the Service of Process (Jersey) Rules 1994 requires an application for service-out to be supported by an affidavit. The application cannot be made by summons as there are no extant proceedings in which to issue a summons until the proceedings are properly constituted by leave being granted and the proceedings served. The affidavit in support of the application is required to be lodged with the Judicial Greffe at the same time as the Representation, which following the procedure for tabling a *billet* in actions commenced by Order of Justice ie (no later than midday) on the Thursday preceding the first Samedi Court hearing at which the Representation will first be called on.⁷⁶ The application for service-out is made orally at the Samedi Court hearing. As actions commenced by Representation are first presented to the Court ex parte the representor is obliged to be full and frank in their application for service out of the jurisdiction; bringing to the attention of the Court those matters which are, objectively, relevant (whether in favour or against the application) to whether the discretion to serve-out should be exercised.⁷⁷ However, the fact that an affidavit in support of the application may be in some way defective is not necessarily to invalidate the order made pursuant to it. Whether to set aside service will depend upon the facts of each case and will include any prejudice to the defendant served, the extent and effect of the non-disclosure and whether, notwithstanding the defect there were clearly valid grounds for leave to serve-out.⁷⁸

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Where the proceedings are commenced by Order of Justice, save where the gateway relied upon is rule 7(b),⁷⁹ the application to serve the Order of Justice out of the jurisdiction is made ex parte in writing to the Judicial Greffier (sitting as Master) who will usually make a decision on the basis of the affidavit in support of the application without the need for a hearing.

i. The Affidavit in Support of an Application to Serve out of the Jurisdiction

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The affidavit in support is usually sworn by the advocate of the party making the application. The affidavit must state that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and the grounds upon which the application is made.⁸⁰ The contents of the affidavit in support are prescribed by PD RC15/01. The affidavit should:

1. exhibit a copy of the proceedings together with any other relevant documentation;
2. identify the paragraph or paragraphs of rule 7 of the Service of Process Rules 1994 relied on as giving the Court jurisdiction to order service-out, together with a summary of the facts relied on as bringing the case within each such paragraph;
3. state the belief of the deponent that there is a good cause of action—it should be sufficiently full to show that the plaintiff has a good arguable case for the relief claimed;

⁷⁶ RCR 2004, r 6/5.

⁷⁷ *Konamaneni v Rolls Royce* [2002] 1 All ER 979 at [179]–[181], cited in *Dick v Pantrust International SA* (n 50) at 32.

⁷⁸ *Virani v Virani* (n 46) at 213; *Heinrichs v Pantrust International SA & Ors* (n 11).

⁷⁹ All proceedings for injunctive relief are required to be signed by the Bailiff before service and so the application for service-out is usually made to the Bailiff as part of the application for the injunction itself; see RCR 2004, r 20/5.

⁸⁰ Service of Process Rules 1994, r 9.

4. summarise the considerations relied upon as showing that the case is a proper one in which to subject a party outside the jurisdiction to proceedings within it;
 5. summarise why Jersey is clearly the most appropriate forum for the proceedings;
 6. draw attention to any features which might reasonably be thought to weigh against the making of the order sought;
 7. show in what place or country the defendant/respondent is or probably may be found and indicate the means by which it is proposed to serve the defendant/respondent; and
 8. indicate the date which the plaintiff invites the Court to specify as the date upon which the defendant is to appear before the Court.
- 2-35** The non-exhaustive list of matters to be taken into account by the Court in exercising its discretion to grant leave to serve out of the jurisdiction are set out in the decision of the Royal Court in *James Capel (C.I.) Limited v Koppel And Fenchurch Trust Limited*⁸¹ and the House of Lords in *Seaconsar*.⁸² Doubt as to the application should be resolved in favour of the party sought to be joined to the proceedings.⁸³
- 2-36** If leave to serve-out is granted, the plaintiff is required to make arrangements to serve the Act of Court granting leave, the proceedings, the summons (the form of which is prescribed by the Service of Process Rules 1994)⁸⁴ and the application for service out of the jurisdiction on the defendant.⁸⁵ The Act of Court giving leave to effect service out of the jurisdiction must specify the date upon which such defendant is required (either in person or by their advocate) to appear before the Royal Court. The return date is invariably a Friday afternoon, coinciding with the usual weekly sitting of the Samedi division. In fixing a return date the Court will allow sufficient time for service of the proceedings, for the defendant to properly consider the proceedings, for the defendant to decide how it wishes to respond and for the defendant to instruct Jersey counsel.⁸⁶ Where the expiration of prescription is imminent, a plaintiff seeking leave to serve out of the jurisdiction must give careful consideration to the timing necessary to make the application for leave, have it determined, arrange to effect service of the proceedings abroad and table the proceedings for return date on a Friday. While service of the proceedings will have the effect of pausing time from running for the purposes of prescription⁸⁷ if the proceedings are not tabled in time for the return date given in the summons, time will begin to run again.⁸⁸
- 2-37** In the case of a dispute *under* rather than *against* a trust, a jurisdiction clause in a trust instrument that confers exclusive or non-exclusive jurisdiction on the Royal Court will normally but not invariably be decisive in favour of satisfaction of the requirement that Jersey is

⁸¹ [1989 JLR 51]; see also PD RC15/01.

⁸² [1993] 3 WLR 756.

⁸³ *James Capel (CI) Ltd v Coppel and Fenchurch Trust Ltd* (n 43).

⁸⁴ A draft summons to be served outside Jersey can be found in app IV.

⁸⁵ Personal service by a local process server or firm of lawyers is usually the Court's preferred method of service. Where personal service is demonstrably not possible or impractical, the plaintiff may approach the Court for an order for substituted service once personal service has been attempted and failed.

⁸⁶ The Court is likely to be guided by, but is not bound to follow, the periods listed in CPR PD 6 (Service out of the Jurisdiction).

⁸⁷ The affidavit of service should record the precise date and time on which service is affected.

⁸⁸ As to tabling, see Ch 1.

the proper place in which to bring the claim, even though Jersey might not otherwise be the natural forum. Conversely a plaintiff is likely to face an uphill battle to persuade the Royal Court to give permission for service-out in a dispute *under* a trust if the trust instrument contains a jurisdiction clause that confers jurisdiction (particularly exclusive jurisdiction) on a foreign court, even if the foreign court might otherwise not be the natural forum. That the trust is governed by Jersey law is but one factor (albeit one of some weight) towards the Jersey court being the appropriate forum, and likewise a foreign governing law is a pointer of some weight against, but this matter is not decisive on the issue of *forum conveniens*.

The loss of a limitation defence available in a foreign jurisdiction is a factor to be taken into account in determining what are the ends of justice, but the Court may in a proper case override the objections of the defendant to loss of such a defence, for instance where the plaintiff has not been negligent in failing to commence proceedings in the foreign country in time and the defendant has been astute not to mention the limitation issue to the plaintiff before time abroad expires.

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F. Applications to Contest Jurisdiction

A defendant who wishes to contest the jurisdiction of the Royal Court, either on the ground that the case is not within one of the jurisdictional gateways, or that the case is not a proper one for the exercise of the discretion, should, no later than 28 days after the proceedings are placed on the pending list, issue a summons in the usual way seeking an order for a declaration:⁸⁹

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1. setting aside the proceedings or service of the proceedings on that party;
2. declaring that the proceedings have not been duly served on that party;
3. discharging any earlier order giving leave to serve the proceedings on that party out of the jurisdiction;
4. declaring that in the circumstances of the case the Court has no jurisdiction over that party in respect of the subject matter of the claim or the relief or remedy sought in the proceedings.

If no return date before the Court has been fixed then the time limit for the application is within seven days from the expiry of the time limit for the filing by the objecting party of a pleading in the proceedings.⁹⁰ A party who fails to make an application within the time specified shall be deemed to have submitted to the jurisdiction of the Court in the proceedings.⁹¹ A party who makes an application shall not be deemed to have submitted to the jurisdiction of the Court in the proceedings unless the Court shall otherwise order.⁹²

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⁸⁹ RCR 2004, r 6/7(4).

⁹⁰ The application must be made by summons stating the grounds of the application; and supported by an accompanying affidavit verifying the facts on which the application is based.

⁹¹ RCR 2004, r 6/7(8).

⁹² *ibid*, r 6/7(9). See Ch 15, para 15–24.

i. Applications for Stay on Grounds of forum non conveniens

- 2-41 A defendant served within or without the jurisdiction may apply for a stay of proceedings on the ground that some foreign court, rather than the Royal Court, is the appropriate forum for determination of the claim.⁹³ An application to stay proceedings in Jersey on grounds of *forum non conveniens* is not a dispute as to the Court's jurisdiction within the scope of RCR 6/7(3) and therefore the time limits in that provision are inapplicable.⁹⁴ An application for a stay on grounds of *forum non conveniens* may be made at the same time as an alternative to a challenge to the jurisdiction of the Royal Court. It should normally be made promptly after the close of pleadings but before the laying down of directions for trial and orders for discovery are made. It is not a bar to an application for a stay on grounds of *forum non conveniens* for the applicant to have participated in the proceedings.⁹⁵ There is no time limit to issue a summons for a stay although delay will be an extremely significant factor in the Court refusing a stay.⁹⁶ An application to stay proceedings in Jersey on grounds of *forum non conveniens* is essentially the reverse exercise of that considered above in relation to service of the proceedings out of the jurisdiction and decisions on applications for a stay on grounds of *forum non conveniens* are relevant to a plaintiff seeking leave to serve-out provided that it is remembered that both the question and the burden of proof are reversed. The connecting factors above remain the same. On an application to set aside an order granting leave to serve proceedings on a defendant out of the jurisdiction, the burden of proof falls on the plaintiff to show (again but this time on an *inter partes* basis) that Jersey was clearly the natural or appropriate forum in which the case could be suitably tried in the interests of all the parties and the ends of justice. On an application for a stay of proceedings on the ground of *forum non conveniens*, the burden would fall on the defendant to show not only that Jersey is not the natural or appropriate forum but also that there is another available forum which is distinctly more appropriate than Jersey.⁹⁷ The evidential burden will rest on the party who seeks to establish the existence of matters which will assist him in persuading the Court to exercise its discretion in his favour. The burden of proof therefore depends entirely on the form of the application, not on whether the defendant had been served as of right.⁹⁸ It is open to a defendant to issue a summons on two alternative grounds and, if he does so, the Court will consider first the application to set aside, in respect of which the burden would fall on the plaintiff. Although if the defendant's summons were to fail on that ground, he could hardly then succeed on an application for a stay, whereas if he were to succeed, there would be no need to consider a stay. In an application to stay proceedings, matters are to be considered as

⁹³ Exceptionally, a defendant who has been served out of the jurisdiction may seek a stay on ground of *forum non conveniens*, as where the defendant so served fails to pursue a challenge to the service-out, but is nonetheless permitted by the Court to pursue an application for stay in conjunction with other defendants who have been served within the jurisdiction; see *Koonmen v Bender* (n 64) at [23].

⁹⁴ *Leeds United FC Ltd v Weston* [2012 (1) JLR N23].

⁹⁵ *Leeds United FC Ltd v Weston* (n 61).

⁹⁶ *ibid.*

⁹⁷ *Jaiswal v Jaiswal* (n 16); *SGI Trust Jersey Ltd v Wijsmuller* (n 63); *Gheewala v Compendium Trust Co Ltd* (n 16); *Campbell v Campbell & Ors* [2014 (2) JLR 465].

⁹⁸ *Campbell v Campbell & Ors* (n 97) at [21]–[33]; contra *The Spiliada* [1987] AC 460 but supported by *Gheewala v Compendium Trust Co Ltd* (n 16).

at the date of the hearing of the stay and may include relevant matters that have occurred since the Court granted leave to serve-out.⁹⁹

An important factor arising in relation to such an application is whether the forum contended for by the defendant forum is an available forum.¹⁰⁰ In the trust context, it may, for instance, be argued that the foreign court is not available, because the local judge in the foreign country concerned has heard a Beddoe application or is otherwise conflicted and cannot hear the substantive dispute. In reality, the availability of the foreign court only tends to arise in the offshore world where the size of the alternative jurisdiction means it is only able to draw upon a limited pool of judges. In situations where a dearth of non-conflicted judges is a practical difficulty, it can easily be countered in the Beddoe context, if the procedural practice in the foreign court permits another judge to be brought in to determine the substantive dispute.¹⁰¹ For many years Jersey has countered the apparent practical difficulty of only having two permanent judges of the Royal Court by appointing Commissioners to satisfy the need for extra capacity. A defendant seeking a stay is not obliged to agree to submit to the jurisdiction of the court contended for in the event a stay is granted, if he is not otherwise amenable to that jurisdiction. Whether other defendants can be brought before the foreign court, remains a relevant factor for the Court to consider in whether or not to grant a stay on grounds of *forum non conveniens*.

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a. Availability of the Foreign Jurisdiction

A foreign court will be considered to be available to a plaintiff if, by the time of the application for a stay, it would be open to him to institute proceedings against the defendant before that court as of right.¹⁰² If this has only come about because the defendant has voluntarily submitted to the jurisdiction of the foreign court then so be it. An alternative jurisdiction will be considered to be *available* if a defendant undertakes to submit to that jurisdiction.¹⁰³ However, no such undertaking is required in order for the defendant to argue that a distinctly more appropriate forum than Jersey exists.

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b. Rebutting the prima facie Case for a Stay on Grounds of *forum non conveniens*

Where the Court concludes there is another available forum that prima facie is more appropriate than Jersey, the Court will normally grant a stay unless circumstances militate against granting a stay, such as the plaintiff being unable to obtain justice in the foreign forum.¹⁰⁴ If no available forum is more appropriate than Jersey then the Court will normally refuse a stay.

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A plaintiff who asserts they will be unable to obtain substantive or procedural justice in a foreign forum must provide positive and cogent evidence that they are unlikely to receive

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⁹⁹ *Brazil (Federal Republic) v Durant Intl Corp* (n 61).

¹⁰⁰ *Spiliada Maritime Corp v Canisulex Ltd* (n 98) at 477; Dicey, Morris and Collins, *The Conflict of Laws*, 14th edn (London, Sweet and Maxwell, 2006) vol 1, § 12-028; Briggs and Rees, *Civil Jurisdiction and Judgments*, 4th edn (London, Lloyds of London Press, 2005) § 4.14.

¹⁰¹ *Cp Koommen v Bender* (n 64) at [40]–[41].

¹⁰² *Gheewala v Compendium Trust Co Ltd* (n 16); *Lubbe v Cape plc* [2000] 1 WLR 1545 (HL).

¹⁰³ *Brazil (Federal Republic) v Durant Intl Corp* (n 61); *Gheewala v Compendium Trust Co Ltd* (n 16); *Campbell v Campbell & Ors* (n 97).

¹⁰⁴ *Gheewala v Compendium Trust Co Ltd* (n 16).

just treatment.¹⁰⁵ This is properly to be regarded as part of the second limb of the *Spiliada* test and not concerned with the availability of the foreign jurisdiction; once a *prima facie* case for a stay has been made out, the burden is thrust back onto the party seeking to retain Jersey as the *forum conveniens*. It is not appropriate for the Court to compare the quality of justice obtainable in a foreign forum which adopts a different procedural system (such as in civil law inquisitorial jurisdictions) with that obtainable in a similar case conducted in the Royal Court.¹⁰⁶ The mere existence of political difficulties in the foreign forum is usually insufficient in order for a stay to be refused. Something in the order of judiciary partiality, want of judicial independent or experience,¹⁰⁷ the likelihood of excessive delay¹⁰⁸ or the non-availability of an appropriate remedy is usually required.¹⁰⁹ Where the foreign jurisdiction's civil administration has utterly broken down, a stay in favour of the courts of that place cannot practically be granted.¹¹⁰ In less extreme cases, where the plaintiff is able to persuade the court that there is a risk¹¹¹ that the foreign court will single out the plaintiff or his claim for flagrantly unjust treatment, or that the foreign court is generally and seriously unreliable, it now appears that the Court will not generally order a stay of proceedings. The evidence required to support this contention need not be particular to the plaintiff or his individual claim (though it may be more persuasive if it is), but may be based on more general evidence of judicial failure or misconduct in relation to claims of the type advanced by the plaintiff. A personal or juridical advantage to the plaintiff in hearing a claim in Jersey is a relevant consideration for the Court if injustice would be caused by depriving him of it by granting a stay although it is only one factor and may be outweighed if keeping the claim in Jersey resulted in greater inconvenience and expense and the Court is otherwise satisfied that substantial justice will be done in the available appropriate foreign forum.¹¹² Substantive differences between the recovery or other remedies available in Jersey and in the foreign court will not generally overcome the *prima facie* case for a stay of proceedings.¹¹³ There is no presumption that a plaintiff is entitled to win and therefore an argument that a stay should be refused and the plaintiff must be permitted to sue in Jersey because they will lose in a foreign court, has no weight. If practical justice requires that a trial take place in Jersey because it is unrealistic to expect that it will be possible to obtain a sensible hearing in the alternative forum, it is improbable that a stay will be appropriate.¹¹⁴ Thus, if the plaintiff is able to obtain financial support for proceedings if they are brought in Jersey, but will be unable to obtain it, or a reasonable equivalent, if the claim must be brought in the foreign court and will as a result be unable to sue at all,

¹⁰⁵ *The Abidin Daver* [1984] AC 398 at 411.

¹⁰⁶ *The Spiliada* (n 98) at 482.

¹⁰⁷ *Lubbe v Cape Plc* (n 102).

¹⁰⁸ *The Abidin Daver* (n 105) at 411.

¹⁰⁹ *Gheewala v Compendium Trust Co Ltd* [1998] JLR N-7].

¹¹⁰ It is to be noted that in these circumstances, the dividing line between the availability of the foreign jurisdiction and the factors which might otherwise militate in favour of a stay are difficult to distinguish. It is to be recalled that the overall test is one which asks what the interests of justice require.

¹¹¹ *AK Investment CJSC v Kyrgyz Mobil Tel* (n 55).

¹¹² *In re Allied Irish Banks (C.I.) Ltd* [1987–88] JLR 157].

¹¹³ *Spiliada Maritime Corp v Cansulex Ltd* (n 98) at 482.

¹¹⁴ *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* (n 55), a conclusion which may be reinforced by reference to Art 6 of the ECHR.

it will rarely be just to grant a stay of the proceedings.¹¹⁵ Where a plaintiff would be forced to bring proceedings in more than one jurisdiction because of a stay granted to one or more of a number of defendants in Jersey, an argument resisting a stay could be sustained on the basis that it would adversely affect the efficient conduct of litigation to run two or more sets of proceedings with the attendant risk of inconsistent conclusions being reached between the Jersey and foreign courts.¹¹⁶

*ii. A Stay on the Basis of the Existence of Parallel Proceedings—*lis alibi pendens**

Where proceedings are already pending before a foreign court, and a second action is begun in Jersey where the same issues are in dispute, the Court has a discretion to stay the Jersey proceedings. Generally, the principles applicable are those considered above in connection with *forum conveniens*. A foreign forum in which proceedings have already been initiated is not necessarily the *forum conveniens* if a question of Jersey law is essential to resolution of dispute on the basis that a court applies its own law more reliably than does a foreign court.¹¹⁷ The existence of simultaneous proceedings elsewhere is but one factor to be taken into account in the determination of the appropriate forum.¹¹⁸ As an alternative to a stay, where the same plaintiff begins proceedings in more than one jurisdiction, he may be required to elect which set of proceedings he wishes to pursue.¹¹⁹ The Court also retains a general discretion to stay Jersey proceedings in order to await the outcome of a foreign action. The Royal Court may also in certain circumstances¹²⁰ grant an anti-suit injunction restraining the bringing or continuance of foreign proceedings.¹²¹

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G. Effect of a Jurisdiction Clauses in the Trust Instrument

While Jersey has historically looked to the law of England and Wales in matters of private international law, the effect of a jurisdiction clause in a trust instrument is strictly a matter of Jersey law and not the law of any other country or territory. Questions concerning the effect of jurisdiction clauses most commonly arise either (1) in the context of a plaintiff's application for permission to serve proceedings out of the jurisdiction, or an application by the defendant to set aside such service;¹²² or (2) an application by a defendant to stay proceedings served within the jurisdiction on grounds of *forum non conveniens*.

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¹¹⁵ *Connelly v RTZ Corp Plc* (No 2) [1998] AC 854.

¹¹⁶ *Insurance Corp of Ireland v Strombus* [1985] 2 Lloyd's Rep 138 (CA).

¹¹⁷ *Stanway v Bush* [1992 JLR 115], particularly relevant given the 'firewall provision' in Art 9 of the Trusts (Jersey) Law 1984, which postdate the decision.

¹¹⁸ Dicey, Morris and Collins, *The Conflict of Laws* (n 100) vol I §§ 12-035 to 12-037; Briggs and Rees, *Civil Jurisdiction and Judgments* (n 100) § 4.19.

¹¹⁹ *Australian Commercial Research and Development Ltd v A.N.Z. McCaughan Merchant Bank Ltd* [1989] 3 All ER 65, where it was said that if the plaintiff elected to pursue the foreign action, the English claim should be dismissed, and not merely stayed.

¹²⁰ Dicey, Morris and Collins (n 100) vol 1, §§ 12R-001(5), 12-067 to 12-076; Briggs and Rees (n 100) §§ 5.37 to 5.44.

¹²¹ *Heerema v Heerema* [1985-86 JLR 293].

¹²² See below.

i. Jurisdiction Clauses

- 2-48** Before the Court is in a position to grapple with the effect of a jurisdiction clause in a trust instrument, it must first determine whether the provision relied upon in the trust instrument is in fact a jurisdiction clause. This is primarily a question of construction of the specific formulation of words used.¹²³ A trust governed by a law other than Jersey that contains, or is alleged to contain, a jurisdiction clause, is to be construed in accordance with the rules of construction of the governing law of the instrument.¹²⁴ Having determined whether the particular provision is a jurisdiction clause, the Court must then determine whether it is exclusive or non-exclusive. Next the Court should consider the scope of the jurisdiction clause and whether the particular matter in issue in the proceedings is within its scope. Finally, the Court should ask, to the extent that the matter in question is within its scope, which jurisdiction the clause in question provides for in relation to the matter in question.
- 2-49** A very common formulation often found in professionally drafted trust instruments is that a designated country, or its courts of that country, are to be ‘the forum of administration’ (or the forum for the administration) of the trust.¹²⁵ Where the formulation used is that courts of ‘X’ country or territory are to be its forum of administration, the clause is likely to be properly construed as jurisdiction clause.¹²⁶ Where however the formulation is that the country itself is said to be the forum of the administration of the trust,¹²⁷ the clause is more properly construed to point to the physical place where from which the trust is administered.¹²⁸
- 2-50** A provision alleged to be an exclusive jurisdiction clause that uses the formulation ‘forum of administration’ may often be intertwined with a proper law provision that the law of ‘X’ country should be the law ‘to the exclusive jurisdiction of which’ the rights of all parties and the construction and effect of the provisions of the trust should be subject.¹²⁹ Such a formulation is, properly construed, a proper law clause and the reference to ‘exclusive jurisdiction’ a red herring.¹³⁰

¹²³ *Crociani v Crociani* (n 6) at [60]–[63], citing with approval *Marley v Rawlings* [2015] AC 129, at [17–10]: ‘[T]he aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context’ and *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, at [21]: ‘if there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other’. As to the principles in the construction of a document, see Ch 4.

¹²⁴ Hague Trust Convention, Arts 8 and 9; see para 2–65 below.

¹²⁵ *Crociani v Crociani* [2014] UKPC 40; *Koornmen v Bender* [2002 JLR N [45]], (2003–04) 6 ITEL 568; *Dick v Pantrust International SA & Ors* (n 50). The Court of Appeal and Privy Council in *Crociani* were of the view that the phrase ‘forum of administration’ was ambiguous and strongly suggested ([2014] JCA 089 at [155]) that use of the expression should be abandoned.

¹²⁶ *Crociani v Crociani* (n 125) at 26; *E.M.M. Capricorn Trustees Ltd v Compass Trustees Ltd* [2001 JLR 205].

¹²⁷ *Koornmen v Bender* (n 64).

¹²⁸ *Crociani v Crociani* (n 125); contra *NABB Brothers Ltd v Lloyds Bank International (Guernsey) Ltd* (n 39) at [5], [50] and [59], where a provision identifying Guernsey as the forum for administration was taken to be a jurisdiction clause in favour of Guernsey. It should be noted that many professionally drafted Jersey trust deeds contain a provision that authorises the trustees to administer the trust in any part of the world, making such an interpretation practically otiose.

¹²⁹ *Koornmen v Bender* (n 125); *Dick v Pantrust International SA & Ors* (n 50).

¹³⁰ *Koornmen v Bender* (n 125) at [46]; *Crociani v Crociani* (n 125); *Dick v Pantrust International SA & Ors* (n 50).

ii. Exclusive Jurisdiction Clauses versus Non-exclusive Jurisdiction Clauses

So far as construction is concerned, similar principles will apply to trust instruments as in the case of contractual jurisdiction clause; the question is whether the clause obliges the parties intended to be subject to it to resort to the relevant jurisdiction, irrespective of whether the word 'exclusive' is used.¹³¹ It has been held that a jurisdiction clause that provides that the courts of X country 'shall' be 'the' forum of administration, is suggestive of the clause being intended to confer exclusive jurisdiction. First, the use of imperative 'shall' rather than more permissive language, and the use of the definite 'the' rather than indefinite article 'a/an'. Accordingly, it has been held that such a clause is intended to confer exclusive jurisdiction.¹³² However, both the Jersey Court of Appeal and the Privy Council in *Crociani* did not follow *Koommen v Bender* and the latter considered it was questionable whether the use of the definite article 'the' in the forum stipulation was strong enough on its own to confer exclusive jurisdiction on, in that case, the courts of Mauritius.¹³³

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iii. Matters Falling with the Scope of the Jurisdiction Clause

Again, what matters is what is within the scope of a particular jurisdiction clause as a matter of construction. The formulation that 'the courts of 'X' country are the forum of administration of the trust' has given rise to ambiguity as to what falls within its scope. The expression 'forum of administration' is often used in a way where it is unclear whether the meaning is (1) courts with jurisdiction over administration; (2) law governing administration; or (3) place where administration is carried on.¹³⁴ In the view of the Jersey Court of Appeal the concept of 'forum for the administration of the trust' refers to the locus of internal administration which can if necessary engage the supervisory jurisdiction of the Court rather than of resolution of hostile litigation between beneficiaries and trustees, a fortiori between beneficiaries and ex-trustees.¹³⁵ We do not consider that the phrase is co-extensive with those matters that would fall within the scope of a court order for the administration of the trust by the Court which is, even in England, an obsolete procedure and is unknown in Jersey.

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'Forum for administration' refers to the locus of internal administration which can engage the supervisory jurisdiction of the Court rather than the forum for the resolution of hostile litigation between beneficiaries and trustees (including ex-trustees).¹³⁶ 'Forum for administration' is a different concept from an exclusive jurisdiction for the resolution of disputes. The administration referred to does not include contentious breach of trust litigation but

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¹³¹ *Koommen v Bender* (n 125) at [46] and [48]; Dicey, Morris and Collins, *The Conflict of Laws*, 15th edn (London, Sweet and Maxwell, 2012) vol 1, § 12-105.

¹³² *Koommen v Bender* (n 125) at [46] and [48].

¹³³ *Crociani v Crociani* (n 125) at 22.

¹³⁴ *Crociani v Crociani* [2014] JCA 089. *ibid.*

¹³⁵ *ibid.* at [66]-[97], citing *Chellaram v Chellaram* [1985] Ch 409; P Matthews and T Sowden, *The Jersey Law of Trusts*, 3rd edn (London, Key Haven, 1993) para 4.18, at 46; cf the Hague Trust Convention, Art 8; P Matthews, 'What is a Trust Jurisdiction Clause?' (2003) 7 *Jersey Law Review* 232, at paras 21-22. See also *Crociani v Crociani* [2014] JCA 089 at [91]-[93] and [2014] UKPC 40 at [14] and [19]; *Dick v Pantrust International SA & Ors* (n 50); see *Public Trustee v Cooper* [2001] WTLR 901 at 922H, quoting the unreported judgment of Robert Walker J and *Alsop Wilkinson v Neary* [1996] 1 WLR 1220 at 1224 for an illustration as to the distinction between matters of trust administration and hostile proceedings between the trustee and beneficiaries.

¹³⁶ At [68]; *Chellaram v Chellaram* (n 135) at 430 and the Hague Trust Convention, Art 8(1). See also the categories of trust litigation identified by Lightman J in *Alsop Wilkinson v Neary* (n 135) at 1224-4C.

aspects of the administration that would fall within the Court's supervisory jurisdiction under which the Court may, on admittedly rare occasions, undertake the administration of the trust itself.¹³⁷ The suggestion, in *Bender*, that 'forum for administration' is necessarily intended to confer an exclusive jurisdiction for the resolution of contentious disputes involving beneficiaries was incorrect.

- 2-54** While the term 'forum' may sometimes have a meaning associated with a court; it does not always have that meaning. It may simply refer to the place where trusts are administered.¹³⁸ Use of the term 'jurisdiction' in trust instruments should be approached with care. Jurisdiction may have two meanings: the jurisdiction or competence of the courts of a particular country, ie the forum, as well as meaning 'scope or province of application' of the governing law itself.

iv. Royal Court's Approach to Exclusive Jurisdiction Clauses

- 2-55** For many years, a debate has raged in a number of jurisdictions as to whether the court should give effect to a jurisdiction clause in a trust instrument in the same way it would approach such a clause in a contractual agreement.¹³⁹ As the Privy Council in *Crociani* observed, not all of these decisions are mutually consistent with one another in their construction of various clauses purporting to be jurisdiction clauses or their effect. In a contractual context, the Royal Court normally gives effect to a jurisdiction clause for the simple reason that it has been agreed to by the parties, and the parties should be held to what they have agreed.¹⁴⁰ Analogous reasoning may apply in trust cases as between the original parties who executed the trust instrument containing the jurisdiction clause.¹⁴¹ However, the contractual analogy cannot necessarily be applied where the trustee may not be the original trustees to the trust instrument and in the case of beneficiaries, the basis upon which they can be taken to have agreed to anything is unclear.
- 2-56** The debate as to whether the same approach that applied to a contractual exclusive jurisdiction clause as stated authoritatively by *Donohue v Armco Ltd*,¹⁴² applied equally to an exclusive jurisdiction clause in a deed of trust, has been decided emphatically in the negative by the Privy Council in *Crociani & Ors v Crociani & Ors*.¹⁴³ In that case, a clause in a trust instrument (which the trustee contended was an exclusive jurisdiction clause in favour of Mauritius) gave the trustees the power to appoint new trustees in another jurisdiction and to declare that the trust shall be read and take effect according to the laws of the country of the residence or incorporation of the new trustees. If this power was exercised, the critical part of the clause went on to provide that:

thereafter the rights of all persons and the construction and effect of each and every provision hereof shall be subject to the exclusive jurisdiction of and construed only according to

¹³⁷ Matthews, 'What is a Trust Jurisdiction Clause?' (n 135).

¹³⁸ *Crociani v Crociani* (n 134) at 94.

¹³⁹ *EMM Capricorn Trustees Ltd v Compass Trustees Limited* (n 126); *Green v Jernigan* (2003) 6 ITEL 330; *Koonmen v Bender* (n 125); *Helmsman Ltd v Bank of New York Trust Company (Cayman) Ltd* [2009] CILR 490; *Re Representation of AA* [2010] JRC 164; and *Re A Trust* [2012] Bda LR 79.

¹⁴⁰ The maxim *la convention fait la loi des parties*, is a powerful statement of principle in Jersey contract law; *E.M.M. Capricorn Trustees Ltd v Compass Trustees Ltd* (n 126).

¹⁴¹ *Koonmen v Bender* [2002] JCA 218 [49]–[50].

¹⁴² [2001] UKHL 64, [2002] 1 All ER 749, per Lord Bingham of Cornhill at [24].

¹⁴³ [2014] UKPC 40 at [35].

the law of the said country which shall become the forum for the administration of the trusts hereunder.¹⁴⁴

The Jersey Court of Appeal held that the reference to ‘exclusive jurisdiction’ did not make the courts of Mauritius the only locus in which disputes from the time of the appointment of the fourth appellant, Appleby Mauritius, could be resolved. Rather it meant that the governing law applied to all aspects of the trust. The reference to ‘the forum for the administration of the trusts hereunder’ did not make the courts of Mauritius from that time the only locus in which such disputes could be resolved; it merely referred to the place where the trust was to be administered. Furthermore, the Court of Appeal affirmed the decision of the Royal Court below that in the alternative, there were exceptional circumstances which justified it in overriding the so-called exclusive jurisdiction clause, if it had taken effect.

In *Koommen v Bender*,¹⁴⁵ the Jersey Court of Appeal had previously construed the term ‘forum for administration’ in a jurisdiction dispute (where the contest lay between Jersey and Anguilla) as conferring jurisdiction on the courts of Anguilla for contentious trusts disputes. The decision in *Koommen v Bender* has attracted criticism, most notably from Professor Paul Matthews.¹⁴⁶ The Privy Council and Court of Appeal in *Crociani* have now endorsed the validity of this criticism. The forum for administration of a trust and the forum for the resolution of disputes relating to it need not be the same.¹⁴⁷ *Crociani* makes clear that it considers *Koommen* to have been incorrectly decided on this point. The draftsman’s intention in *Koommen* (objectively construed) in using the words ‘forum for administration’ was not to alter the forum for hostile trust litigation but simply the forum for matters of administration.

The Board in *Crociani* was unanimously of the opinion that in the case of a trust deed, the weight to be given to an exclusive jurisdiction clause was less than the weight to be given to such a clause in a contract. Given that a balancing exercise is involved, this test could be expressed by saying that the strength of the case that needs to be made out to avoid the enforcement of such a clause is less great where the clause is in a trust deed. In the case of a trust clause, the Court is not faced with the argument that it should hold a contracting party to her contractual bargain. It is, of course, true that a beneficiary, who wishes to take advantage of a trust can be expected to accept that she is bound by the terms of the trust, but it is not a commitment of the same order as a contracting party being bound by the terms of a commercial contract. Where it is a beneficiary who wishes to avoid the clause and trustees who wish to rely on it, one would normally expect the trustees to come up with a good reasons for adhering to the clause, albeit that their failure to do so would not prevent them from invoking the presumption that the clause should be enforced.¹⁴⁸ In the case of a trust, unlike a contract, the Court has an inherent jurisdiction to supervise the administration of the trust.¹⁴⁹ This is not to suggest that a court has some freewheeling unfettered

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¹⁴⁴ The full provision is set out at [7]; *Crociani v Crociani* (n 125).

¹⁴⁵ [2002] JCA 218.

¹⁴⁶ Matthews (n 135).

¹⁴⁷ *Crociani v Crociani* (n 134) at [82].

¹⁴⁸ *Crociani v Crociani* (n 125) at [36].

¹⁴⁹ *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26 at [51], where Lord Walker of Gestingthorpe referred to ‘the court’s inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts’.

discretion to do whatever seems fair when it comes to trusts. However, what is clear is that the Court does have a power to supervise the administration of trusts, primarily to protect the interests of beneficiaries, which represents a clear and, for present purposes, significant distinction between trusts and contracts. Accordingly, the Board considered that, while it was right to confirm that a trustee is *prima facie* entitled to insist on and enforce an exclusive jurisdiction clause in a trust deed, the weight to be given to the existence of the clause is less (or the strength of the arguments needed to outweigh the effect of the clause is less) than where one contracting party is seeking to enforce a contractual exclusive jurisdiction clause against another contracting party. The Privy Council considered it right to mention that many cases (including the Jersey authorities *EMM Capricorn Trustees Ltd v Compass Trustees Ltd*¹⁵⁰ and *Koonmen v Bender*¹⁵¹) seem to have assumed that the weight to be given was the same. However, the Board considered that the issue was not fully discussed or considered in any of those cases, which were in any event not binding on the Board and ought now to be regarded as superseded as statements of the law in Jersey.

v. Relevance of a Jurisdiction Clause to Applications to Serve-out

- 2-60 In applications to serve out of the jurisdiction, the existence of a clause in a trust instrument conferring jurisdiction on the courts of Jersey is not in and of itself one of the grounds for service out of the jurisdiction,¹⁵² and so the plaintiff will be unable, even if the trust instrument contains such a clause, to effect service unless the claim falls within at least one of the jurisdictional gateways, or the defendant submits to the jurisdiction, or it becomes possible to effect service within the jurisdiction. Of course where service is possible through one of these gateways, reliance on the jurisdiction clause is unnecessary. The potential relevance of a jurisdiction clause, in an application to serve-out, is that it may be deployed in aid of an application for permission to serve out of the jurisdiction, where the clause confers jurisdiction on the courts of Jersey. The decisions in *Crociani* are clear that a jurisdiction clause in a trust instrument does not negative the Court's discretion in determining whether permission should be granted for service-out. A jurisdiction clause conferring non-exclusive jurisdiction on the Royal Court will aid an application for permission to serve-out (or to resist an application for a stay of proceedings served within the jurisdiction). A jurisdiction clause conferring non-exclusive jurisdiction on the court of another country has less impact than one conferring exclusive jurisdiction, since, being non-exclusive, Jersey proceedings are not an affront to or inconsistent with the terms of the clause. Generally, the matter is determined in accordance with principles of *forum non conveniens*, though even a non-exclusive jurisdiction clause raises a rebuttable presumption that the designated forum is *forum conveniens*.¹⁵³ However, for the Court to give leave to serve proceedings out of the jurisdiction in the face of a clause conferring exclusive jurisdiction on the court of another country would require very special circumstances.¹⁵⁴

¹⁵⁰ [2001 JLR 205].

¹⁵¹ [2002] JCA 218.

¹⁵² For the grounds for service out of the jurisdiction, see r 7 of the Service of Process Rules 1994, discussed at para 2-8 above. Cf contract cases, where a term conferring jurisdiction on the Royal Court is a ground for service out of the jurisdiction; Service of Process Rules 1994, r 7(d)(iv).

¹⁵³ Civil Procedure (2014), vol 1, 6.37.19.

¹⁵⁴ *Koonmen v Bender* (n 125) at [50].

Conversely, a jurisdiction clause may also be deployed in aid of an application challenging the jurisdiction of the Court, even where the claim falls within one of the jurisdictional gateways, where the clause confers jurisdiction on a foreign court. A jurisdiction clause may be deployed in aid of an application to stay the proceedings, where the clause confers jurisdiction on a foreign court, or indeed to resist such an application where the clause confers jurisdiction on the Jersey court.

Where there are multiple defendants, some of whom successfully apply to set aside service out of the jurisdiction, or to stay proceedings served within the jurisdiction, in reliance on an exclusive jurisdiction clause, but there remain some defendants upon whom service has been effective with such service having not been successfully set aside the Court may stay the proceedings as a whole so that they do not continue even against the inactive defendants, unless they apply to lift the stay.¹⁵⁵

vi. Relevance of Jurisdiction Clauses on Claims against the Trust

We have thus far considered the impact of a jurisdiction clause in a dispute *under* a trust. Different considerations apply where the plaintiff is an outsider to the trust asserting a claim *against* the trust assets. In those circumstances the analogy with jurisdiction clauses in a contractual context completely breaks down as, being a stranger to the trust, there is no reason why the plaintiff should be bound or affected by the terms of a trust *against* which he claims. In such claims, a jurisdiction clause, whether exclusive or non-exclusive, has no direct significance as a jurisdiction clause.¹⁵⁶ Nonetheless, the clause may be indirectly significant to the question of appropriate forum, in that any Beddoe application the trustee brings as to what to do about the claim will, *prima facie*, need to be brought in the jurisdiction designated by the jurisdiction clause, and since one of the matters to be considered in a Beddoe application, in a context in which the trustee's right to be indemnified from the trust fund may be compromised, is whether beneficiaries should be added as parties to the main action, it may be expedient for the main action also to be brought in the same jurisdiction as the Beddoe hearing.¹⁵⁷

vii. Powers in the Trust Instrument Changing the Judicial Forum of the Trust

It is not uncommon for a Jersey law governed trust to contain a provision designating a country (usually Jersey) to be the judicial forum of administration of the trust and to also contain a power conferred upon the trustees to change the judicial forum, sometimes coupled with a change in the governing law. Such a power is plainly, in the absence of special wording to the contrary, a fiduciary power to be exercised in the best interests of the beneficiaries as a whole.¹⁵⁸ A self-serving change of judicial forum that is calculated to hinder a personal claim by beneficiaries against the trustees would be liable to be challenged as void as a fraud on a power.¹⁵⁹ The exercise of such a power may also be subject to challenge as

¹⁵⁵ *ibid*, at [62].

¹⁵⁶ *United Capital Corp v Bender* [2006] JRC 004A at [55], affirmed [2006] JLR 242].

¹⁵⁷ *NABB Brothers Ltd v Lloyds Bank International (Guernsey) Ltd* (n 39) at [50], [58] and [59].

¹⁵⁸ *Crociani v Crociani* (n 134) at [56], affirming *Oakley v Osiris Trustees Ltd* [2008] UKPC 2 at [44], per Lord Scott of Foscote.

¹⁵⁹ As in *Crociani v Crociani* (n 134).

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being formally defective.¹⁶⁰ In a case where a change in the judicial forum is contemplated so as to protect the trust from external attack, trustees face the difficulty that the court in the present jurisdiction (in which the power is exercised) is not likely to be the court that the trustees would wish to approach for directions, but if they make the change it is then too late for the trustees to seek directions in the new jurisdiction as the forum for the administration will have changed.

III. Choice of Governing or Proper Law

A. Hague Trust Convention

- 2-65** The Hague Convention on the Law Applicable to Trusts and on their Recognition or simply the Hague Trust Convention is a multilateral treaty developed by the Hague Conference on Private International Law on the Law Applicable to Trusts. It concluded on 1 July 1985 and entered into force as between the signatories to it on 1 January 1992. The purpose of the Convention is to harmonise the conflict of laws rules applicable to trusts and to provide a harmonised framework for the recognition of trusts falling within its scope. The United Kingdom is a signatory to the Convention which was incorporated into UK law almost wholesale as a schedule to the Recognition of Trusts Act 1987. The Act came into force in the UK on 1 August 1987. Section 2(2) of the 1987 Act provides that the Queen in Council may extend the provisions of the Act to any of the Crown Dependencies or colony, however the Act was not expressly extended to Jersey.
- 2-66** The Hague Trust Convention has been ratified¹⁶¹ by and entered into force in Australia,¹⁶² Canada,¹⁶³ Hong Kong,¹⁶⁴ Italy,¹⁶⁵ Liechtenstein,¹⁶⁶ Luxembourg,¹⁶⁷ Malta,¹⁶⁸ Monaco,¹⁶⁹ the Netherlands,¹⁷⁰ San Marino,¹⁷¹ Switzerland¹⁷² and the United Kingdom of Great

¹⁶⁰ As alleged in *Dick v Pantrust International SA & Ors* (n 50); and *Heinrichs v Pantrust International SA & Ors* (n 11).

¹⁶¹ List of states which have signed and or ratified the Convention and the date of its entry into force in those countries, see www.hcch.net/index_en.php?act=conventions.status&cid=59.

¹⁶² Trusts (Hague Convention) Act 1991 entering into force on 1 January 1992.

¹⁶³ Entering into force on 1 January 1993 in Alberta, British Columbia, New Brunswick, Newfoundland and Prince Edward Island.

¹⁶⁴ The UK had extended the application of the Convention to Hong Kong with effect from 1 January 1992. The Convention has continued to apply to the Hong Kong Special Administrative Region since 1 July 1997 when Hong Kong came back under Chinese rule.

¹⁶⁵ Entering into force on 1 January 1992.

¹⁶⁶ Entering into force on 1 April 2006. Liechtenstein is a non-member state of the Hague conference.

¹⁶⁷ Entering into force 1 January 2004.

¹⁶⁸ Entering into force 1 March 1996.

¹⁶⁹ Entering into force 1 September 2008

¹⁷⁰ Entering into force 1 February 1996.

¹⁷¹ Entering into force on 1 August 2006. San Marino is a non-member state of the Hague conference.

¹⁷² Entering into force on 1/7/07, dis-applying Articles 5 and 13 but extending the Convention to oral trusts.

Britain and Northern Ireland.¹⁷³ The Convention has been signed although not ratified by Cyprus,¹⁷⁴ France¹⁷⁵ and the USA.¹⁷⁶

The explanatory report of Professor Alfred E von Overbeck, that accompanies the text of the Convention, is recognised as an authority as to the meaning of each article. This is a particularly useful interpretive document in Jersey in the absence of any domestic legislation or reported cases stating what the provisions of the Convention mean.

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i. Jersey and the Hague Trust Convention

An understanding of the Hague Trust Convention is important for any party involved in cross-border trust litigation in Jersey. The Royal Court may assume jurisdiction over a trust which is governed by Jersey law.¹⁷⁷ Jersey law draws a statutory distinction between trusts governed by the law of Jersey and trusts governed by foreign law. In a bid to limit outside interference with Jersey law trusts, Jersey's Trusts Law¹⁷⁸ prohibits the application of conflict of laws rules (including those in the Hague Convention) to a broad range of matters relevant to a Jersey law trust, set out in Article 9(1). In other words, the Convention is only relevant to the litigation of trust disputes in Jersey to the extent that the trust which is the subject of the dispute has a foreign law. The Hague Trust Convention therefore comprehensively sets out the choice of law rules applicable to non-Jersey law trusts for the Bailiwick but, somewhat surprisingly, there are no reported decisions of the Royal Court that apply the Hague Trust Convention.¹⁷⁹

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There is no domestic legislation on Jersey's statute book that incorporates the Convention into Jersey's domestic law in a similar fashion to the 1987 Act. Jersey, like the UK, operates a dualist system whereby international treaties to which Jersey accedes are not automatically adopted into the domestic law of the island unless expressly incorporated by local legislation. The domestic legislation that was said to harmonise Jersey's conflict of laws rules as to trusts with the Convention was the Trusts (Amendment No 2) (Jersey) Law 1991. This legislation came into force on 1 March 1992. Strictly speaking, the Trusts (Amendment No 2) (Jersey) Law 1991 does not actually import any part of the Convention into Jersey law. What is now Article 4 of the 1984 Trust Law, that governs the determination of the proper law of a trust, is an approximation of Articles 5 to 7 of the Convention, albeit one that closely follows the wording therein.

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That gives rise to a curious situation in which there is apparently no legal mechanism by which the Royal Court may give effect to the rest of the Convention. The Preamble to the Trusts (Amendment No 2) (Jersey) Law 1991 states that the Law is enacted in order to

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¹⁷³ Entering into force on 1 January 1992 in Bermuda, British Antarctic Territories, the BVI, the Falkland Islands, Gibraltar, Guernsey (extended by an Order in Council on 28 April 1993), the Isle of Man, Monserrat, St Helena, South Georgia, the South Sandwich Islands and the Turks & Caicos Islands (as of 1 July 1993).

¹⁷⁴ On 11 March 1998.

¹⁷⁵ On 26 November 1991.

¹⁷⁶ On 13 June 1988.

¹⁷⁷ Trusts (Jersey) Law 1984, Art 5.

¹⁷⁸ *ibid*, Article 9(3A).

¹⁷⁹ This may be reflective of the general disinclination of the Royal Court to assume jurisdiction over a trust whose foreign law is elsewhere.

facilitate the extension of the Convention to the island. As the scheme of the Convention is to provide a harmonised baseline for the rules for determining the law applicable to trusts, the States of Jersey's failure to import the rest of the Convention into Jersey law when given the opportunity must be taken as it being implicit that Jersey's conflict of laws rules pertaining to trusts were already largely compliant with the Convention and required no further amendment (other than the 1991 Law) in order to make them so.

- 2-71 There is very little documented evidence as to what Jersey's conflicts of laws rules pertaining to trusts were prior to the commencement of the Convention. Brown¹⁸⁰ suggests that the common approach of the Royal Court was to apply the then prevailing English conflict of laws rules to Jersey. These rules were supplanted by the 1987 Act but that legislation was enacted only to give effect to the Convention and it is not necessarily indicative of a wholesale revision of what was in place before. Laurence Collins J in *Chelleram v Chelleram* (No 2)¹⁸¹ indicated his view that there was no significant difference between England and Wales' conflict of laws rules before and after the enactment of the Convention.
- 2-72 It may be that Jersey's customary law provides an answer as to how the Royal Court is able to give effect to the Convention even though it has not been expressly incorporated into Jersey's law. As the basis for legal authority in Jersey is long usage and practice, the collective assumption that the Hague Convention in its entirety applies as a matter of domestic law in Jersey might be sufficient to elevate that assumption into a rule the Court would be prepared to follow. If this hypothesis is correct it must therefore follow that Jersey's conflict of laws rules applicable to trusts are co-extensive with the scope of the Convention. It also follows that the extensions to the Convention made by the UK Parliament in the Recognition of Trust Acts 1987¹⁸² do not apply to Jersey because that legislation was never extended to the island by an Order in Council.

ii. Recognition of Trusts

- 2-73 The Royal Court may assume jurisdiction over a trust whose proper law is not that of Jersey. A trust which demonstrates the characteristics in Article 2 and meets the requirements in Article 3 and is governed by the law of a state that recognises trusts is entitled to recognition in Jersey qua trust under Article 11 even if as a matter of domestic Jersey trust law, it would not be considered a trust. Article 11 is designed for the recognition of foreign law trusts in states in which the trust is not a domestic legal institution. As Jersey is a well-developed trust jurisdiction, Article 11 adds little if anything to Jersey's law that it would not already understand.

iii. The Effect of the Convention in States that Do Not Recognise Trusts

- 2-74 The Convention does not have the effect of introducing the concept of the common law trust (with its equitable proprietary trappings) into the domestic law of states which do not

¹⁸⁰ H Brown, *The Jersey Law of Trusts*, 4th edn (London, Key Haven, 2013) ch 6.

¹⁸¹ [2002] EWHC 632 (Ch).

¹⁸² eg s 1(2) provides that the provisions of the Convention shall, so far as applicable, have effect not only in relation to the trusts described in Arts 2 and 3 of the Convention (which confine the Convention only to trusts created voluntarily and evidenced in writing) but also in relation to any other trusts of property arising under the law of any part of the UK or by virtue of a judicial decision whether in the UK or elsewhere.

recognise trusts. The Convention merely requires those non-trust states to recognise trusts that fall within the scope of the Convention for the purposes of private international law only. While this does not require a non-trust state to swallow the concept of a trust wholesale, it does require them to recognise a diluted or ‘trust light’ concept of a segregated fund (or fiduciary patrimony) immune from the claims of the owner’s creditors and heirs.¹⁸³

iv. Temporal Application of the Convention

Article 22 provides that the Convention applies to trusts regardless of the date on which they were created but permits a contracting state to reserve the right not to apply the Convention to trusts created before the date on which the Convention enters into force in relation to that State. In the UK, section 1(5) of the 1987 Act provides that Article 22 was not to be construed as affecting the law to be applied in relation to anything done or omitted before the coming into force of the Act. The effect of that provision is that breaches of trust committed before the commencement of the UK legislation (1 August 1987) are to be determined by the law applicable according to the common law conflict of laws rules then applying to trusts. It is said that section 1(5) was enacted out of an abundance of caution but it is consistent with the recorded position of the United Kingdom at the Hague Conference¹⁸⁴ that Article 22 having any retroactive effect would only be objectionable if it altered the substantive law pertaining before the Convention entered into force, which in the case of the United Kingdom, it is not thought to do.¹⁸⁵ The 1987 Act does not apply to Jersey, neither has Jersey made use of the reservation procedure and it must therefore be assumed that the Royal Court will apply the Convention to trusts regardless of the date on which they were created.

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v. Types of Trust Falling within the Scope of the Convention

The Convention seeks to lay down the key characteristics of a trust but is not an exhaustive statement, much less a definition of a trust. The diverse nature of the Convention required a description that would encompass a range of legal institutions within its scope. The Convention is not limited to the trust as understood by the common law and covers analogous institutions in civil law jurisdictions which exhibit certain core characteristics of a trust and which are to be recognised as ‘trusts’ for the purposes of the Convention.

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The trust is described as a legal relationship created *inter vivos* or on death by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.¹⁸⁶ The Convention can therefore apply to non-charitable purpose trusts (which are recognised as a matter of Jersey law) even though such trusts are invalid in certain other jurisdictions.¹⁸⁷ It is to be noted that Article 2 does not include the

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¹⁸³ See Arts 2(2)(a) and 11 of the Convention. The adoption of the Convention by Luxembourg, Switzerland and Italy was accompanied by reforming legislation to accommodate the concept of a separate patrimony.

¹⁸⁴ See von Overbeck report at Art 22 of the commentary.

¹⁸⁵ *Chellaram v Chellaram (No 2)* EWHC 632 (Ch) at [164]–[166].

¹⁸⁶ Art 2.

¹⁸⁷ Barring a handful of anomalous testamentary purpose trusts, England and Wales has long considered a private purpose trust to be invalid. Note the public policy derogations in Art 18.

fiduciary nature of trusteeship as an essential characteristic of a trust because ‘fiduciary’ is not a term that can be easily translated meaningfully into civilian legal language.

- 2-78 It is doubtful whether a unilateral declaration of trust, where a settlor declares himself to be a trustee of assets that are appropriated to be held so and transferring assets from his silo of private property to his fiduciary silo, can be said to amount to placing assets under the control of a trustee.
- 2-79 Provided the trust is properly created¹⁸⁸ there seems to be no principled reason why a unilateral declaration of trust by the settlor (in contrast with a transfer to a trustee) should not be brought within the applicable law and recognition provision of the Convention. Article 2(2)(a) provides that a trust will not be a trust for the purposes of the Convention where the legal ownership and beneficial ownership of property are part of the trustee’s patrimony, so as to be available for the trustee’s creditors.
- 2-80 Article 2(2)(b) provides that title to the trust assets need not be vested in the trustee for the assets to be subject to a trust within the meaning of the Convention, provided that the assets are held in the name of another person to hold on behalf of the trustee.¹⁸⁹
- 2-81 Article 2(2)(c) provides that a trustee is subject to any obligations specified in the trust instrument, and also to duties imposed on him by law. Omitted from this provision is to whom the trustee owes his obligation. As a matter of Jersey orthodoxy, the trustee is accountable to the beneficiaries (or the Attorney General in the case of charitable purpose trusts) although were the Royal Court to consider a foreign law trust where the duty is owed to the settlor or an enforcer, this would not prevent the trust from being a trust for the purposes of the Convention and capable of recognition in Jersey.¹⁹⁰
- 2-82 The final paragraph of Article 2 recognises that a trustee may himself be a beneficiary of a trust (although not the sole beneficiary of which he is the trustee as it is not possible to owe duties to himself). Trusts that provide for wide reserve rights and powers to the settlor are still ‘trusts’ within the meaning of the Convention although it is not specified what rights and powers are permitted. One runs the risk that while the assets remain vested in the trustee but within the effective control of the settlor,¹⁹¹ the trust may be regarded as a sham in some jurisdictions¹⁹² and held not for the beneficiaries at all but for the settlor.

vi. Evidenced in Writing

- 2-83 The Convention applies only to trusts created voluntarily and evidenced in writing.¹⁹³ A trust that is declared orally will fall within the scope of the Convention if it is subsequently evidenced in writing. A trust will be sufficiently evidenced in writing even if such

¹⁸⁸ Which is a matter falling outside the scope of the Convention under Art 4, see paras 2-90 below.

¹⁸⁹ Underhill and Hayton, *Law of Trusts and Trustees*, 18th edn (London, Lexis Nexis, 2010) at para 100.57 are of the view that Art 2(2)(b) is not wide enough to encompass the concept of an agency or mandate with control over property within the Convention definition of ‘trust’.

¹⁹⁰ Although a trustee who owes a duty solely to the settlor risks being considered a sham unless some obligations are also owed to the beneficiaries as well.

¹⁹¹ Note the extensive menu of reserve powers under the Trusts (Jersey) Law 1984, Art 9A.

¹⁹² Note the Jersey definition of sham is much narrower than that in the UK.

¹⁹³ Art 3.

writing is not signed by the settlor¹⁹⁴ although ‘evidenced in writing’ must be taken to mean sufficiently evidenced to represent the will of the settlor to create the trust in those terms. By section 1(2) of the 1987 Act, the UK has made the scope of Article 3 of the Convention academic in the UK.¹⁹⁵ However, Jersey is not subject to section 1(2) and therefore some consideration of what trusts fall within and without Article 3 is appropriate and necessary. A trust that satisfies the formality requirements will continue to come within the Convention even if it is later affected by a court decision that replaces the original trustee or varies the trust¹⁹⁶ or if the assets of the trust vary over time. It is unclear whether an addition to an existing trust that already comes within Article 3 requires to be evidenced in writing as well. Erring on the side of caution it is suggested that there should be some writing by a settlor indicating his intention that the transferee should hold the additional assets as an accretion to the trust.

vi. Trusts Created Voluntarily

The concept of a trust created voluntarily is fairly open-textured and does not translate well into the lexicon of trust lawyers because of the questions it leaves surrounding resulting and constructive trusts (which share characteristics of being an imposed solution by the court in the nature of a remedy¹⁹⁷ as well as being capable of analysis on the basis of an implicit intention).¹⁹⁸ Both resulting and constructive trusts arise by operation of law or presumed or implied intention rather than voluntary creation in the sense of an express trust. The intention of the drafters of the Convention appears to have been to use a language that provided sufficient flexibility for extending the scope of the Convention while it was allowed to bed-down but which *prima facie* excluded from its scope constructive trusts imposed by the courts.¹⁹⁹ Resulting trusts arising from the failure of an express trust should be covered by the Convention.²⁰⁰ Where a constructive or resulting trust can be analysed as arising as a response to the acts and free will of a settlor and the trustee, such trusts can legitimately be brought within the scope of ‘voluntary trusts’ for the purposes of the Convention.

2-84

a. Resulting Trusts

A resulting trust that arises from the failure of an express trust which fails to exhaust the beneficial interests in the trust fund, and is evidenced in writing must fall within the scope of the Convention.²⁰¹ It is logical that the governing law of an express trust should also govern its failure and determine the effect of such failure as giving rise to a resulting trust.²⁰²

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¹⁹⁴ Or in fact signed by any particular party; signing is not a requirement of Art 3.

¹⁹⁵ Section 1(2) provides: ‘Those provisions [of the Convention] shall, so far as applicable, have effect not only in relation to the trusts described in Articles 2 and 3 of the Convention but also in relation to any other trusts of property arising under the law of any part of the United Kingdom or by virtue of a judicial decision whether in the United Kingdom or elsewhere’.

¹⁹⁶ Von Overbeck, para 50 (eg under the Matrimonial Causes Act).

¹⁹⁷ Although the concept of a remedial constructive trust has largely given way to a more traditional approach and endorsement of the institutional constructive trust.

¹⁹⁸ See Ch 6.

¹⁹⁹ Von Overbeck, para 49.

²⁰⁰ *ibid*, para 51.

²⁰¹ *ibid*, para 51.

²⁰² R Stevens, ‘Resulting Trusts in the Conflict of Laws’ in P Birks and F Rose (eds), *Restitution and Equity* vol 1 (London, Mansfield Press, 2000) at 147, 157.

It is unclear whether the Convention can be read as encompassing a purchase-money resulting trust. It can be argued that such a trust is created voluntarily in the sense that it can be presumed to reflect the settlor's (contributor's) intention by contributing to the purchase price. The difficulty comes in whether such a resulting trust is evidenced in writing. It is an open question as to whether a court declaring the terms of a resulting trust can be said to amount, in itself, to sufficient evidence in writing so as to bring an otherwise undocumented purchase-money resulting trust within the terms of Article 3. While it might seem an acute point, one can imagine circumstance where the recognition of such a trust might have to be sought from the courts of a non-trust or civilian jurisdiction. It must be remembered that the open-textured language of the Convention can be derided or deployed to one's advantage and where a clear unjust enrichment would result from non-recognition of an undocumented purchase-money resulting trust, a more flexible gloss may need to be applied to the language in Article 3.

b. Constructive Trusts

- 2-86** A personal remedy to account as a constructive trustee imposed upon a third party involved in a breach of an express trust is not a trust for the purposes of Article 3 since the Convention is drafted so as to be concerned only with trusts of specific property as a ring-fenced fund.²⁰³
- 2-87** The constructive trust imposed upon a trustee of an express trust (voluntarily created and evidenced in writing) who appropriates trust assets to himself in breach of trust²⁰⁴ is properly to be considered as being one and the same as (or incidental to) the original express trust coming within the terms of the Convention. This is a logical and necessary extension of the protection afforded by the ring-fence in Article 2. The notion of the ring-fence would be wholly illusory if it were possible for the trustee to take assets outside the ring-fence and appropriate them to himself. Indeed Article 11(d) requires it to be possible to recover trust assets from the trustee if he has mingled trust assets with his own property or has alienated trust assets.
- 2-88** Where the trustee in breach of trust transfers trust assets to a third party (the third party not being a bona fides purchaser for value and so no providing anything in substitution for the trust assets) the effect of such a transfer is determined according to the choice of law rules of the forum²⁰⁵ which will normally designate the *lex situs* as the governing law. While a common law or mixed common and customary law jurisdiction will find the third party bound by the prior equitable proprietary interests of the beneficiaries and so a constructive trustee of the property, other jurisdictions that do not recognise the beneficiaries' prior proprietary equitable rights will not find such a constructive trust and are not obliged to do so under the Convention.
- 2-89** Article 3 does appear to exclude a constructive trust arising against a person who is not a trustee but does hold a fiduciary position who misappropriates to himself assets

²⁰³ D Hayton 'The Law Applicable to Trusts and on their Recognition' (1987) 36 *ICLQ* 260 at 264, thus excluding personal liability as a dishonest assistant and as a knowing recipient.

²⁰⁴ *Foskett v McKeown* [2001] 1 AC 102.

²⁰⁵ Arts 11(3)d, and 15(d).

belonging to his principal, such as a company director vis-à-vis his company. On this basis, a constructive trust imposed on a fiduciary arising from the no-profit rule would also seem to fall outside the Convention. In both of these circumstances the trusts are not created voluntarily²⁰⁶ nor evidenced in writing but are imposed by the Court as a mechanism to preserve the fiduciary's duty of fidelity.

vii. Preliminary Matters Excluded from the Scope of the Convention

The Convention applies only to matters which concern the validity of the trust itself. For a trust to be brought into existence it must be validly declared and constituted, any written instrument must itself be valid both as to form and substance and the subject matter of the trust must be validly transferred into the hands of the trustee. Valid creation also touches upon the capacity of the settlor. These are all 'preliminary matters' falling within Article 4 which excludes them from the scope of the Convention. Professor David Hayton first introduced the instructive analogy of a rocket (the trust) and a rocket launcher (the constitutive acts that create the trust)²⁰⁷ but it is sometimes difficult to delineate precisely between the launcher and the rocket. The distinction is best made between those rules applicable to any disposition of property (the launcher) and those which specifically affect the ability to create a trust (the rocket).²⁰⁸ Thus, the transfer of property by the settlor to a trustee, the validity of a will (as to both its form and substance) and the capacity of the settlor are outside the scope of the Convention.

2-90

a. Capacity of the Settlor

There is very little cogent authority on the choice of law rules governing the settlor's capacity to create a trust. The capacity to create a trust is itself comprised to two elements: the capacity of the settlor to alienate property at all and the capacity of the settlor to subject property to a trust. Since the alienation of property affects the title to the property and that any decision on capacity should be enforceable in the place where the property purportedly alienated is located, the *lex situs* should apply to this first issue.²⁰⁹ How should the issue of settlor capacity be approached in self-settlement cases where the settlor unilaterally declares himself trustee of his property? There has been no alienation of the settlor's property, only the capacity in which the settlor holds it has changed. The capacity of the settlor to create a trust of any property of which he may, according to the *lex situs* in which the property is located, dispose is governed by the proper law of the trust.²¹⁰ Curiously, Article 9 of the

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²⁰⁶ Other than perhaps a contorted assertion that a fiduciary must be taken to have impliedly volunteered to hold property on trust for their principal.

²⁰⁷ D McClean, 'Common Lawyers and The Hague Conference' in A Borras, A Bucher, T Stuychen and M Verwilghen (eds), *E Pluribus Unum: Liber Amicorum Gorges Droz* (The Hague/London/Boston, Kluwer Law 1996) at 217: 'the image employed was that of the launcher and the rocket; it will always be necessary to have a "launcher", for example a will a gift or other action with legal effects, which then "launches" the "rocket"; the trust. The preliminary act with legal effects, the "launcher", does not fall under the Convention's coverage.'

²⁰⁸ *Tod v Barton* [2002] EWHC 265 (Ch).

²⁰⁹ *Glencore International AG v Metro Trading International* [2001] 1 Lloyds Rep 284 at [294]. At least where the disposition is *inter vivos*, in the case of a testamentary transfer the *lex successio*nis should be applied so as to avoid scope for the application of any foreign claw-back rules in favour of forced heirs.

²¹⁰ As to determining the proper law, see below.

Trusts (Jersey) Law 1984 provides that in respect of a Jersey law trust the capacity of the settlor is governed exclusively by Jersey law. It is questionable how effective such a rule would be in respect of trusts of property located outside Jersey; and in particular in relation to the settlement of immovables which is typically governed by the *lex situs*.

b. Capacity of the Trustee

- 2-92** The capacity of the intended trustee to receive trust property *inter vivos* is governed by the *lex situs* at the time of the purported transfer.²¹¹ The capacity of the trustee to act as trustee of any property which he is permitted, according the *lex situs* in which the property is located, to receive is governed by the proper law of the trust.²¹²

c. Capacity of the Beneficiary

- 2-93** The capacity of a person to receive property at all *inter vivos* is determined by the *lex situs* in which the property is located, at the time of the purported transfer of property to the trustee. The capacity of a person who may according to the *lex situs* in which the property is located, receive property to assert a beneficial interest under a trust is governed by the proper law of the trust.

d. Vesting Property in the Trustee

- 2-94** The question of whether the property has been successfully vested in trustees is excluded from the scope of the Convention and is thus subject to the general conflicts of laws rules applicable to transfers of property. We are here concerned with only whether the *lex situs* recognises whether the legal title to property may be alienated. Because of the civilian angle to the Convention, any consideration of whether a transfer encompasses both a legal and equitable transfer is a blind alley because civil jurisdictions may not recognise the concept of equitable ownership. The metaphorical process of 'launching the rocket' cannot be invalidated because the *lex situs* does not recognise the concept of beneficial ownership. The particular interest that the beneficiary acquires is governed by the proper law of the trust.

- 2-95** For the purposes of the conflict of laws a distinction is made between movable and immovable property. Within the former category are tangible and intangible movable property. It is the *lex situs* of the property that determines whether the property in question is movable or immovable²¹³ although where the *situs* of an asset is regarded as being, must be a matter of Jersey law. The question of whether any proprietary interest has been transferred *inter vivos*²¹⁴ from a would-be settlor to a would-be trustee is determined by the *lex situs* of the particular asset at the time of the transfer²¹⁵ Whether a disposition by the trustee is effective

²¹¹ Where the transfer is not *inter vivos*, see n 209 above.

²¹² Art 8(2)(a).

²¹³ *Philipson-Stow v IRC* [1961] AC 727.

²¹⁴ Testamentary disposals of movables into trust are governed by the law of the deceased settlor's domicile at death.

²¹⁵ Where the property transferred is a debt, the assignability of the debt to the trustee will have to be determined by the law under which the debt arose and whether the debt has been assigned to the trustee will be determined by the law governing the assignment itself.

to transfer the equitable title or other protected beneficial rights to a would-be beneficiary is determined by the proper law of the trust.

e. Forced Heirship

The key question is whether forced heirship rules affects the trust structure itself or affect the ability of the deceased settlor to transfer title to the trustee at all. If it affects only the ability to create the trust structure, it falls within the Convention and the mandatory rules of the law applicable to succession may be applied under Article 15(1)(c). Only where the forced heirship rule impugns the ability of the settlor to transfer title to the trustee full stop should it be regarded as falling outside the Convention under Article 4. Where a transfer is affected by forced heirship rules, the law governing the deceased estate should determine whether and to what extent a *testamentary* disposition should be restricted by the forced heirship rules.

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Where the testator/settlor is Jersey domiciled, Jersey's succession law provides, only in cases of testate succession of movable property,²¹⁶ that a testator/settlor only has power to freely dispose of one-third of their movable estate.²¹⁷ Where the testator purports to dispose of any portion of the remaining two-thirds, whether or not by settling the assets into trust, such a disposition is liable to be challenged by the settlor's surviving spouse and/or issue to reduce the gift in excess of the free one-third *ad legittimum modernum*. These *légitime* rights do not operate automatically upon the testator's powers of disposal but must be specifically claimed within one year and one day from the date of the testator's death.²¹⁸ While forced heirship rights under the law of jurisdictions other than Jersey will not be given effect to by the Royal Court where any dispute arises as to the validity of a Jersey trust or the validity of any disposition of property into a Jersey trust,²¹⁹ Article 9(3) carves out a specific exemption for Jersey's *légitime* regime which will apply to such questions where a trust is established by a Jersey domiciled settlor.²²⁰

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B. Determining Proper or Governing Law of a Trust

The proper law of the trust will also determine what parts of the 1984 legislation are applicable to the trust or any dispute under it. Part 2 of the Law applies only to Jersey law trusts while Part 3 applies only to foreign law trusts. Part 4 contains general provisions applicable to either foreign or jersey law trusts. The governing law of a trust can be a significant factor

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²¹⁶ There is no restrictions on a testator's power, either *inter vivos* or by will, to effect a disposition of Jersey immovable property but by virtue of Art 11(2)(a)(iii) of the Trusts (Jersey) Law 1984 it is impossible to constitute a trust of Jersey immovable property.

²¹⁷ Wills & Succession (Jersey) Law 1993, Art 7(3). The remaining two-thirds are subject to claims for *légitime*.

²¹⁸ *Robertson v Lazard Trustees Co C.I. Limited* [1994 JLR 103] (there is some divergence of opinion as to whether a *légitime* claim is prescribed after a year and day from the later date of the grant of probate).

²¹⁹ See Ch 15 for an explanation of the Art 9 'firewall' provisions in the Trusts (Jersey) Law 1984.

²²⁰ As of September 2016, the States of Jersey is consulting on a seventh amendment to the Trusts (Jersey) Law 1984 which would have the effect of abolishing this exemption and bringing *légitime* into line with other forced heirship regimes around the world.

as to whether the Court will assume jurisdiction over a trust. The proper law of trust is determined in accordance with Article 4 of the Trusts Law²²¹ which provides:

4 Proper law of a trust

- (1) Subject to Article 41, the proper law of a trust shall be the law of the jurisdiction –
 - (a) expressed by the terms of the trust as the proper law; or failing that
 - (b) to be implied from the terms of the trust; or failing either
 - (c) with which the trust at the time it was created had the closest connection.
- (2) The references in paragraph (1) to ‘failing that’ or ‘failing either’ include references to cases –
 - (a) where no law is expressed or implied under sub-paragraph (a) or (b) of that paragraph; and
 - (b) where a law is so expressed or implied, but that law does not provide for trusts or the category of trusts concerned.
- (3) In ascertaining, for the purpose of paragraph (1)(c), the law with which a trust had the closest connection, reference shall be made in particular to –
 - (a) the place of administration of the trust designated by the settlor;
 - (b) the situs of the assets of the trust;
 - (c) the place of residence or business of the trustee;
 - (d) the objects of the trust and the places where they are to be fulfilled.

- 2-99** There are therefore three routes by which the proper law may be determined. However, the routes in Article 4(1) are not alternatives but must be applied in descending order. Only if the proper law cannot be determined or the resulting proper law results in a proper law that does not recognise trusts or the category of trust with which the dispute is concerned can recourse be made to the next sub-paragraph.
- 2-100** In the vast majority of modern express trusts the trust instrument will contain a proper law clause which will usually (subject to any argument as to whether it is in fact a choice of law clause) be determinative of the issue under Article 4(1)(a). A settlor may choose the governing law of the trust, irrespective of whether the chosen law has any objective connection with the settlor, the trust assets or the beneficiaries. To be valid the choice must be of an individual legal system; in the absence of a valid choice of law the governing law will be determined in accordance with Article 7 of the Convention.²²² Further, the choice must be that of a state which recognises trusts. Where a choice is made and the law does not provide for trusts or the category of trust involved the choice shall not be effective and the law applicable in the absence of choice shall apply.²²³ Where the law with the closest connection to the trust is that of jurisdiction which does not recognise trusts the Convention’s rules become inapplicable.²²⁴ Jersey, having enacted its own legislation that almost identically mirrors Articles 6 and 7 of the Convention, would continue to apply the closest connection test, irrespective of whether that leads to a jurisdiction in which the trust would be invalid.
- 2-101** Where there is a subsequent addition to the assets of a trust whose settlor has validly chosen a governing law, the subsequent accretion does not have the effect of altering the governing

²²¹ Which corresponds with Arts 5–7 of the Convention.

²²² Replicated in Jersey law as Art 4 of the Trusts (Jersey) Law 1984.

²²³ Art 6(2). See *Dick v Pantrust International & Ors* 2016 JRC 155.

²²⁴ Art 5.

law of the original trust, although where the second settlor specifies a particular proper law in their transfer that may be taken as an intention by that settlor to establish a separate trust of the transferred assets.

i. Implied Choice of Law

If there is no express choice of law, there may be an implied one. This involves ascertaining the settlor's subjective intentions. An implied choice may be made from the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case.²²⁵ When considering the trust instrument, the terms or reference to matters that are resonant of a particular legal system will normally determine the issue without recourse to extrinsic evidence. The trust instrument or writing evidencing the trust is the first point of reference; an implied intention cannot be inferred only from the circumstances of the case in the absence of assistance from the trust instrument or other written evidence thereof.²²⁶

As the question of the proper law is always at large when recourse is being made to Article 4, it is the authors' view that Jersey law must be applied in respect of the connecting factors in Article 4(3). That is to say, the *situs* of the assets of the trust or the place of residence or business of the trustee is determined in accordance with the meaning of those concepts under Jersey law.

The Convention (if it applies at all) is only relevant where the proper law of the trust is not that of Jersey. If the Royal Court accepts jurisdiction but finds that under Article 4, the proper law of the trust is not Jersey law, it will apply the foreign proper law, not including its conflict of laws rules. The concept of *renvoi* is therefore excluded from the scope of the Convention. As an example, if the Court held the proper law of a trust to be English law then the Court would apply English trust law but not English conflict of laws rules pertaining to trusts as modified by the Recognition of Trusts Act 1987.

ii. Applicable Law in the Absence of Choice of Law

Where a choice of law is not expressed and cannot be implied, or the choice that has been made is invalid, the governing proper law must be determined in accordance with Article 4(1)(c).²²⁷ Without prejudice to the taking into account of other factors, the Convention and Jersey legislation list 'in particular' four factors which are to be regarded as having a magnetic or especial importance in ascertaining the law most closely connected to the trust: (1) the place of administration of the trust designated by the settlor; (2) the *situs* of the assets of the trust; (3) the place of residence or business of the trustee; and (4) the objects of the trust and the places where they are to be fulfilled.

Where the place of administration of the trust is designated by the settlor, this will be a very strong indicator as to the implied choice of law under Article 4(1)(b).²²⁸ As to the *situs* of

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²²⁵ Art 6.

²²⁶ Von Overbeck 69; the factors in Arts 7 and 4 that go to show where the objective 'centre of gravity' of the trust is in the absence of any valid choice are not part of this exercise and are dealt with below.

²²⁷ Art 7.

²²⁸ Art 6.

trust assets, this is likely to have the greatest significance where a significant portion of the assets are immovables on the basis that enforcing an order relating to property in a state in which the property is located means that the Royal Court would be unlikely to decide a dispute differently from the way that the judge in the court of the *situs* would decide it. The place of residence or business of the trustees is likely to be of no significance where the trustees are spread over a number of jurisdictions.²²⁹ Where the trustee(s) is in a single jurisdiction or the trustee is a company specifically appointed as trustee in a particular jurisdiction this may be of greater significance.²³⁰ As to the final factor—the objects of the trust and the places where they are to be fulfilled—the objects or purposes of the trust are unlikely (objectively speaking) to tell the Court much about the law of closest connection unless it is possible to infer from this something objective about where the trust's assets should be invested or where it should be administered.²³¹ The domicile of the settlor and residence of the beneficiaries are not expressly mentioned but the list is not closed.²³² It is a matter of controversy whether the Court should have regard to whether the validity of the trust impacts on the determination of the proper law, eg if the proper law is of jurisdiction X the trust is valid, if the proper law is of jurisdiction Y it is invalid. While it might be argued that in having established a trust the implied intention of the settlor must be that he would have chosen a governing law in which the validity of the trust would be upheld, the better view must be that by having recourse to the closest connection test in the first place, no implication is possible. Objectively speaking, the law of closest connection must remain the law of closest connection irrespective of whether it leads to the validity or invalidity of the settlement.²³³

iii. Renvoi

- 2-107** Once the governing law of the trust has been determined, that law is applied without regard to the governing law's own conflict of laws rules; the doctrine of *revoi* is therefore excluded.²³⁴ As an example, if the Royal Court held the proper law of a trust to be English law then the Court would apply English trust law but not English conflict of laws rules pertaining to trusts as modified by the Recognition of Trusts Act 1987.

C. Scope of the Governing Law

- 2-108** The list of matters that are to be subject to the governing law, once it is determined, are set out in Article 8 of the Convention but this list is not exhaustive.²³⁵ The proper law

²²⁹ *Harris Investments Ltd v Smith* [1934] 1 DLR 748; and *Jewish National Fund Inc v Royal Trust Co* (1965) 53 DLR (2d) 577.

²³⁰ But note *Re Carapiet's Trusts, Manoogian (Armenian Patriarch of Jerusalem) v Sonsino* [2002] EWHC 1304 (Ch).

²³¹ Note the different results in *Chellaram v Chellaram* [1985] Ch 409 and *Chellaram v Chellaram (No 2)* [2002] EWHC 632 (Ch) at [167].

²³² See *Chellaram v Chellaram (No 2)* (n 231) but these factors had no weight in *Tod v Barton* (n 208) at [36].

²³³ *Re CIS/213/2004* [2008] WTLR 189 [55].

²³⁴ Art 17.

²³⁵ *Minwalla v Minwalla* [2004] EWHC 2823 (Fam); note the use of 'in particular' as with Art 7.

governs the validity and effect of the trust and also its construction and administration²³⁶ although under the *dépeçage* provision in Article 9 of the Convention it is possible for a settlor to choose another law to govern the construction of the trust from the law governing its administration. This provision sits awkwardly with Article 9 of the Trusts (Jersey) Law 1984, which provides that Jersey law alone is to apply to the administration of a Jersey trust, whether the administration be conducted in Jersey or elsewhere, including questions as to the powers, obligations, liabilities and rights of trustees and their appointment or removal even if the settlor has expressly chosen another law to govern this issue. The only way Article 9 of the Trusts (Jersey) Law 1984 can be reconciled with the Convention is if Article 9 is treated as an overriding rule of the forum pursuant to Article 16 of that Convention. Article 8(2)(a) provides that the proper law will govern ‘the appointment, resignation and removal of trustees’. This differs from the old English common law rules that an English court would make orders to appoint or remove trustees according to English law against trustees of a foreign law trust if those trustees were within the jurisdiction of the English court.²³⁷

Article 8(2)(b) applies the governing law of the trust to the rights and duties of trustees among themselves. Where a trustee makes a claim against a co-trustee for contribution in a breach of trust action, in England the Civil Liability (Contribution) Act 1978 applies irrespective of the applicable law of the trust and to the exclusion of the applicable law.²³⁸ Under Jersey law the jurisdiction conferred upon the Royal Court by statute to order a contribution is considerably narrower than currently exists in England²³⁹ although in English common law there existed an inherent jurisdiction for the court to award a contribution as between co-trustees in a breach of trust action (which has now been subsumed within the wider statutory jurisdiction under the 1978 Act). It is considered that such an inherent jurisdiction also exists at Jersey customary law.

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Article 8(2)(c) provides that the trustee’s power to delegate his powers is to be determined in accordance with the proper law. This provision does not deal with the consequences of delegation which will be determined in accordance with whatever law governs that relationship.²⁴⁰

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Article 8(2)(d) deals with the administration of the trust and the trustee’s power to deal with and acquire trust property. These powers may also be subject to *dépeçage* but in the absence of *dépeçage* the law governing the administration of the trust will be the proper law of the trust. The question arises whether Jersey statutory provisions concerning a trustee’s powers can be applied to trusts governed by foreign law.²⁴¹ Article 8(2)(d) also concerns the trustee’s power to create a security interest in the trust property. While the proper law will determine whether a security interest can be created, the nature of that interest in the hands of the secured party is a matter of the *lex situs* of the asset to which the security attaches.

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²³⁶ Art 8(1).

²³⁷ *Chellarlam v Chellarlam* (n 231).

²³⁸ *Petroleo Brasiliiero SA v Mellitus Shipping Inc* [2001] 2 Lloyds Rep 203.

²³⁹ Law Reform (Miscellaneous Provisions) (Jersey) Law 1960, Art 3; *Jersey Electricity Company Limited V. Brocken* [2004] JLR 289].

²⁴⁰ There may well be a contract between the trustee and the delegate and so the governing law of the contract will determine the relationship between them.

²⁴¹ As has been held in the UK to be the case in relation to s 33(1) of the Administration of Estates Act 1925 and ss 31 and 32 of the Trustee Act 1925.

- 2-112 Article 8(2)(e) concerns the investment powers of the trustee which are one of the key elements of the proper administration of the trust. While jurisdictions like Jersey and England and Wales have expanded the powers of trustee when it comes to the types of asset they can invest in,²⁴² these are not to be regarded as mandatory rules that can be used to cut across the rules of the proper law of the trust. Article 8(2)(f) deals with the duration of the trust and powers of accumulation of income. A Jersey trust may last indefinitely.²⁴³ The Royal Court must respect any period of perpetuity or accumulation period that is imposed on a trust governed by foreign law.
- 2-113 Article 8(2)(g) provides that the relationships between the trustees and the beneficiaries including the personal liability of the trustees to the beneficiaries shall be subject to the proper law of the trust. The proper law will govern the fiduciary and other duties owed by the trustee and a protector to the beneficiaries. Evidently, this article does not cover the liability of trustees to third parties, so liability that arises from a trustee misappropriating a third party's property and mixing it with the trust's assets is not to be determined in accordance with the proper law of the trust.
- 2-114 Article 8(2)(h) deals with the variation and termination of trusts.²⁴⁴ On its face, Article 8(2)(h) would suggest that when the English High Court exercises its jurisdiction to vary a Jersey law trust under section 24 of the Matrimonial Causes Act 1973, then the variation should be in accordance with Jersey, rather than English law. The same approach would appear to govern the jurisdiction of the High Court to make an order under the Variation of Trusts Act 1958.²⁴⁵ However, *Charalambous v Charalambous*²⁴⁶ held that section 24 was a mandatory rule of English law within the meaning of Article 15 of the Convention, thereby overriding the application of the proper law of the trust. Whether there really was any pressing reason to treat section 24 as a mandatory rule of English law is questionable.²⁴⁷ The correct threshold being that the proper law should be applied to any variation of a non-English law trust save in cases where to do so would be manifestly incompatible with English public policy under Article 18.
- 2-115 Article 9(4) provides that no foreign judgment in respect of a Jersey trust shall be enforceable to the extent that it is inconsistent with Jersey law. In respect of a trust the proper law of which is Jersey, the provision is wholly consistent with Article 8(2)(h).
- 2-116 One solution might be that in the case of a Jersey trust, were the English court to exercise the jurisdiction contained in Article 47 of the Trusts Law (the equivalent of the English Variation of Trusts Act 1958 jurisdiction) to vary the Jersey trust and the trustee has submitted to the English court's jurisdiction then Article 9(4) would have no application because the judgment against the trustees would have been determined in accordance with Jersey law. Such a solution would also be wholly consistent with Article 8(2)(h).
- 2-117 The practical issue is that despite the Convention, it has long been the practice of the English High Court, where it thinks fit, to order a variation to a foreign law trust in divorce

²⁴² Trusts (Jersey) Law, Art 24(1) and Trustee Act 2000, s 3.

²⁴³ Art 15, perpetuity abolished by the Trusts (Amendment No 4) (Jersey) Law 2006.

²⁴⁴ Examined in detail in J Harris, *The Hague Trusts Convention* (London, Hart, 2002).

²⁴⁵ The approach taken in *Re Paget's Settlement* [1965] 1 WLR 1046 would today appear incompatible with Art 8(2)(h).

²⁴⁶ [2004] EWCA Civ 1030.

²⁴⁷ J Harris, Variation of Trusts Governed by Foreign Law upon Divorce (2005) 120 LQR 16.

proceedings using English law and will use Articles 15, 16 and even 18 to buttress the jurisdiction under the Matrimonial Causes Act 1973.

This solution gets the trustees off the horns of a dilemma in taking the risk of not submitting to English proceedings for the purposes of providing documents and defending the interests of the trust and any subsequent English court order being recognised in Jersey so as to provide protection to the trustees from any breach of trust claim.

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D. Limits on the Scope of the Governing Law

The effect of recognition under Article 11 is qualified by the saving provisions for mandatory rules in Articles 15 and 16 and for public policy under Article 18.

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i. Distinguishing Mandatory Rules and Public Policy Considerations

Mandatory rules are positive rules of law which a state insists upon applying and are superimposed onto the governing law even in circumstances where a different governing law is applicable. A settlor is not permitted to derogate from mandatory rules. Public policy on the other hand involves the disapplication of the foreign governing law in whole or in part and is invoked in circumstances where the court would consider it unacceptable to give effect to it.

2-120

ii. Mandatory Rules of the Law Applicable to Related Areas of Law

The first paragraph of Article 15 preserves the mandatory rules of the law designated by the conflicts rules of the forum for matters other than trusts. The second paragraph permits the judge to mitigate the effect of the first paragraph. It may well be that the provisions of a trust or provisions of the applicable law that govern it might be incompatible with the law applicable to another matter under the forum's own conflict of laws rules. Article 15 is intended to preserve the substantive rules of a foreign law that is designated by the private international law rules of the forum.

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Where a conflict arises between the applicable law of the trust and the applicable law conflict of laws rules in relation to the matters listed in Article 15, the former must be read as giving effect to the latter. Article 15 is concerned with the mandatory rules of the state whose law is designated by the forum's choice of law rules as being applicable in the related areas. Article 15 provides a non-exhaustive list or areas of law related to the trust.²⁴⁸ As to how Article 15 applies in practice: The Jersey Royal Court might have jurisdiction over a trust whose applicable law is that of Utopia but Utopian law might designate the *lex situs* to determine the capacity of a person to act as a trustee of particular trust property which is located in Oz.

2-122

²⁴⁸ Art 15(2) provides that where a mandatory rule is applied under Art 15(1) the Court shall try to give effect to the objects of the trust by other means, which might allow a non-trust state which cannot recognise the trust qua trust because of the application of the mandatory rule, to give effect to it by 'translating' it into the nearest domestic law analogue.

- 2-123 Article 15(1)(c) may appear to have the effect of preserving the rights of forced heirship under the law applicable to the settlor's succession in respect of the deceased's *inter vivos* gifts of property into trust that are situated in a jurisdiction recognising forced heirship claims concerning such property. However, its practical application is likely to be more limited, in accordance with the English position. Article 4 will usually operate so as to prevent any testamentary trust from arising to the extent that it purports to cover that part of the estate reserved for heirs.²⁴⁹ It is unlikely that Jersey would permit a validly created Jersey law *inter vivos* trust to be undermined by foreign forced heirship rules. A transfer by a living settlor *inter vivos* to trustees is a preliminary issue outside the Convention. The relevant question is whether at the time when the settlor purported to create an *inter vivos* trust, he could and did alienate his property to the trustees in accordance with the *lex situs*. If the transfer is valid according to the *lex situs*, and the trust is valid according to the applicable law (Jersey) the transfer cannot later be impugned under Article 15(1)(c). It would also likely be contrary to Jersey public policy, under Article 18, to require trustees to wait and see whether the settlor died domiciled in a forced heirship jurisdiction, for potentially a long period after setting up the trust and not to exercise any dispositive powers except above the value of the property received from the settlor.
- 2-124 Article 15(1)(d) preserves the application of mandatory rules of the applicable law concerning the transfer of title to property and security interests in property. This article is not concerned with the transfer of property to the trustees as this is a preliminary issue excluded by Article 4.
- 2-125 Article 15(1)(e) covers the protection of creditors in matters of insolvency. This must be taken to mean the protection of an insolvent beneficiary's creditors rather than the creditors of an insolvent trust; otherwise there would be no effective ring-fenced fund.²⁵⁰ A protective trust might be vulnerable to being subject to the mandatory rules of the designated governing law as being as a means of frustrating the claims of creditors.²⁵¹ The article should also cover trusts declared by a settlor that can be set aside as a transaction at undervalue or a preference, if not regarded as a preliminary issue.

iii. International Mandatory Rules of the Forum

- 2-126 Article 16 preserves the application of the forum's international mandatory rules as distinct from the domestic mandatory rules of the jurisdiction designated by the application of the forum's choice of law rules. The forum's international mandatory rules are those rules which the settlor is not permitted to derogate from and which are intended to be applied irrespective of the governing law of the trust.²⁵²
- 2-127 Article 16 permits a state leeway to apply its own international mandatory rules in any areas that might affect particular trusts so as to override the terms of the trust. The laws that might fall within Article 16 are those intended to protect the cultural heritage of the

²⁴⁹ Transfers by will are a preliminary issue outside the scope of the Convention.

²⁵⁰ Von Overbeck, para 108.

²⁵¹ It may also be considered contrary to the public policy (Art 18) of a foreign state that is asked to recognise a protective trust governed by Jersey law.

²⁵² Von Overbeck, para 149.

country, public health, certain vital economic interests, the protection of employees or of the weaker party to a contract.²⁵³ Article 16(2) permits the application (but only in 'exceptional circumstances') of the international mandatory rules of a state of close connection with the trust, whose law is neither the law of the forum nor the applicable law. It is to be noted that the Recognition of Trusts Act 1987 omits Article 16(2) but given that legislation does not apply to Jersey it must be assumed that Article 16(2) can be applied as there has been no Jersey derogation under Article 16(3).²⁵⁴

iv. Public Policy

Article 18 provides that the provisions of the Convention (encompassing both the choice of law rules and the recognition of trusts) may be disregarded where their application would be manifestly contrary to public policy. 'Manifestly' indicates a high threshold and Article 18 should be interpreted restrictively so as not to undermine the purpose of the Convention. It has been suggested that Article 18 is a threshold that is rarely, if ever, surmounted²⁵⁵ and will generally be confined to rules which are oppressive, infringe upon human rights or are impossible to give effect to.²⁵⁶

2-128

²⁵³ The French delegation at the Hague Conference asked that the report also include currency exchange regulations in connection with Art 16; Von Overbeck para 149.

²⁵⁴ D Hayton in J Glasson, *International Trust Laws*, 2nd edn (Bristol, Jordan Publishing Ltd, 2006) ch C3 at 16: 'Since a court of equity will do nothing in vain and will not require a person to do an act that is illegal where it is to be done, so that sufficient define protection exists, there seems no need for a common law country [of which Jersey may be one] to adopt this paragraph [Article 16(2)] of worryingly indefinite ambit'.

²⁵⁵ M Koppenol-Laforce, *Het Haagse Trustverdrag* (Deventer, Kluwer, 2002) at 270, 'From experiences with similar articles it follows that such articles [referring to 16 and 18] are hardly ever applied. I see no reason why this should be different with trust cases. Article 16 is the real danger to the recognition of the trust'. However the problems created by the recognition of the trust in non-trust states provides a real prospect that Art 18 will be used more widely as a route of last resort to thwart the recognition of a trust.

²⁵⁶ See Dicey, Morris & Collins, *The Conflict of Laws*, 15th edn (London, Sweet & Maxwell, 2016) ch 5, on the use of public policy in the conflict of laws. Typical cases where public policy is invoked include where the applicable law is fundamentally contrary to basic principles of human liberty, standards of justice, morality or where good relations with a friendly state may be adversely affected.

3

Applications for Directions, the Variation of Trusts

I. Introduction

A trustee may find itself as a party to litigation in a variety of circumstances. Other chapters of this text concern the law and court procedures available to a beneficiary, or trustee on their behalf, where the trustee is in breach of their obligations and proceedings are issued to remedy that position. This chapter is concerned primarily with a very different context in which litigation before the Royal Court involving trusts arises, namely:

3-1

1. a dispute as to the terms upon which the trustees hold and/or administer the subject matter of the trust ('a trust dispute'); and
2. a dispute with one or more of the beneficiaries as to the propriety of any action in the trustee's administration of the trust which the trustees may or may not take in the future ('a beneficiary dispute').¹

These categorisations of trust dispute (which in some cases may not in fact be meaningfully described as a dispute at all)² may be contrasted with a third and fourth category of trust dispute: where the beneficiaries attack the propriety of something done or not done by the trustee (a species of beneficiary dispute but where the acts that give rise to the litigation have already happened) and where a third party to the trust issues proceedings against the trustee in the course of administration of the trust (a third party dispute). The purpose of these categorisations is not to see how many angels one can make dance on the head of a pin. The categorisation of a given dispute has important consequences for the way the costs of the proceedings fall to be paid.

3-2

If the proceedings make allegation of breach of trust on the part of the trustee, an Order of Justice is the more appropriate form of originating process for the action. Disputes between the trust and third parties are also usually normally commenced by Order of Justice as they are, as between the trustee and the third party, no different from any other piece of civil litigation before the Royal Court. However, proceeding by way of Representation may be

3-3

¹ These classifications of trust dispute are lifted from the formulation given in the English decision of *Alsop Wilkinson v Neary* [1996] 1 WLR 1220, which has been approved of and adopted into Jersey law; see *Trilogy Management Ltd v YT Charitable Foundation (Intl) Ltd* [2013 (2) JLR 265]; *In re Dunlop Settlement* [2013 (2) JLR N [6]]; *In re J.P. Morgan 1998 Employee Trust* [2013 (2) JLR 239]; *In re HHH Employee Trust* [2013 (1) JLR 135].

² eg where the class of beneficiaries is closed and all the adult, competent beneficiaries consent to a proposed course of conduct by the trustee but there are minors and unborn who, by virtue of their status, cannot consent.

appropriate in the context of a third party dispute where the third party is claiming beneficial ownership of the assets subject to the trust which necessarily involves the Court's intervention into the internal administration of the trust by determining on whose behalf the trustee holds the trust assets.

- 3-4** Hearings for actions commenced under Articles 51 and 47 transfer (Jersey) law 1984 are generally heard by the Court sitting in private. While this is intended to provide a safe space for the airing of all relevant matters before the Court, it does give rise to some important practical and legal consequences that practitioners contemplating a private hearing must bear in mind.
- 3-5** In this chapter, we consider applications to the Royal Court, typically by trustees but also in some cases by beneficiaries, for a determination on questions arising in the administration of the trust including proceedings for directions as to the exercise of powers. This chapter also considers the jurisdiction conferred upon the Royal Court by Article 47 of the Trusts (Jersey) Law 1984 to vary the terms of a trust. Article 47 contains two distinct jurisdictions: the jurisdiction for the Royal Court to approve an arrangement varying the beneficial interests under trust on behalf of those deemed unable to do so themselves and jurisdiction to vary the scope of the trustee's powers of management and administration of the trust property. Applications under this provision are a classic example of a 'trust dispute'. This chapter is also concerned with how the costs of trust disputes and beneficiary disputes fall to be paid. This chapter also deals with the principles and civil procedure in applying for Beddoe relief (a specialised form of application for directions, concerned with the question whether trustees should litigate at the expense of the trust property and the incidence of costs in that litigation). Outside the scope of this chapter, but considered elsewhere, are the following kinds of trust dispute:
1. applications for the removal of trustees and power holders;³
 2. proceedings for the rescission or rectification of trust instruments on grounds of mistake;⁴
 3. proceedings concerning unauthorised profits and self-dealing transactions made by or entered into by trustees;⁵
 4. proceedings concerning disclosure by trustees or others of information about the trust;⁶ and
 5. issues as to the trustee's indemnity for the costs of legal proceedings in the second category of beneficiary dispute alluded to above and in respect of third party claims against the trust and trustee.⁷

³ Ch 10.

⁴ Ch 4.

⁵ Ch 8.

⁶ Ch 5.

⁷ Ch 11.

II. The Supervisory Jurisdiction of the Royal Court and Applications for Directions

The Royal Court, as in the Chancery Division of the English High Court, has an inherent supervisory jurisdiction in relation to trusts that permits it to intervene in their administration where it considers it appropriate.⁸ This inherent jurisdiction is given expression, in part, by Article 51 of the Trusts (Jersey) Law 1984. Trustees are entitled to seek the assistance of the Court in determining the manner in which the trustee may or should act in connection with any matter concerning the trust.⁹ Matters that may come before the Court for determination under Article 51 are many and various, ranging from the construction of a provision in the trust instrument, whether the trustee should defend or prosecute a claim made against them in the course of their administration of the trust, whether the trustee should exercise its powers in a way that is potentially of momentous importance to the beneficiaries, to whether the trustee or beneficiary is permitted to use trust documents in foreign proceedings, to name but a few. Upon the Court's direction, a trustee may act in accordance with that without fear that in so doing they may be acting in a way for which they might later be criticised by the beneficiaries or made liable to them. The matters upon which the Court can give directions are extremely broad and for reference the full terms of Article 51 are set out here:

51 Applications to and certain powers of the court

- (1) A trustee may apply to the court for direction concerning the manner in which the trustee may or should act in connection with any matter concerning the trust and the court may make such order, if any, as it thinks fit.
- (2) The court may, if it thinks fit –
 - (a) make an order concerning –
 - (i) the execution or the administration of any trust,
 - (ii) the trustee of any trust, including an order relating to the exercise of any power, discretion or duty of the trustee, the appointment or removal of a trustee, the remuneration of a trustee, the submission of accounts, the conduct of the trustee and payments, whether payments into court or otherwise,
 - (iii) a beneficiary or any person having a connection with the trust, or
 - (iv) the appointment or removal of an enforcer in relation to any non-charitable purposes of the trust;
 - (b) make a declaration as to the validity or the enforceability of a trust;
 - (c) rescind or vary any order or declaration made under this Law, or make any new or further order or declaration.
- (3) An application to the court for an order or declaration under paragraph (2) may be made by the Attorney General or by the trustee, the enforcer or a beneficiary or, with leave of the court, by any other person.

⁸ *In re IMK Family Trust* [2008] JLR 250] at [64]; *In the matter of the Internine and Azali Trusts* [2006] JLR 195] at [25]; *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [51].

⁹ Trusts (Jersey) Law 1984, Art 51(1).

(4) Where the court makes an order for the appointment of a trustee it may impose such conditions as it thinks fit, including conditions as to the vesting of trust property.

(5) Subject to any order of the court, a trustee appointed under this Article shall have the same powers, discretions and duties and may act as if the trustee had been originally appointed as a trustee.

- 3-7** Article 51 is a mandatory provision of Jersey's trust law and cannot be derogated from or excluded by the terms of the trust instrument. Article 51 is located in Part 4 of the 1984 Law, making the Court's jurisdiction available to both Jersey law and foreign law governed trusts.¹⁰ Only the Royal Court sitting in the Inferior Number has jurisdiction to grant relief under Article 51 of the Trusts (Jersey) Law 1984.¹¹
- 3-8** In many applications to court under Article 51 that involve some adjudication on some course of action proposed to be taken by trustees, the underlying question may be one as to the construction of the trust instrument or some other provision.¹² The Court will grant relief by making a declaration as to the construction to be given. There is no mechanism in Jersey equivalent to the English courts' jurisdiction under section 48 of the Administration of Justice Act 1985 to obtain an order based on counsel's opinion as to the particular construction of a trust provision without the need for a hearing. In other cases the question may not be the scope or construction of the trustee's powers but one as to the good sense of a proposed course of action, such as a Beddoe application. In that instance the Court is not being asked to make a declaration as the meaning of a document or even to give directions on the basis of a particular set of factual assumptions; but to exercise a judgment.
- 3-9** The classification of an application to court for directions under Article 51 of the Trusts (Jersey) Law 1984 and the consequences following from that classification, and the precise role of the Court turns on the precise question being asked and whether or not the trustee has surrendered its discretion to the Court. Trustees may, in a suitable case, surrender their discretion to the Court, which will then act in the trustee's stead and direct the exercise of the power itself. Alternatively, the trustees may, without surrendering their discretion, merely apply for the Court's approval of a proposed course of action, so as to protect them against future criticism from the beneficiaries. Where there is no surrender of discretion, the Court's function is circumscribed and it grants approval if satisfied that there is no impropriety in the course proposed by the trustee.
- 3-10** Although it is commonplace to refer to every application under Article 51 as an application for directions the term is perhaps more properly confined to an application as to some course of action proposed to be taken in exercise of the trustee's powers, and perhaps then only if there is a surrender of the trustee's discretion. Where there is no surrender of discretion, the course the trustee wishes to take has already been set, subject to the Court's blessing and no 'direction' as to what the trustee should do, in the true sense is sought. The distinction between exercising a substantive judgment on and giving declaratory relief can

¹⁰ *ibid*, Art 50.

¹¹ See the definition of 'Court' in Art 1(1) of the Trusts (Jersey) Law 1984. The Bailiff may constitute the Inferior Number and sit alone without Jurats on any question of construction; see Royal Court (Jersey) Law 1948, RCR 7/8.

¹² *Trilogy Management Limited v YT Charitable Foundation (International) Limited and Ors* [2012] JRC 093 (interpretation of mandatory dividend provision in the articles of association of a trust-owned investment company).

be of some significance, since a declaration as to, say, the width of a class of beneficiaries will be determinative of one or more persons' rights, whereas directions given on a Beddoe application will not. The nature of the jurisdiction the Court is exercising is also relevant to the test for an appeal of any such decision.¹³ The application of Jersey's human rights legislation (and its impact on the practice of conducting directions hearings in private) turns on the distinction¹⁴ and so does the necessity of ensuring that all beneficiaries who may be affected are either made parties or are represented.¹⁵

A. Article 51(1) of the Trusts (Jersey) Law 1984—Directions Concerning the Manner in which the Trustee May or Should Act in Connection with any Matter Concerning the Trust

Only a trustee¹⁶ has locus to make an application under Article 51(1) whereas the locus to seek an order under Article 51(2) is considerably wider, although applications by trustees are far more common than applications by beneficiaries. It may also be that the jurisdiction extends to a person who is alleged to be a trustee, or who is concerned that he may incur liability as a constructive trustee; either qua trustee or as 'any other person', with leave, under Article 51(3). Because Article 51 merely gives expression to the Court's inherent jurisdiction to give directions in the administration of a trust and is not the source of it, the Court may, in theory, also make an order under Article 51(2) of its own motion but in reality will not do so without hearing argument. Beddoe applications can be framed within Article 51(1) although the jurisdiction itself also arises from the Court's inherent jurisdiction.

3-11

B. Article 51(2)(a)(i)–(ii) of the Trusts (Jersey) Law 1984—Orders Concerning the Administration of any Trust and Orders Concerning the Trustee

The scope of the jurisdiction of the court under Article 51(2) is potentially very wide but it does not confer a freewheeling unfettered power on the Inferior Number to do as it pleases. The Court's supervisory jurisdiction must be exercised on a principled basis.¹⁷ The Court is mindful that the settlor has not chosen the Court to act as trustee. The appointed trustee is likely to be a professional, regulated entity, charging for its services. The Court will be reluctant to assume the trustee's role; that is not its function.¹⁸ The Court's role is supervisory and it is limited to ensuring that decisions taken by trustees are reasonable and lawful.¹⁹ In proceedings brought under Article 51(2) of the Trusts (Jersey) Law, the Court

3-12

¹³ *In re B Settlement* [2010] JLR 653; *Alhamrani v Alhamrani* [2008] JLR N [45]; see Ch 4 for the principles of construction prevailing in Jersey.

¹⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (set out in Human Rights (Jersey) Law 2000, Sch 1), art 6(1).

¹⁵ As to which see the procedure section below, specifically in relation to representation orders.

¹⁶ Including a bare trustee or nominee.

¹⁷ *S v L* [2005] JRC 109; *In re B Settlement* 2010 JLR N29; *Crociani v Crociani* [2014] UKPC 40 at [38], per Lord Neuberger.

¹⁸ *In re B Settlement* (n 13).

¹⁹ *Richard v Mackay* (1987) 11 Tru LI 23, 24 per Millett J.

does not simply substitute its own discretion for that of the trustee unless the trustee has surrendered its discretion to the Court and the Court agrees to accept such surrender.²⁰ 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.²¹ The Court may only intervene where the decision is one which no reasonable trustee could arrive at.²² 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 by one or more of the sort of circumstances set out below.²³

- 3-13** There are clearly circumstances where an order will overlap Article 51(2)(a)(i) and Article 51(2)(a)(ii). An order directing the distribution of the trust fund to certain beneficiaries will be an order concerning the execution or administration of the trust as well as relating to the exercise of any power, discretion or duty of the trustee. A settlor, or someone claiming through a settlor such as a creditor, who claims entitlement to the trust assets by way of a resulting trust to the settlor is, we consider, a person within Article 51(2)(a)(i) since the wording is simply ‘any trust’.²⁴ Clearly, Article 51(2)(a)(ii) is the jurisdiction under which the Court, on the beneficiary’s application, can seek to exert some measure of control over the incumbent trustee. If it is alleged that the trustee has not provided proper accounts, the Court may stay the action for a specified period, ordering the trustee to file and serve proper accounts within that period. A payment into court can practically only be ordered if the trustee has money in his hands.²⁵

C. Article 51(2)(a)(iii) of the Trusts (Jersey) Law 1984—Orders Concerning a Beneficiary or any Person Having a Connection with the Trust

- 3-14** The parameters of Article 51(2)(a)(iii) are, at first sight, extremely broad. The Court may make any type of order so long as it *concerns* a beneficiary (qua beneficiary) or person *connected* with the trust. Regard must be had to the purpose for which the jurisdiction to grant relief exists. The article is intended to give a general power to the Court to give directions in administrative proceedings.²⁶ The foundation of the jurisdiction lies in the nexus between trustee and beneficiary arising out of the trust relationship. The fact that a person just happens to be a beneficiary is not of itself sufficient to justify the making of an order, the order must be made for the purpose of vindicating, or at least promoting, some right or interest arising directly out of the trust relationship. Whether a person has a ‘connection’ with

²⁰ which it is not obliged to do; see *In re B Settlement* (n 13); *In re H Trust* [2007] JLR 569].

²¹ *In re Y Trust* [2011] JLR 464].

²² *S v L and Bedell Cristin Trustees Limited* [2005] JRC 109 at [22]–[24], approved in *MM v SG Hambros Trust Co (CI) Ltd* [2010] JRC 037 at [15]; *Re B, C and D Settlements, RBC Trust Company (Jersey) Ltd v E and Ors* [2010] JCA 231, at [38]–[43].

²³ See para 3-23 below.

²⁴ *Jones & Others v Firkin-Flood* [2008] EWHC 2417 (Ch).

²⁵ *Nutter v Holland* [1894] 3 Ch 408, CA.

²⁶ *In re C.A. Settlement* [2002] JLR 312 at [16], referred to in *In the Matter of R and RA Trusts* (25/2014) as the Court’s ‘inherent jurisdiction to supervise, and if necessary intervene in, the administration of trusts’, per Lord Walker in *Schmidt v Rosewood Trust Limited* (n 8) at [51].

the trust within the meaning of Article 51(2)(a)(iii) depends on the factual circumstances relevant to the particular case. The connection must be a direct connection with the relationship between trustee and beneficiary constituted by the trust instrument.²⁷ The Court does not have any supervisory jurisdiction over the directors of a holding company whose shares were held by a trustee, or any of the holding company's subsidiaries. The directors of a company owe duties only to the company of which they are a director to act for the benefit of members of the company as a whole.²⁸ A settlor or protector or the potential object of a discretionary power who is not a beneficiary at the relevant time, all have the necessary direct and immediate connection with the trust relationship.²⁹ A creditor of the settlor convened at the outset of litigation to challenge the validity of dispositions into trust will also have sufficient connection, since the issue is fundamental to the existence or otherwise of the trust relationship.³⁰ A settlor with reserved fiduciary powers under a trust is a 'person having connection' with trust, to the effect that the beneficiaries had the right to seek from the settlor disclosure of information and access to documents held by the settlor in connection with the exercise of its fiduciary powers under the trust.³¹ It has been held in Jersey that Article 51(2)(a)(iii) cannot be used to order a director of a company owned by the trust to disclose information about the company to the trustee on the grounds that the directors owed no duty of disclosure to the trustee or beneficiaries of the trust that arose directly out of the trust relationship. While as directors of the company, they had the ability to procure the documents, their duties as directors were owed to the company and not to the trustee or beneficiaries.³² The mere fact that there happened to be an identity between persons who were the trustees of one trust and the trustees of a second trust could not result per se in there being a connection between the first trust and the trustees of the second trust or vice versa.³³ The order sought must affect the beneficiary in that capacity and must be made for the purpose of vindicating or at least promoting some right or interest arising directly out of the trust relationship.³⁴ That test has been reviewed and refined by the Guernsey Court of Appeal in *In the Matter of R and RA Trusts*³⁵ as being too narrowly cast. In *R and RA Trusts*, the trustee had sought an order for disclosure against some of the trusts' beneficiaries for information concerning assets of the trust which was necessary to enable the trustee to make an informed decision as to the division of the trust fund between branches of a family. The trustee submitted that the equivalent Guernsey provision to Article 51(2)(a)(iii)³⁶ was in wide terms to the effect that the Court had jurisdiction to order the disclosure because the holders of the information were beneficiaries. The beneficiaries, in opposition to the trustee's application, sought to rely on the rationale for the decision in

²⁷ *In the matter of the Bastiaan Broere Trust and the Cornelis Broere Trust; Mourant and Company (Trustees) Limited and Ors v Broere* [2003] JLR 509] at [29]; *RBC Trust Company (Jersey) Ltd v E* (n 22) at [42].

²⁸ *In The Matter Of The G Family Trust* [2014 (2) JLR N 2].

²⁹ [2003 JLR 509] at [26].

³⁰ See *UBS Trustees (Jersey) Limited v Ismail* [2003] JRC 147 at [6]; and *In Re Esteem Settlement* [2002 JLR 53]; *In Re Key Trust* [2003 JLR 437] at [7].

³¹ *In re HHH Employee Trust* [2012 (2) JLR 64].

³² *In re B Settlement* (n 13).

³³ *In re Broere Trusts* (n 27).

³⁴ *ibid*, at [41].

³⁵ 25/2014 (Guernsey CA).

³⁶ Trusts (Guernsey) Law 2007, s 69(1)(a)(iii).

Re B, C and D Settlements and an additional ground, namely that the Court had no jurisdiction to order disclosure against a beneficiary in the context of the trusts' administration.

- 3-15 In the Court's view, in order to justify an order against a beneficiary there must be sufficiently close connection between the position of the beneficiary, qua beneficiary, of the trust whose affairs are being supervised and the relief being sought so as to justify the exercise of the Court's supervisory jurisdiction. The test for proximity is a flexible one; the Court should look to the reality of the situation and not be overcome by technicalities.³⁷ The power in Article 51(2)(a)(iii) is a statutory articulation of the Court's inherent jurisdiction to supervise and intervene in the administration of a trust. At its heart lies the protection of the interests of the beneficiaries as a whole.³⁸ Being a decision of the Court of Appeal of Guernsey the decision in *R and RA Trusts* is not binding on the Royal Court although the presence of Sir Michael Birt, Bailiff of Jersey, on the panel is likely to make it, at least, highly persuasive. A representor who is denied an order for disclosure at first instance in Jersey may now be inclined to take the matter to the Court of Appeal. Although the received wisdom is that if the appellant is a trustee, in appealing he does so at his own risk as to adverse costs, there are strong policy statements from the likes of Salmon LJ in *Re Londonderry Settlement*,³⁹ echoed in the *RBC Trust Company (Jersey) Ltd v E*⁴⁰ decision itself that where an appeal against an order for disclosure can be justified in relation to the welfare of the beneficiaries as a whole, the trustee should take responsibility in either appealing the case itself or by actively supporting a beneficiary who appeals. A trustee who appeals on the basis that the information sought is necessary to protect the beneficiaries' interests is unlikely to be held to have acted unreasonably so as to deprive itself of its indemnity from the fund for any adverse costs.

III. Examples of Applications under Article 51 of the Trusts (Jersey) Law 1984

A. Construction Disputes and Questions of Law

- 3-16 The principles the Court will apply in determining the construction of a particular document, whether or not forming part of the trust documents, or whether to rectify a particular document are considered elsewhere.⁴¹ While only the Inferior Number may grant relief under Article 51, where a question of law or the construction of a document arises, the Inferior Number may be constituted by the Bailiff sitting alone.⁴²

³⁷ See *North Shore Ventures Limited v Anstead Holdings Inc* [2012] EWCA Civ 11 in the context of an order for disclosure against a beneficiary under CPR 71.2(6).

³⁸ *Schmidt v Rosewood Trust Limited* (n 8) at [51] and also *Re Freiburg Trust* [2004] JRC 056 at [6].

³⁹ [1965] Ch 918 at 936.

⁴⁰ [2010] JCA 231 at [30].

⁴¹ Ch 4.

⁴² See the definition of Court in Art 1(1) of the Trusts (Jersey) Law 1984; RCR 7/8 of the Royal Court (Jersey) Law 1948.

B. General Administration Issues

The Royal Court may, theoretically make an administration order if it considers that the issues between the parties cannot properly be resolved in any other way; however, there are no reported decisions in which the Royal Court has assumed such a role (or directed the Viscount to execute the trust)⁴³ and it is likely to be extremely reluctant to do so given the large number of professional trustees who may be appointed instead and the unwieldiness of administration through the Court. A bare trustee or nominee is entitled to apply to the Court for directions.⁴⁴ The jurisdiction of the Royal Court to remove and/or replace a trustee, protector or other power holder is a question arising in the course of the administration of the trust under Article 51.⁴⁵ The wording of Article 51 is sufficiently wide to encompass an action requiring a determination as to an issue of fact rather than a question of construction such as the legitimacy of the birth of a person claiming to be a beneficiary of a settlement under which only legitimate children are entitled.⁴⁶ A settlor, or someone claiming through a settlor such as a creditor, who claims entitlement to the trust assets by way of a resulting trust to the settlor is, we consider, a person within Article 51(2)(a)(i) since the wording is simply 'any trust'.⁴⁷

C. Approval of Transactions

Without being an exhaustive list, examples of transactions for which the approval of the Court has been sought include:

1. Making a substantial distribution out of the trust to a beneficiary to enable him to meet a lump sum order against him in divorce proceedings and then excluding the former spouse as a beneficiary.⁴⁸
2. The division of the trust fund for the benefit of the settlor's children in unequal shares contrary to the settlor's wishes that the fund be divided on a 50:50 basis.⁴⁹
3. The sale of a substantial and valuable asset from the fund.⁵⁰
4. Giving effect to a compromise to which the trustee was a party in a dispute between warring beneficiaries.⁵¹
5. The appointment of the entire trust fund to the principal beneficiary.⁵²

⁴³ Indeed the administrative action, whereby the Court supplants the role of trustee who must execute the trust in accordance with the Court's directions, is virtually unknown in modern English practice.

⁴⁴ *Finers v Miro* [1991] 1 WLR 35, CA.

⁴⁵ *Dick v Pantrust International SA & Ors* [2015] JCR 208.

⁴⁶ Until the enactment of Wills and Succession (Amendment) (Jersey) Law 2010, illegitimate children of a deceased were not entitled to inherit under Jersey's succession rules.

⁴⁷ *Jones & Others v Firkin-Flood* (n 24).

⁴⁸ *Kan v HSBC International Trustee Limited, Poon & Ors* [2015] JCA109.

⁴⁹ *In re Y Trust* (n 21).

⁵⁰ *Marley v Mutual Security Merchant Bank* [1991] 3 All ER 198 (PC); *Brudenell-Bruce v Moore* [2014] EWHC 3679 (Ch). If the Court gives directions approving the trustee's proposed sale of trust property, the trustee will usually have the conduct of the sale unless the Court directs otherwise.

⁵¹ *Re Abacus (C.I.) Ltd v Hirschfield* [2001] JLR 530]. See also *Re E Trust* [2003] JRC 132; *Re the A Settlement* [2009] JRC 125; *RBC Trust Co (Jersey) Limited v E, Re B Settlement* [2012] JRC 005.

⁵² *Re Representation C Corporation formerly the CH Trust* [2009] JRC 025A; *Re A as trustee of the D Trust* [2012] JRC 130.

6. A distribution from the trust to a beneficiary to enable the beneficiary to settle claims made against him as a director.⁵³
7. The disposal by trustees of funds subject to the threat of a proprietary claim by a third party.⁵⁴
8. The settlement of various claims against the trust, the net effect of which is to exhaust the fund.⁵⁵
9. The distribution to a beneficiary on the footing that another beneficiary was dead.⁵⁶

IV. Applications for Directions Concerning the Exercise of Powers

- 3-19** *In re S Settlement*,⁵⁷ the Court identified four distinct but non-exhaustive, categories of situation in which the trustee might seek to invoke the Court's jurisdiction on the exercise of the trustee's powers:⁵⁸
1. 'Category 1': The issue before the Court might be whether the proposed action is within the trustees' powers.
 2. 'Category 2': The trustees may have already decided on a course of action which is within their powers, but may wish to obtain the Court's blessing in view of the momentous nature of the decision. In such a case, the trustees do not surrender their discretion to the Court.
 3. 'Category 3': The trustees do surrender their discretion to the Court. The Court will only accept a surrender for good reason, such as where the trustees are honestly deadlocked or where they are unable to act because of a conflict of interest.
 4. 'Category 4': The fourth category concerns those situations where the trustees have already taken action and that action is challenged as being beyond their powers or an improper exercise of such powers.⁵⁹
- 3-20** These categories provide a convenient working template or prism through which to analyse both whether the proceedings are appropriate for the nature of the question being asked of the Court by the trustee and also the approach the Court will take once proceedings are commenced. However, it should be remembered that there may be degrees of variation within each category and a particular application for directions may straddle one or more categories. There may not always be a bright dividing line between category 2 cases (no surrender of discretion) and category 3 cases (surrender of discretion). The board of a trustee

⁵³ *Re Representation Insinger de Beaufort Trust (Jersey) Limited* [2003] JRC 097.

⁵⁴ *In Re Caversham Trustees Limited* [2010] JRC 054.

⁵⁵ *In Re Dunlop Settlement* [2013] JRC 029.

⁵⁶ *Re the Deed of Trust made by Equity Trust (Jersey) Limited* [2008] JRC 069; *In Re Benjamin* [1902] 1 Ch 72. 57 2001 JLR N[37].

⁵⁸ *S Settlement* was a case concerning Art 47 but the analysis could as readily be applied to applications under Art 51 depending upon the question being asked.

⁵⁹ These are the same categories of cases identified by Walker LJ in the unreported decision referred to by Hart J in *Public Trustee v Cooper* [2001] WTLR 901.

may be unanimous that the circumstances exist that would (for example) justify a sale of a special asset but be divided as to whether or not to sell.

A. ‘Category 1’: The Trustees Seek a Determination on their Powers

The extent of the trustees’ powers is commonly but not invariably a matter of construction, either of the trust instrument or of a statute. The Court will rule on such questions on application by the trustees or a beneficiary so as to bind all interested parties. If the issue is that the trustees’ powers are inadequate, it is open to them to apply to the Court for the conferral of a suitable power, either confined to a particular transaction or generally under Article 47.

3-21

B. ‘Category 2’: The Trustees Seek the Court’s Blessing of a Momentous Decision

Whether a decision is ‘momentous’ is clearly context specific: the decision may be momentous for the future of the trust as a whole or momentous for the trustee in that the decision may mean the trustee is put at risk of personal liability.⁶⁰ Proof of the existence or likelihood of contention among the beneficiaries in relation to the particular decision will be material to whether the decision is sufficiently momentous to require an application to court. An application to bless a decision that is neither momentous nor otherwise difficult will usually be dismissed and where an application is considered to have been inappropriate and a waste of costs the trustees can be made to pay costs personally, and not from the fund pursuant to their indemnity.⁶¹ A final distribution of the trust fund, in circumstances where the trustee has a discretion as to the apportionment of the fund between the beneficiaries and there is disagreement between the objects as to how that power should be exercised, is likely to be a category 2 ‘momentous decision’.⁶² The trustees may sometimes seek the Court’s blessing concerning a particular transaction in relation to the trust assets.⁶³ Generally, it is usually inappropriate, on the basis of the policy of non-intervention set out in *S v L & Bedell Cristin Trustees Limited*,⁶⁴ (and at the very least impractical) for the trustees to seek the Court’s blessing for everyday changes in the trust’s assets. Very often the trustees’ investment powers are delegated to professional asset managers who manage the fund’s portfolio day to day without the involvement of the trustees. An exception to this general approach applies to decisions to sell so-called ‘special assets’ of the trust, such as a decision to sell a family estate,⁶⁵ or to dispose of a controlling interest in a family company.⁶⁶

3-22

⁶⁰ See consideration as to liabilities below.

⁶¹ Trusts (Jersey) Law 1984, Art 53.

⁶² *In re Y Trust* (n 21) at [32]–[40].

⁶³ *Kan v HSBC International Trustee Limited, Poon & Ors* (n 48); ((i) to make a substantial distribution out of the trust to a beneficiary to enable him to meet a lump sum order against him in divorce proceedings and (ii) to exclude the former spouse as a beneficiary).

⁶⁴ [2005] JRC 109.

⁶⁵ *Public Trustee v Cooper* (n 59) at 923D–E; *Re Repus Trust* [2005] JRC 081 (majority shareholding in company owning family estate).

⁶⁶ *Public Trustee v Cooper* (n 59); the beneficiaries were largely opposed to the takeover and one of the trustees had other interests in the transaction.

i. The Nature of the Application and the Surrender of Discretion

- 3-23 A trustee seeking directions on a momentous decision has a choice: (1) they may seek the Court's approval of an exercise of a power which (subject to that approval) they have already decided upon (category 2); or (2) they may seek to surrender the decision to the Court, so that it is the Court which actually discharges the trustees' functions in that instance (category 3). Whether the trustees have surrendered their discretion to the Court and to what degree will determine the parameters in which the Court can act and is of fundamental importance to the nature of an application under Article 51.⁶⁷ An application to court for approval under Article 51 does not automatically entail a surrender of discretion.
- 3-24 In practice, it is not always apparent whether the trustee has in fact surrendered its discretion. A clear example of fence-sitting by the trustee is in the context of a Beddoe application seeking the Court's leave to litigate, or not to litigate. The trustee may not indicate whether they have decided upon a particular course for which they are seeking approval or leaving the decision to the Court. An application for approval of a course of action without a surrender of the trustees' discretion will typically be made in a category 2 case, where the decision that has been reached is particularly momentous for the trust. Where the Court is asked to bless a course of action that the trustees have already decided upon the Court must be addressed on at least the following three matters when it is asked to give directions:⁶⁸
1. whether the Court is satisfied that the trustee has formed the opinion in good faith that the circumstances of the case render it desirable and proper for it to carry out the proposed steps;
 2. whether the Court is satisfied that the opinion which the trustees have formed is one which is reasonable for the trustee, if properly instructed as to the exercise of their discretion, could have arrived at; and
 3. whether the Court is satisfied that the opinion at which the trustee has arrived is not vitiated by any actual or potential conflict of interest which has or might have affected its decision.
- 3-25 The above matters are not exhaustive. It was made clear in *Public Trustee v Cooper*⁶⁹ that the duties of the Court in category 2 cases in particular depend upon the circumstances of each case. There may be other matters beyond those three identified above.⁷⁰
- 3-26 The Court's function where there is no surrender of discretion is more limited than if there is a surrender. The Court is concerned to see that the proposed exercise of the trustees' powers is lawful, within the scope of the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors.⁷¹ The Court only needs to be satisfied that the trustees can properly form

⁶⁷ *ibid.*

⁶⁸ *In re Y Trust* [2014] (1) JLR 199].

⁶⁹ [2001] WTLR at [925].

⁷⁰ *Jones v Firkin-Flood* (n 24), per Briggs J suggested the Court may feel insufficiently certain about the propriety of a proposed discretion that it may decline to bless it where the trustees have demonstrated a general unfitness to act by conduct prior to the taking of the relevant decision.

⁷¹ *In re Y Trust* (n 21) at [39], the Royal Court referred to the test set out in *Re Hastings-Bass Deceased* [1975] Ch 25 at 41 as being helpful:

the view that the proposed transaction is for the benefit of beneficiaries and that they have in fact formed that view.⁷² Once it appears that the proposed exercise is within the terms of the power proposed to be exercised, the Court is concerned only with limits of rationality and honesty and will not withhold its approval simply because it would not itself have exercised the power in the way the trustee proposes.⁷³ The Court will, however, act with caution. It is to be remembered that in giving its blessing to the proposed course of action, the beneficiaries will be barred thereafter from complaining that the exercise of the power amounts to a breach of trust or can be set aside under Article 47I. Where the Court is left in doubt as to the propriety of the trustees' proposal it will withhold its approval. This does not amount to prohibition on the exercise proposed, only that the trustees undertake it at their own risk. As with a surrender of discretion, the trustees are obliged to put all relevant material and considerations before the Court. In our view, this will include disclosure of the trustees' reasons since the reasons will necessarily be material to the Court's assessment of whether the proposed exercise is made appropriately, even though in other circumstances they would not otherwise be obliged to give such disclosure.⁷⁴

The Court may also entertain an application under category 2 where the trustees have a conflict of interest,⁷⁵ without requiring them to surrender their discretion, if the power might rationally be exercised in a number of different ways.⁷⁶ That course may save the expense of evidence and argument on the way in which the Court should exercise its discretion qua trustee.

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C. 'Category 3': The Trustees do Surrender their Discretion to the Court

Where the trustee surrenders its discretion, the Court will act qua trustee in giving its directions. The Court acts as a reasonable trustee could be expected to act having regard to all the material circumstances.⁷⁷ The Court has no greater powers than the trustees would have done, had they not surrendered their discretion. Trustees who surrender their discretion must put before the Court all the material necessary to enable the discretion to be exercised, including, for example, any requisite expert advice.⁷⁸ This may include legal advice but it has been held that disclosure of otherwise privileged material into Article 51 proceedings will not amount to a waiver of privilege.⁷⁹

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⁷² *Re Kane Trusts* [2004] JRC 041.

⁷³ *In re Y Trust* (n 21) at [32]–[40].

⁷⁴ See later chapters on disclosure of deliberative documents to beneficiaries.

⁷⁵ Although the nature of the conflict will clearly be of relevance; see Ch 8.

⁷⁶ *Re Drexel Burnham Lambert UK Pension Plan* [1995] 1 WLR 32.

⁷⁷ As to what disclosure is made to the Court to enable it to consider all material circumstances, see below.

⁷⁸ *Marley v Mutual Security Merchant Bank & Trust Co Ltd* (n 50); *Re Representation of Lincoln Trust Co (Jersey) Limited* [2007] JRC 138; *Re the A Employee Share Trust* [2009] JRC 089 at [14]–[15], [18]; *Thommessen v Butterfield Trust (Guernsey) Limited* 2009–10 GLR 102; cf *Tamlin v Edgar* [2011] EWHC 3949 (Ch) at [25], per Morritt J.

⁷⁹ See privilege issues below.

- 3-29** The Court is not obliged to accept a surrender of the trustees' discretion. A surrender of discretion is generally regarded to be a course of last resort and will normally only be accepted by the Court in relation to specific exercise of discretion where there is no sensible alternative.⁸⁰ The trustees should be clear as to what aspect of their discretion they are surrendering to the Court. Where the Court does accept a surrender it will do so only for a limited, discrete purpose and will be extremely reluctant to accept a general surrender of discretion requiring it to act as trustee generally, or accept a surrender of a discretion that is to be exercised from time to time in changing circumstances.⁸¹ The trustees have accepted office under the terms of the particular trust instrument and are not entitled as a matter of course to hand over the trusteeship to the court.⁸² There must be a good reason for the surrender.⁸³ Good reasons have been held to include cases in which there is deadlock between the trustees (or directors of a corporate trustee), of a kind which cannot be resolved by removing one trustee (or director) rather than another;⁸⁴ cases in which the trustees are disabled from acting by a conflict of interest;⁸⁵ and cases in which the trustees are faced with a proposed compromise of litigation against a third party where the beneficiaries take strong and opposed views as to the merits of accepting it⁸⁶ and perhaps even where they do not.⁸⁷ Even without any contention by the beneficiaries as to the terms of a compromise, the trustees may seek the court's approval for their decision to accept or reject it.⁸⁸ Not every conflict of interest will require the trustees to surrender their discretion. Where a transaction engages the fair-dealing rule (ie a purchase by the trustee of a beneficial interest in the trust), the trustee may seek the Court's approval without surrendering their discretion but will bear the burden of establishing that the transaction was fair and reasonable.⁸⁹ The trustee must disclose the fact of the conflict of interest, even if it appears obvious.⁹⁰ However, where a transaction with the trust property engages the self-dealing rule so as to vitiate the transaction on the grounds of conflict of interest, the trustee must apply to court and surrender its discretion if the transaction is challenged by the beneficiaries.

⁸⁰ *In re B Settlement* (n 13).

⁸¹ ibid. In *Trilogy Management Limited v YT & Ors* [2014] JRC214 at [25] it appears that the Court accepted the surrender of the corporate trustee's discretion as to the conduct of the litigation in which the trustee was involved owing to a deadlock on the board of directors, directing it to remain neutral and to give such assistance as the Court required.

⁸² *S v L & Bedell Cristin Trustees Limited* (n 22).

⁸³ *In re H Trust* (n 20); *Abacus (C.I.) Limited v Hirschfield* (n 51); *Public Trustee v Cooper* (n 59) at 923G.

⁸⁴ In *The Matter of the H Trust* (n 20). All deadlocks can be resolved by removing enough trustees (or directors of the corporate trustee); the reference to the term 'honestly deadlocked' in *Cooper* appears to refer to a deadlock in which all the trustees are behaving reasonably; *Trilogy Management Limited v YT & Ors* (n 81) (deadlocked board of directors of corporate trustee).

⁸⁵ *In The Matter of the S Settlement* [2001] JLR N37].

⁸⁶ eg *Re Earl of Strafford* [1980] Ch 28, CA.

⁸⁷ *Abacus (C.I.) Ltd v Hirschfield* (n 51) treating the Court's ability to assess the strength of a claim by or against the trust as sufficient to justify a surrender of the trustees' discretion.

⁸⁸ *Re Q Trusts* [2001] CILR 481, Cayman GC.

⁸⁹ *Public Trustee v Cooper* (n 59).

⁹⁰ *Kan v HSBC International Trustee Ltd* 2015 (1) JLR N [31]; *In re Y Trust* (n 68).

D. ‘Category 4’: Challenging the Purported Exercise of a Power after the Event

It is open to beneficiaries to challenge an exercise (or purported exercise) of the trustees’ powers after the event. If a course taken by the trustees is within the four corners of the power, the onus is on the challenger to show that their discretion has been improperly exercised. Where the action taken amounts to a breach of trust an action should be brought by way of Order of Justice and recourse to Article 51 is usually inappropriate unless the transaction sought to be impugned can be set aside without any determination as to fault under the Court’s statutory jurisdiction.⁹¹ Cases within category 4 are usually hostile litigation to be decided, without a privacy order, in open court. The grounds on which a challenge can be mounted are broadly:

1. The trustees have failed to take into account only relevant matters or the exercise is initiated by mistake or misapprehension, sufficient to warrant setting the decision aside under Article 47D–J of the Trusts (Jersey) Law 1984.
2. A necessary consent to exercise a power has not been forthcoming.
3. The trustees’ decision is predicated on a factual situation that is not accurate.
4. The trustees have not brought their minds to bear on their discretion but have acted at the behest of others or have otherwise failed to give genuine consideration to the exercise of the power.
5. There has been an excessive execution of the power.
6. The trustees have failed to remain impartial as between the beneficiaries.
7. The trustees have failed to comply with some formality imposed by the trust instrument or general law.
8. The trustees have failed adequately to indicate an intention to exercise a particular power.
9. The power has purportedly been exercised by the wrong person. For example, where a trustee has purported to appoint a new trustee but the power of appointment is in fact vested in a protector.
10. The trustees have acted in breach of a duty of care in the exercise of investment or other administrative powers.
11. The power has been exercised outside the time in which it was exercisable.
12. There has been a fraud on the power, ie the power has been exercised for a purpose for which it was not conferred.
13. The trustee has a personal (and therefore a conflict of) interest in the exercise of the power.

A beneficiary may commence proceedings challenging the acts of the trustee on any one or more of the foregoing grounds and trustees can apply to the Court for a decision on the validity of an exercise of one of their powers, once a doubt has arisen irrespective of whether it was exercised by themselves or by their predecessors. Where a doubt has arisen, the trustees need to know whether they should continue to administer the trust on the footing that the exercise of the power was valid. A trustee who is at fault in failing to make

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⁹¹ Trusts (Jersey) Law 1984, Art 47D–J.

a timely and well-ordered application for the determination of whether a power was validly exercised may be made to pay costs.⁹²

V. Distributions and the Trustee's Right of Indemnity for Liabilities and the Insolvency of a Jersey Trust

- 3-32 Liabilities incurred by the trustee with a third party, such as liabilities under a contract, stand in a different category from the cases discussed thus far. In Jersey law,⁹³ a trustee is only liable to a third party with whom he expressly contracts *qua* trustee, up to the value of the trust property in the trustee's hands.⁹⁴ If the counterparty to the transaction does not know that the trustee is acting as trustee, the trustee shall have recourse, first, to the trust property by way of indemnity but will be personally liable to the full extent of his assets for any shortfall.⁹⁵ Article 32(1) would appear to provide a fool-proof means for the trustee to avoid personal liability to a third party by making a distribution that reduces the trust fund to below the value of the liability. However, the application of Article 32(1) is not a straightforward matter. Where there is doubt as to the applicability of Article 32(1) or where Article 32(2) is engaged, the trustee should seek directions under Article 51 before making a distribution from the trust that would leave the fund unable to fully discharge the trustee's liability to a third party. Where the liability is for a known sum, the trustee should satisfy it from the trust fund before making any distribution. If the liability is for an unknown sum the liability will have to be compromised or litigated. Where liabilities are prospective or contingent an order of the Court cannot discharge a trustee from an obligation which he himself has assumed. It therefore follows that before an order for distribution can be made, the Court must permit the trustee (unless he is willing to rely on an indemnity from one or more beneficiaries) to retain a sufficient portion of the trust property to meet any prospective or contingent liability which he has incurred in the performance of the trust. If the amount of the retention cannot be agreed, the Court can fix it.

A. Distributions from the Trust Fund

- 3-33 Trustees often seek directions from the Court in order to distribute the fund on a particular factual footing. A trustee cannot be expected to incur any risk of personal liability in the distribution of the trust fund. Whether a proposed action is within the scope of the trustee's powers is ultimately a question of construction of the trust instrument.⁹⁶ Where the trustee's powers of distribution or the beneficiaries' entitlement to the trust fund are not clear the trustee should either apply to the Court for directions under Article 51(2)(a)(ii)

⁹² *Re Toland Trust* [2005] JRC 142.

⁹³ Trusts (Jersey) Law 1984, Art 32(1). For more on the trustee's indemnity and trust insolvency, see Ch 11.

⁹⁴ See Ch 11.

⁹⁵ Trusts (Jersey) Law 1984, Art 32(2).

⁹⁶ *Philean Trust Co Ltd v Taylor* [2003] JRC 038; *Re The Double Happiness Trust* [2003] WTLR 367; *Re Pinto's Settlement* [2004] WTLR 878; see Ch 4.

or, in the few remaining cases in which it is proper to do so, pay the fund into court. The trustee runs a personal risk if it distributes the trust fund in circumstances where there are competing claims to the beneficial title (ie a tracing claim, or a disposition into trust is being attacked as prejudicial to creditors or forced heirs or can otherwise be impugned as the proceeds of crime etc). Where the trustee is aware of an adverse claim to the trust property that is being pressed or is being held in abeyance, a distribution will usually have to wait until the claim is determined. If the claim is not being pressed, or if the trustees are aware of circumstances which may give rise to a claim that has not yet been brought but may be, the case is more complicated. If the trustee is informed of an adverse claim against the trust fund but no proceedings are brought for several years, the trustee may apply for a direction as to whether and on what basis it may administer the trust disregarding the claim. A trustee runs the risk of incurring personal liability if it distributes with notice of a claim to the trust assets. Any application to court will have to either seek leave to distribute, notwithstanding the claim or seek directions as to whether they should litigate the claim.⁹⁷ The Court has power to permit a distribution notwithstanding the claim but will not ordinarily do so without giving notice of the application to the plaintiff.⁹⁸ But the trustee could not in our view be protected by court order against receipt-based personal claims unless the third party was made a party or given notice of the proceedings. Even so, it appears that the Court may order distribution if the possibility of a claim appears to be remote or speculative, not founded on firm evidence.⁹⁹

B. Declaratory Relief

The Court had jurisdiction to make a declaratory judgment under Article 51(2)(b) on any live issue before it with a sufficient degree of reality and immediacy to have a practical bearing upon the resolution of an actual dispute or a dispute likely to arise in the future. Preferring the law of Scotland to that of England,¹⁰⁰ the Jersey courts have never adopted the approach, prevailing in England, that a declaratory judgment could only be given on rights which were certain to come into effect and not on those which were merely possible or hypothetical.¹⁰¹

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It has been observed that it is the function of the courts to decide only live, practical questions and that they have no concern with hypothetical, premature or academic questions, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs. ‘The Courts are neither a debating club nor an advisory bureau.’ Hypothetical questions will not be entertained. The action ‘cannot be used for the mere purpose of declaring legal propositions where no practical

⁹⁷ *In re PW Trust* [2010] JLR 619]; as to Beddoe relief, see para 3-39 below.

⁹⁸ *Re Armstrong Whitworth Securities Co Ltd* [1947] Ch 673; *Finers v Miro* (n 44); *Sinel Trust Ltd v Rothfield Investments Ltd* [2003] JCA 048, [2003] WTLR 593. In Jersey, it has been held (in particular circumstances) that a third party with a proprietary claim to the trust assets could be joined as a party to the trustee’s application for directions: *Re Abacus (C.I.) Ltd* [2000] JLR 165].

⁹⁹ *Sinel Trust Ltd v Rothfield Investments Ltd* (n 100); *Moss v Integro Trust (BVI) Ltd* (1997/98) 1 OFLR 427 (BVI).

¹⁰⁰ Under whose law the test is whether the trustee is in any immediate difficulty in knowing how to apply capital or income or to exercise any power or discretion vested in him? If, but only if, that test is satisfied should the trustee raise the question by claim; see *Re Freme’s Contract* [1895] 2 Ch 256 at 278; *Re Staples* [1916] 1 Ch 322.

¹⁰¹ *In the Matter of the Curatorship of X* [2002] JLR 259] at [17]–[18].

question or dispute lies beneath.' It is a matter of the circumstances of each particular case whether there is or is not a live practical question. There must be a sufficient degree of reality and immediacy before a declarator will be granted. If the declarator will have a practical bearing upon the resolution of an actual dispute it will be competent. It is sufficient for the competency of a declarator that there be an actual consequence either pecuniary or in *facto praestando*. This need not be an immediate practicality: a real possibility of the critical eventuality emerging may be sufficient.¹⁰²

- 3-35** The Court will decide any question raised as to the rights of the beneficiaries in a way which binds all the parties interested in the trust. If a question of construction of the settlement is raised, the Court will pronounce upon the correct construction and all concerned will be bound. Similarly, if a question of fact is raised, such as the paternity of one claiming as a beneficiary, the Court will determine the issue as between all concerned. The same applies to a question as to the rights of the trustees.

C. Distributions and Transactions from the Trust that Prejudice Creditors and/or the Trustee's Indemnity

- 3-36** Where there is a better than speculative case that the trust was made for the purpose of putting assets beyond the reach of the settlor's creditors by transferring assets to trustees at undervalue,¹⁰³ and within five years of the settlement the settlor is declared *en désastre* or the transfer caused him to become insolvent,¹⁰⁴ then the position is more complex. Article 17(1) of the Bankruptcy (Désastre) (Jersey) Law 1990 authorises the Viscount to make an application to the Court for an order restoring the position to what it would have been if the debtor had not entered into the transaction. If the Court is satisfied that the settlement was in good faith for the purpose of carrying on business and that there were reasonable grounds for believing that the transaction would be of benefit to the settlor at the time the transaction was entered into, the Court will not make the order sought.¹⁰⁵ The range of orders the Court can make are set out in Article 17(3) and include (at Article 17(3)(d)) a personal money order against the trustee even after distribution.¹⁰⁶ An order made under Article 17(1) may affect the property of or impose an obligation on any person, whether or not he or she is the person with whom the debtor entered into the transaction.¹⁰⁷ In the authors' view, a beneficiary who receives a distribution of property from a

¹⁰² Zamir & Woolf, *The Declaratory Judgment*, 2nd edn (London, Sweet and Maxwell, 1993) at 272.

¹⁰³ See Bankruptcy (Désastre) (Jersey) Law 1990, Art 17(7).

¹⁰⁴ Bankruptcy (Désastre) Amendment (No 5) Law 2006. In practice the cash-flow insolvency test is used although the Court of Appeal in *Re PSD Enterprises Ltd* [1998 JLR 321] held that balance sheet insolvency may evidence cash-flow insolvency as a matter of fact.

¹⁰⁵ Bankruptcy (Désastre) (Jersey) Law 1990, Art 17(2).

¹⁰⁶ Bankruptcy (Désastre) (Jersey) Law 1990, Art 17(3)(d) authorises the Court to make an order requiring a person to pay in respect of a benefit received by him or her from the debtor such sum to the Viscount as the Court directs. While a trustee does not 'benefit' in the sense that he receives only the legal title to the property subject to the trust, the wording of Art 17(3) is wide and it is to be noted that the trustees receive the trust assets from the settlor as principal, not merely in a ministerial capacity. The Court would be unlikely to make a personal money order against the trustee if the trust assets or the beneficiaries who had received them from the trustee were available to make redress to the creditors, but if the trust assets and the beneficiaries had disappeared by the time the creditors made their claim, then the only effective remedy would be one against the trustee, and that is precisely what the trustee would be worried about.

¹⁰⁷ Bankruptcy (Désastre) (Jersey) Law 1990, Art 17(4).

trust that is the result of a settlement defrauding creditors would not come within the statutory exemption in Article 17(5). While they may acquire the distribution from the trustee rather than the debtor and even if they receive it in good faith, they will not do so for value.

The purpose of seeking directions has nothing to do with any duty the trustee or beneficiaries may have to any external party to the trust and everything to do with the interaction of a depletion of the trust fund with the trustee's entitlement to its indemnity. The principles that govern the position where the trust fund is insufficient to satisfy the trustee's indemnity are discussed elsewhere.¹⁰⁸

The authors' view is that the Court would likely be sympathetic to a trustee who made an application to the Court in these circumstances, provided that he did not have reasonable grounds for suspicion that the trust was a device to defraud creditors at the time when he first accepted office and was not aware that the settlement would cause the settlor to become insolvent. Unless the Court is satisfied that no personal order could be made against the trustee under Article 17(3)(d) of the Bankruptcy (Désastre) (Jersey) Law 1990 following distribution, or that suitable arrangements had been made to protect the position of the trustee and possible future creditors following distribution, we would not expect the Court to direct a distribution, even though that might mean that no distribution could in the end take place (or at all) pending the outcome of the Viscount's application under Article 17(1). Similar difficulties could arise in relation to a possible personal claim against a trustee under Article 17A of the Bankruptcy (Désastre) (Jersey) Law 1990, though here the problem is to degree less acute, owing to the shorter time limits which apply to such claims.¹⁰⁹

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VI. Beddoe Proceedings

In the absence of an express provision in the terms of the trust authorising the trustee to incur costs in the prosecution or defence of hostile proceedings with a third party (or conceivably against co- or former trustee in default), without the blessing of the Court or in the absence of the express consent of all the beneficiaries to that course, the trustee may protect himself as regards the incidence of costs in those hostile proceedings by making an application to court for directions under Article 51(1) as to whether or not it should litigate. A 'Beddoe Order' has been described as 'the only absolutely certain protection' that a trustee or personal representative could obtain against the risk of having to pay, personally, the costs of commencing or defending legal proceedings.¹¹⁰ The principle is as follows:¹¹¹

3-39

But a trustee who, without the sanction of the Court, commences an action or defends an action unsuccessfully, does so at his own risk as regards the costs, even if he acts on counsel's opinion; and when the trustee seeks to obtain such costs out of his trust estate, he ought not to be allowed to charge them against his cestui que trust unless under very exceptional circumstances. If, indeed,

¹⁰⁸ See Ch 11.

¹⁰⁹ Bankruptcy (Désastre) (Jersey) Law 1990, Art 17A(9); a preference must be given during the period of 12 months prior to a declaration of *désastre* for it to be susceptible to challenge by the Viscount.

¹¹⁰ *Dagnell v JL Freedman & Co* [1993] WLR 388 at 392, per Lord Browne-Wilkinson.

¹¹¹ *In re Beddoe* [1893] 1 Ch 547 at 557–58, CA, per Lindley LJ.

the Judge comes to the conclusion that he would have authorized the action or defence had he been applied to, he might, in the exercise of his discretion, allow the costs incurred by the trustee out of the estate; but I cannot imagine any other circumstances under which the costs of an unauthorized and unsuccessful action brought or defended by a trustee could be properly thrown on the estate ...

I entirely agree that a trustee is entitled as of right to full indemnity out of his trust estate against all his costs, charges, and expenses properly incurred: such an indemnity is the price paid by cestuis que trust for the gratuitous and onerous services of trustees; and in all cases of doubt, costs incurred by a trustee ought to be borne by the trust estate and not by him personally ...

But, considering the ease and comparatively small expense with which trustees can obtain the opinion of a Judge of the Chancery Division on the question whether an action should be brought or defended at the expense of the trust estate, I am of opinion that if a trustee brings or defends an action unsuccessfully and without leave, it is for him to shew that the costs so incurred were properly incurred. The fact that the trustee acted on counsel's opinion is in all cases a circumstance which ought to weigh with the Court in favour of the trustee; but counsel's opinion is no indemnity to him even on a question of costs.

- 3-40** Put plainly and in modern parlance, Beddoe relief predetermines, in advance, the question of recovery of the costs of the conduct of the main proceedings (including the trustee's liability in those proceedings for adverse costs) from the trust fund by way of indemnity to the trustee as between the trustee and the beneficiaries.¹¹² Beddoe relief does not predetermine the incidence of costs in the main proceedings for which the relief has been sought.
- 3-41** An application to the Royal Court for directions as to taking or defending legal proceedings involving the trust and third parties under the Court's Beddoe¹¹³ jurisdiction can conceivably be made under Article 51(1) although the scope of the relief that the Royal Court may give in a Beddoe application is more limited than that under Article 51(1). A Beddoe application could conceivably fall into either the second or the third of the *In Re S Settlement* categories, depending on whether (1) the trustees resolved to proceed with the proceedings but seek the Court's blessing for the purposes of protecting themselves from personal cost exposure in the event the claim fails; or (2) they have not made up their mind and wish the Court to direct them what to do in the circumstances. Where it is not realistic to expect the beneficiaries to fight the case (eg where the trust is entirely discretionary and no one yet has any interest in possession) the trustees may be directed to defend the trust itself.
- 3-42** Is Beddoe relief required where the litigation is being conducted by or against a company owned by the trust, as distinct from litigation conducted by or against the trustee? Ordinarily, whether a company should litigate is a question for the directors of the company rather than its shareholder (the trustee). Where the company does resolve to litigate, the issue is not the trustee's indemnity in respect of the litigation because the trustee, qua shareholder, incurs no personally liability in respect of the costs of the litigation. The only

¹¹² *In The Matter Of The Representation Of A Limited* [2013] (1) JLR 305] citing P Matthews and T Sowden, *The Jersey Law of Trusts*, 3rd edn (London, Key Haven, 1993) para 18.7, at 205.

¹¹³ *Re Beddoe* (n 111).

circumstances where it may be appropriate for the trustee to apply for directions in relation to proceedings brought by or against a company in which the trust has an interest are:

1. where the company is impecunious and unable to afford the cost of the litigation and the trustee is considering whether to fund or contribute to the cost of the litigation out of the other trust assets; or
2. whether the trustee should exercise its rights qua shareholder to intervene in the management of the company in regard to the litigation in the interests of the beneficiaries of the trust.

It is inappropriate for a co- or former trustee, sued by beneficiaries or by a co- or successor trustee for breach of trust, to apply for Beddoe relief. The position of the defendant trustee is not analogous to that of a trustee sued by a third party to the trust because the defendant trustee, if guilty of a breach of trust, is not entitled to an indemnity from the fund to defend themselves.¹¹⁴

3-43

A. Procedure to Apply for Beddoe Relief

Beddoe proceedings are commenced by Representation as a free-standing set of proceedings set apart from the main hostile action to which they relate.¹¹⁵ The Representation, when called on in Samedi Court, is usually requested *bas de la liste* so as to preserve confidentiality as to what the proceedings are about. The Representation needs to be supported by a detailed affidavit sworn on behalf of the trustee. Exhibited to the affidavit should be:

1. The pleadings in the main action (or the draft pleadings proposed to be served if the trustee is to be the plaintiff in the main action).
2. An opinion from a suitably qualified lawyer¹¹⁶ setting out the merits of the claim(s) proposed to be brought or defended in the main action (including the instructions to counsel if the advice is given on formal instructions).¹¹⁷
3. Full and frank disclosure of all relevant matters that go to the strengths and weaknesses of the action in the main proceedings.¹¹⁸
4. A costs budget or estimate the main action.
5. Any known facts concerning the means of the opposite party.
6. Evidence concerning the value, nature and liquidity of the trust fund.
7. The significance of the main action to the trust/estate and why the Court's directions are needed.
8. Whether the trustees have proposed or undertaken, or intend to propose, mediation/ADR, and if not, why not.

¹¹⁴ *In re Carafe Trust* [2005 JLR 159]; *In re Internine Trust* [2004 JLR N[43]].

¹¹⁵ *Barclays Bank v Bhander* 1998/152 (unreported).

¹¹⁶ Invariably, recourse is had to senior counsel at the independent English Chancery Bar although there is no requirement either in Jersey or in England that counsel should be in silk.

¹¹⁷ Including the instructions to counsel. The privilege in such advice is maintained notwithstanding its disclosure to the Court; see *In the matter of the M and Other Trusts* [2012 (2) JLR 51], citing with approval *Macedonian Orthodox Community Church St Petka Inc v Diocesan Bishop of Macedonian Orthodox Church of Australia & New Zealand* [2006] NSWCA 160.

¹¹⁸ A trustee may be deprived of its costs of the proceedings (or the relief sought) if it fails to do so; see *In re A & B Trusts* [2007 JLR 444]; *Deery v Continental Trust Co Ltd* [2010 JLR N [8]]; *Alsop Wilkinson v Neary* (n 1) at 1224F.

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9. What, if any, consultation there has been with the beneficiaries.¹¹⁹
10. A draft Act of Court.

B. Parties Convened to the Beddoe Proceedings

- 3-45** In convening parties to the Representation, all the trustees (if more than one) should be convened as a party to the proceedings, either as representors or respondents. Any person with an interest in the Beddoe proceedings or an interest in the trust, may also be convened as a party by the trustee. Beneficiaries are usually necessary parties to the Beddoe application because they are entitled to be heard on whether trust money should be spent or placed at risk in the main action. In simple cases, or in cases where the known beneficiaries are of full age and capacity and have given informed consents to the course of action proposed by the trustee and there are unborn or unascertained beneficiaries then the Court may be able to assess what directions to give without convening any party other than the trustee. If there are only two views of the appropriate course to take in the proposed litigation, and one is advocated by one beneficiary who is opposed to the trustee's view, that beneficiary should be joined. It may not be necessary for other beneficiaries to be joined, as the beneficiary who is convened or the trustees may be able to present the other arguments.¹²⁰ If the trustees are unsure as to who should be joined, the trustee should seek a direction from the Court as to whom it should convene as parties in the prayer for relief.¹²¹ In deciding who to join as a party to a Beddoe application the trustees should remain neutral and should not come across as partisan by seeking to avoid joining beneficiaries whose view does not accord with the trustees' as to the appropriate course to be adopted in respect of the main action.
- 3-46** Any beneficiary who is an opposing party in the main action would usually be joined to the Beddoe proceeding but excluded from a hearing in which the trustee discusses the strengths and weaknesses of its case in the proposed litigation.¹²² Before the opposing party withdraws, the trustee should give a précis of the facts, excluding the matters that will be mentioned to the Court in private, and the opponent should be allowed to comment on the facts. All the parties to the application should have an opportunity to file their own evidence. Material that would be privileged as against the beneficiary in the main proceedings may be withheld in the course of the Beddoe proceedings. Privilege will not be lost in any material placed before the Court in Beddoe proceedings.¹²³

¹¹⁹ The trustee will be expected to have canvassed the views of the principal adult beneficiaries before applying for directions. Where the trust is charitable, the trustee is expected to have canvassed the view of the AG.

¹²⁰ RCR 2004, r 4/4.

¹²¹ The trustee will have to make a supporting application for service out of the jurisdiction on beneficiaries who cannot be served in Jersey. See Service of Process Rules 1994, r 7(j).

¹²² *In re E Trust* 2008 JLR N [17]; *Re M and L Trusts* [2003] JRC 002A. See also *Re Esteem Settlement* [1995 JLR 266] at [268]; *Re Bhandher* [1998 JLR N-18]; *Re IMK Family Trust* (n 8), affd [2008] JCA 196.

¹²³ *In the matter of the M and Other Trusts* (n 117).

C. The Beddoe Court

The Master does not have jurisdiction to determine a Beddoe application which must be listed and heard before the Inferior Number.¹²⁴ The usual practice is that the Court will sit in private to hear the application.¹²⁵ This explains why, unfortunately, there is not a great deal of reported Jersey cases on Beddoe applications. It is a contempt of court to disclose without the leave of the Court any documents that a party receives in the course of proceedings for Beddoe relief such as affidavits, exhibits, skeleton arguments, notes of the content of the hearing and the judgment of the Court) save to the extent that the party in possession of such documents has them independently of those proceedings.¹²⁶ In the course of a Beddoe application the trustee is expected to give full and frank disclosure of all relevant matters that go to the strengths and weaknesses of the action in the main proceedings and the Court will be privy to information that it would not normally be presented in the course of hostile proceedings. For this reason neither the presiding judge nor the Jurats in a Beddoe application may sit to hear the main action. The Court that grants the trustee Beddoe relief will remain permanently constituted until the main proceedings are concluded so as to allow the trustee to return to it for directions as to what further steps it should take (while protected by the indemnity) during the course of the main proceedings.

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D. Costs of Beddoe Proceedings

Whether the Beddoe application authorises the trustee to proceed or is dismissed, the costs of Beddoe proceeding itself is usually ordered to be met as an expense of the administration of the trust and allowed on a full indemnity basis and a direction to that effect should normally be included as an item in the prayer to the Representation.¹²⁷

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E. Outcome of the Beddoe Proceedings

In granting Beddoe relief, the Court is taking a calculated risk, on the basis of the evidence before it of the outcome of the main action for which the relief is sought and the likely cost consequences of those main proceedings. The Court will rarely grant a trustee blanket approval for it to take such steps and spend what trust money as it pleases in the main action. To do so would be to grant the trustee a blank cheque without effective oversight.¹²⁸ A Beddoe order will contain a direction for the trustee to file a periodic written report with the Court at particular milestones in the main action and in any event to issue a summons for further directions on the occurrence of any event that might reasonably

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¹²⁴ Trusts (Jersey) Law 1984, Art 1(1) (see definition of 'court'); cf Royal Court Rules 2004, Sch 1.

¹²⁵ *In the matter of the M and Other Trusts* (n 117), approving *Midland Bank Trust Co Limited v Green* [1980] Ch 590, at 606, per Templeman J; as to privacy orders see para 3-106.

¹²⁶ *In The Matter of the M and Other Trusts* (n 119); *Westbond Intl Bank Ltd v Cantrust (C.I.) Ltd* [2004] JRC111 at [16].

¹²⁷ *Davies v Watkins* [2012] EWCA 1570.

¹²⁸ The beneficiaries have a very limited, and cumbersome mechanism to seek to challenge the legal costs of a trustee incurred in litigation on behalf of the trust; *Alhamrani v Alhamrani* (n 13).

impact upon the prospects of success in the main action. If the Beddoe application is dismissed, the trustees cannot proceed to litigate at the expense of the trust. If the trustee does proceed in the main action, this will be at their own risk as to costs and at their own expense without recourse to the statutory entitlement to an indemnity (unless they subsequently receive an indemnity from any beneficiary). A trustee is not to be penalised or disentitled to its costs in the main action for not having sought Beddoe relief.¹²⁹

VII. Procedure in Proceedings to Obtain Directions under Article 51 of the Trusts (Jersey) Law 1984

A. Commencing Proceedings

- 3-50** Proceedings for directions are commenced by way of Representation.¹³⁰ For those without automatic¹³¹ locus, the Representation lodged with the Judicial Greffe must be accompanied by an affidavit in support of an application for leave to bring the proceedings, which is made orally at the first Samedi Court hearing. In considering whether leave should be granted, the Court will take into account (1) the justice of the case, including the interests of both the applicant and the prospective respondents to the proceedings; (2) public policy, which requires that a person with no legitimate interest in so doing should not be entitled to bring proceedings concerning a trust; and (3) the need for the applicant to show a good arguable case on the substantive issues to be raised, going beyond the existence of a mere *prima facie* case.¹³²
- 3-51** The proceedings should be headed ‘IN THE MATTER OF [named] TRUST’ and ‘IN THE MATTER OF ARTICLE 51 OF THE TRUSTS (JERSEY) LAW 1984’. The Representation and any supporting application or material in support of the Representation should be deposited with the Judicial Greffe by midday on the Thursday before the usual Friday sitting of the Samedi division in the usual way.¹³³ The prayer setting out the relief sought in the proceedings can be lengthy, setting out not only the substantive relief sought (ie a determination on the issue that has precipitated the Representation) but also directions as to the convening of parties, the making of Representation orders,¹³⁴ orders for the appointment of a guardians ad litem, service¹³⁵ of the Representation,¹³⁶ the filing and service of evidence and other material and directions as to how the Representation is to proceed to a final hearing. When the matter is called on at the Samedi division hearing, the Court will give directions for the disposal or future conduct of the proceeding as appear to it appropriate.

¹²⁹ *Singh v Bhasin* [2000] WTLR 275, cited in *Trilogy Management Limited v YT Charitable Foundation (International) Limited & Ors* (n 1).

¹³⁰ As to Representations generally, see Ch 1 and the rules for service and listing.

¹³¹ Trusts (Jersey) Law 1984, Art 51(3).

¹³² *Johnson Matthey Bankers Ltd v Shamji and Ors* [1985–86 JLR N–26d].

¹³³ See the procedure for commencement of proceedings by Representation in Ch 1.

¹³⁴ RCR 2004, r 4/4.

¹³⁵ As to Jersey’s rules of service, see Ch 1.

¹³⁶ RCR 2004, rr 6/34 and 6/37.

B. Parties

If there is more than one trustee, all the trustees must be made parties to the Representation. Where the trustee is bringing the action (eg under Article 51(1), where only a trustee can bring the action), and a co-trustee does not wish to be joined as a representor, he must be joined as a respondent. A person who has more than one capacity should not appear more than once on the face of the Representation. Beneficiaries are usually convened to proceedings for directions for two reasons: (1) they are likely to have information that will be material to the application such as an opinion on how the trustee should proceed; and (2) it may be unfair to make a decision without allowing that opinion to be put to Court.¹³⁷ Not all the beneficiaries need to be convened to the proceedings; the Court may order such of them to be convened as may be appropriate having regard to the nature of the relief sought. For example, where the animus for the application is that the trustee is faced with a dilemma as to what it should do and there are only two views of the appropriate course, one of which is advocated by a beneficiary who will be joined, it may be unnecessary to join any other beneficiary since the trustees may be able to represent the other view¹³⁸ (without, presumably, compromising their position as to costs). This approach is not appropriate when the Representation involves the determination of rights rather than a choice on a particular course; in such a case it seems that all those interested must either be parties or be represented by a party joined to the proceedings.¹³⁹ Representations are conventionally commenced ex parte. Where the trustee has any doubts as to which beneficiaries should be convened (eg if there is a large class of discretionary beneficiaries) they may combine the first Samedi division hearing of the Representation with an application for directions as to joinder of parties or giving service of the proceedings to those interested under the trust to allow them to seek to be joined if they so wish. The Court may theoretically dispense with hearing from any other party than the trustee. This procedure may enable trustees to obtain directions where the expense and delay associated with proceedings convening other parties may not be in the interests of beneficiaries. The procedure may be useful where the fund is small, or where the principal beneficiaries are adults and agreeable to the course proposed and the other beneficiaries are unborn, unascertained or cannot be found. It may also be useful where the trustees are under such severe time constraint that the Court's decision is required before beneficiaries can be joined and heard.¹⁴⁰

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C. Representation Orders

Under rule 4/4 RCR 2004 the Court may appoint one or more persons to represent any person (including an unborn person) or class of persons who is or may be interested (whether presently or for any future, contingent or unascertained interest) in, or affected by proceedings concerning, property subject to a trust. The Court may exercise its jurisdiction under

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¹³⁷ *In re E Trust* 2008 JLR N [17].

¹³⁸ *Cp Re A Settlement* [1994 JLR 139].

¹³⁹ See para 3-54.

¹⁴⁰ *Re Owens Corning Fibreglass (UK) Pension Plan Ltd* [2002] PLR 323 (where, however, the use of the procedure was criticised).

rule 4/4 if it is expedient to do so and one of the conditions in rule 4/4(2) RCR 2004 is satisfied. A judgment or court order under rule 4/4(1) RCR 2004 shall be binding on the person or class represented by the person or persons so appointed. The conditions in rule 4/4(2) RCR 2004 are that the person, class or some member of the class sought to be represented, cannot be ascertained or, cannot readily be ascertained or even if ascertainable, cannot be found. Alternatively, that person, class or some member of the class sought to be represented are ascertainable and can be found, it is otherwise expedient, to make the order for the purposes of saving expense. A beneficiary is to be ascertainable by reference to either a class of persons (which itself must be ascertainable) or by reference to a relationship to some person, whether or not living, at the date of the trust's creation or at the time which under the terms of the trust is the time by reference to which members of a class are to be determined.¹⁴¹ Where the representation will determine legal rights, it is necessary to ensure that all interested persons are represented if they are not made parties. A representation order¹⁴² is useful when there are large numbers of beneficiaries with the same interest, as in the case of wide discretionary trusts. If it is difficult to find a member of the class willing or suitable to act as a representative defendant, it is possible to appoint another person as representative defendant, for instance one of the solicitors involved.¹⁴³ On an application for directions in the narrow sense, ie one as to the exercise of trustees' powers not involving any determination of legal rights, it seems that representation orders are not necessary but can in any event be applied for.¹⁴⁴ Factors which are likely to weigh in favour of the expediency of a representation order are: the absolute number of beneficiaries and whether the beneficiaries can be divided into classes who have the same interest.

D. Evidence

- 3-54** A trustee will only be protected from liability for breach of trust by acting in accordance with the Court's directions if he has made full and frank disclosure of all relevant circumstances; this is so even if the action is to proceed with the participation of beneficiaries as defendants.¹⁴⁵ Written evidence should be given by way of affidavit.¹⁴⁶ A trustee may be refused its costs from the fund if it fails to make disclosure of all relevant information to the Court.¹⁴⁷ A trustee who seeks the directions of the Court and convenes beneficiaries must provide sufficient material in order for the beneficiaries to make informed submissions.¹⁴⁸ The trustee's affidavit should show the significance of the proposed course of action for

¹⁴¹ *Trusts (Jersey) Law 1984*, Art 10(1).

¹⁴² Under CPR, pt 19, r 19.7.

¹⁴³ *Chessells v British Telecommunications plc* [2002] PLR 141 at [22]; and see 'Proceedings Relating to Trusts', a paper dated 18 August 2003 by Lloyd J for the Pension Litigation Users' Committee.

¹⁴⁴ See The Chancery Guide (5th edn, 2005), para.26.28: 'It is not necessary to make representation orders ... on an application for directions ... but such orders can be useful in an appropriate case'. The term 'application for directions' appears to be used in its narrower sense.

¹⁴⁵ *Marley v Mutual Security Merchant Bank & Trust Co Ltd* (n 50). A trustee may also be refused costs from the fund if it fails to make full disclosure of all relevant material see *In Re A & B Trusts* (n 118); and *Hogg v Williamson* [2003] JLR N 38].

¹⁴⁶ RCR 2004, r 6/20.

¹⁴⁷ *In re A & B Trusts* (n 118).

¹⁴⁸ *In re B Settlement* [2011] JLR 236].

the trust and why the Court's directions are needed. The affidavit should explain what consultation, if any, there has been and its result. Where the beneficiaries principally concerned are not numerous and are all or mainly adult, identified and traceable, the trustees are expected to have canvassed the proposed or possible course of action with all the adult beneficiaries or, if there are numerous beneficiaries (including those not yet born or identified, or minors), then with the principal adult beneficiaries. Where the trust is charitable the trustees must have consulted the Attorney General.¹⁴⁹ If a minor beneficiary is a party to the representation, the Court will expect to have put before it the instructions to and advice of an appropriately qualified lawyer¹⁵⁰ as to the benefits and disadvantages to the child of the proposed course of action by the trustee and any other possible course. The duty of giving instructions will ordinarily be performed by the child's guardian ad litem.¹⁵¹

It will rarely be in the interests of justice for trustees, in the course of obtaining directions from the Court, to be required to disclose all of their communications with their advisors in the context of those proceedings. Trustees are often faced with difficult situations in which they were entitled to seek the guidance and protection of the Court, which involved obtaining legal advice. The Court has expressed it to be important that they should not be inhibited in their communications with their advisors by the fear that they would be required to disclose those communications to beneficiaries convened to the directions hearing (although disclosure of such communications could be required in certain circumstances, eg if the conduct of the trustee in bringing the directions application were impugned). 3-55

VIII. Costs of Proceedings under Article 51

The costs of proceedings for directions where the parties do not include strangers to the trust or trustees or beneficiaries claiming otherwise than in that capacity, is a matter of some complexity. It is not the case that all parties can expect their costs to be met by the trust fund and it is obviously incumbent upon lawyers advising parties as to the costs risks.¹⁵² 3-56

A. Statutory Provisions as to the Incidence of Costs

Article 53 of the Trusts (Jersey) Law 1984 provides that the Court may order the costs and expenses of and incidental to an application to the Court under the 1984 Law to be raised 3-57

¹⁴⁹ Jersey does not yet have a regulatory body for charitable trusts, like the UK's Charity Commission part of whose role is to supervise charities' activities. The Charities (Jersey) Law 2014 establishes, for the first time, an office of Charity Commissioner who will maintain a register of Jersey charities but the Commissioner will have no jurisdiction equivalent to that in s 115 of the Charities Act 2011 and no consent need be sought.

¹⁵⁰ Meaning one whose qualifications and experience are appropriate to the circumstances of the case. The qualifications should be stated in the advice. If there is a hearing that lawyer should, if possible, appear at the hearing.

¹⁵¹ RCR 2004, r 4/2(2). The appointment of which may be sought by the trustees as an item of relief at the first directions hearing.

¹⁵² *In re Esteem Settlement* [2000] JLR N41].

and paid out of the trust property or to be borne and paid in such manner and by such persons as it thinks fit.¹⁵³ That provision is without prejudice to the Court's general discretionary power in relation to costs given voice in Article 2 of the Civil Proceedings (Jersey) Law 1956 which provides that the costs of and incidental to all proceedings in the Royal Court shall be in the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid.

B. The Trustee's Indemnity for Costs Reasonably Incurred

- 3-58** The trustee's usual right of indemnity for costs reasonably incurred¹⁵⁴ applies to orders for costs in proceedings for directions under Article 51. The general rule, not peculiar to the right of indemnity concerning litigation costs, is that a trustee is entitled to a full indemnity from the trust fund in respect of costs and expenses properly incurred by him in connection with the performance of his duties and exercise of his powers and discretions as a trustee. This general principle of trust law extends to costs incurred in litigation concerning the trust.¹⁵⁵ The trustee's right of indemnity in respect of litigation costs extends only to costs properly incurred in the execution of the trust, ie costs that are honestly and reasonably incurred.¹⁵⁶ Doubt is to be resolved in favour of the trustee,¹⁵⁷ ie the trustee is entitled to costs *not* improperly incurred. It will come as little surprise that the costs of defending hostile proceedings for breach of trust are not to be borne by the trust fund by way of an indemnity but by the trustee personally on the usual basis.¹⁵⁸ The trustee's right to an indemnity can be lost or curtailed or an order for costs made against him personally where the trustee has conducted himself in a manner that is contrary to his duty. Misconduct in this context includes caprice, obstinacy, negligence or carelessness and dishonesty is not required.¹⁵⁹ A trustee may also be deprived of costs or have an order for costs made against them by reason of his unreasonable conduct in proceedings,¹⁶⁰ for example taking a step that needlessly increases costs,¹⁶¹ failing to give the Court the request disclosure of information,¹⁶² by acting in a partisan fashion by siding with some beneficiaries and not others,¹⁶³

¹⁵³ The discretion under Art 53 may only be overturned on appeal if (1) the judge misdirected himself as to applicable principles; (2) irrelevant matters were taken into account or relevant matters not taken into account; (3) the decision was plainly wrong; or (4) there has been a material change of circumstances; *In re J.P. Morgan 1998 Employee Trust* (n 1).

¹⁵⁴ Given expression in Trust (Jersey) Law 1984, Art 26(2). As to the nature and extent of the trustee's indemnity, see Ch 11.

¹⁵⁵ *Turner v Hancock* (1882) 20 ChD 303; *Re Spurling's Will Trusts* [1966] 1 WLR 920 at 930–36, both cited with approval in *Alhamrani v J.P. Morgan Trust Co (Jersey) Ltd* [2007] JLR 527].

¹⁵⁶ *ibid*; *Re Beddoe* (n 111) at 562, per Bowen LJ.

¹⁵⁷ *Landau v Anburn Trustees Ltd* [2007] JLR 250].

¹⁵⁸ *In re Internine Trust* (n 114); *In Re Carafe Trust* (n 114).

¹⁵⁹ *Turner v Hancock* (n 156).

¹⁶⁰ *In re Esteem Settlement* 2001 JLR N[8]; *In re Y Trust* 2011 JLR N[34] although decision sanctioned, trustee deprived of part of costs as unreasonable treatment of beneficiary disaffected by decision directly contributed to parties' substantial costs.

¹⁶¹ *Patterson v Wooler* (1876) 2 ChD 586 (trustees increased costs perversely, unreasonably, unjustly and obstinately and were ordered to pay them).

¹⁶² *In re A & B Trusts* (n 118).

¹⁶³ *Alsop Wilkinson v Neary* (n 1) at 1225F.

by involving itself in claims that ought to be made by others¹⁶⁴ or not at all.¹⁶⁵ Where a court order is silent as to costs or there is no order for costs, no party is entitled to their costs in relation to that order but this does not affect the entitlement of a party to recover costs of a fund held by him as trustee (which arises as a matter of general law).¹⁶⁶ If a trustee is to be deprived of his costs from the trust fund, this must be expressly provided for in any order.

C. Types of Proceedings Brought under Article 51 and their Respective Costs Treatment

The classification of litigation involving trustees described by Lightman J at the start of this chapter in the English case of *Alsop Wilkinson v Neary*¹⁶⁷ is instructive and a sound basis for analysis of the cost burden in a range of trust proceedings before the Royal Court. Without wishing to oversimplify matters, and stating that the classification of proceedings is more an art than a science, the main types of proceedings falling within the first two of Lightman LJ's categories can be distilled further, into the following five categories which all engage the Court's supervisory jurisdiction under Article 51:

3-59

1. Category 1: Proceedings for the construction of the trust instrument or determination of questions of law as to the validity or scope of trusts or powers.
2. Category 2: Proceedings for directions in the administration of the trust.
3. Category 3: Proceedings for the vindication of the beneficiaries rights against the trustee, such as the provision of accounts, the provision of information or distribution of the fund.
4. Category 4: Proceedings commenced by the trustee for relief from the consequences of the no-conflict and no-profit rules.
5. Category 5: Proceedings for the removal of trustees.

Proceedings for the construction of the trust instrument or determination of questions of law as to the validity or scope of trusts or powers or for directions in the administration of the trust (categories 1 and 2 above) are divisible, for costs purposes, into three further categories named 'the Buckton categories' after the English decision from which they are derived:¹⁶⁸

3-60

1. *Buckton Category 1*: Proceedings that are brought by the trustee to seek the Court's guidance as to the construction of the trust instrument or some other question of law arising in the administration of the trust or in relation to the trusts on which the trust

¹⁶⁴ *ibid*, at 1225D.

¹⁶⁵ *Singh v Bhasin* (n 129).

¹⁶⁶ *Trilogy Management Limited v YT Charitable Foundation (International) Limited* [2012] (2) JLR 330; *Landau v Anburn Trustees Ltd* (n 158).

¹⁶⁷ [1996] 1 WLR 1220.

¹⁶⁸ *Re Buckton* [1907] 2 Ch 406 at 413–17—‘the classic statement’; see *McDonald v Horn* [1995] 1 All ER 961 at 970h, CA, per Hoffmann LJ. The 3 categories have been restated many times in Jersey: *In re J.P. Morgan 1998 Employee Trust* (n 1); *Trilogy Management Ltd v YT Charitable Foundation (Intl) Ltd* (n 1); *In re Dunlop Settlement* (n 1); *In re HHH Employee Trust* (n 1); *Alsop Wilkinson v Neary* (n 1). In *IBM United Kingdom Pensions Trust Limited v Metcalf* [2012] EWHC 125 (Ch), ‘where a case does not fall neatly within any of the Buckton categories, the court must exercise its statutory jurisdiction in the way it considers best to achieve fairness and justice’.

property is held.¹⁶⁹ In these cases, the costs of all parties are, whatever the outcome, usually treated as necessarily incurred for the benefit of the trust fund and ordered to be paid out of it. The trustee is at risk as to costs if he commences a construction claim unnecessarily, though will be protected if it does so on advice.¹⁷⁰

2. *Buckton Category 2:* Proceedings in which the application is made by someone other than the trustee, but raises the same kind of issue as in *Buckton* category 1 and would have justified an application by the trustee.¹⁷¹ While differing in form, such proceedings do not differ in substance from the category one and similar considerations therefore apply as to costs.
3. *Buckton Category 3:* Proceedings in which the application is made by someone other than the trustee, and differs in substance and form from *Buckton* categories 1 and 2 in that they have the character of a hostile claim founded on a point of construction or law raised by someone other than the trustee to a beneficial interest in or entitlement to the trust fund. While on paper apparently clearly distinguishable from either *Buckton* category 1 or 2, in practice the line may not be easy to draw. The difference, between this kind of litigation and litigation within the first two categories, is that the claim is brought not in substance for the benefit of the trust fund, but for the benefit of the plaintiff. A case which falls clearly within the third category is where the whole of the trust fund has been distributed to a supposed beneficiary in reliance on some construction of the trust instrument, or view of the law, and another person claiming to be the true beneficiary brings proceedings against the recipient or the trustee in reliance on a rival construction, or rival view of the law. In *Buckton* category 3 cases the general principles as to costs of hostile litigation apply between the plaintiff and the party against whom the claim is directed; the unsuccessful party will usually be ordered to pay the successful party's costs subject to the general qualifications which apply in ordinary hostile litigation.¹⁷²

- 3-61** The *Buckton* categories are not closed.¹⁷³ We can also add a fourth category of proceedings that are conceptually distinct from the categories already enumerated above but which also engage the Court's supervisory jurisdiction. An example of this fourth category of would be proceedings commenced by the trustee but having the quality of *Buckton* Category 3 proceedings, ie where the issue is not so much the construction of the trust instrument but a dispute over the beneficial ownership of the trust fund.¹⁷⁴ Where, for example, there is a hostile dispute between two persons who claim to be the true owner of the trust property and the trustee intervenes by seeking the determination by the Court of the construction of the trust deed on the issue as for whom he holds the fund. Although in form the

¹⁶⁹ In *Trilogy Management Limited v YT Charitable Foundation (International) Limited* (n 167), proceedings to determine the proper construction of a mandatory dividend provision in articles of association of a company wholly owned by the trustee were, despite the differences between the parties, held to be non-adversarial proceedings concerning the proper administration of the trust.

¹⁷⁰ *Re Buckton* (n 169) at 414.

¹⁷¹ *In Re JP Morgan 1998 Employee Trust* (n 1) and *In Re HHH Employee Trust* (n 1) settlor with fiduciary powers entitled to indemnity for reasonable costs of exercising them by analogy to the indemnity principle applicable to trustees proper.

¹⁷² See Ch 1 for the applicable principles governing the recoverability of costs in civil proceedings in Jersey.

¹⁷³ *Singapore Airlines Ltd v Buck Consultants Ltd* [2011] EWCA Civ 1542.

¹⁷⁴ *McDonald v Horn* (n 169) at 971d.

proceedings come within *Buckton* category 1, in substance the dispute comes within *Buckton* category 3, and the costs of the rival claimants to the fund should be governed by the principles of cases falling within the third category (that costs follow the event and that the losing party should pay the costs of the winning party and the trustee, the trustee being entitled to indemnity in respect of his costs so far as not recovered from the losing party, subject to the trustee behaving unreasonably.

i. Buckton Category 1: Beneficiaries' Costs in Proceedings for the Construction of the Trust Instrument, Determination of Questions of Law and the Scope of Powers

Beneficiaries' costs will normally be ordered to be paid out of the trust fund in cases falling within *Buckton* categories 1 and 2, whatever the outcome.¹⁷⁵ That is on the basis that such costs are incurred for the benefit of the trust as a whole. Such costs are often assessed on a full indemnity basis under Article 53, rather like the trustee's indemnity rather than the indemnity basis under rule 12/5 RCR 2004.¹⁷⁶ In cases within *Buckton* category 3, the unsuccessful beneficiary will normally be ordered to pay the costs of the successful beneficiary on the same basis as in any other kind of hostile proceedings. But it does not necessarily follow that just because the proceedings come within *Buckton* categories 1 or 2 an order for costs out of the trust fund will be made in favour of unsuccessful beneficiaries. Since beneficiaries are awarded costs by analogy to the trustees' right of indemnity, beneficiaries are subject to the same requirement of reasonableness as applies to trustees.¹⁷⁷ Beneficiaries should not be joined unnecessarily,¹⁷⁸ and respondent beneficiaries have been disallowed their costs where they chose to be represented in court though their claims were hopeless.¹⁷⁹

3-62

a. Trustee Neutrality and Costs

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Where proceedings for directions have a hostile character as between different parties convened to the proceedings, the proper course of the trustee, if it wishes to preserve its entitlement to costs on the indemnity basis, is to remain neutral as between the competing beneficiaries or persons who claim to be beneficiaries. Such proceedings might for example arise where the trustee has distributed the whole or part of the trust fund on an alleged misconstruction of the trust instrument or a misinterpretation of the law.¹⁸⁰ Provided that a trustee conducts himself in the proceedings in a neutral fashion, his right of indemnity is secure.¹⁸¹ A trustee who takes the side of some beneficiaries against others is at risk of being held to have acted unreasonably and so deprived itself of the indemnity, and may be ordered to pay costs of the successful beneficiary.

¹⁷⁵ *D'Abo v Paget* (No 2) [2000] WTLR 863.

¹⁷⁶ *Trilogy Management Limited v YT Charitable Foundation (International) Limited* (n 167).

¹⁷⁷ *Green v Astor and others* [2013] EWHC 1857 (Ch).

¹⁷⁸ *Re Amory* [1951] WN 561.

¹⁷⁹ *Re Preston's Estate* [1951] Ch 878.

¹⁸⁰ Query whether the trustee should have sought directions as to the distribution in the first place?

¹⁸¹ *In Re Internine Trust* [2006] JLR 176; *Alhamrani v JP Morgan Trust Company (Jersey) Limited* (n 156); *Landau v Anburn Trustees Ltd* (n 158); *Trilogy Management Ltd v YT Charitable Foundation (Intl) Ltd* (n 167).

- b. Costs of Appeals from Proceedings for the Construction of the Trust Instrument,
Determination of Questions of Law and the Scope of Powers

- 3-64** The traditional orthodoxy was that a trustee should not appeal a decision of the Court made under the supervisory jurisdiction. Having come to court with a question and in seeking an order to protect and indemnify it, the trustee should be satisfied with the Court's answer.¹⁸² A trustee who appeals an order made in proceedings concerning the construction of the trust and similar proceedings does so at his own risk as to costs, and will normally be ordered to pay costs if the appeal fails¹⁸³ absent special circumstances.¹⁸⁴ The costs of the other parties to the appeal, even if they were unsuccessful, might also be regarded as incurred for the benefit of the estate, although it should not be assumed that that would always be appropriate.¹⁸⁵ It has been said by the Guernsey Court of Appeal, the leading judgment being given by the then Bailiff of Jersey, that if the trustee considers that the decision at first instance is not in the best interests of the beneficiaries (not merely that it is incorrect), he may and should appeal and that if the appeal failed an adverse order for costs would be made against him only if he had acted unreasonably.¹⁸⁶
- 3-65** If a beneficiary successfully appeals in a case which falls within *Buckton* category 1 or 2, the costs of all parties will normally be paid out of the trust fund.¹⁸⁷ If the appeal fails, the appellant beneficiary will normally be ordered to pay costs of the respondents on the standard basis, with the respondent trustee entitled to the difference between its costs on the standard basis and indemnity basis out of the trust fund.¹⁸⁸ But in special circumstances the Court of Appeal may allow the appellant beneficiary's costs (as well as costs of other parties) out of the trust fund, and such circumstances will arise if large interests are at stake and the Court of Appeal is satisfied that the point in the appeal admits of sufficient difficulty as to make it proper for a second opinion to be taken.¹⁸⁹ In *Trilogy Management v YT & Ors*, the Court permitted the losing trustee respondent its costs on the indemnity from the fund rather than the standard basis citing that the question before it was one arising in respect of the proper administration of the trust, and that it was reasonable for Trilogy to seek to uphold the decision of the Royal Court. Trilogy's position was not an ordinary adversarial one of seeking to gain an advantage.
- 3-66** A beneficiary wishing to guard against the risk that, in the event his appeal fails, the costs of the appeal will fall to him may wish to make arrangements with the other respondents, including the trustee, that he will ask the Court to make only one order for costs against him where that the appeal can be determined without submissions from the trustees and without the need for representation of respondent beneficiaries who share the same interest as the appellant.

¹⁸² *Re Londonderry's Settlement* [1965] Ch 918 at 930G–931A.

¹⁸³ *Trilogy Management Ltd v YT Charitable Foundation (Intl) Ltd* (n 167).

¹⁸⁴ *Westminster Corporation v St George's, Hanover Square* [1909] 1 Ch 592 at 613, CA.

¹⁸⁵ *Trilogy Management Ltd v YT Charitable Foundation (Intl) Ltd* (n 167).

¹⁸⁶ *Re R and RA Trusts* (n 26); see also the dissenting judgment of Salmon LJ in *Re Londonderry's Settlement* (n 183).

¹⁸⁷ *Stuart-Hutcheson v Spread Trustee Company Ltd* [2002] WTLR 1523 (Guernsey CA).

¹⁸⁸ *Re Stuart* [1940] 4 All ER 80, CA.

¹⁸⁹ *ibid.*

3-67

The Royal Court has said that where there is an appeal by a party other than the trustee, from a decision of the Royal Court following a surrender of the trustee's discretion on the basis that the Court had exceeded its jurisdiction, it was in principle appropriate for the trustee, from among the respondents, where the trustee's stance on the issues dividing the other parties is neutral, to make such arguments as could properly be made in opposition to the appeal. The Court was entitled to expect the fullest assistance from a trustee, who should ensure that all relevant law was placed before the Court and that all arguments for and against the various possible courses of action were rehearsed. The Court would usually be assisted if a trustee recommended a particular course of action and explained the reasons for its recommendation. It would not be in the public interest for trustees to be discouraged from making recommendations for fear of being penalised in costs merely if the Court were to decide against their recommendation.¹⁹⁰

ii. Buckton Category 2: Proceedings in which Directions Are Sought for the Guidance of the Trustee in the Administration or Execution of the Trust

3-68

Proceedings of this kind are similar in character to proceedings falling within *Buckton* categories 1 and 2. They typically involve a question as to how a trustee should proceed in the light of facts presented to the Court rather than a question of law or construction. Beddoe applications are a common proceeding of this kind. If brought by a trustee in his capacity as such (or beneficiaries) for the guidance or proper protection of the trustees in the administration of the trust, such an application falls within *Buckton* category 1 (or 2), so that normally the costs of all parties are paid out of the trust fund on a full indemnity basis. If all the beneficiaries are of full age and capacity and have the same view on a question of administration, a trustee who nonetheless proceeds for directions is likely to be acting without due cause and may be penalised in costs for which it will not be permitted recourse to the fund. A trustee will have proper cause to seek directions under this category where minor or unascertained beneficiaries are interested. A trustee who makes an application for directions having disregarded his duties as trustee and in circumstances where the application would or might not have been required had the trustee acted conscientiously as a trustee, may be deprived of costs.¹⁹¹ In a case where a trustee makes an application for directions as a result of the conduct of a disaffected beneficiary who appears intent on disrupting the administration of the trust, the disaffected beneficiary is at risk of being deprived of his costs and at worst of being ordered to pay all the costs of the application which was made necessary by reason of his conduct.¹⁹² However, a beneficiary who makes a bona fides claim against the trustees in third party proceedings should not be deprived of costs (nor be ordered to pay costs) of the Beddoe application itself, by reason only that he has commenced the claim and therefore necessitated the Beddoe application.¹⁹³ An application may be made for a pre-emptive costs order in respect of the costs of trustees or beneficiaries of an application to the Court for directions concerning the administration of the trust.¹⁹⁴

¹⁹⁰ *In re B Settlement* (n 13), approving *In re Esteem Settlement* [2001 JLR N [8]].

¹⁹¹ *Lloyds Bank Private Banking (C.I.) Ltd v Cala Cristal SA* [1996 JLR N20].

¹⁹² *Green v Astor and others* (n 178).

¹⁹³ Such a beneficiary might, however, become at risk as to costs if he adopts an excessive role in the Beddoe application and seeks to use it as a forum for promoting his claim in the third party proceedings.

¹⁹⁴ See above.

iii. Buckton Category 3 Proceedings for the Accounts, the Provision of Information to Beneficiaries or Distribution of the Fund

- 3-69** There is a very fine line between a claim for breach of trust and proceedings in which beneficiaries claim to enforce their rights against the trustee in the administration or execution of the trust. This category of case is concerned with beneficiaries who complain of the acts or (more usually) omissions of the trustee, without seeking to restrain commission of a breach of trust, or compensation for breach of trust, or to recover trust property allegedly wrongly misappropriated by the trustee. The general principle is that the trustee's right of indemnity applies so as to entitle the trustee to its costs out of the trust fund even if he is unsuccessful. However, if the trustee has been guilty of misconduct, that is if he acts unreasonably in the proceedings, or his unreasonable conduct occasions the proceedings, the trustee will be deprived of costs or ordered to pay costs.¹⁹⁵ The operative principle is somewhat different from that applicable to disputes founded on breach of trust.¹⁹⁶ Where a trust fund proves deficient to pay all the costs, a trustee may lose the priority over beneficiaries to which he would otherwise be entitled having regard to his conduct.¹⁹⁷ The cases within category 3 may conveniently be sub-divided into three groups: (1) claims for production of accounts or information by the trustee; (2) claims in respect of money due from the trustee; and (3) claims for enforcement of beneficiaries' rights to distribution of capital or income

iv. Claims against the Trustee for the Production of Accounts or Information about the Trust

- 3-70** A trustee must be prepared to account for its stewardship of the trust property at any given point in time. A trustee who indefensibly fails to produce accounts may be ordered to pay not only the costs of proceedings to obtain the accounts, but also the costs of taking the account which is ordered.¹⁹⁸ Where the trustee's neglect is only slight, the Court may be content to deprive the trustee of costs without ordering him to pay costs.¹⁹⁹ Where the cause of a trustee's failure to account is a trustee's negligence, a claim for a contribution between two or more trustees who are in default of their duty of care, may be possible.²⁰⁰ Before the seminal Privy Council decision of *Schmidt v Rosewood Trust Ltd*,²⁰¹ trustees were ordered to pay costs where they unreasonably failed to provide information to which the plaintiff beneficiary was entitled,²⁰² though in a case where the plaintiff beneficiary

¹⁹⁵ *Turner v Hancock* (n 156); *Re Jones* [1897] 2 Ch 190; *Armitage v Nurse* [1998] Ch 241 at 262C–G.

¹⁹⁶ Note, that in *Alsop Wilkinson v Neary* (n 1), Lightman J said at 1224 that in a 'beneficiaries dispute' costs follow the event, citing *McDonald v Horn* (n 169) at 971, per Hoffmann LJ, referring to hostile claims by beneficiaries against trustees or other beneficiaries. We do not consider that either Lightman J or Hoffmann LJ had in mind the principles applicable to cases such as *Turner v Hancock* (n 156) which were irrelevant to the issues in those cases. The distinction between cases such as *Turner v Hancock* and breach of trust cases was confirmed in *Armitage v Nurse Armitage v Nurse* (n 196).

¹⁹⁷ *Beer v Tapp* (1862) 31 LJCh 513.

¹⁹⁸ *Kemp v Burn* (1863) 4 Giff 348; *Re Watson* (1904) 49 SJ 54; *Re Skinner* [1904] 1 Ch 289; *Re Holton's Settlement Trusts* (1918) 88 LJCh 444.

¹⁹⁹ *Heugh v Scard* (1875) 33 LT 659.

²⁰⁰ See claims for contributions generally.

²⁰¹ [2003] UKPC 26.

²⁰² *Re The Den Haag Trust* (1997–98) 1 OFLR 495; *Bhander v Barclays Bank & Trust Co Ltd* (1997–98) 1 OFLR 497.

commenced proceedings with unreasonable haste, the Court made no order for costs.²⁰³ While it has been held that beneficiaries do not now have an absolute entitlement to disclosure of documents or information about the trust,²⁰⁴ our view is that the same principles as to costs apply as before *Schmidt v Rosewood Trust Ltd* in cases where there is no reasonable doubt that the discretion should be exercised by ordering the disclosure sought by the plaintiff. Where there is a reasonable doubt whether a beneficiary should be given the disclosure sought, the prudent course is for the trustee to take the initiative and seek the Court's determination on the matter, under Article 51, in which case it is likely that the proceedings will fall within *Buckton* category 1 so as to entitle the trustee to costs even if the decision goes against them in favour of the requesting beneficiary.²⁰⁵ Requests for information by beneficiaries are often an early warning sign of a claim for breach of trust or actions seeking the removal or replacement of the trustee(s). Trustees may be naturally concerned that by providing beneficiaries with information, they may be providing the beneficiaries with a rod to later beat them with, with the disclosed material subsequently used against the trustee. While that might be a legitimate concern, a trustee must be cautious in responding to requests for information in these circumstances. If the trustee is perceived as conducting himself in an obstructive fashion, and not for the benefit of the trust, he increases his cost risk in the proceedings for disclosure.

v. Proceedings Commenced by the Trustee for Relief from the Consequences of the No-Conflict and No-Profit Rules

Proceedings seeking relief for self-dealing or other profits from the trust are likewise matters of administration and are subject to the same considerations. Proceedings commenced by beneficiaries seeking to assert a personal or proprietary remedy in respect of any profit or loss arising from a self-dealing transaction are properly to be regarded as hostile proceedings and subject to the usual rule that costs follow the event.²⁰⁶

3-71

vi. Proceedings for the Removal of Trustees

The Court's inherent and statutory jurisdiction in proceedings for or concerning the removal of trustees is a question arising in the administration or execution of the trust. Except in the exceptional cases where the basis of the application for the trustee's removal is not contested (such as where the trustee has disappeared),²⁰⁷ contested proceedings to remove the trustee, or proceedings necessitated by a trustee's unreasonable refusal to resign²⁰⁸ are likely to follow the usual rule that costs follow the event.²⁰⁹

3-72

²⁰³ *Re Dartnall* [1895] Ch 474, CA.

²⁰⁴ *In re Rabaiotti 1989 Settlement* [2000 JLR 173]; *Schmidt v Rosewood Trust Ltd* (n 8) at [54] and [67].

²⁰⁵ As in *Re Londonderry's Settlement Trusts* [1964] Ch 594, where the contentions of the trustees were unsuccessful at first instance, though they recovered their costs out of the trust fund; see 614. As to the costs of the trustees' successful appeal, see § 21–84.

²⁰⁶ See Ch 8 for the applicable principles against self-dealing by a trustee and the applicable remedies.

²⁰⁷ *In re Jeep Trust* [2010 JLR N [25]].

²⁰⁸ *In re E Trust* [2008 JLR 360].

²⁰⁹ A more detailed examination of the costs principles applicable to removal applications can be found in Ch 10, para 10-31.

vii. Pre-emptive Costs Orders for Beneficiaries

- 3-73 Beneficiaries who are convened to Article 51 proceedings are often concerned that any costs incurred by them in participating actively in the proceedings should come not from their own pockets but be borne by the trust fund. In all probability the proceedings are likely to be classified as coming within *Buckton* category 1 or 2 and that in accordance with settled practice the Court can be expected to exercise its discretion to award them their costs out of the trust fund on a full indemnity basis. Such reassurance may be insufficient to persuade beneficiaries to participate actively in the proceedings, since ultimately costs are a matter of the Court's discretion and cannot be guaranteed.²¹⁰ Further, even if persuaded, the beneficiaries may not be able to obtain legal advice and representation without making a substantial personal payment on account.²¹¹
- 3-74 A pre-emptive or prospective costs order is one whereby a party is granted an order in advance of the trial to ensure that his costs will be paid from the trust fund on a full indemnity basis in any event. A prospective costs order is what a trustee is granted who seeks and is granted Beddoe relief. In England, the courts have made clear that such orders in favour of a beneficiaries are only made in narrow circumstances and the Court must be satisfied that the beneficiary would in any event receive a costs order in his favour at the conclusion of the proceedings.²¹² In effect, for a beneficiary to obtain a pre-emptive costs order the beneficiaries need to be performing the same functions as the trustee in the proceedings or at least assisting the trustee.²¹³ Applying the orthodox English law analysis, a prospective costs order may be granted in favour of (1) a trustee or other fiduciary on a Beddoe application; (2) trustees and representative beneficiaries in proceedings coming within *Buckton* category 1 or 2; and (3) beneficiaries in hostile pension scheme litigation.²¹⁴ However, where trustees have power to agree to indemnify a beneficiary who is a party to the proceedings for their costs, and properly exercise such a power, there is usually no need for the beneficiaries to make an application for a prospective costs order. The English courts have resolutely refused to countenance the possibility of a pre-emptive costs order in respect of *Buckton* category 3 proceedings other than in pensions litigation.²¹⁵
- 3-75 It would appear that the position in Jersey is somewhat more flexible. In certain unusual circumstances the Royal Court has granted a prospective costs order to beneficiaries bringing an action to challenge the propriety of an action taken by the trustees (even where the Court cannot be satisfied that the trial judge would make such an order) and there are obiter indications that the Royal Court will not rule out an extension of the circumstances in which a prospective costs order may be awarded in the future.²¹⁶ In *re X Trust*, the

²¹⁰ *Trilogy Management Limited v YT & Ors* [2013] JRC 147, where the applicant threatened to withdraw from the proceedings if no order was made in her favour.

²¹¹ See Ch 1 for the restrictive funding arrangements permissible with one's lawyers in Jersey law. Not all proceedings before the Royal Court are attractive to third party funders, administrative proceedings among them.

²¹² *McDonald v Horn* (n 169) at 970, per Hoffmann LJ.

²¹³ *Chessells v British Telecommunications plc* (n 145).

²¹⁴ *Trilogy Management Ltd v YT Charitable Foundation (International) Ltd* [2013] (2) JLR N 14]; *McDonald v Horn* (n 169).

²¹⁵ *McDonald v Horn* (n 169); cf *Wallersteiner v Moir (No 2)* [1975] QB 373. This appears to be the position in Guernsey; see *ICRC v Thommessen & Butterfield Trust (Guernsey) Limited* (n 78).

²¹⁶ *In re X Trust* [2012] (2) JLR 260.

beneficiaries brought a derivative action against the incumbent trustee alleging it had acted in breach of trust. The derivative action was advanced on the basis that as the incumbent trustee, the trustee was conflicted and could not pursue itself. By reference to the principles governing the exercise of the Court's supervisory jurisdiction over trusts, the Court held that there was no logical reason why the exercise of the jurisdiction should not extend to the Court's discretion in an appropriate case to making an order that the costs of the action against the trustee be met from the fund. In the exercise of the discretion the Court would have regard to the interests of the different beneficiaries, or conceivably the interests of beneficiaries and third parties to the fund. The existence of a contractual nexus (such as in a pension scheme case) may add to the weight in favour of making an order but the absence of such a nexus was not to imply that the beneficiaries have no right to the good administration of the trust. The question is whether the order sought is in the best interest of the fund and the beneficiaries as a whole. In authorising a prospective costs order in a derivative action claim, the Court is effectively awarding what would be equivalent of Beddoe-type relief had the trustee applied instead. The full ramifications of the *X Trust* decision have yet to be explored and there is recent authority that appears wedded to the English, more restrictive orthodoxy.²¹⁷ It is to be noted that in *Crociani v Crociani*,²¹⁸ the Royal Court observed that an application for a prospective costs order by beneficiaries (not by way of a derivative action) against the trustee seeking reconstitution of the fund was not bound to fail.

D. The Taxation of Costs in Proceedings Commenced under Article 51

The incidence of costs arising from proceedings under the inherent jurisdiction or Article 51 depends upon the role the trustee plays in the course of the proceedings. The Royal Court Rules 2004 contain provisions as to the taxation of costs in Part 12. The trustee indemnity for the costs and expenses of administering the trust (including any legal costs incurred in the course of administration, are not to be confused with the indemnity basis of taxation of litigation costs under Part 12 of the Royal Court Rules 2004).²¹⁹ The procedure for the taxation of costs on the indemnity basis is specifically designed for taxation of awards of costs on a party to party basis in hostile litigation, while the trustee's indemnity for costs is a matter purely internal to the trust. The Judicial Greffier will not apply the Factor 'A' and Factor 'B' rates.²²⁰ Most (if not all) of the detailed provisions of Part 12 of the RCR do not therefore apply to the taxation of a trustee's costs in an application for directions, as they apply between a paying and a receiving party rather than trustee in administrative proceedings.

3-76

²¹⁷ In *Trilogy Management v YT & Ors* (n 211), the Court refused to make a prospective costs order in favour of a third party to the trust who had already been granted a pre-emptive costs order in respect of a construction dispute involving the same trust on the basis that it was by no means clear that the third party would be ordered her costs at trial (although acknowledging the breadth of the jurisdiction to be wide).

²¹⁸ [2015] JRC 178.

²¹⁹ RCR 2004, r 12/5.

²²⁰ *Alhamrani v JP Morgan Trust Company (Jersey) Limited* (n 156).

- 3-77** The guidance provided to the Greffier in the taxation of a trustee's costs in this context is as follows.²²¹
1. the scales applicable on a normal taxation of costs were not relevant to a taxation of a neutral trustee's entitlement to recover his costs and expenses from the trust fund;
 2. a trustee's duty included an obligation to consider whether the charges of a particular lawyer or firm of lawyers were appropriate both to the nature of the problem and the size of the trust fund. It was also desirable, in appropriate cases of complex trust litigation, for specialist legal advice to be obtained from English solicitors and Chancery counsel and a trustee could recover the reasonable costs so incurred;²²²
 3. when considering legal costs, the Greffier should concentrate on whether a particular matter was one upon which it was reasonable to spend time and whether the degree of time spent was reasonable;
 4. the test was not whether the Greffier considered that the costs were incurred at the correct level, but whether they were reasonably incurred; and
 5. the taxation process should be exercised against the background of the general rule that a trustee acting reasonably was entitled to a full indemnity out of the trust fund. Costs or expenses could only be disallowed in respect of a particular item on the basis that they were incurred unreasonably, which was a high hurdle to surmount. In addition, the Greffier should resolve any doubts as to the reasonableness of costs in favour of the trustee.
- 3-78** Where the trustee proposes a course for which it seeks the Court's sanction (an *In re S Settlement* category 2 case), rather than surrenders its discretion, the trustee is not to be treated for the purposes of taxation of costs as not assuming a neutral role so as to come within the above guidelines. A trustee who has taken a position but still seeks the Court's blessing comes within (5) above.
- i. *Basis of the Taxation of Costs in Article 51 Applications*
- 3-79** Having set out the circumstances in which a trustee, and in some instances the beneficiaries, are likely to be able to obtain their costs from the trust fund, what follows is a discussion of the basis upon which such recovery is permitted.
- a. Trustees' Costs
- 3-80** A beneficiary has no right to seek the taxation of a neutral trustee's costs and expenses if they are not agreed; they may, however, challenge the costs on the more limited grounds that they were unreasonably incurred or unreasonable in amount.²²³ On a taxation of a trustee's costs and expenses ordered under the Royal Court's inherent jurisdiction and RCR 12/3(1)(b) the Greffier will not apply the indemnity basis under RCR.12/5. That procedure was specifically designed for taxation of awards of costs in hostile litigation. Nor will the

²²¹ *Landau v Anburn Trustees Ltd* (n 158).

²²² *Alhamrani v J.P. Morgan Trust Co (Jersey) Ltd* (n 156); *In re Internine Trust* (n 183).

²²³ *Alhamrani v JP Morgan Trust Company (Jersey) Limited* (n 156); *Landau v Anburn Trustees Ltd* (n 158).

Greffier apply the Factor 'A' and Factor 'B'²²⁴ rates.²²⁵ Most (if not all) of the detailed provisions of Part 12 of the RCR are therefore inapplicable, as they applied between a paying and a receiving party rather than to a neutral trustee although the Greffier could apply aspects of Part 12 in appropriate cases. The guidance provided to the Greffier in the taxation of trustee's costs is as follows:²²⁶

1. the scales applicable on a normal taxation of costs were not relevant to a taxation of a neutral trustee's entitlement to recover his costs and expenses from the trust fund;
2. a trustee's duty included an obligation to consider whether the charges of a particular lawyer or firm of lawyers were appropriate both to the nature of the problem and the size of the trust fund. It was also desirable, in appropriate cases of complex trust litigation, for specialist legal advice to be obtained from English solicitors and Chancery counsel and a trustee could recover the reasonable costs so incurred;
3. when considering legal costs, the Greffier should concentrate on whether a particular matter was one upon which it was reasonable to spend time and whether the degree of time spent was reasonable;
4. the test was not whether the Greffier considered that the costs were incurred at the correct level, but whether they were reasonably incurred;
5. the taxation process should be exercised against the background of the general rule that a trustee acting reasonably was entitled to a full indemnity out of the trust fund. Costs or expenses could only be disallowed in respect of a particular item on the basis that they were incurred unreasonably, which was a high hurdle to surmount; and
6. the Greffier should resolve any doubts as to the reasonableness of costs in favour of the trustee.

b. Beneficiaries' Costs

Where costs of beneficiaries are ordered to be paid out of the trust under a pre-emptive costs order by analogy with the trustee's right of indemnity from the fund, the beneficiary is usually afforded the same treatment for taxation purposes as the trustee and costs will not be taxed on the usual standard or indemnity basis.²²⁷ There has been a trend towards directing taxation of beneficiaries' costs payable out of the fund in non-hostile litigation on the indemnity basis, especially in cases involving minor or representative beneficiaries.

3-81

IX. Article 47—Applications for the Variation of a Trust

The Royal Court has no inherent jurisdiction to approve a variation of a trust on behalf of minors, unborn or unascertained beneficiaries.²²⁸ The Court's jurisdiction to vary a trust

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²²⁴ See *In Re Internine Trust* (n 183).

²²⁵ PD RC 09/01.

²²⁶ *Landau v Anburn Trustees Ltd* (n 158).

²²⁷ RCR 2004, rr 12/4 and 12/5.

²²⁸ *In re IMK Family Trust* (n 8) at [65], neither does Art 51 confer such a power; see *In re Turino Consolidated Ltd. Retirement Trust* [2008] JLR N27].

is derived from Article 47 of the Trusts (Jersey) Law 1984. The Royal Court's jurisdiction to vary a trust can only be exercised over a trust that has Jersey as its proper law.²²⁹

47 Variation of terms of a Jersey trust by the court and approval of particular transactions

(1) Subject to paragraph (2), the court may, if it thinks fit, by order approve on behalf of –

- (a) a minor or interdict²³⁰ having, directly or indirectly, an interest, whether vested or contingent, under the trust;
- (b) any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trust as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons;
- (c) any person unborn; or
- (d) any person in respect of any interest of his or hers that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined,

any arrangement, by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto, varying or revoking all or any of the terms of the trust or enlarging the powers of the trustee of managing or administering any of the trust property.

(2) The court shall not approve an arrangement on behalf of any person coming within paragraph (1)(a), (b) or (c) unless the carrying out thereof appears to be for the benefit of that person.

(3) Where in the management or administration of a trust, any sale, lease, pledge, charge, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure or other transaction is in the opinion of the court expedient but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the terms of the trust or by law the court may confer upon the trustee either generally or in any particular circumstances a power for that purpose on such terms and subject to such provisions and conditions, if any, as the court thinks fit and may direct in what manner and from what property any money authorized to be expended and the costs of any transaction are to be paid or borne.

(4) An application to the court under this Article may be made by any person referred to in Article 51(3).

3-83 Article 47(1)–(2) is in similar, although not identical, terms to section 1 of the Variation of Trusts Act 1958. In construing the article, regard may be had to English authorities although they must be considered in their relevant context to discern whether the differences between the Jersey and UK provisions are so significant as to make the English cases inapplicable in Jersey.

²²⁹ Trust (Jersey) Law 1984, Art 6. As to the Royal Court's willingness to accept a variation or give effect to a variation of a Jersey trust by a foreign court, see Ch 15.

²³⁰ Trusts (Jersey) Law 1984, Art 1(1): a person, other than a minor, who under the law of Jersey or under the law of their domicile, is legally incapable of managing and administering his or her own property and affairs by reason of mental disorder or of addiction.

A. An Arrangement

The statutory definition of arrangement that is capable of approval under Article 47 is extremely wide. 'Arrangement' encompasses any proposal to vary or revoke any of the trusts and need not necessarily be in the nature of a contract between the parties (and cannot be so in the case of a single beneficiary or a proposal on behalf of beneficiaries incapable at law of contracting with one another).²³¹ In *Mubarik v Mubarak*,²³² it was said that Article 47 empowers the Court to approve an arrangement that might be so extensive as to leave little of the existing trust's provisions extant.

3-84

i. The Classes of Persons on whose Behalf the Court May Approve an Arrangement

Article 47 does not confer power on the Royal Court to approve an arrangement varying the terms of a trust at its own discretion. The arrangement may only be approved by the Court on behalf of the persons listed in Article 47(1)(a)–(d). The Court may not, for example, approve an arrangement to vary a trust on behalf of a capable, ascertained, adult beneficiary.²³³

3-85

a. Article 47(1)(a): Minors and Interdicts

A minor²³⁴ or an interdict (an adult who lacks capacity),²³⁵ whether their interest in the trust is vested or contingent, will fall within Article 47(1)(a). The paragraph also applies where trust capital is held on bare trust absolutely for a minor and would be capable of being called for, but for the fact that the beneficiary is a minor. A minor or interdict beneficiary who is a discretionary beneficiary has a sufficient interest within Article 47(1)(a) to permit the Court to consent to any variation to the terms of the trust on his or her behalf. A court-appointed curator has the power to do or arrange for all such things to be done in relation to the property and affairs of the interdict as appear to the curator to be necessary or expedient for the maintenance of the interdict.²³⁶ However, a curator must apply to the Court for leave before he may conduct or participate in legal proceedings in the name of the interdict which includes proceedings to vary a trust of which an interdict is a beneficiary.²³⁷ The appointment of a curator and any decision on whether it is appropriate for the curator, on behalf of the interdict, to propose or participate in an application to vary a trust are dealt with in a discrete hearing from the hearing to vary the trust. Unlike England and Wales,

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²³¹ *Re Steed's Will Trusts* [1960] Ch 407 at 419, 422–23 CA, approved *In re Osias Settlements* [1987–88 JLR 389].

²³² [2008 JLR 403].

²³³ Although where all the beneficiaries are *sui juris* they may collectively put an end to or vary the trust under the principle in *Saunders v Vautier* (1841) EWHC Ch J8; see *Re Osias Trusts* (n 232) at 402. The States of Jersey has consulted on a seventh amendment to the Trusts (Jersey) Law 1984 which would extend Art 47 to empower the Court to vary a trust regardless of whether that variation is supported or opposed by any one or more of the adult beneficiaries.

²³⁴ A person who attains majority in their country of domicile but who would still be a minor in Jersey is still a minor for the purposes of Art 47(1)(a); see *In Re N* [1999 JLR 86].

²³⁵ Both defined under the Trusts (Jersey) Law 1984, Art 1(1); see discussion in relation to prescription in Ch 16.

²³⁶ Mental Health (Jersey) Law 1969, Art 43(15).

²³⁷ *ibid*, Art 43(17)(c).

Jersey does not have a separate Court of Protection to determine whether the proposed variation is for the beneficiary lacking capacity's benefit. The costs of the application to the Royal Court to sanction the curator's participation in the hearing can be ordered to be paid out of the trust fund at the subsequent hearing. Where the trust might otherwise be varied out of court under the rule in *Saunders v Vautier*,²³⁸ but for a single adult beneficiary without capacity, the interdict's curator may apply to the Royal Court under Article 43(17)(d) of the Mental Health (Jersey) Law 1969 for authorisation to exercise a power to consent to the proposed variation vested in the interdict. This procedure is likely to be cheaper than proceedings to vary the trust under Article 47 because it does not require the convening of all the other parties in order for the Court to make a decision on the arrangement.²³⁹

Foreign Powers of Attorney

- 3-87** Jersey law does not have an equivalent of a lasting power of attorney that could in England and Wales be granted under the Mental Capacity Act 2005 and so any Jersey power of attorney (that is not an irrevocable security power of attorney)²⁴⁰ will lapse automatically upon the supervening incapacity of the donor. Nevertheless, where a person not resident in Jersey has given a lasting power of attorney in compliance with the United Kingdom legislation and that power has been registered by the Office of the Public Guardian or Court of Protection in England, it is the practice of the Royal Court to order the registration of such power with the Judicial Greffe in Jersey, notwithstanding the supervening incapacity of the donor. This practice is founded on the principle of comity and enables an attorney to act in relation to assets of the donor situate in the island. The authority conferred by a foreign lasting power of attorney is likely to be wide enough to cover an assent to the variation of a trust entirely out of court in accordance with the principle in *Saunders v Vautier*. However, an out of court variation may not be desirable where the consent of the attorney to the proposed arrangement is vitiated by a conflict of interest,²⁴¹ such as the attorney also being a beneficiary of the same trust. In complex cases, reliance solely on the power of attorney may be unsafe and the attorney may wish the protection of a court order even if the assent to the proposed variation appears to fall within the scope of the powers vested in the attorney. In such circumstances the appropriate way to proceed is by way of an application under the Mental Health (Jersey) Law 1969, notwithstanding that the attorney is not a court-appointed Jersey curator of the interdict's affairs.

Indirect Interests of Minors and Interdicts

- 3-88** An indirect interest includes an interest derived under a sub-trust, the trustee of which is one of the beneficiaries of the head-settlement. Where the head-settlement is proposed to be varied, the trustee of the sub-settlement will have to consult the terms of the sub-trust

²³⁸ (1841) EWHC Ch J82, approved in *In re Turino Consolidated Ltd Retirement Trust* (n 217).

²³⁹ See Ch 1 and below for the procedural requirements for convening parties to a Representation.

²⁴⁰ A specialised form of power of attorney under Powers of Attorney (Jersey) Law 1995 expressed to be irrevocable and is given either (1) for the purpose of facilitating the exercise of powers of a secured party under the Security Interests (Jersey) Law 1983 or of powers given pursuant to a security agreement, or (2) pursuant to or in connection with or for the purpose of or ancillary to security governed by foreign law.

²⁴¹ There is a very limited class of circumstances where an attorney may act notwithstanding a conflict; see Mental Capacity Act 2005, s 12.

as to whether it has adequate powers to approve the variation on behalf of its beneficiaries. Where it has adequate powers but the variation is so momentous as to put the trustee at risk of personal liability, were it to approve it, an application under Article 51 of the Trusts (Jersey) Law 1984 for directions may be necessary. Where the sub-trustee has insufficient powers to approve the variation, recourse may be made to Article 47(3) of the Trusts (Jersey) Law 1984. Alternatively, the Court may approve the variation to the head-trust on behalf of the sub-trust's beneficiaries, if it is for their benefit under Article 47(1)–(2) and they fall within the categories of persons on whose behalf the Court can consent.

b. Article 47(1)(b): Unascertained Persons and Persons who May Become Entitled to an Interest

3-89

An identifiable person who already has a vested interest or a contingent interest under the trust is outside the scope of Article 47(1)(b). Article 47(1)(b) is directed primarily at prospective beneficiaries, that is to say trusts in favour of persons who will at a future date or on the happening of a future event satisfy a particular description or come to fall within a particular class so as to acquire an interest under the trust. A prospective beneficiary under such a trust has a hope of an interest but not an interest in a technical sense. Unlike the equivalent provision in the 1958 Act,²⁴² Article 47(1)(b) does not contain a proviso that excludes the Court from giving consent on behalf of any person who would satisfy a description or fall within a class if it were assumed that the date or event had happened on the date of the application to court. The effect of the omission of the proviso in the Jersey legislation is to widen considerably the scope of persons on whose behalf the Court can consent to a variation. The interests of unascertained beneficiaries are to be considered as a single class rather than a collection of unascertained individuals.²⁴³

c. Article 47(1)(c): Unborn Persons

3-90

Article 47(1)(c) speaks for itself, and since it is silent as to the nature of the interest that an unborn person is required to have in order to come within the Court's jurisdiction, it must be taken as including those *en ventre sa mère* and all those future unborn persons, not yet conceived and therefore unascertained. Unborn children cannot simply be treated as a single class, united by the single factor that they are all, as yet, unborn. Regard must be had to the proposed arrangement as it may be that its terms impact different unborn persons in different ways, eg a variation to the effect that a child born before a certain future date will obtain a benefit but children born afterwards will not. In those circumstances the two classes of unborn children require separate consideration by the Court and an arrangement that does not benefit them both cannot be approved, notwithstanding that it may conceivably benefit other unborn persons.

d. Article 47(1)(d): Persons whose Interest Arises by Reason of any Discretionary Power

3-91

The fourth and final class of persons on whose behalf the Court may assent to a variation of the terms of a trust are any person or persons in respect of any interest of his or hers

²⁴² Variation of Trusts Act 1958, s 1(1)(b).

²⁴³ *Mubarik v Mubarak* [2008 JLR 430].

that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined. Jersey does not have a statutory basis for protective trusts akin to that in section 33(1)(i) and (ii) of the Trustee Act 1925, which perhaps accounts for this rather inelegantly worded paragraph. In the authors' view, the provision covers the same ground as the parallel provision in section 1(1)(d) of the Variation of Trusts Act 1958. This category of beneficiary is anomalous in that the proviso in Article 47(2) does not apply so that the Court can approve a variation that is not for the benefit of a person falling within Article 47(1)(d).

B. Scope of the Court's Powers to Vary

- 3-92** Article 47 empowers the Court to vary or revoke all or any of the terms of a trust, including terms that had arisen from an irrevocable exercise of power by the trustee.²⁴⁴ However, a trustee who applied for the revocation of a trust provision that had arisen as a result of an irrevocable exercise of power by him should expect to have the motivation for such a request very closely examined by the Court.²⁴⁵ The Court cannot approve a variation that is objected to by a beneficiary with an interest in the arrangement on whose behalf the Court cannot give its consent. It has been held that an object of a fiduciary power may also block a proposed arrangement but only if (1) they are a single, adult beneficiary or (2) a restricted class of beneficiaries who all object to the arrangement.²⁴⁶ While the jurisdiction of the Court under Article 47 is confined to trusts that have Jersey as their proper law, the Court is able to approve an arrangement to the effect of a complete revocation of a Jersey law trust and the transfer of the trust assets to trustees of a trust governed by a foreign law.²⁴⁷ Technically speaking, the power conferred by Article 47(1) is that the trust may be varied or revoked wholly or partly. There is no power to approve a complete resettlement of the trust property and the terms of the relief sought should not use the word 'resettle'. That said, there is very little practical difference between a re-settlement and a revocation of the existing trusts and substitution with new trusts; the test is whether in substance the substitution is a variation rather than a resettlement.²⁴⁸ If a substantial foreign connection is established, and the Court is satisfied that the trusts will be enforceable under the law of the place to which the transfer is made and that the new trustees have suitable experience of administering trusts, the Court is normally prepared to sanction a transfer which is beneficial to the beneficiaries for whom it is made, whether the transfer is made for fiscal or other reasons.
- 3-93** It seems that Jersey does not adhere to the principle that continues to prevail in English law, which provides that if the substratum of the trust is sought to be varied, which is to say that if the purpose of that trust changes by reason of the proposed variation, the Court has no power to effect the variation under the statutory jurisdiction. In *Osias Trusts*,²⁴⁹ the

²⁴⁴ *In Re DDD 1976 Settlement* [2012 (1) JLR N8].

²⁴⁵ *ibid.*

²⁴⁶ *Mubarik v Mubarak* (n 244).

²⁴⁷ *Re Osias' Settlements* (n 232); *In Re N* (n 235); *In re Douglas* [2000 JLR 73]; and see *Seale's Marriage Settlement* [1961] Ch 574; *Re Weston's Settlements* [1969] 1 Ch 223, CA; *Re Windeatt's Will Trusts* [1969] 1 WLR 692. Such a transfer is permitted by Art 10 of the Hague Trust Convention.

²⁴⁸ *Re Holt's Settlement* [1969] 1 Ch 100.

²⁴⁹ [1987–88 JLR 389].

Court identified both the practical difficulty of being able to identify when the substratum had been altered but also a difficulty of principle in that the Court's jurisdiction to approve a variation on behalf of those in Article 47(1)(a)–(d) is co-extensive with the doctrine in *Saunders v Vautier*; there was no reason why the Court could not approve a variation that changed the substratum, if that could otherwise be achieved if all the beneficiaries were *sui juris*. However in *Mubarik v Mubarak*,²⁵⁰ the Court of Appeal expressed its reservation as to whether, if the trust is not to come to an end, the assets must remain dedicated to at least some, if not all of the trust purposes so as the beneficiaries could still call on the Court for protection.

The Court will not approve a proposed variation that is contrary to public policy.²⁵¹ It is no objection to an arrangement on grounds of public policy that its purpose is to mitigate or avoid tax provided that the tax avoidance is of benefit.²⁵² The Court will likewise withhold its approval of an arrangement if one of its terms is or may amount to a fraud on a power.²⁵³ There was a fraud where part of the appointor's motive was to enable the approval of a settlement which was more favourable to him than it would otherwise have been.²⁵⁴

3-94

C. Varying Trustees' Powers

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Article 47(1) expressly provides the Court with jurisdiction to enlarge the trustee's powers²⁵⁵ but is silent as to whether the Court has power to restrict them, if to do so would be of benefit to a person in one or more of the classes set out above. Without express provision in the trust instrument itself or the assent of all beneficiaries of full age and capacity, the trustee has no power to release or restrict their own powers. Where there is such a power in the trust instrument and the exercise of that power would not be an improper exercise, an application to vary under Article 47 is not required. Where there is no existing power to restrict or release the trustee's powers but a restriction would be for the benefit of the beneficiaries the better course is to seek an enlargement of the trustee's powers to release or restrict under Article 47(3) than under Article 47(1)–(2).

D. Benefit

3-96

The key proviso that qualifies the Court's power to approve an arrangement varying a trust under Article 47(1) is that an arrangement must appear to the Court to benefit those

²⁵⁰ [2008 JLR 403].

²⁵¹ Trusts (Jersey) Law 1984, Art 11(2)(b)(ii).

²⁵² *Re the Peter Hynd 'H' Settlement* (2000–01) 3 ITELR 701; *In Re DDD 1976 Settlement* (n 245); *In Re Douglas* (n 248); *In Re Neil Ashley* (1990) Settlement [2003 JLR N9]; *In re Bruno Sangle-Ferriere Children's Settlement* [2007 JLR N8]; *Re Sainsbury's Settlement* [1967] 1 WLR 476; *Re Weston's Settlement* (n 248) at 245; per Lord Denning MR and at [247], per Harman LJ.

²⁵³ *Re Robertson's Will Trusts* [1960] 1 WLR 1050; *Re Wallace's Settlements* [1968] 1 WLR 711; *Re Brook's Settlement* [1968] 1 WLR 1661.

²⁵⁴ *Re Brook's Settlement* (n 254).

²⁵⁵ Such enlargement may only be made to powers necessary for managing or administering the trust property and cannot be used, eg, to confer a power to add beneficiaries; *In Re DDD 1976 Settlement* (n 245).

persons falling within Article 47(1)(a)–(c), on whose behalf the Court gives its consent.²⁵⁶ The Court has no power to approve an arrangement that benefits any other person.²⁵⁷ The Court is not concerned with the wisdom or fairness of the proposed arrangement from the perspective of the party proposing it²⁵⁸ or from the perspective of any person who is of full age and capacity and is therefore capable of assenting for themselves.²⁵⁹ The Court will consider the total amount of benefit or advantage that the proposal has for each of the parties affected by the application. Article 47 does not require that in every possible circumstance, there will be a benefit to each person or category of persons on whose behalf the Court is able to consent to the arrangement. The Court is prepared to take a risk in approving an arrangement if a prudent adult motivated by self-interest and considering the potential risk would take the same risk.²⁶⁰ An arrangement can therefore still be approved even if eventually no benefit or even a loss befalls those persons as a result of the arrangement.²⁶¹ What is and what is not an arrangement of sufficient benefit to the beneficiaries unable to consent is highly case specific but the following guidance can be gleaned from the reported cases. Benefit is to be widely construed and is not confined to financial advantage to the beneficiaries for whom the Court is consenting, although in most cases a financial or fiscal advantage will be the relevant benefit, however a financial benefit will not automatically be sufficient.²⁶² Benefit may include a wider interest in maintaining assets for a whole family, the avoidance of conflict within a family or the reduction, avoidance, minimisation or deferral of the trust's tax liabilities as a whole.²⁶³ Benefit and drawbacks of a non-financial character as a result of the arrangement will be relevant for the Court's consideration. Benefit may include the discharge of a moral obligation, for example towards dependants.²⁶⁴ A moral obligation may be inferred to extend to minors and unborn beneficiaries if it is unanimously accepted by the adult beneficiaries.²⁶⁵ There is no moral obligation to vary a trust to revoke an exclusion of the settlor from benefit where the settlor was not in need.²⁶⁶ It has been held to be of benefit to children that they should be settled in life before they begin receiving an income sufficient to make them independent of the need to work.²⁶⁷ That kind of consideration may justify an arrangement that postpones vesting; where there would also be a serious tax disadvantage to a beneficiary in vesting at all, the Court may be persuaded to go further so as to replace an absolute interest with a discretionary trust.²⁶⁸ Educational and social considerations can outweigh financial considerations, especially where the latter are slight, and may be decisive in whether the arrangement is approved or not.²⁶⁹ Provided

²⁵⁶ *In Re DDD 1976 Settlement* (n 245).

²⁵⁷ *ibid.*

²⁵⁸ *Re Steed's Will Trusts* (n 232) at 420.

²⁵⁹ *Re Berry's Settlement* [1966] 1 WLR 1515; and see *Goulding v James* [1997] 2 All ER 239, CA.

²⁶⁰ *In re Bruno Sangle-Ferriere Children's Settlement* (n 253).

²⁶¹ *Re Druce's Settlement Trusts* [1962] 1 WLR 363.

²⁶² *In re N* (n 235); *In re Bruno Sangle-Ferriere Children's Settlement* (n 253).

²⁶³ *In re N* (n 235); *In Brian Munro Ltd Settlement* [1995 JLR N30]; *In re Douglas* (n 248); *In Re DDD 1976 Settlement* (n 245); *In re Neil Ashley* (1990) Settlement (n 253).

²⁶⁴ *In Re DDD 1976 Settlement* (n 245); *In re T Settlement* [2002 JLR 204].

²⁶⁵ *In re T Settlement* (n 265).

²⁶⁶ *In re DDD 1976 Settlement* (n 245).

²⁶⁷ *Re Holt's Settlement* (n 249) at 121; *In Re Brian Munro Ltd Settlement* (n 252).

²⁶⁸ *Re Elizabeth K Gates Estate Trust* [2000 JLR N-68].

²⁶⁹ *Re Weston's Settlement Trusts* [1970] Ch 560.

the arrangement is of some benefit, however slight, the Court has jurisdiction to approve it. However, it has a discretion and is not bound to do so.²⁷⁰ The Court will look at the proposed arrangement as a whole in light of the apparent purpose of the trust.²⁷¹ For the arrangement to come within the Court's jurisdiction for approval, there must be a benefit capable of accruing to each actual or potential beneficiary on whose behalf the Court can give consent. That principle is not in conflict with the Court's willingness in some cases to take a risk in approving the arrangement on that person's behalf. The distinction is said to be between the differing personal characteristics of a possible beneficiary and the surrounding circumstances which may or may not affect him.²⁷²

E. Variation in the Context of Matrimonial Proceedings

The power of the English courts to order a variation to a Jersey trust is well known.²⁷³ Section 24(1)(c) of the Matrimonial Causes Act 1973 has been interpreted very widely and the English court may vary the interests of the spouses and others under the trust including extinguishing an interest of either spouse. The Court may also order the removal of the trustees.²⁷⁴ Article 9(4) of the Trusts (Jersey) Law 1984 shields a trust (whose governing law is that of Jersey) from enforcement in Jersey of an order under section 24 of the Matrimonial Causes Act 1973 the effect of which is to vary the terms of a trust, if such enforcement would be inconsistent with Jersey law.²⁷⁵ Notwithstanding Article 9(4), if the trustee is personally subject to the jurisdiction of the English courts or the interests of the beneficiaries are otherwise at risk, it had been the practice that trustees were practically compelled to apply to the Royal Court to seek directions as to whether they could give effect to an order made against the trust.²⁷⁶ Such applications were made under Article 51(1) and not Article 47(1), notwithstanding that in effect the trustee was seeking the Court's approval of a variation in the manner in which the trust was administered without resorting to a formal express amendment to the terms of the trust that would otherwise fall within Article 47(1). Since the enactment of the current version of Article 9 of the Trusts (Jersey) Law 1984 there is an unsatisfactory lacuna as to what should happen in circumstances where there is a foreign court order varying a Jersey trust to which the beneficiaries of the trust do not consent (the solution in *Mubarik*). Subject to any amendment to the 1984 Law to allow the Royal Court to effect a variation over the heads of the adult beneficiaries, the Royal Court currently has no power either to make the variation itself or to direct the trustee to act in accordance with the foreign order.

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²⁷⁰ *Re Van Gruisen's Will Trusts* [1964] 1 WLR 449.

²⁷¹ *Re Steed's Will Trusts* (n 232) at 421 and 422; *Re Van Gruisen's Will Trusts* (n 271).

²⁷² *Re Holt's Settlement* (n 249) at 122.

²⁷³ See Ch 15 for the principles applicable to the recognition and enforcement of foreign judgments purporting to vary Jersey law trusts.

²⁷⁴ *E v E* (financial provision) 1990 2 FLR 233.

²⁷⁵ *In re B Trust* [2006] JLR 562.

²⁷⁶ *Mubarik v Mubarak* (n 244).

F. The Trustee's Role in an Application for Variation of a Trust

- 3-98** The Court will have regard to the views of the trustee in relation to matters relevant to the exercise of the Court's discretion.²⁷⁷ The trustee is expected to act as a watchdog for those who are not parties to the proceedings such as unascertained beneficiaries within Article 47(1)(b), unborn persons within Article 47(1)(c) and discretionary beneficiaries under Article 47(1)(d). Where the proposed arrangement confers discretion on the trustees the Court may have regard to how the trustees may purport to exercise it.²⁷⁸ The Court may also seek an indication from the trustee as to how it would exercise an existing discretion if there were no variation in order to determine the prospective benefit of the proposed arrangement. A guardian ad litem and curator (or attorney) has a similar function and is under a duty to inform himself of the minor's or interdict's existing interest, the nature of the application for approval of the arrangement and to instruct his legal team as he thinks best.²⁷⁹ The trustee's role is not to represent the interests of adult beneficiaries, who are capable of taking their own view as to the proposed arrangement, nor is it to represent the wishes or purported wishes of the settlor or testator (unless that is a matter relevant to the Court's discretion).²⁸⁰ The trustees should not usually issue the proceedings for approval of a variation. If, and only if, they are satisfied that the proposals are beneficial to the persons interested and have a good prospect of being approved by the Court and, crucially, that if they do not make the application, no one else will, then it may be proper for the trustees to commence the proceedings.²⁸¹ Where there is a doubt (and there will often be a doubt) the trustee should combine the Article 51 and Article 47 proceedings together, first seeking directions whether to propose the variation (which is likely to be a momentous decision or a surrender of discretion case) before then proceeding to an application to vary if so directed.²⁸²

G. The Effect of an Order Varying the Trust

- 3-99** Article 47 merely authorises the Court to approve an arrangement on behalf of those who cannot themselves consent. If the other beneficiaries (of full age and capacity) have assented to the arrangement as well then the approval of all interested parties has been obtained, the trust will be varied or revoked in much the same way as it might have been under the rule in *Saunders v Vautier*, had all the beneficiaries been able to consent to the variation. The view that the court order does not in fact vary the trusts when making its order but only makes good a want of capacity to consent on the part of some of the beneficiaries has the support of House of Lords authority.²⁸³ The significance of the Court's role in varying the trust is that in some jurisdictions (notably England and Wales)²⁸⁴ certain written formalities must

²⁷⁷ *Re Steed's Will Trusts* (n 232) at 420 and 422.

²⁷⁸ *Re Druce's Settlement Trusts* (n 262).

²⁷⁹ *Re Whittall* [1973] WLR 1027.

²⁸⁰ As to which see below.

²⁸¹ *Re Druce's Settlement Trusts* (n 262).

²⁸² In contrast to the usual procedure on a Beddoe application.

²⁸³ *IRCV v Holmden* [1968] AC 685 at 701, 710 and 713.

²⁸⁴ eg Law of Property Act 1925, s 53(1)(c).

be adhered to in order to effect a disposition of an equitable interest (which may in some cases, particularly in a matrimonial context, be what the variation amounts to).

H. Article 47(3): Power of Court to Vary Administrative Powers

Article 47(3) is the Jersey equivalent of section 57(1) of the Trustee Act 1925 and is a very different type of application to vary the terms of a trust than the jurisdiction under Article 47(1). Before considering an application under Article 47(3) regard should first be had to the terms of the trust instrument. Article 24(1) of the Trusts (Jersey) Law 1984 provides, in similar terms to the Trustee Act 2000, that subject to the terms of the trust and the trustee's duties in law (eg the prohibition on a trustee from self-dealing in the trust property), a trustee shall have all the same powers as a natural person acting as the beneficial owner in relation to the trust property. While the default position at law will render any question of expanding the trustee's powers when the trust instrument is silent on that matter moot, the jurisdiction under Article 47(3) will still be relevant for those trusts that maintain restrictions on the powers of the trustee to administer and invest the trust property. The object at which Article 47(3) is directed is to secure that the trust property is administered and managed as advantageously as possible in the interests of the beneficiaries. Note that the Court has no power to order the termination or winding up of a trust under this provision. Neither does the Court have power to approve an extension of the trustee's powers of management or administration that could be effected without the Court's intervention.²⁸⁵ There are three issues:

3-100

1. The scope of the jurisdiction to authorise an enlargement or conferral of investment and other administrative powers on the trustee.
2. The circumstances in it which it will be proper for the Court to accede to applications of this character.
3. Whether the application should be made under Article 47(3) or Article 47(1).

As regards the first issue, Article 47(3) largely speaks for itself, the Court has jurisdiction to extend or confer a power of investment or other similar administrative power, including an administrative power of delegation where such a power is expressly excluded from the terms of the trust.²⁸⁶ In considering what extended powers of investment should be conferred the Court must consider any discernible underlying purpose to the trust, the size of the fund, the scope and efficacy of provisions for seeking professional advice and the ability of the trustees to control the delegation of investment decisions. As regards the second issue, the Court will exercise the jurisdiction if, having regard to contemporary evidence of investment practice, it is satisfied that the powers available to the trustee under the trust instrument are insufficient. It is reasonable to expect that, in view of the general

3-101

²⁸⁵ eg by an existing power of amendment to the trust instrument.

²⁸⁶ *Anker-Petersen v Anker-Petersen* (1998) 12 TruLI 166 (6 December, 1990); for earlier (conflicting) authority and dicta, see *Re Brasseys Settlement* [1955] 1 WLR 192 at 196 (jurisdiction exercised but no report on availability of jurisdiction). Note that Art 25 of the Trusts (Jersey Law) 1984 is in similar terms to Art 24 and provides that subject to the terms of the trust, a trustee may delegate the execution or exercise of any of his or her trusts or powers (both administrative and dispositive).

extension of investment powers effected by the Article 24(1), the Court will only be prepared to authorise the extension of trustee investment powers as ‘expedient’, where those powers are excluded or unduly restricted by the trust instrument. Needless to say, the Court should dismiss an application to extend the trustee’s powers under Article 47(3) where there is no pressing need, so as to make it expedient, to do so. As regards the third issue, it is the better practice for the application to be made under Article 47(3) rather than Article 47(1), if no variation of beneficial interests is being sought, although where an application is to be made under Article 47(1) in any event it is likely to be desirable to roll the two applications into a single set of proceedings. Where only an extension of the trustee’s powers is sought, in contrast to applications to vary the terms of a trust, which the trustee should not generally make without directions, the trustee is the natural person to make the application under Article 47(3). Further, an Article 47(3) application does not require the trustee to obtain the consent of every adult beneficiary; and the application does not require the Court to give consent on behalf of every category of beneficiary separately. Under Article 47(3) the proposed extension or transaction must be for the benefit of the trust as a whole and not for the benefit of one beneficiary (or indeed the trustee).²⁸⁷ An application under Article 47(3) is therefore a far less costly application because it does not put the legitimate interests of the beneficiaries in peril.

I. Procedure for Applications to Vary

- 3-102** Proceedings to vary the terms of a trust either under Article 47(1) or 47(3) should be commenced by Representation.²⁸⁸ The wording in Article 47(1) ‘by whom so ever proposed’ indicates that any person may be the representor, even a person who has no interest under the terms of the trust.²⁸⁹ Prima facie then, Article 47(3), providing that any of the persons in Article 51(3) may apply for an order to approve a variation, would appear somewhat unnecessary. The provisions, when read together, must be taken to mean that Article 47(3) is intended to be read as non-exhaustive and indicative only of the persons who can make the proposal. A representor who is not the Attorney General, a trustee, an enforcer or a beneficiary can only make an application to vary the trust with the Court’s leave.

i. Parties to Be Joined and Who Need Not Be Joined

- 3-103** All the trustees must be convened as parties. The trustees’ role is acutely important where approval is sought on behalf of persons falling within Article 47(1)(b)–(d) as the trustees are normally expected to represent the interests of those persons. While strictly speaking adult beneficiaries for whom the Court cannot give its consent do not need to be made parties (as they can consent out of court), in practice all ascertained living persons, whether or not the Court is assenting to the arrangement on their behalf, who are directly or potentially interested in the variation, should be convened.²⁹⁰ This practice has

²⁸⁷ *Re Thomas* [1930] 1 Ch 194; *Re Beale’s Settlement Trusts* [1932] 2 Ch 15.

²⁸⁸ As to Representations generally, see Ch 1.

²⁸⁹ eg the settlor, although such a person would have to seek the Court’s leave under Art 47(3).

²⁹⁰ *In re Osias Settlements* (n 232).

developed as a matter of convenience so that if there is an alteration to the terms of the proposed arrangement while the arrangement is before the Court and to which they have already consented, their interests in that alteration can be represented.²⁹¹

The following may, but need not be convened as parties:²⁹²

3-104

1. beneficiaries whose interests are not in any way affected by the proposed variation, for instance a life tenant in a case where only the reversionary interests are to be varied;
2. persons who could take only under a power of appointment whether or not released²⁹³ but who have no interest in default of the power of appointment being exercised;²⁹⁴
3. persons with discretionary interests under a so-called 'protective trust';²⁹⁵ and
4. persons who may become entitled to an interest in the future under Article 47(1)(b).²⁹⁶

ii. Representation Orders

Unlike in proceedings for directions under Article 51 of the Trusts (Jersey) Law 1984, representation orders are usually inappropriate in the context of an application to vary the terms of a trust. All minor and interdict beneficiaries on whose behalf the Court's approval is sought under Article 47(1)(a) should be joined as parties, by their respective guardians ad litem and curators. The Court does have jurisdiction to approve a variation on behalf of absent minor beneficiaries²⁹⁷ and in exceptional circumstances will exercise that jurisdiction, for example, where there is a large class of minor beneficiaries with remote interests, at least one of whom is a party and represented.²⁹⁸ Unborn persons do not yet exist and therefore cannot be parties and those coming within Article 47(1)(b) and (d) are not normally parties either and are usually represented by the trustee. Where there are two or more groups of unborn beneficiaries with opposing interest (eg where the variation affects them in different ways) the trustee cannot represent them both effectively. The correct procedure in such a case is for the interests of separate classes of unborn beneficiaries to be looked after by a suitable adult beneficiary or a guardian ad litem of a minor beneficiary in a quasi-representative role.

3-105

iii. Separate Representation

The trustee and every beneficiary or class of beneficiaries made a party must be separately and exclusively represented. Persons of full age and capacity (if they wish to be represented in their own right) should be represented by their own counsel and not by the same counsel

3-106

²⁹¹ The costs of adult beneficiaries of full capacity are usually allowed out of the trust fund.

²⁹² If it is proposed to deliberately not convene any beneficiary as a party, then the Court should be given an explanation as to why.

²⁹³ *Mubarik v Mubarak* (n 244).

²⁹⁴ *Re Christie-Miller's Marriage Settlement* [1961] 1 WLR 462; *Re Courtauld's Settlement* [1965] 1 WLR 1385.

²⁹⁵ Note these are not persons under Art 47(1)(d), which refers to a person whose fixed interest's replacement with a discretionary interest under a protective trust has not yet been triggered.

²⁹⁶ *Re Moncrieff's Settlement Trusts* [1962] 1 WLR 1344. However, note the proviso in the English legislation is absent in Jersey's; if *Re Moncrieff* were re-run in Jersey, the adopted son would not have been a person excluded from the Court's jurisdiction to consent on his behalf.

²⁹⁷ *Re Whittall* (n 268) at 1031.

²⁹⁸ *Re Portman's Settlement Trusts*, 11 March 1976 unreported per Slade J; see also *Re Clarke's Will Trusts* [1961] 1 WLR 1471 at 1477.

as those on whose behalf the Court's approval is being sought.²⁹⁹ Unlike in the UK,³⁰⁰ where the usual practice is for parties *sui juris* to be separately represented by their own counsel from those who are not *sui juris* even where the same firm of solicitors can act for all with appropriate safeguards, owing to the fused nature of Jersey's legal profession, it is not usually appropriate for the same firm of advocates to act on behalf of all the parties.

iv. Representor's Evidence

- 3-107** The prayer for relief should normally seek an order under Article 47(1) of the Trusts (Jersey) Law 1984 approving on behalf of the beneficiaries, for whom the Court's approval is sought, an arrangement varying (or revoking as appropriate) the trusts in the terms of the draft instrument arrangement (which should appear as a schedule to the affidavit filed in support of the action), subject to such modifications as the Court may approve. The Representation should state the legal basis for the order sought, that the relief sought comes within the jurisdiction conferred by Article 47, that the relief sought is for the benefit of the beneficiaries concerned (referring to the affidavit as to which beneficiaries and how the arrangement benefits them) and is otherwise fit for approval on their behalf. The supporting affidavit should contain the bulk of the case in support of the claim and the terms of the proposed order approving the arrangement. It is suggested the affidavit should cover the following matters:

1. The present constitution of the trust, exhibiting copies of the relevant trust documents.
2. Material information in relation to the assets subject to the trust and their value and income yield. Where a material issue turns on the precise value of the trust assets, this evidence should be supported by an up-to-date professional valuation although as with medical evidence, it is usually unnecessary for this evidence to be supported by an affidavit from the valuers. Where the trust fund comprises of shares in private companies, it may be useful to exhibit recent company accounts, together with other material information relating to the companies concerned. It is not normally necessary for the trust accounts to be included in the evidence.
3. Material information in relation to the beneficiaries, normally stating the date of birth of minor beneficiaries and, where material, the age of adult beneficiaries. If anything turns on the health of particular beneficiaries (to include mental health where a curator may need to be appointed) or their ability to have children,³⁰¹ the evidence should cover such matters, and a medical certificate should be exhibited,³⁰² although it is normally unnecessary for any such medical evidence to be supported by an affidavit from the doctor from whom it is obtained.
4. Where the benefit of the proposed variation is a mitigation or saving of tax, the evidence must include the computation showing how the tax saving is to be achieved and the quantum of the saving to be expected. This may involve evidence as to the assets comprised in the patrimony of the beneficiaries where that affects tax rates

²⁹⁹ The trustee is usually instructed by the adult beneficiaries to assent on their behalf.

³⁰⁰ *Re Whigham's Settlement Trusts* [1971] 1 WLR 831.

³⁰¹ Children not yet born may come within a class of beneficiaries under Art 47(1)(b) and/or (c).

³⁰² As to evidence concerning a woman being past child-bearing age, see *Re Westminster Bank Ltd's Declaration of Trust* [1963] 1 WLR 820.

applicable to trust assets or their income. Where the benefit, or a benefit, of the proposed variation involves provision from sources other than the trust fund itself, the evidence should cover the availability of such provision and its value. Actuarial evidence consisting of instructions to the actuary, and his opinion, should be exhibited where, in order to assess the benefit of an arrangement, it is necessary to value the interests of the beneficiaries. It will not normally be necessary for this actuarial evidence to be supported by an affidavit from the actuary.

5. Unless the reasons are self-evident, the affidavit should state the reasons why the representor(s) desire the proposed variation.
6. Where a personal covenant is to be given, there should be evidence of the financial position of the covenantor.³⁰³
7. A draft Act of Court containing the proposed arrangement.

The Representation and affidavit should be deposited with the Judicial Greffe in accordance with the procedure in Chapter 1. At the first Friday Samedi Division hearing the representor should seek the Court's directions as to the convening of parties, service of the proceedings (whether within or without the jurisdiction) and supporting material upon them, the filing of responses and such other case management directions as the Court considers appropriate. A guardian ad litem and curator must be appointed for parties who are minors or interdicts; where this has not already been done the directions sought at the first hearing may include orders for the appointment of such officers.

3-108

v. Responses and Evidence

Applications under Article 47 are rarely opposed as a considerable amount of front-loading is required in preparation before the proceedings are issued. The adult beneficiaries convened as respondents will not normally file evidence. If the adult beneficiaries have anything to say in the proceedings that is not a consent to the proposed arrangement then the Court has no jurisdiction to make the variation.

3-109

Any guardians ad litem and curators should file evidence to the effect that they support the proposed variation as being in the interests of the children and unborn beneficiaries. Unless the Court orders otherwise their evidence must be accompanied by a written opinion to this effect by the advocate who will appear on the hearing of the application.³⁰⁴ In line with the English practice, it is not thought that there is a requirement for a written opinion in respect of interests under Article 47(1)(d).³⁰⁵ It is, however, for the Royal Court, not the guardian ad litem, curator or the trustees, to determine whether a proposed variation is beneficial to the minor or unborn beneficiaries concerned, and an objection from a litigation friend or the trustees on behalf of a minor or unborn beneficiary cannot preclude the jurisdiction. Where the interests of two or more minor beneficiaries, or two or more of the minor beneficiaries and unborn beneficiaries, are similar, only a single written opinion needs to be filed, notwithstanding the usual practice is that the trustees concerned on behalf

3-110

³⁰³ *Re Clitheroe's Settlement Trusts* [1959] 1 WLR 1159 at 1163.

³⁰⁴ Including any formal instructions to the advocate.

³⁰⁵ CPR Practice Direction 64A—Estates, Trusts and Charities, para 4.3; see too Chancery Guide (7th edn, amended September 2014) paras 25.12 and 25.13.

of unborn beneficiaries will normally be represented in court by a different advocate from the advocate or advocates representing the minors.

vi. Hearing

The substantive hearing is before the Inferior Number. The substantive hearing before the Court will normally be in private or at the very least the identities of the parties anonymised.³⁰⁶ As proceedings under Article 47 only arise for want of an inability of minors, unborns and unascertained beneficiaries to consent to an arrangement, the proceedings are not to be regarded as hostile or adversarial for the purposes of the usual rule that proceedings before the Royal Court should ordinarily be in public.

vii. The Act of Court

- 3-111** We consider it unlikely that the Court has jurisdiction under Article 47(1) to order that the proposed arrangement or transaction, once approved, *should* be carried into effect.³⁰⁷ The usual order is that the Court approves the arrangement.³⁰⁸ If an extension to the trustee's administrative or investment powers is approved, such approval will have the effect of amending the terms of the trust from the date of the order. The Court can rescind or vary an order under Article 47(1) or (3) or make any new or further orders.³⁰⁹

viii. Costs

- 3-112** The proposed order for costs will normally be agreed between the parties in advance of the hearing and the Court will normally give effect to the proposed order. Where it is proposed that costs should, either in whole or in part, be paid out of the trust fund in which minor, unborn or unascertained beneficiaries are interested that will be a factor to be taken into account in determining whether the proposed variation is beneficial to those beneficiaries. However, if it is proposed that costs should be paid out of the fund in which minor, unborn or unascertained beneficiaries are to be interested under the variation, the judge should either order the costs concerned to be taxed summarily, or order a detailed taxation of costs unless the costs are agreed or approved on some basis. The Court might be prepared to dispense with a detailed taxation, if it can be satisfied that the non-adult beneficiaries will be adequately protected without it, for example where there are adults (whether trustees or beneficiaries) who might be expected to scrutinise costs of other parties properly. The

³⁰⁶ As to private hearings see below. Private hearings can be justified only on the basis that they involve confidential information, or are necessary to protect the interests of a child, or perhaps on the basis that they involve matters arising in the administration of a trust. A contentious issue of fact or law would provide a reason for the giving of a public judgment with suitable anonymisation, as would the absence of any real prejudice to the protection of confidential information or the interests of a child.

³⁰⁷ *Re Hambleden's Will Trusts* [1960] 1 WLR 82, not following *Re Joseph's Will Trusts* [1959] 1 WLR 1019. See too *Re Holt's Settlement* (n 249).

³⁰⁸ See eg *Re Chapman's Settlement Trusts (No. 2)* and *Re Rouse's Will Trusts* [1959] 1 WLR 372; *Re Needler's Settlement Trusts*, The Times, 11 April 1959. For a form of order where the AG is a party, see *Re Longman's Settlement Trusts* [1962] 1 WLR 455; as to the Royal Court's jurisdiction to approve a cy-pres scheme for charitable and non-charitable purpose trusts see the Trusts (Jersey) Law 1984, Art 47A.

³⁰⁹ Trusts (Jersey) Law 1984, Art 47(4).

parties should be prepared to file schedules of costs in case the Court decides to order a summary taxation. Where an application under Article 47(1) is successfully contested, or nonetheless fails, the usual principles concerning the costs of proceedings will apply.³¹⁰ The unsuccessful representor may be ordered to pay the costs of those successfully resisting the application, though the Court has discretion to make a different order. Where the application to vary is successful despite opposition, it becomes necessary to consider where in the structure the opposition comes from. Opposition cannot come from a beneficiary of full age and capacity.³¹¹ If the opposition comes from the guardian of a minor or curator of an incapable beneficiary, then in principle the guardian or curator may be ordered to pay costs. However, there is a strong argument to be made that the Court should make a different order if the guardian or curator has been advised not to support the application on the basis of professional advice that the proposed variation is genuinely believed not to be beneficial to those for whom he is concerned. In those circumstances, even if the Court decides to override that advice and approve the variation, it would be harsh to deprive a guardian or curator of his costs, and harsher still to order him to pay the costs of the other parties. If the opposition comes from the trustees, then they would nonetheless usually be entitled to their costs on an indemnity basis from the trust fund. But even in assessing their costs on the full indemnity basis, the trustees might be deprived of costs unreasonably incurred, for example in the preparation of irrelevant or unnecessary evidence.³¹² Where the trustees have been professionally advised to oppose or not support a proposed variation, but the representor presses ahead, the trustees should consider whether they should seek to protect their position as to costs by obtaining the directions of the Court under Article 51.

X. Privacy Orders

While Jersey subscribes to the general principal that the proceedings of the Court should be conducted with members of the public and press permitted to attend,³¹³ it is a common feature of proceedings under Article 47(1) and Article 51 that hearings are usually ordered to be heard in private.³¹⁴ Part of the rationale for public proceedings is to protect litigants from inappropriate behaviour on the part of the Court, to maintain public confidence in the impartial administration of justice and make uninformed and inaccurate reporting or comment on proceedings less likely.³¹⁵ This is not to say that proceedings conducted in private are invariably riven with examples of the abuses given above or that such abuses would not occur if the proceedings were in public. The privacy of hearings for directions and applications for variation of trusts is often billed as a selling point by those wishing to

3-113

³¹⁰ See Ch 1.

³¹¹ If the proposed variation is dependent on his consent, it cannot succeed if his consent is withheld; and if it is not so dependent, then his opposition is irrelevant and he should not be a party.

³¹² See *Goulding v James* (n 260) at 252e–j.

³¹³ *JEP v Al Thani & Ors* [2002 JLR 542].

³¹⁴ The term ‘in private’ is to be preferred to ‘in camera’ or ‘in chambers’; see *JEP v Al Thani & Ors* (n 314) at [18]–[21].

³¹⁵ *JEP v Al Thani & Ors* (n 314) at [12], approving *R v Legal Aid Board, ex parte Kaim Todner (a firm)* [1999] QB 966.

promote the island's fiduciary services industry. Privacy can be attractive both for trustees and those beneficiaries who perhaps for cultural or other reasons do not wish to be seen to be washing their linen in public. As has already been stated, an application under Article 47(3) to extend the trustee's powers is a different jurisdictional animal from an application to vary the beneficial interests under a trust under Article 47(1). In our view, while there may be commercial sensitivity in a proposed transaction for which the trustee lacks sufficient powers, this is the only conceivable justification for an application under Article 47(3) to be heard in private. The Court may take other measures, short of ordering the proceedings to be in private, in respect of litigants' privacy, often by anonymising judgments.

A. Principles of Privacy

- 3-114** Sitting in private means the Court will exclude all persons from court who are not a party or the legal representatives of a party. Although proceedings under both Article 47 and 51 are commenced by Representation rather than by way of Order of Justice, the form of originating process has no bearing on whether the Court will hear the action in private. The determinative factor is the substance of the proceedings and not their form. The practice has developed that hearings falling within categories (a), (b) and (c), that is hearings of an administrative or supervisory character, identified in *S Settlement*,³¹⁶ should be heard in private on the basis that having such applications in public would tend to undermine the relationship of confidence that lies at the heart of the relationship between the trustee and its beneficiaries. It follows that proceedings against the trustee for breach of trust should not be heard in private but in open court.
- 3-115** In Article 47 and Article 51 proceedings, an order that the proceedings be heard in private is usually sought as an item of relief in the prayer to the Representation presented to the Court on the first Friday Samedi Division hearing. The Court should not direct the proceedings to be in private until all the parties have been convened and have had opportunity to make submissions on the issue of privacy. The burden to obtain a privacy order lies with the party seeking an order for proceedings to be in private. The threshold that must be satisfied is that proceeding in private is the only way in which justice can be achieved. The convenience of the party or parties, potential embarrassment and a party or parties' preference are insufficient justifications to order the proceedings be in private. *Al Thani* was a case where there was argument between the parties as to whether proceedings should be in private. Where it may be convenient for all parties to the litigation that the proceedings are conducted in private, an order should not be made on the basis that there is no *inter partes* opposition to privacy. The burden is not discharged by all parties agreeing that the proceedings should be in private. The Court should itself be resistant to it, starting from the position that hearings *prima facie* should be heard in public and the Court should be addressed at length on the relevant principles to be applied before making an order. The parties should ensure that the basis for a privacy order and its scope are clearly recorded as the rationale may be prayed in aid later when a party may seek to lift the order in respect of certain documents and materials. Without being able to refer to a clear basis on which a privacy order was made,

³¹⁶ 2001 JLR N [37].

the Court may be reluctant to vary or lift the order and a party seeking variance will be at a disadvantage in only being able to make very generalised submissions.

B. Factors to be Considered in Applications for Privacy Orders

Whether to make a privacy order is not a question of the Court's discretion as to what is expedient or reasonable; the jurisdiction must be exercised on a principled basis.³¹⁷ The Court must conduct a balancing exercise, weighing the principle of open justice against the competing considerations of (1) an individual's right to respect for confidentiality of their private business and affairs; and (2) the benefit to trustees concerned with the administration of their trusts to seek the Court's guidance in a relatively informal and flexible manner. Clearly within (2) is a desire to ensure Jersey's fiduciary services industry obtains the assistance it requires so as to ensure Jersey remains an attractive jurisdiction in which to establish a trust as against rival offshore jurisdictions. That factor was clearly in play in the Court's assertion in *Al Thani* that the Jersey Court has accorded a greater importance to the need to respect the confidentiality of private trusts than has been the case elsewhere.³¹⁸

3-116

The chief object of the Court must be to secure that justice is done.³¹⁹ That is a serious qualification to the well-known aphorism that justice should not only be done but should manifestly and undoubtedly be seen to be done.³²⁰ It follows that where privacy is necessary for justice to be done or that at least without privacy it would be doubtful that justice can be achieved, the Court has jurisdiction to order the proceeding be conducted in private. This test is a strict one: the convenience of the parties, the embarrassment of publicity or simply that no party objects to an order for privacy, are not factors that will weigh in favour of the Court granting a privacy order.³²¹ Hearings in private are said to contribute to the administration of justice by allowing issues to be discussed frankly and informally in a way the parties may not wish to do were the proceedings in open court.³²²

3-117

In an application for directions the trustee is obliged to give full and frank disclosure to the Court in order for it to determine the question before it. Such disclosure is likely to include material that is of commercial or legal sensitivity. It must be able to summarise the arguments for and against the proposed course of action, including any weaknesses or possible risks in relation to what is proposed. That duty of disclosure is not lessened in cases in which the trustee does not surrender its discretion to the Court. It follows that whether or not the trustee surrenders its discretion, had it not applied to Court for directions that material would have remained confidential. The trust should not have material that would otherwise remain confidential made public simply because the Court, rather than the trustee, is acting *qua* trustee or because the Court is assisting the trustee with a decision the trustee has to make.³²³ The justification for private hearings is not simply on the basis of

3-118

³¹⁷ *JEP v Al Thani & Ors* 2002 (n 314).

³¹⁸ *ibid*, at [28].

³¹⁹ *Scott v Scott* [1931] AC at 437–38, per Lord Haldane.

³²⁰ *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256.

³²¹ *JEP v Al Thani & Ors* (n 314).

³²² *ibid*, at [19] citing *Hodgson v Imperial Tobacco Ltd* [1998] 1 WLR 1056 at 1069, per Lord Woolf.

³²³ *ibid*, at [25]; *In the Matter of M and Other Trusts* (n 117).

the trustee's obligation in order to obtain the protection of a court order. The Court considers that there is a strong policy imperative that trustees should feel able to come before the Court confident in the knowledge that they may speak frankly to the Court and that what is said or produced to the Court and to the other parties to the private proceedings will not be released to third parties or used for purposes other than the private proceedings.³²⁴

- 3-119** The Court must have regard to the purpose of its jurisdiction under Article 51 or 47. The broad purpose of those provisions is to assist trustees to resolve the difficulties of their office by seeking judicial guidance in an orderly but relatively informal and flexible manner. Where the Court is sitting and exercising an administrative or quasi-parental jurisdiction to protect the interests of all the beneficiaries of a trust, the Court should generally sit in private.³²⁵ Hearing proceedings in private engages Article 6(1) of the European Convention of Human Rights.³²⁶ Although it was not the subject of a decision outside Jersey, Jersey's approach was held compatible with the Convention on the basis that the protection of the private lives of the parties was sufficient justification, absent any compelling reason to the contrary, for resolving to sit in private.
- 3-120** Proceedings that are controversial or hotly contested applications which are or have the character of adversarial proceedings should, *prima facie*, be conducted in open court.³²⁷ However it is a mistake to think that all proceedings commenced under Article 51 or 47 are harmonious. Some applications for directions may be fiercely contested and have all the features of hostile litigation that, should in principle, be heard in open court yet remain in private.³²⁸

C. Consequences of Privacy

- 3-121** It is a contempt of court for party to a hearing held in private to disclose any material received by them in the course of the proceedings or to reveal the nature or contents of a private hearing without the permission of the Court.³²⁹ A party who already has material in their possession, independent of the hearing, is free to use such material provided in doing so it does not reveal that those documents were used in a private hearing or the contents of that hearing.³³⁰
- 3-122** It remains unclear whether a party to private proceedings is permitted to use material 'in their mind' acquired by them from participating in the private hearing without the Court's permission. In our view, having regard to the purpose of a privacy order, provided the material in a person's mind does not reveal its source or the nature of the private hearing then no permission is required. However, material whose provenance cannot be disclosed is likely to be of limited, if any, practical use. Similarly, a party who pleads facts in English proceedings that are substantiated by documents that cannot be disclosed by reason of a

³²⁴ *In the Matter of M and Other Trusts* (n 117).

³²⁵ *JEP v Al Thani* (n 314) at [28].

³²⁶ Incorporated into Jersey's domestic law by the Human Rights (Jersey) Law 2000.

³²⁷ *JEP v Al Thani & Ors* (n 314).

³²⁸ *Trilogy Management Ltd v YT Charitable Foundation (Intl) Ltd* (n 167).

³²⁹ *Westbond International Bank v Cantrust (CI) Limited* (n 126); *In the Matter of M and Other Trusts* (n 117).

³³⁰ *In the Matter of M and Other Trusts* (n 117).

privacy order leaves itself vulnerable in being unable to fulfil their obligations under the CPR unless and until the Royal Court grants leave to discharge or vary the privacy order in respect of the material.³³¹

All the other parties to the proceedings must consent to any variation of a privacy order in order for any party to use documents subject to such an order outside the private proceedings. Where consent cannot be achieved an application to court for leave to use the documents is required. In the context of directions application (unless the party is already in possession of the material by some means other than having obtained them in the private proceedings), it will be a contempt of court for any party to use documents subject to a privacy order outside the proceedings without the leave of the court. This is so even where the party seeking to use the documents is subject to, and wishes to use the documents to satisfy, an order for disclosure to which they are subject in another jurisdiction.³³²

3-123

D. Privacy and the Implied Undertaking

There is likely to be a considerable degree of overlap between materials that are subject to a privacy order and materials that are subject to the implied undertaking.³³³ It is a contempt of court for a party who has received material from another party under compulsion to use or refer to that material in another set of proceedings without the Court's permission.³³⁴

3-124

i. Material Protected by the Implied Undertaking

The categories of documents that are usually subject to the implied undertaking are material produced under the compulsion of a court order such as an order for discovery, disclosure pursuant to an injunction or ordered for production under a *subpoena duces tecum*, or under the *Norwich Pharmacal/Bankers Trust* jurisdiction³³⁵ or an analogous situation, and written evidence provided under an order for the filing of affidavits (including accompanying exhibits). It follows that material will not be subject to the implied undertaking (but when the Court is sitting in private, is still likely to be the subject of a privacy order) where it has not been produced under compulsion. In the context of an Article 51 application, the trustee's duty is not limited to documents upon which it intended to rely (the usual order for discovery) but also to produce material of which the trustee considers that the Court should be informed under its duty of full and frank disclosure.³³⁶ Material produced in furtherance of the trustee's duty of full and frank disclosure is to be treated as akin to

3-125

³³¹ *Trilogy Management Limited v YT & Ors* [2014] JRC 182. Particular care should be made when referring to documents in a pleading or affidavit. Under RCR 2004, r 6/17 the Royal Court may order any party to any proceedings in whose pleadings or affidavits reference is made to any document to produce that document for the inspection of any other party and to permit the other party to take copies; see also CPR 31.14: 'A party may inspect a document mentioned in—(a) a statement of case; (b) a witness statement; (c) a witness summary; or (d) an affidavit'.

³³² *In the Matter of M and Other Trusts* (n 117).

³³³ *Mayo Associates SA v Anagram (Bermuda) Limited* [1998] JLR 4c]; *Re Esteem Settlement* [2002] JLR 213].

³³⁴ *Re Esteem Settlement* (n 334) at [7]; and *Apricus Investments Limited v CIS Emerging Growth Limited* [2004] JRC 038 at [7]–[8].

³³⁵ See Ch 5.

³³⁶ *Marley v Mutual Security Merchant Bank & Trust Co Ltd* (n 50); *Re Representation of Lincoln Trust Co (Jersey) Limited* (n 78); *Re the A Employee Share Trust* (n 78).

discovery under compulsion of a court order.³³⁷ It is necessary to identify the specific documents which are the subject matter of the application and it is not appropriate, other than in the simplest cases, to refer to documents as a class or category and further the purpose to which the documents are to be put must be identified.³³⁸ Where the use of documents subject to the undertaking are sought in order to assist in the recovery process following trial and determination of the sums due, the Court may take a more flexible approach to the requirement of particularising specific documents.³³⁹ Whether the Court is prepared to release material subject to the implied undertaking requires the Court to hold the balance between two competing interests. First, there is an important public interest in protecting privacy and confidential information so as not to deter litigants from making full and frank discovery in civil proceedings. Secondly, there are the interests of justice, particularly in complex international cases, including but not limited to those involving fraud, in enabling those defrauded to pursue those who have defrauded them in various jurisdictions if necessary.³⁴⁰ Ultimately, in deciding whether to order documents to be released from the implied undertaking the Court will apply a broad ‘interests of justice’ test. The Australian case of *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd*,³⁴¹ cited with approval before the Jersey Royal Court in *Claes Enhörning v Nordic Link Limited and Ors*,³⁴² considered the following factors will be relevant where the Court is weighing the balance of releasing documents from the undertaking (although not all factors will be of relevance in every case and they are listed in no particular order of importance):

1. the nature of the document for which leave is sought;
2. the circumstances in which it came into existence;
3. the attitude of the author of the document and any prejudice the author may sustain;
4. whether the document pre-existed litigation or was created for that purpose and therefore expected to enter the public domain;
5. the nature of the information in the documents (in particular whether it contains personal data or commercially sensitive information);
6. the circumstances in which the document came into the hands of the applicant for leave;
7. the likely contribution of the document to achieving justice in the proceedings for which leave is sought; and
8. whether there is a commonality of facts between the parties.

3-126 The requirement for leave at all arises from two competing public policy imperatives. The undertaking ensures the confidentiality of the party’s private documents, and thereby encourages the full and proper disclosure of documents that the administration of justice requires.³⁴³ The public interest in privacy and confidence demands that the principle of compulsion is not abused and should not be pressed further than the course of justice

³³⁷ *Re Esteem Settlement* (n 334) at [7].

³³⁸ *Eagle Star Ins Co Ltd v Arab Bank plc*, 25 February 1991, unreported, per Hobhouse J.

³³⁹ *Re Esteem Settlement* (n 334) at [16]–[17].

³⁴⁰ *ibid*, at [11]; *Deepak Mokhandas Dalmal and others v Rhone Company Limited*, 27 April 1988, Jersey, unreported, per Commissioner Vibert, *Sybron Corporation v Barclays Bank plc* [1985] 1 Ch 299.

³⁴¹ [1992] 110 ALR 685.

³⁴² unreported, 24th January 1997.

³⁴³ *Sybron Corp v Barclays Bank Plc* (n 341) at 322.

requires. The courts should, therefore, not allow another party, or anyone else, to use the documents for an ulterior or purpose foreign to the justification for disclosure in the first action without good reason.³⁴⁴ Where the party who has provided material protected by the undertaking is able to demonstrate some specific harm in the release of the undertaking the Court will also consider that in the balance. Often the ‘harm’ will be expressed as a concern that where the other court makes an adverse finding on the basis of the documents to be released, the disclosing party is not given the opportunity of explaining the documents so as to vindicate itself. That said, it is hard to conceive that the Jersey Court would place much weight upon what in most cases is bound to be a peripheral finding of fact by a foreign court in relation to a Jersey trust. Where a finding of fact is not in fact peripheral (foreign matrimonial proceedings being the clear example) it is open to the party protected by the implied undertaking to give evidence to the foreign court to explain the documents if to do so is in the interests of either the trustee or the beneficiaries.³⁴⁵

As well as a power to control what documents are released from the undertaking the Court can also determine to what use documents may be put once released. It is highly unlikely the Court will give unlimited use of documents or give leave for the transfer of documents to a third party wholly outside the proceedings on the footing that the Court would then have lost control completely of what use is made of the documents.

3-127

E. Privacy and Privilege

It is a peculiar feature of the Court’s administrative jurisdiction under Article 51 that privileged material is often disclosed to the Court. The Court is restricted in its ability to be able to grant leave for the use of documents outside a private hearing that are privileged in the hands of other parties to the private proceedings. ‘Privilege’ in this context means legal professional privilege; that is material protected by legal advice privilege and litigation privilege. Given that the issue of privilege here arises in the context of proceedings between trustees and beneficiaries, the material may also be subject to common interest or joint interest privilege. Consideration will need to be given to the following matters in the following order: (1) whether the material is privileged (2) in whose hands is the material privileged; (3) whether the use of that material in proceedings brought under Article 47 or 51 has already waived privilege; and (4) if privilege survives in the material, whether the Court may give leave for a party to private proceedings to use such material outside the private proceedings.

3-128

i. Whether the Material is Privileged

Legal professional privileged material may be subject to legal advice privilege or litigation privilege. It is not the function of this text to explore in detail the nature of legal professional privilege.³⁴⁶ Legal advice privilege applies to confidential communications which

3-129

³⁴⁴ *Riddick v Thames Board Mills Ltd* [1977] 3 All ER 677 (CA) at 895–97; *United Capital Corporation v Bender & Koonmen* [2005 JLR 401]. Recognising the existence of common interest privilege in Jersey as per *Buttes Gas & Oil Co v Hammer (No 3)* [1981] QB 223, per Lord Denning.

³⁴⁵ *Re Esteem Settlement* (n 334) at 18.

³⁴⁶ *Benne Limited v VAR Hanson & Partners* [1997 JLR N10a].

pass between a client and his lawyer which have come into existence for the purpose of giving or receiving legal advice about what should prudently and sensibly be done in the relevant legal context. If in doubt as to whether the advice was given in a relevant legal context an objective two-stage test should be applied: (1) does the advice relate to rights, liabilities, obligations or remedies of the client; and (2) if it does, the advice will be covered by legal advice privilege provided it falls within the policy underlying the justification for legal advice privilege in Jersey law. Material provided in the course of an application for directions under Article 51 or an application to vary the terms of a trust under Article 47 may often include material that is covered by legal advice privilege such as legal advice on the interpretation of a provision of the trust instrument itself, or the mandatory dividend provision in the articles of association of an investment company wholly owned by the trust.³⁴⁷ Legal advice privilege is narrower in ambit than litigation privilege but can be claimed more commonly. Documents that are privileged under this head are privileged for all time unless privilege is expressly or impliedly waived or inadvertently lost.³⁴⁸ For litigation privilege to apply, the material in question must be confidential, be a communication between either the lawyer (acting in a professional capacity) or the client and a third party, or be a document created by or on behalf of the client or his lawyer, be made for the dominant purpose of litigation and litigation must be pending, reasonably contemplated or existing. The burden of proving material is legally professionally privileged is always with the person asserting the privilege. Legal advice privilege and litigation privilege are distinct types of legal professional privilege. Legal advice privilege can apply whether or not litigation is pending or contemplated whereas litigation privilege can only apply when litigation is pending or contemplated. Legal advice privilege only applies to communications between a lawyer and client whereas litigation privilege can apply to communications by a client or his lawyer and a third party.

a. Joint and Common Interest Privilege

- 3-130** Privilege in materials put before the Court in an application for directions or an application to vary a trust may also be shared between the parties to the proceedings. Such material may be the subject of joint interest privilege or common interest privilege or the related concept of common interest privilege.³⁴⁹ Persons with a joint retainer to a firm of solicitors or Jersey advocates cannot assert privilege against one another for documents generated in respect of the joint retainer but the waiver of privilege excludes communications after an actual conflict of interest has arisen.³⁵⁰ This is a joint privilege. Joint interest privilege may apply where a third party can establish a joint interest in the subject matter of a privileged communication between a lawyer and a client and that third party is not party to the client/lawyer relationship.³⁵¹ Joint privilege gives that third party a right of access to the communication against the client and gives that third party the right to claim privilege against the

³⁴⁷ *Trilogy Management Ltd v YT Charitable Foundation (Intl) Ltd* (n 170).

³⁴⁸ *Three Rivers District Council & Ors v The Bank of England* [2004] EWCA Civ 218.

³⁴⁹ As in *In The Matter of the M and Other Trusts* [2012] JRC127; *UCC v Bender & Koonmen* (n 345); *Buttes Gas & Oil Co v Hammer (No 3)* (n 345), per Lord Denning.

³⁵⁰ *TSB Bank v Rober Irving & Burns* [1999] Lloyd's Rep IR 528 and [2000] 2 All ER 826 (CA).

³⁵¹ *MD Mezzanine SA SICA v Servus Holdco SARL* [2012] EWHC 1270 (Comm).

rest of the world in respect of that communication. Joint interest privilege has been held to exist in the relationship between beneficiaries and trustees.³⁵²

in order for joint privilege to arise the joint interest must exist at the time that the communication comes into existence. If the parties subsequently fall out and sue one another, neither of them can claim privilege as against the other in respect of any documents that are caught by the joint privilege, as the original joint interest is not destroyed by a subsequent disagreement between the parties.³⁵³

*Ford v Financial Services Authority*³⁵⁴ is the first English authority (there are currently no Jersey authorities) to establish the specific criteria for making a finding of joint interest privilege in the absence of a joint retainer, where the parties had a joint interest in the subject matter of the relevant communication when it was made. An individual claiming joint privilege in these circumstances would need to adduce evidence that: (1) he communicated with the lawyer for the purpose of seeking advice in an individual capacity; (2) he made clear to the lawyer that he was seeking legal advice in an individual capacity, rather than only as a representative; (3) those with whom the joint privilege was claimed knew or ought to have appreciated the legal position; (4) the lawyer knew or ought to have appreciated that he was communicating with the individual in that individual capacity; and (5) the communication with the lawyer was confidential. That formulation is not without difficulty. The principal difficulty is likely to be that if joint privilege exists it cannot be waived without the consent of all the individuals who satisfy the above checklist. This is a somewhat startling proposition when the position may have to be determined years after the relevant advice is given and consent sought from people whose interests by that time may be totally different.

It is important to establish whether it is the privilege that is joint or whether it is the interest (sometimes also known as 'common interest').

3-131

3-132

There is a privilege which may be called a 'common interest' privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him—who have the self-same interest as he—and who have consulted lawyers on the self-same points as he—but these others have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsel's opinions. All collect information for the purpose of litigation. All make copies. All await the outcome with the same anxious anticipation—because it affects each as much as it does the others. Instances come readily to mind. Owners of adjoining houses complain of a nuisance which affects them both equally. Both take legal advice. Both exchange relevant documents. But only one is a plaintiff. An author writes a book and gets it published. It is said to contain a libel or to be an infringement of copyright. Both author and publisher take legal advice. Both exchange documents. But only one is made a defendant.

In all such cases I think the courts should—for the purposes of discovery—treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or

³⁵² *W Dennis & Sons v West Norfolk Farmers Mutual and Chemical Cooperative Company Limited* [1943] 1 Ch D 220; a similar principle may be discerned from *Kousouros v O'Halloran and another* [2014] EWHC 2294 (Ch) in that parties may have a joint interest as beneficiaries under a will in ensuring that it was properly administered.

³⁵³ B Thanki, *The Law of Privilege*, 2nd edn (Oxford, Oxford University Press, 2011) at para 6.13.

³⁵⁴ [2011] EWHC 2583 (Admin).

the other's legal adviser. Each can hold originals and each make copies. And so forth. All are the subject of the privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other the copies. All are privileged.³⁵⁵

- 3-133** While a joint privilege cannot be waived as against third parties unilaterally, it is thought the same difficulty does not arise where it is the interest, rather than the privilege that is joint.³⁵⁶ Joint or common interest privilege has not been well explored in the Jersey courts and the English law doctrine is currently unclear as to what sort of common interest will suffice for this type of privilege to apply. It is still uncertain as to whether common interest privilege will apply in any given situation. Consequently, it is best to be cautious when considering disclosing privileged documents to third parties. If in doubt, consider disclosure only on the basis of express contractual undertakings that privilege in the documents is not waived.
- 3-134** Common interest privilege arises where a person voluntarily discloses a privileged document to a third party who has a common interest in the subject matter of the privileged document or in litigation in connection with which the document was brought into existence.³⁵⁷ It will arise where parties share the same interest in litigation (or potential litigation), or in a commercial transaction to which the legal advice relates. Where common interest privilege applies, the document remains privileged in the hands of the recipient and the recipient can assert the disclosing party's privilege as against the world. *In The Matter of the M and Other Trusts* identifies the parties to an application under Article 51 as having a common interest privilege.
- 3-135** *Winterthur Swiss Insurance Company & Anor v AG (Manchester) Ltd & Ors*³⁵⁸ confirmed that common interest privilege can be used as both a 'sword' to obtain disclosure as well as a 'shield' to prevent disclosure. In other words, if party B has a sufficiently common interest in communications that are held by party A, then party B can obtain disclosure of those communications from party A even though as against third parties the communications would be privileged from production. In the context of the use of privileged materials in a private hearing common interest privilege as a shield is the focus. For the applicant for leave, the objective is to resist the suggestion of a common interest privilege in documents he seeks leave to use. If the privilege in the material survives disclosure into the private proceedings, the Court cannot grant leave to use the material where those who share the common interest privilege with the applicant, object to its use outside the private proceedings.
- 3-136** There is English Court of Appeal authority³⁵⁹ to the effect that a claim for common interest privilege cannot be maintained where there is a conflict of interest between the parties sharing the common interest. However, this ignores the possibility that while two parties may have diametrically opposed interests in one respect their interests may be aligned in another and the bar on common interest applying to parties in conflict may not

³⁵⁵ *Buttes Gas & Oil Co v Hammer (No 3)* (n 345), per Lord Denning, approved in *UCC v Bender and Ors* (n 345).

³⁵⁶ *Winterthur Swiss Insurance Company & Anor v AG (Manchester) Ltd & Ors* [2006] EWHC 839 (Comm), compared with *Guinness Peat v Fitzroy Robinson* [1987] 1 WLR 1027.

³⁵⁷ *UCC v Bender* (n 345).

³⁵⁸ [2006] EWHC 839 (Comm).

³⁵⁹ *Lee v South West Thames Regional Health Authority* [1985] 1 WLR 845.

be sacrosanct.³⁶⁰ The categories of relationship capable of giving rise to common interest privilege are not closed. It is significant that any parties who do or might use the same solicitors will fall within the doctrine³⁶¹ for the reason that applications under Article 47(1) to vary the terms of a trust permit, certainly as a matter of English law at least, the use of a single firm of solicitors to represent all parties.

ii. In whose Hands is the Material Privileged?

In *Three Rivers District Council and others v Governor and Co of the Bank of England*,³⁶² the Court of Appeal gave a very restrictive definition of 'client' and held it would only cover communications between the lawyer and a small group of the bank's employees actually charged with instructing the Bank's lawyers. This means where the client is a company, you cannot assume that all documents produced by employees and sent directly to lawyers will be privileged. Care must be taken to establish in whose hands material may be privileged. Privilege is a defence to disclosure. It follows that it is not the place of the party seeking leave to use material subject to a privacy order (or any other party) to identify or assert privilege in any document if the privilege in that document does not belong to that party. A party cannot assert a defence that does not belong to it. Privilege may be lost in a number of ways but can only be waived, expressly or impliedly, by the person who has the benefit of the privilege; the Court cannot waive privilege in a document.³⁶³

3-137

iii. Has the Privilege in Material already been Waived?

Privilege may be lost in several different ways, for example by placing privileged material before the Court, by the loss of confidentiality in the material or by express waiver³⁶⁴ by or on the authority of the owner of the privilege. Here we are concerned with whether the disclosure of material that might otherwise be privileged in a private hearing for directions or variation of the trust will amount to a waiver of privilege. Confidentiality is a prerequisite of privilege, all privileged documents are confidential, although not all confidential documents are privileged.³⁶⁵ It has been held that disclosure is not lost by disclosure to the Court as part of an Article 51 application.³⁶⁶ Nor is it lost by disclosure to persons sharing a common interest.³⁶⁷ Whether privilege has in fact been waived is a highly fact-specific exercise. It is unclear whether the nature of the Court's jurisdiction, the common interests of the parties (or a combination of both) is determinative of the question of whether privilege has been waived. It should not be assumed that just because a Representation under Article 51 proceeds on the footing that the Court is exercising an administrative jurisdiction in

3-138

³⁶⁰ Rix J declined to decide the point in *The Sagheera* [1997] 1 Lloyd's Rep 160, acknowledging the parameters of the doctrine where widening.

³⁶¹ *The Good Luck* [1992] 2 Lloyds Rep 540 at [542].

³⁶² [2003] EWCA Civ 474.

³⁶³ *Cunningham v Cunningham* [2010] JLR N [24]].

³⁶⁴ *B v Auckland District Law Society* [2003] UKPC 38.

³⁶⁵ C Hollander, *Documentary Evidence*, 11th edn (London, Sweet & Maxwell, 2012) paras 24-01 to 24-02.

³⁶⁶ In *The Matter of the M and Other Trusts* (n 350); *Macedonian Orthodox Community Church St Petka Inc v Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand* (n 117). Cf *UCC v Bender* (n 345), privileged document filed in public proceedings only loses its confidentiality if it comes into public domain, by being read aloud in court to form part of record or quoted verbatim in a judgment.

³⁶⁷ In *The Matter of the M and Other Trusts* (n 350).

assisting the trustee to make a decision or interpreting a provision, that the interests of all those convened to the application are aligned. In our view, the principle stated in *A, B and C v Rozel Trustees (Channel Islands) Limited*, that disclosure in applications under the Court's administrative jurisdiction will not waive privilege, is possibly too wide and close regard should be had to the common interest of the convened parties. Privilege is not lost on the basis that confidentiality has been destroyed but on a different basis: that no privilege can attach to communications between parties whose interests are opposed. In Article 51 proceedings, even though the convened parties may disagree as to the proposed course to be taken by the trustees, they all have a common interest in the resolution of that question. In an Article 47(1) application, the beneficial interests are sought to be varied, giving rise to an inherent potential conflict of interest between the beneficiaries whose interests are the subject of the variation. That conflict is the reason the jurisdiction is so tightly hedged with the requirements of 'benefit' and separate representation of the convened beneficiaries. As no privilege can attach to communications between parties whose interests are opposed, it is the authors' view that privilege will be lost where disclosure of material is made to a party or parties who do not share a common interest, notwithstanding that there is a privacy order in effect so as to make the proceedings confidential.

iv. Can the Court Give Leave to Use Privileged Material outside Private Proceedings?

- 3-139** The Court will not (and arguably cannot) give leave for the use of material subject to a privacy order that is privileged.³⁶⁸ To do so would cut across the principle that legal advice privilege is an absolute defence to disclosure.³⁶⁹

F. Seeking Leave to Use Material Subject to a Privacy Order

- 3-140** Owing to the common overlap between materials protected by the implied undertaking and a privacy order, what follows deals with applications for leave which effectively vary or revoke both, either in whole or in part.
- 3-141** A litigant subject to a privacy order may seek to vary or lift the order in whole or in part for a number of reasons. One reason may be that during the course of private proceedings, material may be disclosed or facts may be brought to light that suggests one of the parties to the litigation may have a claim against a party to the proceedings or a third party outside the proceedings.³⁷⁰ If that party then seeks to pursue a claim using the material disclosed in the course of a private hearing he will be in contempt of court, not only for breach of the privacy order but also for breach of the implied undertaking. A variation to the terms of a privacy order is sometimes also made in the context of matrimonial proceedings. Where the trustee seeks directions as to how it should respond to foreign ancillary relief proceedings, the trust's beneficiaries are very likely to be convened to that application. That directions hearing will ordinarily be in private. If the beneficiaries are joined to the ancillary relief

³⁶⁸ ibid; *Cunningham v Cunningham* (n 352).

³⁶⁹ Query whether a court that holds the trustee's surrendered discretion is capable of waiving privilege qua trustee. Where the trustee is entirely deadlocked on all matters, owing to deadlock of the board of directors who cannot be removed, the Court probably will have jurisdiction to waive privilege on the trustee's behalf.

³⁷⁰ eg *Trilogy Management v YT & Ors* (n 332).

proceedings they may be subject to foreign court orders to disclose material about the trust from the directions hearing to the English court in order to assist it with its determination as to whether or not to make an order varying the trust. There are two issues for a party seeking to vary a privacy order: the first is with regard to the implied undertaking,³⁷¹ the second with regard to the privacy order.

i. Procedure

It is open to the parties to agree to the use of materials that would otherwise be subject to the implied undertaking or the privacy order, out of court. Where agreement out of court cannot be achieved an application to court for an order granting leave to use the materials will be required. Any application to vary or rescind the whole or part of a privacy order so as to permit the use of material which is the subject of that order, outside those proceedings, should be made in the proceedings to which the order relates by way of summons. Where proceedings have already closed the application should be made by Representation.³⁷² The application is a question of law and will be determined by the judge sitting alone without Jurats. All of the parties to the private hearing must be convened to the summons in order for those parties to make submissions on the implied undertaking and the privacy order.

3-142

Close regard should be had to case management where the private material is required in order to properly plead a claim which is approaching the expiration of a limitation or prescription period. There can be a considerable delay between the time when the need for the private materials first becomes apparent and an order giving leave for their use. This is especially the case where there may be multiple parties to the private proceedings, each of whom must be convened, review the documents sought to be used, provide instructions, file responses to the summons and be heard at the hearing, that is to say nothing of the Court's diary.

3-143

The summons must be served with a supporting affidavit.³⁷³ The applicant should compile a schedule of documents sought to be used which should be appended to the summons. Close regard should be had to which category the document(s) fall(s) into: whether subject to the implied undertaking, the privacy order (both) or neither.³⁷⁴

3-144

The applicant's affidavit accompanying the summons should set out in detail the relationship between the documents sought and the reasons why they are required. The Court will be looking for an alignment between the probative value of the documents to the issues or likely issues in the litigation for which they are sought. The affidavit argument should set out the consequences for the applicant if leave is refused and any other relevant factors in the Court's decision (such as an impending limitation or other procedural deadline). Where a date for a first hearing cannot be coordinated by agreement between the parties and the Royal Court a date-fix appointment will be necessary.³⁷⁵

3-145

³⁷¹ See para 3-117 above.

³⁷² The Representation to determine the application for leave will itself be heard in private as to hold the proceedings in public would reveal the contents of the private hearing.

³⁷³ As to the service of a summons, see Ch 1.

³⁷⁴ An application for leave to use documents where no leave is required is waste of time and costs.

³⁷⁵ As to the date-fix procedure, see Ch 1.

ii. What Material Can the Court Release?

- 3-146** No permission is needed to use material that is in the possession of the party seeking leave, if their possession of such material arises independently of the private hearing, provided in doing so neither the party nor the material reveals (1) that the material was used in a private hearing or (2) the contents of that hearing.³⁷⁶ The Court will not grant leave for the use of material that is privileged unless it can be demonstrated that privilege has been waived.³⁷⁷ It is not the role of the applicant to identify documents that may be privileged in the hands of other parties to the private proceedings. It is the responsibility of the party whose privilege it is to assert it. Where a defence of privilege is raised, the status of a document will have to be determined before the Court may authorise its use by the applicant.³⁷⁸ Where no privilege is asserted or is asserted but found wanting, the Court can grant leave to use the material.³⁷⁹
- 3-147** The Court will not ordinarily grant leave for the use of material disclosed in Article 51 proceedings that discloses the trustee's reasoning or decision-making process³⁸⁰ (other of course than that which refers to legal advice which is privileged) unless the trustee has put itself in a position where it has submitted to the jurisdiction of a foreign court such that were leave refused the trustee may be in breach of a court order to provide material relating to their exercise of their discretion.³⁸¹
- 3-148** The Court can grant leave for the use of material that is subject to the implied undertaking. In a private hearing there is clearly a degree of overlap between material that is subject to the privacy order and material that is subject to the undertaking. However, the approach the Court will take to the two categories is distinct and the two categories are not entirely co-extensive—material such as transcripts of oral evidence in the private proceedings are not subject to the undertaking, neither is material disclosed voluntarily although such material would still be subject to privacy.
- 3-149** It is unclear whether the Court's leave is required for a party to use facts that it has in its mind (as opposed to material in a document) as a result of having seen or heard material in the course of private proceedings. This uncertainty is highly unsatisfactory given that if leave is required and not sought, a party who uses the material and their lawyers will be in contempt of court. In our view, in the absence of a Jersey decision to the contrary,³⁸² it does. A fact that cannot be substantiated but by reference to material subject to a privacy order is likely to be of little practical utility in any event. In practice, it is also likely to be extremely difficult to silo material in a person's mind from material protected by the privacy order, particularly if what is in someone's mind is the result of the processing of accumulated protected material over a period of time. Does the very fact of there having been proceedings in private require the Court's leave? The fact of the proceedings having taken place is not secret, the Representation will be deposited with the Greffe for tabling in the usual way and therefore reference to there having been a hearing does not in our view require leave,

³⁷⁶ *Westbond International Bank Ltd v Cantrust (C.I.) Ltd* (n 126) at [6].

³⁷⁷ *In The Matter of the M and Other Trusts* (n 350).

³⁷⁸ *Shirley v Channel Islands Knitwear Co Ltd* [1985–86 JLR 404].

³⁷⁹ Once used by the applicant in public proceedings elsewhere any privilege that may have existed in the document is likely to be lost on grounds of destruction of confidentiality.

³⁸⁰ See Ch 5.

³⁸¹ *In The Matter of the M and Other Trusts* (n 350).

³⁸² *Sybron Corporation v Barclays Bank Plc* (n 341) at 318.

provided that in mentioning the fact of the hearing nothing else is revealed as to who was convened to it or its contents.

- 3-150** In all cases where the Court is sitting in private, it should be addressed on and considered whether it is appropriate for a judgment to be given in open court announcing the order which is being made and giving some account of what has happened at the private hearing.³⁸³ In order to do this, it is usual that the Court orders the excise of the identities of the relevant parties from the public judgments in order to preserve the parties' anonymity.

iii. Factors for the Court in Lifting a Privacy Order

Where there is a significant degree of overlap between the two categories of document the Court has elided the test applicable to whether or not to release material from the implied undertaking with consideration of what harm will result from the release.³⁸⁴ The Court will weigh the evidential forensic value of the documents sought to be used, against the genuine risk of harm to the party whose document it is.³⁸⁵ As in cases where only the implied undertaking is in issue, it is incumbent upon the applicant seeking leave to use material, to particularise which documents it seeks leave for and to state their reason for seeking to use the material outside the private proceedings. Where the material is needed in order to prosecute or answer other claims, the applicant for leave must demonstrate what evidential value the private material has to the matters in issue in the proceedings. Where the material subject to a privacy order is sought to be used in proceedings, either before the Royal Court or before the court of another jurisdiction it is not the place of the Court giving leave to make a detailed examination of the merits of the proposed action. The Court need only be satisfied that the proposed action is to be or has been commenced for a bona fides purpose and is not an abuse of process or otherwise unsustainable.³⁸⁶ It is incumbent upon the respondents to the application for leave to identify which particular documents (if any) they object to the use of outside the private hearing and on what basis. A general and un-particularised assertion of harm resulting from the use of the documents is insufficient. 'Harm' usually requires evidence of harm of a financial, reputational or operational nature. Furthermore, the harm must be of such a nature and degree so as to outweigh the injustice cause to the party seeking leave, if leave is refused.

3-151

iv. Costs

A hearing to vary or lift a privacy order is not an application that requires the Court's involvement in any event; it is possible to truncate the procedure outlined above by the agreement of all parties out of court. Where the Court finds the objection of the other parties to the private proceedings baseless then the Court may order costs against that party and/or deprive that party of their costs from the trust fund. A trustee who assumes a neutral position will ordinarily be entitled to its costs of the proceedings.³⁸⁷

3-152

³⁸³ *JEP v Al Thani & Ors* (n 314).

³⁸⁴ *Trilogy Management v YT & Ors* (n 332) at [4].

³⁸⁵ *ibid.*

³⁸⁶ *Westbond International Bank Ltd v Cantrust (C.I.) Ltd* (n 126); and *Claes En Enhörning v Nordic Link Limited*, unreported (24 January 1997) (JRC). Where the proposed action is to be brought by the trustee and the trustee has Beddoe relief to bring the action, it is unthinkable that the Beddoe court would have sanctioned a proposed course which is not bona fides or otherwise an abuse of process or unsustainable.

³⁸⁷ See above.

4

Litigation Concerning the Existence of the Trust, the Rectification of its Terms and the Exercise of Powers

I. Introduction

As in English law, for a Jersey trust to be valid and enforced by the Court, there must be an intention to create a trust, together with certainty of both subject matter and objects.¹ Every non-charitable trust must be either for the benefit of identifiable individuals,² or for a non-charitable purpose which can be enforced by the Court.³

4-1

Even in those cases where an express trust is on its face valid, Jersey has well-developed jurisprudence on the doctrines which permit the Court to declare the trust to be invalid, or liable to have its terms rectified. The Court may declare that a trust is a sham and there is no trust at all. Such a challenge goes to the genuine intention to create a trust in the first place. The Court will also intervene to rectify or to set aside a trust (in its entirety or more often the exercise of particular powers) in order to grant relief from the settlor's (and sometimes the trustee's) mistake. Closely aligned to the jurisdiction to rescind a transaction for mistake is the jurisdiction, now placed on a statutory footing in Jersey, to challenge the exercise of a power where it is claimed that, but for a certain mistake, the donee of the power would not have exercised it as he did.⁴ As will be apparent, the focus of this chapter is to examine the basis upon which the intent of the settlor or of a person exercising trust powers can be vitiated so as to treat the stated or assumed intent as having never been effective to begin with.

4-2

¹ At the time of going to press the States of Jersey are currently consulting on a seventh amendment to the Trusts (Jersey) Law 1984 to permit a trust to be created without certainty of objects from the outset provided it is possible for a beneficiary to be alive, ascertainable or in existence at some during the trust period (which in Jersey may be indefinite).

² Trusts (Jersey) Law, Art 10; *In Re Exeter Settlement* [2010] JLR 169].

³ Jersey has made express statutory provision in Art 12 of the Trusts (Jersey) Law 1984 (as amended) for the possibility of non-charitable purpose trusts which require the appointment of an 'enforcer' who, in the absence of beneficiaries, has locus to apply to court for the enforcement of the trust under Art 51. See *Morice v Bishop of Durham* (1804) 9 Ves 399, at 404–05, per Sir William Grant: 'There must be somebody, in whose favour the Court can decree performance'. Prior to the enactment of the Trusts (Amendment No 3) Jersey Law 1996, Jersey's trust law did not even admit of the possibility of so-called 'trusts of imperfect obligation' for the erection and maintenance of tombs and monuments, for the saying of masses and for maintenance of animals.

⁴ Formally known, as the rule in *Hastings-Bass* [1975] Ch 25.

II. Sham Trusts

- 4-3** The classic definition of a sham, as approved by the Royal Court in what is currently the leading case on the subject,⁵ comes from the dicta of Diplock LJ in *Snook v London and West Riding Investment Ltd*:⁶

acts done or documents executed by the parties to the ‘sham’ which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual rights and obligations (if any) which the parties intend to create...for acts or documents to be a sham, with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.

- 4-4** In *Mackinnon*, the Jersey Court of Appeal identified the following features in the doctrine of sham: both the settlor and trustee must have intended that the true position would not be as set out in the trust instrument, but that either the trust is invalid and of no effect, or that the assets of the trust were intended to be held for the settlor absolutely, so that the assets were simply held to the settlor’s order; and both the trustee and the settlor intended to give a false impression to a third party or parties (including the other beneficiaries and the courts) that the assets had been settled into the trusts and were held on the terms of the trust instrument.⁷ Giving a false impression is not to be equated with deceit. What is required in a case based on sham is a common intention to give a false impression, which if not strictly a deceit comes very close to dishonesty on the part of the parties to the sham arrangement.⁸ The intention that is relevant is the parties’ subjective intention.⁹
- 4-5** A sham can take a number of different forms. Most commonly, sham is used to describe a situation where there is a document or other evidence that suggests property was settled into trust, that the property is held on certain terms set out in the trust documents but in reality the shared intention of both the settlor and the original trustee is for the trustee to hold the property on trust for the settlor or to his order.¹⁰ However, conceptually a sham can also properly describe a situation where the terms of the trust that are intended by the settlor and trustee are not reflected in the trust documents but trust assets are not held for the benefit of the settlor or to his order; eg, a trust that is expressed on its face to be discretionary for the benefit of the settlor’s children but is intended actually to be administered for them on the basis that each has a fixed beneficial interest. Properly understood, there is no such thing as a ‘sham trust’. In reality, each of the above permutations of a sham trust are just different facets of the same principle; a sham trust is merely a document (or series of

⁵ *Mackinnon v Regent Trust Company Ltd* [2005] JLR 198].

⁶ (1967) 2 QB 786 at 802.

⁷ *MacKinnon v Regent Trust Co Ltd* (n 5) at 21. These 2 elements must be pleaded in a claim alleging sham or the claim is liable to be struck out; at 35.

⁸ *ibid*, at 20.

⁹ *Hitch v Stone* [2001] EWCA Civ 63 at 66, per Arden LJ.

¹⁰ *Abdel Rahman v Chase Bank (CI) Trust Co Ltd* [1991] JLR 103]; *Mackinnon v Regent Trust Company Ltd* (n 5); *C.I. Law Trustees Ltd v Minwalla* [2005] JLR 359].

documents) that purport to create a trust, which does not in fact exist because the parties thereto lack the necessary intention to create a trust.

To allege that a trust is sham is a serious accusation against the probity of both the settlor and the original trustee and, if such a challenge succeeds, can have devastating consequences for those with a beneficial interest in the trust fund. Challenges to trusts on the ground of sham are not uncommon. They often arise in claims where there is perceived to be merit in ‘cracking’ a trust in order to make assets available for the benefit of a settlor’s former spouse and/or creditors.¹¹ The assets sought to be released may also be tainted as the proceeds of crime which is sought to be subject to foreign or domestic orders for seizure and confiscation.¹²

Notwithstanding the leaps and bounds which have occurred in the last 20 years in terms of the regulation of Jersey’s trust industry, and while fiercely disavowed by those charged with safeguarding the island’s reputation as an international financial centre, it is not unfair to say that Jersey, along with many other reputable offshore jurisdictions, still battles with the stubborn perception of those, often outside the island and with little direct experience of how its trust industry operates, that a Jersey trust always was and continues to be little more than a glorified bank account for the settlor. Such an impression is sustained by the perception of Jersey as a ‘tax haven’ where rich, powerful (and sometimes nefarious) people were and are able to shelter their money from prying eyes using complex corporate and trust structures administered by obliging and submissive professional trustees. Such an impression is also not easily shaken off in circumstances where the settlor reserves to himself (as is possible) all the powers listed in Article 9A of the *Trusts (Jersey) Law 1984*.¹³ Settlors would not infrequently make use of fully flexible, discretionary, so-called ‘Red-Cross trusts’¹⁴ with boilerplate trust instruments, without named human beneficiaries or naming only the settlor and his spouse and possibly issue as beneficiaries. Such trusts would frequently be ‘governed’ by confidential letters of wishes signed by either the real economic settlor or a so-called ‘settlor of convenience’ or someone else nominated by either the real economic settlor or settlor of convenience to give directions to the trustees as to how the assets were to be managed.¹⁵ Before the enactment of specific legislation making it clear that the use of ‘reserved powers’ by settlors would not have the effect of invalidating a trust,¹⁶ settlors may also have had a had a very hands-on approach to the management, use of and benefit from trust assets which may have been unsupported by or in contradiction with the trust’s constitutive documents.

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¹¹ *In re Fountain Trust* [2005 JLR 359]; *Dick v Pantrust International SA & Ors* [2015] JRC 2008.

¹² See Ch 14, although it is not necessary for the assets to vest in the settlor for the assets to be subject to an order for confiscation or to be subject to an external civil asset recovery order under the *Civil Asset Recovery (International Co-operation) (Jersey) Law 2007*.

¹³ At the time of writing the States of Jersey is consulting on a seventh amendment to the *Trusts (Jersey) Law 1984* to provide statutory clarification that as well as reserving all of the Art 9A powers, the settlor may reserve to themselves the entire beneficial interest in the trust assets and for the trust still be valid under Jersey law.

¹⁴ ie naming charities without any particular connection to the settlor simply in order to satisfy the requirement for certainty of objects.

¹⁵ The jurisprudence on the status of letters of wishes has developed considerably since the *Trusts (Jersey) Law 1984* was first enacted; see *West v Lazard Bros & Co (Jersey) Ltd* [1987–88 JLR N22]; *In re Rabaiotti 1989 Settlement* [2000 JLR 173].

¹⁶ *Trusts (Jersey) Law 1984*, Art 9A.

A. The Shamming Intent

- 4-8** In addition to the intention not to give effect to the trusts, the Jersey authorities speak of a requirement to intend to give a false impression.¹⁷ The shamming intent is a subjective intent and must be shared by both the settlor and the trustee.¹⁸ It is difficult to establish the necessary intent, because a finding of sham carries with it a finding of dishonesty, because innocent third parties may often rely on the apparent genuineness of the trust provisions, and because the Court places great weight on the existence and provisions of formal signed documents.¹⁹ Reckless indifference, ie the acceptance of the office of trustee without the trustee knowing or caring what it had signed up to, will be taken to amount to the necessary intention for these purposes.²⁰ There is New Zealand authority²¹ that ignorance on the part of the trustee is tantamount to intention. There is no Jersey authority on this point but in our view ignorance would not be tantamount to intention unless it involved a wilful shutting of the eyes to what would otherwise be obvious.
- 4-9** An allegation that a Jersey trust structure is a sham (other than those challenges made in courts outside Jersey, which are far more common)²² is largely now confined to so-called 'legacy structures', ie those established long before the modern regulatory regime governing trust company business administered by the Jersey Financial Services Commission (JFSC). Since 1998, the JFSC's heavy emphasis on the requirement that a professional trustee must conduct its business with integrity²³ makes sham, with its inherent requirement that the trustee be party to a dishonest arrangement, an inherently unlikely conclusion for the Court to reach without significant and cogent evidence in support.²⁴ Subsequent actions of the parties to the trust in disregarding the trusts declared are admissible to establish that they intended at the time when the trusts were declared never to carry them out.²⁵ If the shamming intent is not established to exist at the outset of the trust then the trustee's conduct in subsequently disregarding the trusts is simply to be regarded as a breach of trust.²⁶ This means that as a matter of Jersey law, a trust cannot, in its entirety, become a sham by prescription or by being administered in a way inconsistent with its apparent terms with the effluxion of time. The evidence of conduct subsequent to the establishment of the trust that demonstrates a disregard from the terms of the trust serves to displace a rebuttable

¹⁷ *MacKinnon v Regent Trust Co Ltd* (n 5).

¹⁸ *ibid*; *In re Esteem Settlement* [2003] JLR 188].

¹⁹ *Hill v Spread Trustee Co Ltd* [2005] EWHC 336 (Ch), esp where the trust is settled with the benefit of professional advice

²⁰ *In re Esteem Settlement* (n 18), affirmed in *A v A* [2007] EWHC 99 (Fam).

²¹ *In Re Reynolds* [2008] NZCA 122 at [38].

²² *Prest v Petrodel Resources Ltd & Ors* [2013] UKSC 34.

²³ Codes of Practice for Trust Company Business.

²⁴ *Dick v Pantrust International SA & Ors* [2015] JCR 208 at 50–52: '[trusts] are valid on their face and we must at this stage [a jurisdiction challenge] proceed on the basis that they are valid and to treat them as valid, unless and until a court of competent jurisdiction determines otherwise'.

²⁵ *Abdel Rahman v Chase Bank (C.I.) Trust Co Ltd* (n 10); *Hitch v Stone* (n 9) at 65, approved in *MacKinnon v Regent Trust Co Ltd* (n 5).

²⁶ *Shalson v Russo* [2003] EWHC 1637 at 190, per Rimer, applied in *MacKinnon v Regent Trust Company Limited and Ors* [2004] JLR 477].

presumption that the trust, when settled, was intended by the settlor and trustee to be valid. The Royal Court in the seminal *Esteem* litigation suggested (obiter and without the benefit of argument) that individual settlements into a trust may be held to be a sham even if the trust under which those settlements are made is otherwise valid if the requisite intention can be proven in respect of those individual settlements.²⁷

If the trustee acts in disregard of the terms of the trust by slavishly complying with the settlor's wishes about the administration of the trust, that may point towards a shamming intent. However, subject to the terms of the trust, the trustee is entitled to consider the settlor's wishes or guidance in the exercise of their dispositive and administrative powers and provided they exercise their own discretions under the trusts in doing so then the settlor's influence can usually be disregarded as evidence pointing to a shamming intent.²⁸ An 'alter ego' trust, where a person establishes a trust over the trustee of which he has control, is not, by virtue of this fact, a sham nor does the person with control of the trustee thereby have or acquire a beneficial interest under the trust.²⁹ The mere retention of wide powers and a beneficial interests by the settlor does not of itself make the trust a sham, so long as the trustee genuinely has control of the assets and exercises his own independent discretions in respect of those matters where the terms of the trust require him to do so.³⁰ On its proper construction, a trust in which a settlor retains wide beneficial interests and powers might be held to be a bare trust,³¹ but such an arrangement is entirely different from alleging that the settlor was party to a sham. Despite potential difficulties with the perception of doing so in courts outside of Jersey alluded to earlier, there is nothing inherently sinister in a Jersey trust having as its only beneficiary the International Committee of the Red Cross, leaving other beneficiaries to be appointed from a very wide (but sufficiently conceptually certain) class of potential objects.³²

If a trustee of a trust, which is not itself alleged to be a sham, has a power to transfer trust assets to another trust, and purport to exercise the power in a way which would be authorised by the power if the transferee trust were genuine, the Court will not lightly infer that the transfer and transferee trust were shams and that the true intention of the trustees making the transfer was that the transferred assets should become held, in breach of trust, for a third party; but if the inference is made then the transferred assets will remain held on the trusts of the transferor trust and not in trust for the third party who was intended to benefit.³³

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²⁷ *In re Esteem Settlement* (n 18) at [60].

²⁸ See the issue of the settlor's practical control over the trusts, below.

²⁹ *Public Trustee v Smith* [2008] NSWSC 397, (2007–08) 10 ITEL 1018 at [119]–[120]. See too *Re Reynolds* (n 22); (2007–08) 10 ITEL 1064 at [70]–[72] (although alter ego arguments may provide evidence of a sham).

³⁰ See n 13 above. While such a trust may be valid in Jersey, such a trust is likely to raise eyebrows in courts outside Jersey and a settlor establishing such a trust should not be given the impression that the trust is immune from challenge.

³¹ Eg, were the settlor to reserve to himself all of the powers in the Trusts (Jersey) Law 1984, Art 9A(2) the settlor would achieve something very close to absolute beneficial ownership of the trust property.

³² *R v Allen* [1999] STC 846 at 872g, CA; *Re Exeter Settlement* [2010] JRC 012; Trusts (Jersey) Law 1984, Art 10.

³³ *Wily (as Trustee of the Bankrupt Estate of Fuller) v Fuller* [2000] FCA 1512.

B. The Position of the Original Trustee

- 4-12** In Jersey law, as in English law, for a trust to be a sham, the original trustee must share the settlor's shamming intent at the time of the constitution of the trust.³⁴ It follows that if the original trustee does not share the settlor's intent then the settlor's private intention that the instrument should be a sham will have no effect on the status of the trust. If the original trustees receive assets intending to hold them subject to the terms of the trust instrument, any later arrangement with the settlor to treat the trust as a sham will constitute a breach of trust and will not convert an otherwise valid trust into a sham trust.³⁵ If the original trustee accepts the settlement of additional assets into trust which they have agreed to hold for the settlor's benefit (or on different trusts to those declared in the trust instrument), there may be a sham in relation to those assets alone.³⁶

C. The Appointment of Subsequent or New Trustees

- 4-13** If, as will often happen, the original trustee retires and new trustee or trustees are appointed in its place, two questions arise: first, has the original trustee been a party to a sham and, secondly, whether the new trustees are also parties to the same sham. If the original trustee is not a party to a sham but the settlor and the incoming new trustee have agreed to hold the assets for the settlor's benefit (or on different trusts from those declared in the trust instrument) then the trusts are valid and the appointment of the new shamming trustee will not have the effect of making the otherwise valid trust a sham, for the same reasons that it is not possible for a trust that is established without a shamming intent to subsequently become a sham trust because the settlor and trustee agree to that. However, if the original trustees were parties to a sham then the appointment of new trustees who do not share the shamming intent may convert the sham into a valid trust—the common intention will have been broken.³⁷ If both the original and new trustee shares the same shamming intent then the sham will continue. Where trusts are declared by trustees by way of a re-settlement, under a power conferred on them by an existing settlement, the trustee's intention alone is sufficient to establish a sham.³⁸

D. The Effect of Finding a Sham

- 4-14** A trust held to be a sham is void *ab initio* and the trust property is to be treated, by third parties such as creditors, revenue authorities, trustees in bankruptcy or ex-spouses and

³⁴ *Snook v London and West Ridings Investments Ltd* [1967] 2 QB 786 at 802D–F, CA; *MacKinnon v Regent Trust Co Ltd* (n 26), affirming *Shalson v Russo* (n 26).

³⁵ *MacKinnon v Regent Trust Co Ltd* (n 5); *In re Esteem Settlement* (n 18). See also *Shalson v Russo* (n 27) at [190], where it was said that ‘unless that intention (ie the intention to treat the assets as belonging to the settlor) is from the outset shared by the trustee (or later becomes shared), I fail to see how the settlement can be regarded as a sham’. The words in brackets (‘or later becomes shared’) were questioned in *Hill v Spread Trustee Co Ltd* (n 20); and must be treated as having been said *per incuriam*. The better analysis is that a trustee who agrees with a settlor to depart from the terms of the trust is to be regarded as acting in breach of trust and as an accessory respectively.

³⁶ *In re Esteem Settlement* (n 18).

³⁷ *A v A* (n 20).

³⁸ *Shalson v Russo* (n 26).

legatees as still belonging to the settlor or his estate. There is authority (although none of it from Jersey)³⁹ that where the acts and documents reflect a transaction divisible into separate parts, a transaction is a sham as to only part of the transaction,⁴⁰ so as to sever the sham provisions and the other remaining provisions which are valid despite the finding of a shamming intent.

E. Reliance on the Sham by the Settlor and Trustee

In a series of recent English cases, and as a matter of principle, the parties to a declaration of trust cannot rely on their own shamming intent as against innocent third parties. If the declaration of trust is a sham or pretence, then ‘as against an innocent third party it cannot lie in the mouths of the pretenders to say to the disadvantage of that innocent third party that the transaction was a sham, pretence and thus of no effect’.⁴¹ For a settlor or trustee to rely on their own shamming intent as against innocent third parties would mean them relying on their own wrongful intent to give a false impression to the outside world, of which they would not normally be permitted to lead evidence, at least where it is coupled with reliance upon some illegal intention so as to come within the *ex turpi causa* or illegality principle.⁴² The essential rationale of what is known as the illegality doctrine, according to a recent UK Supreme Court decision,⁴³ is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system. In assessing whether the public interest would be harmed in that way, it is necessary to consider (1) the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim; (2) any other relevant public policy on which the denial of the claim may have an impact; and (3) whether denial of the claim would be a proportionate response to the illegality. In considering whether it would be disproportionate to refuse relief to which the plaintiff would otherwise be entitled, as a matter of public policy, various factors may be relevant. Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties’ respective culpability. It seems to us that this general rule is capable of being applied to prevent a claim by a settlor or a trustee (perhaps being sued by a beneficiary for breach of trust) to deprive the beneficiary of locus by setting aside a trust on the grounds that the trustee and the settlor intended the trust to be a sham. The key point is that although an intention to mislead is required for a finding of sham, there need not be any strict illegality involved (at any rate at the point at which the sham declaration is

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³⁹ *AG Securities v Vaughan* [1990] 1 AC 417; *National Westminster Bank plc v Jones* [2001] 1 BCLC 98 at [45], [59].

⁴⁰ *Rafiland Pty Ltd v Commissioner of Taxation* [2008] HCA 21, although the Royal Court in *In re Esteem Settlement* (n 18) at [60] suggested that individual dispositions into trust were capable of being a sham if the trust into which the assets are settled is otherwise not so effected.

⁴¹ *Carman v Yates* [2004] EWHC 3448 (Ch), [2005] BPIR 476 at [219]. See too *National Westminster Bank plc v Jones* (n 40) at [60]; *Hill v Spread Trustee Co Ltd* (n 20), above, referring to D Hayton, ‘Shams, Piercing Veils, Remedial Constructive Trusts And Tracing’ (2004) (1) *Jersey Law Review* 8.

⁴² *Tinsley v Milligan* [1994] 1 AC 340, now disallowed by the UK Supreme Court in *Patel v Mirza* [2016] UKSC 42.

⁴³ *Patel v Mirza* (n 42).

executed); and so it appears that there may be circumstances where the dishonesty involved in the execution of a trust intended as a sham will not prevent the settlor or trustee from later asserting the sham, provided any illegal intention was never carried into effect.⁴⁴ If third parties have relied on the provisions of the trust instrument to their detriment, the settlor (and for the same reason) may be estopped from asserting that the trust is a sham and from seeking to recover the trust property.⁴⁵

F. Reliance by those who are not Parties to the Sham

- 4-16** If there ever were any subsequently appointed trustees who were not implicated in the sham, and did not know of it when appointed, they would do well to apply to court as soon as they discovered it. They would not be giving evidence of their own wrongful intent, but that of their predecessors. A different example would be where the true arrangement (behind the apparent trust created for tax reasons) is that the trust fund should be held, not on the trusts expressed in the trust deed, but on trusts for a particular person (not the settlor) absolutely on the basis of a constructive trust or of a valid oral declaration of trust. In our view it is clear that, in such circumstances, the 'real' beneficiary can enforce the 'true' trusts in his favour. It may even be that he can do so without the need to assert the existence of a sham (and so without alleging dishonesty), if the 'true' trusts are constituted before the execution of the sham document and so take priority over it.

G. The Relationship between Settlor Reserved Powers, Interests and Control

- 4-17** So long as the trusts are intended to take effect according to their terms, the retention of wide powers or weighty influence over the trustee or the administration of the trust assets by the settlor does not, of itself, make the trusts a sham.⁴⁶ If the powers that are retained are within the scope of Article 9A of the Trusts (Jersey) Law 1984, then as a matter of Jersey law at least, such retention is not capable of being construed as the trusts being intended as a testamentary instrument so as to require them to be in compliance with the formalities required of Jersey wills, though it might create a bare trust for the settlor so that the trust property falls into his estate on his death, but the trusts, while the settlor still lives, would still be valid and not a sham.
- 4-18** A trust is either a sham in the sense described above and is invalid or it is not and is valid and enforceable. There is simply no middle state between a valid trust and a sham.⁴⁷ If the settlor retains power to direct investments, that does not make the trust a sham.⁴⁸ Indeed, where the settlor directs investments through the internal machinery of the trust that would seem to affirm the trust as being valid and not a sham. Even if the settlor retains practical

⁴⁴ *Tribe v Tribe* [1996] Ch 107; *Painter v Hutchison* [2007] EWHC 758 (Ch).

⁴⁵ *Re Esteem Settlement* (n 18) at [53(c)].

⁴⁶ *ibid.*

⁴⁷ *Re Esteem Settlement* [2003] JCR 092.

⁴⁸ Trusts (Jersey) Law 1984, Art 9A(2)(d), (h).

control of the whole administration of the trust through informal, personal influence over the trustees, that does not enable his creditors to ‘pierce the veil of the trust’ which Jersey does not recognise as a doctrine that applies to the institution of the trust.⁴⁹

H. The Proper Law Governing the Question whether a Trust is a Sham

The significance of this question arises because whether a Jersey trust is a sham is a question that goes to the validity of the trust and thus is subject to the firewall protection found in Article 9 of the Trusts (Jersey) Law 1984 which requires a foreign court to apply Jersey law to the issue before that foreign decision is capable of being given effect to by the Jersey Court.⁵⁰ Where there is a competing forum in which the issue of sham in relation to a Jersey trust arises, this is likely to be given weight in the Court’s evaluation of whether Jersey, rather than that competing jurisdiction, is clearly the most appropriate forum in which to have the dispute.⁵¹ While there is a great deal of affinity between Jersey and English law on the question of sham (if perhaps a divergence in the willingness of some Courts in some quarters to make such a finding) if, in the future, a divergence emerged between Jersey and other jurisdictions on the substantive law governing sham arrangements,⁵² then the issue of which law governs the question of whether a trust is a sham would acquire a new significance. There are two possible alternative answers to the question: the first is to apply the law of the *lex situs* of the trust property. In our view this approach is incorrect, a view which is supported by Jersey authority and by the English Court of Appeal.⁵³ The alternative, and in our view, the correct approach is, by analogy with the position in contract to apply the law that would apply to the trust assuming it to be valid.⁵⁴ Most modern drafted Jersey trusts contain a governing or proper law clause designating Jersey to be the proper law of the trust for the purposes of Article 4 of the Trusts (Jersey) Law 1984. Where, as is often the case, the trust contains a power to change the proper law of the trust so as to create an ambulatory proper law, the question of sham will remain rooted to the proper law of the jurisdiction (1) which is nominated as the proper law or (2) with which the trust at the time it was created had the closest connection, whichever proper law comes to govern the settlement during its lifetime.⁵⁵ The Royal Court has long considered it an exorbitant assumption of jurisdiction for a foreign court, particularly the Family Division of the English High Court in the context of applications for ancillary relief affecting Jersey trusts, under section 24 of the Matrimonial Causes Act 1973, to declare a Jersey trust to be a sham without recourse to Jersey law on that question.⁵⁶ The solution is therefore either to obtain admissible expert

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⁴⁹ *Re Esteem Settlement* (n 47) at [105]–[107], [122]–[124].

⁵⁰ Art 9 applies only to Jersey law trusts. A trust governed by a foreign proper law must apply that proper law to the question of sham. See Ch 15.

⁵¹ *Dick-Stock v Pantrust International SA & Ors* (n 24).

⁵² eg that the requirements for a sham finding were tighter under Jersey law than say under English law.

⁵³ *In Minwalla v Minwalla* [2004] EWHC 2823 (Fam), [2005] 1 FLR 771, see the criticisms in *C.I. Law Trustees Ltd v Minwalla* [2005] JRC 099.

⁵⁴ See Art 8(1) of the Rome Convention on the Law Applicable to Contractual Obligations. See Art 4 of the Trusts (Jersey) Law 1984 as to how to determine the proper law of the trust.

⁵⁵ Trusts (Jersey) Law 1984, Art 4(1)(a)–(c).

⁵⁶ *Minwalla v Minwalla* (n 53) and *A v A* (n 20) at [21], should it be needed, that ‘there is not one law of “sham” in the Chancery Division and another law of “sham” in the Family Division’, approved in *Petrodel Resources Ltd v Prest* (n 22), per Lord Sumption.

evidence of Jersey law for admission into foreign proceedings, to circumvent the firewall provisions,⁵⁷ or to commence proceedings in Jersey in tandem with proceedings elsewhere for a Jersey determination on the question of sham. An issue like sham, that goes to the very existence of a trust and that requires the application of Jersey law (and by virtue of Article 9, only Jersey law) is likely to be a factor of significant weight in favour of the Royal Court assuming jurisdiction over a trust dispute in its assessment of whether Jersey is *forum conveniens*.⁵⁸

III. Jersey's Rules as to Rescission for Mistake

- 4-20** The law relating to rescission on the grounds of mistake as it applies to trusts has had an extensive airing before courts in Jersey and England and Wales in recent years. That judicial attention is down, in no small order, to the fiscal consequences of a trust now often being the major if not *the* motivating factor for its creation. When the fiscal consequences of a disposition into or from a trust go awry there usually follows an intense focus on the subjective intention of those who have caused the mistake.
- 4-21** The Royal Court will rescind, ie set aside, a disposition of property into or from a trust if it is satisfied that the settlor or the trustee⁵⁹ was acting under a mistake of so serious a character as to render it unjust on the part of the donee of the property to retain it and that but for the mistake the disposition would not have been made.⁶⁰ An order to rescind on grounds of mistake operates so as to treat the disposition as having never been made at all. Where an order for rescission is obtained by the settlor, the trustee will hold the assets, together with any profit derived from them, on bare trust for the settlor.⁶¹ Closely related to mistake as a basis upon which to rescind a disposition into or out of a trust is the jurisdiction to challenge the exercise of a power under the principle which has become known as 'the Rule in *Re Hastings-Bass*'⁶² under which it is possible to claim that, but for a certain mistake, the donee of the power (usually the trustee) would not have exercised it as he did.

A. Meaning of Mistake

- 4-22** The jurisdiction of the Court to set aside transactions for mistake has been recently revised as a matter of English law in the UK Supreme Court in the case of *Pitt v Holt*.⁶³ That

⁵⁷ See Ch 15.

⁵⁸ See the Trusts (Jersey) Law 1984, Art 5 for the gateways. See *Dick v Pantrust & Ors* (n 24). The Court will obviously not determine such a factually complex question as whether the trusts were intended to be a sham at a jurisdiction hearing.

⁵⁹ *Re Lochmore Trust* 2010 JRC 068 (which extended the doctrine of equitable mistake to apply *mutatis mutandis* to trustees as it does to settlors).

⁶⁰ *Re the A Trust* [2009] KRC 245; *The First Conference Trust* 2010 JRC 055A; *Re B* [2012] JRC 299; *Strathmullen Trust* 2014 JRC 056; *Pitt v Holt* [2013] UKSC 26 (bringing the English law doctrine of rescission for equitable mistake into line with that of Jersey).

⁶¹ *Re Strathmullen Trust* (n 60) at [29].

⁶² [1975] Ch 25, CA.

⁶³ [2013] UKSC 26.

decision, which can broadly be described as approving the line of authorities beginning with *Ogilvie v Littleboy*⁶⁴ in preference to those beginning with *Gibbon v Mitchell*,⁶⁵ has aligned the English law position with that which has operated in Jersey for many years.⁶⁶ A transaction that is vitiated by an operative mistake is voidable at the insistence of the applicant and not void *ab initio*.⁶⁷ On both sides of the English Channel, the test for rescission for mistake has been aligned so that now there must simply be evidence of a causative mistake of sufficient gravity to render it unjust or unconscionable on the part of the donee to retain the property given to him.⁶⁸ This test will normally be satisfied when there is a mistake either as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction.⁶⁹ We consider that it will suffice that the trust would not have been made in the terms in which it was made but for the mistake, and that it is not necessary to show that it would not have been made at all.⁷⁰ The assessment of what is or would be unconscionable is an objective one. The gravity or seriousness of the mistake has to be assessed by a close examination of the specific facts. Those facts may be tested by cross-examination but the mistake may be so obvious as to be apparent on the face of the paper evidence. The Court will need to be appraised of the circumstances of the mistake and its consequences. The mistake may be of fact or of law.⁷¹ A mistake as to the fiscal effect (or the fiscal consequences) (which from the cases are invariably unfavourable) of a voluntary disposition may suffice to enable the Court to rescind the disposition. However, note Lord Walker's chilling warning that:

In some cases of artificial tax avoidance the court might think it right to refuse relief, either on the ground that such plaintiffs, must be taken to have accepted the risk that the scheme would prove ineffective, or on the ground that discretionary relief should be refused on grounds of public policy.⁷²

The Royal Court has expressed itself as seeing there to be no need for it to strive to protect the interests of HMRC,⁷³ although the Court will not shut its eyes to tax avoidance in the exercise of its discretion.⁷⁴ The fact that the settlor forgot, did not know about or overlooked, a specific fact or a legal requirement does not itself suffice to invoke the jurisdiction, but it can lead to a false belief or assumption which the Court will recognise as an operative mistake.⁷⁵ Mere ignorance of a fact is not enough, even if it can be said to have caused the

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⁶⁴ (1897) 13 TLR 399.

⁶⁵ [1990] 1 WLR 1304.

⁶⁶ *Re S Trust* [2011] JRC 117; *In Re B Life Interest Settlement* [2012] JRC 229.

⁶⁷ *Re S Trust* (n 66).

⁶⁸ See the threefold test *In the Matter of Lochmore Trust* (n 59): i) Was there a mistake on the part of the settlor? ii) Would the settlor not have entered into the transaction 'but for' the mistake? iii) Was the mistake of so serious a character as to render it unjust on the part of the donee to retain the property?

⁶⁹ *ibid*, at [122].

⁷⁰ *ibid*, at [108], [109], [122].

⁷¹ *Re S Trust* (n 66) at [34]–[38].

⁷² *Pitt v Holt* (n 60) at [135].

⁷³ *In re S Trust* (n 66) at [39] 'in our view Leviathan can look after itself', per Bailhache.

⁷⁴ See *IFM Corporate Trustees v Helliwell and Mountain* [2015] JRC 160 in which the Royal Court stated that it was entitled to consider the ethics of 'aggressive' tax avoidance as part of its discretion in whether to allow an application to rectify a trust instrument.

⁷⁵ *Pitt v Holt* (n 60) at [104]–[123].

disposition to be made. For ignorance to become operative, the Court must be prepared to draw an inference that it represented a mistaken conscious belief or a mistaken tacit assumption.⁷⁶ A settlor who believes he has a normal life expectancy, so that the creation by him of an *inter vivos* settlement will have inheritance tax advantages, but is in fact suffering from a terminal or degenerative illness at the time when he creates a trust, may have a mistaken conscious belief or mistaken tacit assumption which will allow the disposition to be set aside.⁷⁷ A mis-prediction of future events is not an operative mistake. However, if there is a mistaken conscious belief or tacit assumption as to future events it does not matter whether it is owing to carelessness on the part of the settlor or donor, unless he deliberately ran the risk or must have taken the risk of being wrong. The mistake need not be known to the person or persons taking the benefit under the disposition.⁷⁸

B. The Rule in *Re Hastings Bass* and Applications under Articles 47E to 47I of the Trusts (Jersey) Law 1984

- 4-24** Jersey has long recognised and incorporated wholesale into its own law,⁷⁹ what has come to be known as ‘the Rule in *Re Hastings Bass*'.⁸⁰ The jurisdiction has become an important feature in the landscape of Jersey trust practice and provides significant comfort to trustees. The latest restatement of the rule in Jersey, prior to the *Pitt v Holt* appeals, was that given by Lloyd J in *Sieff v Fox*:⁸¹

Where trustees act under a discretion given to them by the terms of the trust, in circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of the exercise is different from that which they intended, the court will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account.⁸²

- 4-25** As is well known the rule has developed predominantly as a tool by which trustees are able to effectively turn the clock back on the exercise of (usually a dispositive) power where the

⁷⁶ *ibid*, at [108]: ‘The court cannot decide what is unconscionable by an elaborate set of rules but must always form a judgment about the justice of the case in hand’, per Lord Walker at [127]–[128].

⁷⁷ *ibid*, at [109]–[113]. However, the Court may refuse relief where the donees of the interests appointed under a trust retained those interests where they were collectively aware of the settlor’s medical problems see *In Re B Life Settlement* (n 66).

⁷⁸ *In Re B Life Interest Settlement* (n 66). The issue of unconscionability will involve an assessment of their position, above all where they have changed their position in some way as a result of the disposition in their favour.

⁷⁹ See *In The Matter Of The Green GLG Trust* [2002 JLR 571] at [27]: ‘We consider that the *Hastings-Bass* principle is entirely consistent with precedent and principle’.

⁸⁰ [1975] Ch 25 expressed in the following terms: ‘where by the terms of a trust (as under section 32) a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he has achieved is unauthorised by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account’. The rule is something of a misnomer as found by the English Court of Appeal in *Pitt v Holt* [2011] EWCA Civ 197 when the rule, as it had developed in the intervening 30 years, was extensively analysed.

⁸¹ [2005] EWHC 1312 (Ch), approved in Jersey *In The Matter of the B Life Interest Settlement* [2013 (1) JLR 1].

⁸² *Sieff v Fox*, [2005] EWHC 1312 (Ch), per Lloyd J.

exercise of that power gave rise to an unintended or unforeseen (and invariably negative) tax consequence. The rule at English common law was derived from the law of powers and so remains confined only to trustees or other fiduciaries who are vested with fiduciary powers. The first, fundamental question is whether the person exercising the power sought to be avoided using the rule had such a power at all. Neither the rule at common law nor the language of the Jersey statutory provisions is apt to save cases of excessive execution, whether procedural or substantive (ie where the exercise of the power is not within the four corners of the power, such as an appointment to a non-beneficiary)⁸³ but cases of excessive execution are void *ab initio* and do fall within the pre-*Pitt v Holt* formulation of the rule in *Re Hastings Bass* in any event, which is concerned with the substantive, rather than the formal validity of the exercise of a power. The rule has no application to enable a settlor to reverse a disposition made by him directly into trust⁸⁴ as no question of power arises (although a settlor may be able to avail himself of the allied and closely related in effect, though conceptually distinct, rules governing rescission for mistake). The scope of the rule had been developed by the Royal Court beyond dispositive powers into administrative⁸⁵ and investment⁸⁶ powers vested in trustees.

The position at English common law prior to the *Pitt v Holt* decisions was that the jurisdiction to reverse a transaction under the rule in *Re Hastings Bass* was available irrespective of whether there was negligence on behalf of the fiduciary or its professional advisors. This position has been preserved by the new legislation.⁸⁷ The Jersey and English positions in this regard are now at odds: the availability of the relief in English law is now dependent on there having been a breach of duty by the fiduciary to come within the rule. Where a fiduciary takes professional advice, which is wrong, resulting in an unfavourable outcome following the exercise of the power, the fiduciary is not within the scope of the rule and the appropriate remedy is to seek redress against the professional advisor. The no-fault, Jersey approach makes the *Re Hastings Bass* jurisdiction a very efficient means of loss allocation as between the trustee, the beneficiaries and the professional services industry.

4-26

C. Articles 47B to 47I of the Trusts (Jersey) Law 1984

Following the English Court of Appeal's decision⁸⁸ but prior to the UK Supreme Court's judgment in the conjoined appeals of *Pitt v Holt* and *Futter v Futter*,⁸⁹ Jersey's States set about drafting an amendment to the Trusts (Jersey) Law 1984.⁹⁰ That amendment, taking effect as of 25 October 2013, had the effect of creating, in statutory form, a jurisdiction identical to that under 'the rule *In re Hastings-Bass*'⁹¹ as formulated immediately prior to

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⁸³ *In re B Life Interest Settlement* (n 66) at [95].

⁸⁴ Although a statutory jurisdiction now exists where the settlor places a disposition into trust with fiduciary who then settles it on the trustee; see Trusts (Jersey) Law 1984, Art 47F.

⁸⁵ *In re Winton Investment Trust* 2007 JLR N [56]; *In re Seaton Trustees Ltd* 2009 JLR N [15].

⁸⁶ *In re Howe Family No 1 Trust* [2007] JLR 660.

⁸⁷ Trusts (Jersey) Law 1984, Arts 47F(4), 47H(4).

⁸⁸ [2011] EWCA Civ 197.

⁸⁹ [2013] UKSC 26.

⁹⁰ Now the Trusts (Amendment No 6) (Jersey) Law 2013, taking effect on 25 October 2013.

⁹¹ [1975] Ch 25.

the Court of Appeal decision in *Pitt v Holt* and a jurisdiction identical to that which already existed in Jersey at common law for rescission for mistake.⁹² Formally, judgments of the English Court of Appeal and UK Supreme Court are not binding on Jersey and therefore no such amendment was strictly necessary. However, the dramatic re-casting of the *Re Hastings Bass* jurisdiction by the English Court of Appeal in *Pitt v Holt*,⁹³ that ‘the Rule in *Re Hastings Bass*’ was not in fact a rule at all (or at least not in the terms hitherto understood), lead to considerable disquiet in Jersey as to whether the theoretical foundation of the Jersey cases, that had adopted the rule, had collapsed so as to require Jersey to construct a new jurisdictional basis for the rule if it was to survive.⁹⁴ The solution was a series of complex provisions inserted as Articles 47B–47J of the Trusts (Jersey) Law 1984. These provisions are within Part 2 of the Trusts (Jersey) Law and therefore only apply to trusts which have Jersey as their proper law.⁹⁵ However, the instrument that exercises the power that is sought to be set aside need not be governed by Jersey law, provided the trust is.⁹⁶ Jersey’s firewall provisions⁹⁷ provide that the validity of a Jersey trust and validity and effect of any transfer of property into a Jersey trust shall be determined in accordance with the law of Jersey and no rule of foreign law shall affect such question.⁹⁸

- 4-28** The new legislative provisions may be summarised as follows: Articles 47E and 47G provide a statutory re-enactment, in the widest possible terms, of the jurisdiction to rescind for mistake. Articles 47F and 47H provide a statutory jurisdiction that encompasses the effect of the rule in *Re Hastings Bass*, as formulated prior to the *Pitt v Holt* decisions in England. First, so far as concerns the statutory jurisdiction to rescind transfers or other dispositions of property to a trust, or to rescind the exercise of power over or in relation to a trust or trust property that are vitiated by a mistake, a relevant mistake has been defined as widely as it could possibly be by Article 47B(2) to include a mistake to the effect, the consequences⁹⁹ or any advantages to be gained from the disposition or the exercise of such power, and includes mistakes of pre-existing or contemporaneous facts, or law (including foreign law). Under Article 47E, settlors or their successors in title or heirs¹⁰⁰ may apply for a declaration from the Court that a transfer or disposition into a trust by the settlor or his or her agent¹⁰¹ is voidable, and either of no effect or such effect as the Court may determine, if and only if, the disporon made a mistake (as defined) in relation to the transaction, he would not have

⁹² Following the cases from *Ogilvie v Littleboy* 13 TLR 399, the leading Jersey authority on mistake is *In re S Trust* [2011] JLR 375; see also *In the Matter of Lochmore Trust* (n 59).

⁹³ 2011] EWCA Civ 197.

⁹⁴ *In re B Life Interest Settlement* (n 66); *In re Onorati Settlement* [2013 (2) JLR 324].

⁹⁵ Trusts (Jersey) Law 1984, Art 6.

⁹⁶ *Representation of Wilkes and Wilkes* [2015] JRC 200.

⁹⁷ See Trusts (Jersey) Law 1984, Art 9(1)

⁹⁸ *Moffat v Apex Trust Company Limited* [2014] JRC 252; *CCC Limited v Apex Trust Limited* [2012 (1) JLR 314]; this means the domestic law of Jersey (ie without reference to its conflict of law principles).

⁹⁹ Thereby burying conclusively any lingering doubt as to the significance of the distinction between the 2 concepts which had, for many years troubled the debate as to the precise scope of the doctrine; see *Gibbon v Mitchell* [1990] 1 WLR 1304.

¹⁰⁰ Including it seems a person granted a lasting power of attorney under English law; see *In The Matter of the Robinson Annuity Investment Trust* [2014] JRC 133.

¹⁰¹ The settlor may act ‘in person (whether alone or with any other settlor)’ or through ‘a person exercising a power ... to transfer or make other disposition of property to a trust on behalf of a settlor’; Trusts (Jersey) Law 1984, Art 47E(1) and (2).

effected the transaction but for the mistake, and the mistake is of so serious a character as to render it just for relief to be given. Under Article 47G, donees of a power (be they trustees or otherwise), the trustee, or a beneficiary or enforcer of an affected trust, the Attorney General where the affected trust is charitable, or any other person with leave of the Court, may also apply for a declaration that the exercise of a power by a trustee or other fiduciary, or a donee of a power, over or in relation to a trust or trust property, is voidable, on grounds of a mistake (as defined).

As will be readily apparent, Articles 47E and 47G (mistake) do not add anything to the position concerning the jurisdiction to rescind at common law in Jersey. Having long followed the far more open-textured and contextual test for mistake in the *In re A Trust*¹⁰² line of cases,¹⁰³ the definition of a qualifying mistake needed neither widening nor clarification in Jersey, and the test for relief as set out in the case law has simply been transposed into statutory form.

4-29

As regards the statutory *Hastings-Bass* remedies, Article 47F concerns transfers or dispositions of property to a trust which occurs in consequence of the exercise of a fiduciary power. Settlors, or their successors in title or heirs, may apply for a declaration from the Court that a transfer or disposition into a trust by their fiduciary¹⁰⁴ is voidable, and either of no effect¹⁰⁵ or such effect as the Court may determine, if and only if the power was exercised in such a way that the donee (1) failed to take into account all relevant considerations or took into account irrelevant considerations; and (2) would not have exercised the power, either at all or in the manner it was so exercised but for that failing, it being irrelevant whether there was any lack of care or fault by the donee or any person giving advice in relation to the exercise of the power. It is tolerably clear that Article 47F is directed to cover a situation in which a settlor does not settle property directly onto trustees¹⁰⁶ but instead places the property in the hands of a nominee or bare trustee for the settlor who then settles it into trust at the direction of the settlor. Article 47H applies to simple exercises of power over or in relation to a trust or trust property. Like at common law, the power does not have to be of a fiduciary character. Donees of a power (be they trustees or otherwise), the trustee, or a beneficiary or enforcer of an affected trust, the Attorney General where the affected trust is charitable, or any other person with leave of the Court, may also apply for a declaration that the exercise of a power by a trustee or other fiduciary over or in relation to a trust or trust property, is voidable as aforesaid, on the equivalent grounds.

4-30

It is further provided that no declaration may be made which would prejudice any bona fides purchaser for value of any trust property without notice of the matters which render the transfer, disposition or exercise of power voidable,¹⁰⁷ that the Court can make

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¹⁰² [2009 JLR 447].

¹⁰³ *In re R Remuneration Trust* [2009] JRC164A; *In re Lochmore Trust* (n 59); *In re S Trust* (n 92); and *In re B Life Interest Settlement* (n 66).

¹⁰⁴ Art 47F(1) and (2) of the Trusts (Jersey) Law 1984 provides that the settlor may act 'whether alone or with any other settlor) through a person exercising a power ... to transfer or make other disposition of property to a trust on [his] behalf ... [such person owing] a fiduciary duty to the settlor in relation to the exercise of his or her power'.

¹⁰⁵ Thereby negating it for the purposes of any taxing statute.

¹⁰⁶ Whose only remedy both prior to and after the enactment of this legislation is an action to rescind the settlement by reason of a vitiating mistake.

¹⁰⁷ Trusts (Jersey) Law 1984, Art 47(I)(4).

consequential related orders, such as orders for the recovery of distributions, or as to what the trustee should do next¹⁰⁸ and that a transaction that is set aside under Articles 47E to 47H shall be without prejudice to any personal remedy which may be available against a trustee or any other person.¹⁰⁹ The legislation also provides that Articles 47E to 47H are not exhaustive as the grounds upon which it is possible to make an application for a declaration that a transfer or other disposition of property to a trust, or the exercise of any power over or in relation to a trust or trust property, is void or voidable.¹¹⁰

- 4-32 The effect of a qualifying mistake is to reverse a transfer of property into trust so as to treat it as though there had never been a transfer.¹¹¹ However, there is Jersey authority that Articles 47E and 47G have no application to a mistake, the effect of which is to reverse the entire transfer of trust property so as to leave the trust effectively empty.¹¹² In Jersey law, as in English law, a trust cannot continue without property subject to the trust.
- 4-33 In the authors' view, there is a possibility that the *Strathmullen*, which confines the application of Articles 47E and 47G only to applications to set aside a transfer for mistake that would not have the effect of extinguishing the trust by the application of those provisions, may be incorrect. An operative mistake amounts to a failure in the settlor's dispositive intent. The Court in the *Strathmullen* decision does not seem to have considered that a transfer of trust property which is subject to a successful challenge on grounds of mistake, if vested in the trustee, could be said, on orthodox trust principles, to still be subject to a trust: a bare trust in favour of the settlor. However, given Article 47E and 47G effectively replicate and do not abolish Jersey's pre-existing common law rules governing rescission for mistake, the Court's favoured approach in *Strathmullen* may amount to a distinction without a difference.

D. What Remains of the Rule in *Re Hastings Bass* at Common Law?

- 4-34 There is Jersey authority that the rules governing rescission for mistake survive and are independent of the Trusts (Amendment No 6) (Jersey) Law 2013.¹¹³ The 2013 legislation does not expressly repeal the rule at common law and there is relatively recent authority for the proposition that a statute must clearly abolish or override a rule of customary law which, if taken to be a statement of the Jersey position of the doctrine of implied repeal, preserves the rule at common law.¹¹⁴ *Strathmullen* may not be a reliable basis upon which to assume that the pre *Pitt v Holt* formulation of the rule in *Re Hastings Bass* survives in Jersey at common law. The jurisdiction to rescind for mistake in England is now aligned with

¹⁰⁸ *ibid*, Art 47I(3).

¹⁰⁹ *ibid*, Art 47J(b).

¹¹⁰ *ibid*, Art 47J(a).

¹¹¹ *In the Matter of the Onorati Settlement* (n 94).

¹¹² *In The Matter Of The Strathmullen Trust* (n 60); see also *In The Matter Of The Robinson Annuity Investment Trust* (100); *Boyd v Rozel Trustees (Channel Islands) Limited* [2014] JRC 056, followed by *In the Matter of the Wilkes Annuity Investment Trust* [2015] JRC200.

¹¹³ *In The Matter of the Strathmullen Trust* [2014] (1) JLR 309.

¹¹⁴ *Morgan and Kemp v Deputy Registrar for the Parish of St Helier* [2007] JRC 151.

the common law position that has long existed in Jersey and the 2013 legislation merely replicates the rule at common law. The issue is not whether the rule in *Re Hastings Bass* survived the Trusts (Amendment No 6) (Jersey) Law 2013 but whether the rule at common law in Jersey survived the English decisions in *Pitt v Holt*. There has yet to be a reported Jersey decision on the scope (or even the survival) of the common law rule in Jersey. Doubt has been expressed as to the survival of the common law rule in Jersey following *Pitt v Holt*.¹¹⁵ In *In re B Life Interest Settlement*,¹¹⁶ the exercise of the power in question has held not fall within the ambit for relief under the formulation of the *Hastings-Bass* rule prior to *Pitt v Holt* anyway and so it was unnecessary to determine whether the Royal Court should follow the narrower approach of the English Court of Appeal. The Court did, however, express a provisional view that, in light of the current Jersey and English authorities, if it had been required to make a decision, it would have held that the previous Jersey cases applying the *Hastings-Bass* principle were wrong. The English Court of Appeal's decision in *Pitt v Holt*, now confirmed by the UK Supreme Court, was a significant watershed for the ambit of the rule at common law. The English Court of Appeal's decision has effectively demolished the sub-stratum upon which the rule was built. The Jersey authorities prior to *Pitt v Holt* are based upon the adoption of that sub-stratum and provide no other conceptual basis upon which the rule could survive in Jersey in its pre *Pitt v Holt* formulation. Given the Privy Council's position at the apex of the Jersey court system, composed of largely the same individuals as the UK Supreme Court, were a case that relied on the rule at common law to be appealed to the Privy Council, there would be a significant risk that the Court would seek to align the common law of Jersey with that (now) of England. Historically, appeals against the application of the rule have been rare as the outcome is generally favourable to all parties other than (usually) the revenue agency that has lost out on tax avoided by the reversal of the relevant transaction. The continuing moral opprobrium heaped on offshore jurisdictions such as Jersey for being seen to facilitate tax avoidance, a practice described in *Pitt v Holt* as 'a social evil which puts an unfair burden on the shoulders of those who do not adopt such measures',¹¹⁷ would seem to make the prospects of an alignment more rather than less likely if the Privy Council were to be given the opportunity. By contrast, the Privy Council would have far less scope to attack or seek to narrow the application of the rule that falls squarely within statutory provisions which are an expression of a deliberate policy choice by a politically independent jurisdiction.

In reality, it may not matter whether the common law rule survives. The Trusts (Amendment No 6) (Jersey) Law 2013 is expressed to be both prospective and retroactive in effect so any fiduciary or trustee wishing to set aside the exercise of any power over or in relation to a trust or trust property occurring before or after 25 October 2013 can avail itself of Articles 47F and 47H without needing to resort to the common law rule.¹¹⁸ It is difficult to imagine a factual scenario that would fall without the very broad scope of the Articles 47F and 47H.

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¹¹⁵ *In re Onorati Settlement* (n 94).

¹¹⁶ [2013] (1) JLR 1.

¹¹⁷ [2013] UKSC 26 at [135].

¹¹⁸ Trusts (Jersey) Law 1984, Art 47D.

IV. Rectification and Construction of Trust Documents

- 4-36** The remedies of rectification and rescission for mistake are conceptually distinct, but the circumstances in which they may be available have the potential to overlap. Both rectification and rescission form part of the Royal Court's equitable jurisdiction to relieve parties of the consequences of their mistakes.¹¹⁹ As a matter of practice, the remedies of rectification and rescission on the basis of mistake may often be sought in the alternative and the Royal Court may well ask whether it is appropriate to rectify a settlement before considering whether, in its discretion, it ought to be set aside, even where the plaintiff seeks only its rescission.¹²⁰
- 4-37** The remedy of rectification proceeds on the basis that a given transaction, which is valid and not subject to any flaws is wrongly recorded in a written instrument. The Court has a discretion to rectify the written document (including for our purposes a trust instrument or any instrument executed under it)¹²¹ which does not give effect to the true intention of the maker of that instrument, whether as a result of ignorance or mistake, so as to make the document read as being in accordance with what the parties or party to the document intended. The rectification of a document has the effect of 're-writing' the document to accord with the settlor's original intention. It is therefore retrospective in effect; treating the document as always having always been, *ab initio*, as rectified.¹²² Rectification is therefore strictly limited to some clearly established disparity between the words of a legal document and the intentions of the parties to it.¹²³
- 4-38** The English Court of Appeal has described rectification in the following terms from which we do not demur:¹²⁴
- [R]ectification is about putting the record straight. In the case of a voluntary settlement, rectification involves bringing the trust document into line with the true intentions of the settlor as held by him at the date when he executed the document. This can be done by the court when, owing to a mistake in the drafting of the document, it fails to record the settlor's true intentions. The mistake may, for example, consist of leaving out words that were intended to be put into the document; or putting in words that were not intended to be in the document; or through a misunderstanding by those involved about the meanings of the words or expressions that were used in the document. Mistakes of this kind have the effect that the document, as executed, is not a true record of the settlor's intentions.
- 4-39** The relevant intention is that of the maker of the trust instrument, ie the settlor, or in the case of an instrument executed to give effect to a power under the trust, the relevant power

¹¹⁹ *Allnutt v Wilding* [2007] EWCA Civ 412, [2007] WTLR 941 at [5], apparently not cited to the Royal Court in *Re Representation of Sanne Trust Co Ltd* [2009] JRC 025A; see P Matthews 'Shome, Mishtake, Shurely?' (2010) 14 *Jersey and Guernsey Law Review* 208.

¹²⁰ See *Gibbon v Mitchell* (n 99) at [1307E].

¹²¹ The scope of the remedies extends beyond the law of trusts; see generally, *Snell's Equity*, 33rd edn (London, Sweet and Maxwell, 2014) § 14-007 and Chs 15 and 16; Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 4th edn (Sydney, Butterworths/Lexis, 2002).

¹²² *In Re Exeter Settlement* (n 2).

¹²³ Lord Walker said in *Pitt v Holt* (n 60) at [131].

¹²⁴ *Allnutt v Wilding* (n 119).

holder. Where the settlor or power holder is a corporate entity rather than a natural person, the relevant intention is the intention of the directors (in the case of a company) or the equivalent of directors in the case of any other corporate entity (eg a council in the case of a Jersey foundation) that cause the corporate person to execute the relevant document.¹²⁵

In the case of rectification, the party seeking the remedy must prove the existence of a specific intention which, as a result of a mistake, is not recorded or is mis-recorded. A general intention to achieve a certain fiscal objective is not enough. The focus of the Court's enquiry is whether the evidence proves an intention to include specific words or to achieve a specific intention which is not achieved by reason of a mistake in the drafting.

The leading modern authority on the Jersey law of rectification is *In Re Sesemann Will Trust*.¹²⁶ The three requirements are, first, that there is sufficient evidence of a genuine mistake having been made so that the document sought to be rectified does not accord with the true intentions of the party(ies) to it. Secondly, that there is no other practical remedy available to the parties and the third requirement (which is more a rule of procedure rather than a substantive part of the test) is that there must be full and frank disclosure of all facts relevant to the Court's discretion.

There is no conceptual limit on the type of mistake that fails to accord with the maker of a document's true intentions that is capable of giving rise to a claim for rectification.¹²⁷ The Court will not lightly rectify a voluntary settlement, and will be more easily satisfied if the application is supported by other evidence, such as the settlor's contemporaneous written instructions.¹²⁸ Many of the Jersey cases arise from the failure of the trust, as drafted, to properly exclude the possibility of an adverse tax impact on the settlor and there is as yet no rule, although it may be a consideration for the Court in its discretion,¹²⁹ that rectification cannot be obtained where the sole purpose of seeking rectification is to achieve a legitimate tax mitigation or advantage which can be proven to have been the parties' true intention when the document was executed.¹³⁰ Where a trust falls within the jurisdiction of the Royal Court,¹³¹ the Court may rectify a trust instrument, even if the trust is governed by a foreign law (in accordance with that foreign law, to be proved as a matter of fact). The Court may also direct a trustee who brings such an application to submit to the jurisdiction of the courts whose law governs the trust.¹³²

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¹²⁵ *Re the M Remuneration Trust* [2007] JRC 184; *In The Matter of the DSL Remuneration Trust* [2007] JRC251.

¹²⁶ [2005 JLR 421]. See also *Re MM Patel Settlement* [2003] JRC 096 and *Re Representation of PP Investors 2008 JRC 031; In the matter of the Exeter Settlement* (n 2).

¹²⁷ *Re Beachcroft Trust* [2004] JRC 144; *Re Bluebird Settlement* [2003] JRC 098; *In the Matter of the M Remuneration Trust* [2007] JRC 184; *Re MM Patel Settlement* (n 127); *Re Representation of Barclays Wealth Trustees (Jersey) Limited* [2008] JRC 165; *Re Exeter Settlement* (n 2). See also *Re Representation of Sanne Trust Company Limited* [2009] JRC 025B and *DD v B & C* [2010] JRC 193, which appear to be at odds with the English authorities on the same point—Matthews, 'Shome, Mishtake, Shurely?' (n 119).

¹²⁸ *Van der Linde v Van der Linde* [1947] Ch 306; *Whiteside v Whiteside* [1950] Ch 65, CA.

¹²⁹ *IFM Corporate Trustees Limited v Helliwell and Mountain* (n 74).

¹³⁰ *Re Moody Jersey 'A' Settlement* [1990 JLR 264]; *Re Representation Sanne Trust Co Ltd* [2009] JRC 025A.

¹³¹ See *Trusts (Jersey) Law 1984*, Art 5.

¹³² *In Re Barret* [2001 JLR N 34].

A. Locus to Apply for Rectification

- 4-43** Clearly a party with no interest in the outcome has no standing to bring a rectification application. Having divested himself of the trust property, a settlor has no interest in a rectification claim, unless he is also a beneficiary (or as is often the case in the cases, accidentally remains as a beneficiary or is deemed to be so). Even where the settlor has no continuing interest in the trust following settlement, it seems to us unlikely that the settlor would be deemed to have no standing to seek rectification. The settlor must, in our view, have a right to ensure that his disposition into trust takes effect as he intended. A beneficiary with a present interest, whether vested or contingent and however remote, must in our view, have locus to apply to court to correct a mistake in the terms of the trust instrument by analogy with the position of such a beneficiary to bring a breach of trust claim.¹³³ By extension, this must also include a person that may stand to benefit where the trust instrument, as rectified, will give them an interest that does not presently exist. The real question will be whether, with the remedy being discretionary, the Court will grant the relief sought. This will fall to be determined by the evidence and by the position adopted by the settlor and by those interested in the settlement.

B. Standard of Proof

- 4-44** A party who seeks rectification of a document must establish with the highest possible degree of probability that due to a genuine mistake a trust deed does not represent the intention of the parties.¹³⁴ The Court will not lightly rectify a settlement, and will be more easily satisfied if the application is supported by other evidence, such as the settlor's contemporaneous written instructions.¹³⁵ While there is no requirement in law to do so, it will be difficult as a matter of evidence to prove the requisite mistake in the absence of such outward expression of the maker's true intention. It is not sufficient to show that the settlor did not intend what was recorded; the burden is on the applicant for rectification to positively prove what was specifically intended.¹³⁶ However, it is not necessary for him to have specified the precise form of words to be inserted so long as the evidence shows with some degree of specificity what was intended.¹³⁷ Unlike in a dispute where the issue is the construction of the particular document, the Court may consider the evidence of the draftsman of the document sought to be rectified, at least in so far as such evidence goes to the draftsman's mistake in recording the settlor's true intention.¹³⁸

¹³³ Defined in the Trusts (Jersey) Law 1984, Art 1(1) as 'a person entitled to benefit under a trust or in whose favour a discretion to distribute property held on trust may be exercised'; see *Freeman v Ansbacher Trustees (Jersey) Ltd* [2009] JLR 1].

¹³⁴ *In re Madge's Settlement* [1994] JLR N-16b].

¹³⁵ *Van der Linde v Van der Linde* (n 129); *Whiteside v Whiteside* (n 128).

¹³⁶ *Allnutt v Wilding* (n 119).

¹³⁷ *Giles v Royal National Institute for the Blind* [2014] EWHC 1373 (Ch).

¹³⁸ *In the Matter of the Y Trust* 2011 JRC 135.

i. The nature of the Operative Mistake in Rectification Cases after Pitt v Holt

The decision of the UK Supreme Court in the conjoined appeals of *Futter v Futter* and *Pitt v Holt*¹³⁹ considered the test for mistake as it applies to the remedy of rescission and did not specifically address the test for mistake as it applies to rectification. The effect of *Pitt v Holt* (as it applies to rescission) was to align the test in English law with what was already accepted to be the accepted test in Jersey.¹⁴⁰ Nowhere in *Pitt v Holt* is it suggested that rescission and rectification are not to be treated as part of the same principle of equitable mistake¹⁴¹ and in our view the mistake that is required to be proven to obtain rectification is essentially the same that needs to be shown to rescind: namely: an operative mistake of so serious a character as to render it unjust or unconscionable on the part of the donee to retain the property on the terms of the unrectified document.¹⁴²

4-45

C. Bars to Relief for Rectification and Rescission

As in England, rectification and rescission in Jersey are discretionary remedies. Rectification will be refused where an instrument, as executed, achieves its purpose even though it does not achieve some ulterior objective—including a fiscal objective. The Court will not grant rectification of a document to reflect an intention that did not in fact exist at the time of the instrument's execution. The Court can rectify a deed which does not reflect the transaction which the parties intended but the remedy cannot be used to achieve some other transaction which is not supported by a contemporaneous intention but which in hindsight would have been desirable.¹⁴³

4-46

The Court may refuse to rescind a transaction because of a change of position,¹⁴⁴ or on the grounds of public policy.¹⁴⁵ The Court will take into account the effect of the order on third parties, such as those who have received distributions under a settlement which it is sought to rescind, and may require undertakings that no claims will be brought against such third parties.¹⁴⁶

4-47

A claim to rectification or rescission is not barred by the prescription provisions in Article 57 of the Trusts (Jersey) Law 1984 but is subject to the equitable doctrine of laches and so delay and acquiescence may bar a claim for rectification. For laches to act as a bar to relief there must have been some form of detrimental reliance on the part of the person relying on the defence, or a relevant third party.¹⁴⁷ Since the relief is discretionary the Court

4-48

¹³⁹ *Pitt v Holt* (n 60).

¹⁴⁰ *Ogilvie v Littleboy* (n 93), affirmed in *Ogilvie v Allen* (1899) 15 TLR 294, HL, recently affirmed and adopted in *In the Matter of Strathmullen Trust* (n 60); see also *Re Lochmore Trust* (n 59).

¹⁴¹ Indeed in *Lady Hood of Avalon*, it was said that the question whether the Court awards rescission or rectification is only a question of degree; per Eve J, cited without adverse comment in *Pitt v Holt* (n 60) at [106].

¹⁴² *Pitt v Holt* (n 60) at [101].

¹⁴³ *Re Sesemann Will Trust* [2005] JRC 151; *In re BB* [2011] JLR 672.

¹⁴⁴ *Pitt v Holt* (n 60) at 126 and *In The Matter of the R Remuneration Trust* (n 103) at [32]; *In The Matter of the A Trust* [2009] JLR 447; *In The Matter of the B Life Interest Settlement* [2013 (1) JLR 1] at [10].

¹⁴⁵ *IFM Corporate Trustees* (n 74).

¹⁴⁶ *Pitt v Holt* (n 60) at [141].

¹⁴⁷ *Fisher v Brooker* [2009] UKHL 41

still has scope, for example, to elect against giving relief to a careless mistaken party who could be said to have assumed the risk of his own mistake.¹⁴⁸

- 4-49** A delay between the execution of the document sought to be rectified and the application to rectify in and of itself, even if of some considerable time, will not usually act as a bar to relief. It may be the case that the relevant parties agree not to seek rectification of trusts which will not come into operation, if at all, for many years, but only apply when it becomes practically necessary to do so, the delay will not be a bar to the remedy because it does not engage the purpose of the doctrine of laches. The impact of delay is that it may undermine the quality of the evidence needed to satisfy the high burden of proof on the applicant for relief that there has been a genuine mistake and the nature of that mistake.¹⁴⁹ Trustees who become aware of an error are under a positive duty to apply timeously to correct it and an unreasonable delay may result in the Court penalising a trustee in costs.¹⁵⁰

D. Practical Considerations in Applications for Rectification, Rescission and under Articles 47F and 47H of the Trusts (Jersey) Law 1984

- 4-50** An application to rectify a trust document or to reverse a transaction within the scope of Article 47B–J is to be brought by way of Representation and is often, so-called, ‘friendly’ litigation under Article 51 of the Trusts (Jersey) Law 1984, where none of the relevant parties convened to the proceedings oppose the application. Where the effect of the rectification sought is to reduce the amount of tax payable, or to trigger a claim for a tax refund, it is the Court’s practice to at least notify the relevant tax authority of the proceedings, if not convene them as a party to the action. There may often be, in the background, a claim for professional negligence against a lawyer who advised, or failed to advise (as the case may be) on (usually) the tax consequences of a particular disposition into trust. The Court will be astute to ensure that justice is achieved in considering an application to which there is no real opposition, hence the requirement that there be full and frank disclosure of all relevant material as a basis for seeking rectification. The Court will not allow itself to be used as a mere rubber stamp. Notwithstanding that all parties may agree, it is usually incumbent upon one of the parties convened, usually the trustee, to act as a devil’s advocate and put the arguments both for and against the remedy sought.¹⁵¹ It is not appropriate for only one representative to be before the Court.¹⁵² Advocates are expected to give the Court all the help it requires to ensure that it has jurisdiction and can properly exercise its discretion in the way it is asked.¹⁵³ Thought should be given to which witnesses can be called to give live evidence.

¹⁴⁸ Cf *Pitt v Holt* (n 60) at [114]. Where it is suggested that while a purely unilateral mistake may be sufficient to found relief it is arguably a good reason for the Court to apply a more stringent test as to the seriousness of the mistake before granting relief.

¹⁴⁹ *In The Matter of the C Trust* [2008 JLR N20].

¹⁵⁰ *Re McLean Family Settlement* [2002] JRC 152.

¹⁵¹ Provided there is no opposition in fact, we can see no objection to a single firm fielding different advocates to put forward the argument both for and against the order sought.

¹⁵² As in *Allnutt v Wilding* (n 119), where the claim for rectification failed. Although it is incumbent upon the applicant for relief to inform court at early stage and seek its approval if it intends not to convene all the beneficiaries; *In re R Remuneration Trust* 2009 JLR N [40].

¹⁵³ *Southgate v Sutton* [2011] EWCA Civ 637.

Any doubts as to the existence or genuineness of a mistake may be best resolved by enabling the Court to hear oral evidence, with or without cross-examination. Where the trustee or its professional advisors have caused the mistake, the trustee will usually be denied its costs of the rectification application.¹⁵⁴ In practice, very often there will be an agreement behind the scenes whereby the trustee (or its insurers) will indemnify the other convened parties' costs of the application.¹⁵⁵ The Court will usually order the costs of a trustee who is not responsible for the mistake to take its costs from the fund by way of its usual indemnity but the trustee will be under a duty to consider whether the costs of the application should be recovered for the benefit of the fund from the person(s) responsible.¹⁵⁶ A trustee is usually entitled to a full indemnity from the trust fund for its reasonable costs of a settlor's successful application to set aside trust for mistake.¹⁵⁷ Notwithstanding that many rectification and rescission claims are conducted on 'friendly terms' under the Court's supervisory jurisdiction, it is not the practice of the Royal Court to hear a rectification application in private.¹⁵⁸ There is no public interest in protecting professional draftsmen from embarrassment for their mistakes that would justify the Court sitting in private; indeed, there may be a public interest in such errors being made public so that prospective clients might be aware of them and to ensure professional standards are kept high. The Court may still be persuaded to redact the identities of a beneficiary, settlor or protector convened to the proceedings.

E. Construction of Trust Documents

Proceedings for the determination of the proper construction of a trust document are usually commenced by way of Representation under Article 51(2)(a)(i). Construction disputes can be so-called 'friendly litigation', where (usually the trustee) seeks clarification from the court on the meaning of the trust instrument, sometimes in conjunction with an application for directions as to whether it can or should act in accordance with that clarification. However, there are plenty of examples in Jersey case law of highly contentious and bitterly fought disputes over the true meaning of documents.¹⁵⁹ The costs of a construction dispute are considered elsewhere.¹⁶⁰ The Court will usually convene all those with divergent views and/or all those affected by the disputed construction as parties to the proceedings.

4-51

¹⁵⁴ *Re Hawtrey Discretionary Settlement* [2007] JRC 191 at [17].

¹⁵⁵ eg *Abacus CI Ltd v Imperial Cancer Research Fund* 2002/194C (unreported) at [10]; *Re C Trust* [2008] JRC 071, [2008 JLR N20] at [12].

¹⁵⁶ *Re Representation Abacus CI Limited* [2004] JRC 219 at [30].

¹⁵⁷ *In re Strathmullen Trust* (n 113) (unless otherwise paid, eg by trustee's financial advisor responsible for mistake).

¹⁵⁸ *In re Sanne Trust Co Ltd* 2009 JLR N [49].

¹⁵⁹ See the long-running *Trilogy* litigation concerning the proper construction of a company's articles of association, the company having been established as a means of providing funds for a sizeable charitable foundation; *Trilogy Management v YT and Others* [2012] JRC 093; *Trilogy Management v YT and Others* [2014] JRC 214; *Trilogy Management v YT and Others* [2012] JCA 204.

¹⁶⁰ See Ch 3 on applications for directions. See *Trilogy Management Ltd v YT Charitable Foundation (Intl) Ltd* [2013 (2) JLR 265]; *In re Dunlop Settlement* 2013 (2) JLR N [6]; *In re J.P. Morgan 1998 Employee Trust* [2013 (2) JLR 239]; *In re Internine Trust* 2004 JLR N [43].

i. Applicable Principles

- 4-52 Care should be taken to ascertain whether there is in fact any ambiguity in the document at all.¹⁶¹ If a description, read in its context and in the light of the admissible surrounding circumstances, points without ambiguity to a single person or thing, there is a strong presumption (though not an absolute rule)¹⁶² that that is the person or thing intended, and the Court will prefer it to another person or thing that corresponds less accurately with the description given in the document. The Jersey law principles governing the construction of trust documents will be familiar to those familiar with the applicable principles under English law. The proper law of a trust will govern the principles to be applied in the construction of the trust instrument.¹⁶³ The interpretation of documents is a matter of law, not a matter of fact and therefore can be adjudicated upon by the Bailiff sitting alone without Jurats.¹⁶⁴ The principles to be applied to the construction of trust documents are no different from the approach to be adopted in respect of the construction of other documents:¹⁶⁵
1. the aim is to establish the presumed intention of the maker(s) of the document from the words used;
 2. words must, however, be construed against the background matrix of the surrounding facts existing at the time when the document was executed;¹⁶⁶
 3. the circumstances that are relevant and admissible for this purpose are those that must be taken to have been known to the maker at the time or, where there are more than one, known to the makers of or the parties to the document, and include absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man;¹⁶⁷
 4. evidence of subjective intention, earlier drafts and negotiations and other matters extrinsic to the document in question is inadmissible, as is evidence of events subsequent to the making of the instrument (but not in this jurisdiction, unlike some others);¹⁶⁸
 5. the critical provisions have to be read in the context of the document as a whole;¹⁶⁹
 6. words should as far as possible be given their ordinary meaning; and¹⁷⁰

¹⁶¹ In *Philean Trust Company Limited v Taylor & Ors* [2003] JLR 61], the trustees, whilst deferring to the order of the Court, had taken the view that the fact that the clause under scrutiny could bear 2 interpretations, depending on how the Court found the law to stand, did not necessarily mean that there was an ambiguity.

¹⁶² See *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 778B-D, HL.

¹⁶³ Hague Trust Convention, Art 8; see *Trusts (Jersey) Law 1984*, Art 9(1)(a).

¹⁶⁴ The Master does not have jurisdiction to determine a construction dispute, which must be referred to the Inferior Number of the Royal Court, which can for these purposes constituted the Bailiff sitting alone. See RCR 2004, r 7/8 and the Royal Court (Jersey) Law 1948, Sch 1, Art 15(1).

¹⁶⁵ In *The Matter of the Internine and the Intertraders Trusts* [2005] JLR 236].

¹⁶⁶ *Re Representation Trustees of the H Settlement* [2005] JRC 077 at 9; *Prenn v Simmonds* [1971] 1 WLR 1381.

¹⁶⁷ *Investors Compensation Scheme Ltd v West Bromwich Bldg Socy* [1998] 1 WLR 913.

¹⁶⁸ Evidence of this kind may be relevant and admissible where an estoppel is said to arise but not as an aid to construing the original meaning of the document. See *Philean Trust Co Ltd v Taylor* (n 161) at 17, approving *Lewin on Trusts*, 17th edn (London, Sweet and Maxwell, 2000) Ch 6, para 6–14, at 166.

¹⁶⁹ *Re Representation Mourant & Co Trustees Limited* [2001] JLR 218] at [16].

¹⁷⁰ *Society of Lloyd's v Robinson* [1999] 1 WLR 763: ‘Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation’, per Lord Steyn.

7. principle (6) may have to give way if consideration of the document as a whole, having regard to the principles set out above or common sense, points to a different conclusion.¹⁷¹

The Royal Court has said that when attempting to discern the true meaning of a power conferred in a trust deed or other instrument the Court must have regard to the nature of the deed and the purpose for which the power appears to have been granted—though this will depend to a large extent on the terms of the instrument itself.¹⁷² A power of amendment reserved in a trust must be exercised for the purpose for which it was granted and not for one beyond the contemplation of the makers of the original instrument.¹⁷³

4-53

ii. Admissible Evidence in the Interpretation of Trust Documents

The intention that the Court is seeking to elucidate is the intention of the settlor as objectively expressed by the document. The Court will look to ascertain the objective meaning that the words of the document convey, when considered as a whole in the light of the surrounding circumstances.¹⁷⁴ The document is not to be understood by reference to the purpose or motive, desire or other subjective intentions or state of mind of the maker of the document.¹⁷⁵ While evidence of the surrounding circumstances as an aid to explain the objective meaning of a document or the evidence to show what the words mean is admissible, no evidence of extrinsic circumstances is admissible to add to, contradict, vary or alter the terms of a deed or other written instrument.¹⁷⁶ It is not permissible to adduce evidence to show that what was in the settlor's head was different from what the document itself expresses. Drafts of trust documents cannot be referred to in order to interpret the final version,¹⁷⁷ nor can preliminary negotiations or discussions between the settlor and the draftsman over its terms¹⁷⁸ nor are the subjective intentions of the draftsman admissible.¹⁷⁹ If the document does not express the settlor's true intention, it may be possible to have the document rectified to make it accord with the settlor's subjective intentions but that is a conceptually different process from that which the Court undertakes in a construction

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¹⁷¹ Common sense, in this context being reflected by the passage from the speech of Lord Reid in *Schuler (L) AG v Wickman Machine Tool Sales Ltd* [1974] AC at 251 in which he observed: 'The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear'. See also Lord Steyn, again in *Society of Lloyd's v Robinson* (n 170), and Lord Hoffmann's observations in *Investors Compensation Scheme Ltd v West Bromwich Bldg Socy* (n 167) at 913 concerning the need, on occasion, for a court to accept that the parties must have used the wrong words or syntax. But note *Arnold v Britton & Ors* [2015] UKSC 36, per Lord Neuberger.

¹⁷² In *The Matter of the Internine and the Intertraders Trusts* (n 165) at 63.

¹⁷³ ibid, at 63, citing Lord Steyn in *Society of Lloyd's v Robinson* (n 170), citing *Hole v Garnsey* [1930] AC 472.

¹⁷⁴ In re *Internine Trust* (n 165); *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101 at [14].

¹⁷⁵ In re *Internine Trust* (n 165).

¹⁷⁶ In re *Pinto Voluntary Settlement* 2004 JLR N [11], applying *Ex parte Viscount Wimborne* [1983] JJ 17 and *Philean Trust Co Ltd v Taylor* (n 161).

¹⁷⁷ *National Bank of Australasia v Falkingham & Sons* [1902] AC 585 at 591, PC, per Lord Lindley.

¹⁷⁸ *Prenn v Simmonds* [1971] 1 WLR 1381, HL; *Chartbrook Ltd v Persimmon Homes Ltd* (n 174); *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44.

¹⁷⁹ Re *Bird Charitable Trust* [2008] JRC 013 at [12]. However, evidence as to the settlor's and draftsman's subjective intention is admissible in actions for rectification of a trust instrument to make it accord with those intentions.

dispute.¹⁸⁰ In relation to the rectification of wills, the Royal Court has assumed a far more expansive jurisdiction than that hitherto available under English law.¹⁸¹ The Royal Court may consult dictionaries for the meanings of ordinary English words.¹⁸² It will also consult Article 1(1) of the Trusts (Jersey) Law 1984¹⁸³ and the Interpretation (Jersey) Law 1954 for legislative terms that are undefined either by the Trusts Law or the trust instrument itself. The meaning of ordinary words is not strictly evidence of fact as such but dictionaries are nonetheless admissible on the meaning of words in foreign languages and terms used in a technical or scientific sense.¹⁸⁴

- 4-55** The surrounding circumstances, or ‘matrix of fact’, can and must be taken into consideration in interpreting a trust document. The matrix of fact cannot be admitted to contradict, vary or alter the terms of a document and can only be admitted to aid in their application, particularly to identify persons and things referred to in the document itself. Facts admissible for this purpose must be objective external facts and cannot include direct evidence of the subjective intention of the settlor. The settlor’s written instructions may even be admitted, not as evidence of subjective intention, but as evidence of the state of the settlor’s knowledge.¹⁸⁵ Where a word has an ordinary meaning, that ordinary meaning may be departed from when it is clear from the surrounding circumstances that the ordinary meaning does not accord with the settlor’s intention or meaning to be given to a particular word. Evidence is admissible as part of the matrix of fact, that the maker of a document habitually used a particular word in a peculiar sense of his own, perhaps as referring to a particular person or piece of property.¹⁸⁶ But the evidence would need to show that the usage was habitual; evidence that the settlor said when he executed the settlement that by a particular word in it he meant something other than its natural meaning would not be admissible. The surrounding circumstances which are relevant are those which exist or are in the reasonable contemplation of the settlor when the settlement is made. Future or unforeseen circumstances are inadmissible.¹⁸⁷ Evidence of conduct of the parties after the making of a settlement is not admissible to assist in its interpretation.¹⁸⁸ Such evidence is,

¹⁸⁰ See rectification above. Although note the UK Supreme Court’s acknowledgement in *Marley v Rawlings* [2014] UKSC 2 at [38]–[41] that ‘a powerful case for the conclusion that the difference between construction and rectification has reduced almost to vanishing point’; see Lewison, *The Interpretation of Contracts*, 5th edn (London, Sweet & Maxwell, 2011) para 9.03, fn 67.

¹⁸¹ *In Re Vautier* [2000] JLR 351] (including a power to add, delete or substitute words); *In the Estate of Phillips* [2009] JLR N21] (the latter case suggesting that the jurisdiction should be exercised sparingly, requiring clear and compelling evidence of a mistake).

¹⁸² *Philean Trust Company Limited v Taylor* (n 161).

¹⁸³ eg *Strathmullen* (n 60) in which the Court’s interpretation of the term ‘Trust’ was central to its conclusion as to the scope of Arts 47E and 47G.

¹⁸⁴ In *Philean Trust Co Ltd v Taylor* (n 161) the phrase ‘children and remoter issue’ in a trust deed was construed as being limited to only legitimate issue (consistently with Jersey succession law and would not be rebutted by dictionary definitions or everyday usage) if the trust deed had been drafted by lawyer, in the absence of any special circumstances. But note *In Re Erskine Trust, Gregg & Anor v Piggott & Ors* [2012] EWHC 732 (Ch) on the impact of the ECHR principle of non-discrimination.

¹⁸⁵ *Re Ofner* [1909] 1 Ch 60.

¹⁸⁶ *Williams on Wills*, 9th edn (London, LexisNexis/Butterworths, 2013) vol 1, § 57.18.

¹⁸⁷ *In The Matter of the Internine and the Intertraders Trusts* (n 165).

¹⁸⁸ *ibid*.

however, admissible for the purposes of determining whether or not the settlement or parts of it are a sham.¹⁸⁹

Note that Jersey will allow the admissibility of extrinsic evidence of the testator's intention to cure an obvious or patent error in a will (which may create a trust) which would, if not admitted, result in the failure of that part of the will.¹⁹⁰ This is a similar jurisdiction to that provided for in England by section 21 of the Administration of Justice Act 1982 in relation to wills.¹⁹¹

4-56

iii. Tools for Interpreting Patent and Latent Ambiguities

A patent ambiguity in a document is one which is ambiguous on its face—ie a gift to 'one of my children' or 'a gift of [] shares in X Limited' where the settlor may have 100 shares in X Limited. A latent ambiguity is one which is not apparent from the face of the document, but which appears when the words of the document subsequently come to be applied to the circumstances that exist at the time it comes to apply the provision—ie a disposition of property into trust with a power for the trustee to appoint to one of two people who have the same name. It is not possible for the trustee to identify which of the two possible alternatives is the true object of their power.¹⁹² In English law there is a clear (but somewhat tenuous) distinction as to whether the court will admit evidence of the settlor's subjective intention when construing a document that contains a latent, as opposed to a patent ambiguity. When construing a patent ambiguity, the court will attempt to resolve the ambiguity by interpreting it having regard to the surrounding matrix of fact (other than direct evidence of the subjective intention of the settlor). If it is not possible to construe the ambiguity in this way and the gift or trust is dependent upon a provision containing a patent ambiguity, then it will be void for uncertainty and will fail. The approach in English law is apparently different where there the ambiguity is latent.¹⁹³ In such cases it is permissible to adduce evidence of the settlor's subjective intention and such evidence will be admissible to assist in construing the latent ambiguity in a document. The distinction between patent and latent ambiguities has been described as 'highly artificial and capable of producing results which offend against common sense' and even 'not merely capricious but also ... incoherent'.¹⁹⁴ The distinction is a limited one, admitting evidence of the settlor's subjective intent (contrary to the basic rule that the author of a document's intent is to be gathered from the document) to save a latent, but not a patent ambiguity. All other surrounding circumstances are admissible in either case.

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¹⁸⁹ *AG Securities v Vaughan* (n 39); *Minwalla v Minwalla* (n 53); see *Abdel Rahman v Chase Bank (C.I.) Trust Co Ltd* (n 10); *Re Esteem Settlement* (n 18) (approving *Hitch v Stone* (n 9)).

¹⁹⁰ *In the Matter of the Representation of Vibert* [1987–88 JLR 96] but only if it would be admissible under the law of testator's domicile; see *In re Estate of Chief Aleyideio* [2003 JLR N [7]].

¹⁹¹ However, the more benevolent approach to the construction of documents, esp with regard to the admissibility of extrinsic evidence under French and Roman law as espoused by Pothier (2 *Coutumes d'Orleans* (1821 edn) para 150 at p 497) and Dalloz (*Nouveau Répertoire*, 1st edn, Testaments, para 109 and 116 at p 500) was to be preferred to English authorities.

¹⁹² *Re Jackson* [1933] Ch 237.

¹⁹³ See Tucker, Le Poidevin, Brightwell, *Lewin on Trusts* 19th edn (London, Sweet & Maxwell, 2014) at 6-013.

¹⁹⁴ *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* (n 162), per Lord Hoffmann.

- 4-58** There is no Jersey authority that specifically provides for the same distinction in respect of the construction of trust documents subject to a latent ambiguity. However, there is authority¹⁹⁵ that extrinsic evidence of the subjective intentions of the parties is admissible in relation to the interpretation of both wills and servitudes that are subject to a latent ambiguity¹⁹⁶
- 4-59** The justification commonly deployed for allowing in direct evidence of the settlor's subjective intention in the case of a latent ambiguity is that it prevents the gift from being void.¹⁹⁷ In the author's view, given the expectation is anomalous, it is of limited application and can only be used for the purpose of preventing a gift from failing and is not of general application.
- 4-60** It might be argued that if the settlor's subjective intention were capable of preventing a patent ambiguity from making a gift void the distinction between latent and patent ambiguities is somewhat arbitrary and the settlor's subjective intention should also be admissible. However, the distinction turns on different purposes for which the settlor's subjective intent is admitted into evidence. In the case of a latent ambiguity, the person or thing referred to is completely and correctly described, though it turns out that the description in the document applies just as equally to another person or thing. The admissibility of evidence of the settlor's subjective intent does not add to, contradict or vary the terms of the settlement. In contrast, in a case of a patent ambiguity, the settlement does not accurately express the settlor's intentions and the evidence is wanted in order to alter (ie rewrite) the expression given to them.

¹⁹⁵ *La Petite Croatie Limited v R.P. Ledo and A.K. Ledo (Née Gale)* [2009] JRC090.

¹⁹⁶ A servitude is a burden imposed on one piece of Jersey immovable property for the use and benefit of another piece of Jersey immovable property belonging to another proprietor. See *In re Amy* [2000] JLR 80], approving Pothier, *Traité des Testaments, et Donations Testamentaires*, vol XXVII (1822 edn) at 150: 'Les dernières volontés sont susceptibles d'une interprétation large; et on doit principalement s'attacher à découvrir quelle a été la volonté du testateur' [wills are susceptible to a broad interpretation; one must in general endeavour to ascertain what was the intention of the testator.]

¹⁹⁷ *In re Double Happiness Trust* [2002] JLR N [48]], it was said that the Court will endeavour to uphold the validity of a trust by interpreting it, as far as possible, to give effect to the intention of the settlor and it will reluctantly be compelled to allow the trust to fail if the subject matter, beneficial interests or beneficiaries are uncertain, or the trust deed is incoherent.

5

Disclosure of Trust Information and Documents

I. Introduction

The first part of this chapter is concerned with the disclosure of information and documents pertaining to a trust and the rights of trustees and beneficiaries to such material under Jersey trust law to:

5-1

1. be given, without demand, information about the existence of a trust and their interest under it;
2. seek from trustees, on demand, access to trust accounts, information about the trust, the trust property and documents relating to the trust;
3. the disclosure obligations of an outgoing trustee to its successor(s); and
4. the disclosure obligations of a trustee to other persons that are connected to the trust, other than a beneficiary, such as a protector, power holder or the settlor.

The second part of this chapter is concerned with an array of legislative and procedural regimes, not based upon Jersey trust law, for the disclosure of documents and information pertaining to a trust in the context of:

5-2

1. hostile litigation before the Royal Court;
2. the obtaining of evidence in Jersey for use in civil proceedings outside of the island; and
3. a notice having been issued by Jersey's Comptroller of Taxes to a trustee to provide relevant 'tax information' under Jersey's Tax Information Exchange Agreement (TIEA) regime.

II. The Voluntary Provision of Trust Information to Beneficiaries

In many instances, a trustee is concerned less with what they *must* disclose to the beneficiary¹ and more with what they *may* disclose. The tension that exists in any request for disclosure

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¹ See para 5-5.

of information is a triangulation, between: maintaining the confidence of the beneficiaries that the trustee is accountable to them; the trustee's duty of confidentiality to and as between beneficiaries; and, thirdly, the value the trustee may ascribe to maintaining a 'safe space' in which it is free to exercise its discretion without constant surveillance and interference from beneficiaries.

- 5-4** The beneficiaries' requests for disclosure information and documents about the trust from the trustee may be enforced by way of legal proceedings. Such proceedings are usually commenced by way of Representation, but the 'entitlement'² that is sought to be vindicated by such proceedings is that which arises under trust law and can be contrasted with the process of formal discovery which is a procedural requirement of litigation before the Royal Court³ that is ancillary to the vindication of the beneficiaries' rights against the trustee for disclosure of trust information.

A. Voluntary Disclosure

- 5-5** There is a narrow range of instances in which, absent special circumstances, it is usually unnecessary (and unreasonable)⁴ for the trustee to seek directions from the Court as to whether it should give disclosure of information and documents to the beneficiary. A trustee is obliged to inform the adult beneficiaries⁵ who attain a vested interest in possession of their interest.⁶ We consider that generally similar considerations apply to discretionary beneficiaries and objects of discretionary trusts or fiduciary powers. There is no requirement to disclose the existence of a settlement to all objects of fiduciary powers (which could be a very wide class) in all circumstances.⁷ The trustee must identify those discretionary beneficiaries who are, in the circumstances, real potential candidates for benefiting from the proper exercise of the trustee's discretion under the trust or power; and disclosure may, indeed normally should, be limited to those discretionary beneficiaries.⁸ Where trustees have a duty of disclosure without demand under the principles set out above, the information that needs to be given is the existence of the settlement and the beneficiary's interest under it. Unless it is self-apparent from the trustees' communication, sufficient information

² As will be seen, strictly the beneficiaries have no such unassailable entitlement to trust documents from the trustee; see *Rabaiotti 1989 Settlement* [2000 JLR 173]; *Schmidt v Rosewood* [2003] UKPC 26 and the vindication of a beneficiary's claim for information and documents as an aspect of its inherent supervisory jurisdiction in the administration of a trust.

³ RCR 2004, r 6/17 (Discovery and inspection of documents); RCR 2004, r 6/16 (Discovery by interrogatories).

⁴ With the attendant consequence that the Court may deny the trustee its costs of such an application or may order indemnity costs against it if other parties are put to the expense of arguing the matter.

⁵ The duty of voluntary disclosure to a beneficiary has been held, in England, to arise when the beneficiary reaches majority, see *Hawkesley v May* [1956] 1 QB 304, although it does not follow that there need never be disclosure without demand in relation to interests of minor beneficiaries and the fact that a beneficiary is a minor does not mean that the trustees are unaccountable to him. A minor is able to enforce the accountability of the trustees in proceedings commenced in his name with a guardian ad litem acting on his behalf, who will normally be the minor's parent. See RCR 2004, r 4/2.

⁶ *Hawkesley v May* (n 5); in *Foreman v Kingstone* [2005] WTLR 823 at [85], NZ HC, the duty to inform beneficiaries of their rights was described as 'fundamental'.

⁷ *Re Manisty's Settlement Trusts* [1974] Ch 17 at 25; and see *Re Hay's Settlement Trusts* [1982] 1 WLR 202 at 208–10 and cases therein cited.

⁸ See *Re Manisty's Settlement Trusts* (n 7).

about the identity of the trustees should also be provided to enable the beneficiary to seek further information from the trustees on demand. However, we do not consider that the trustee has to provide the beneficiary with copies of any accounts or trust documents without demand. If the beneficiary wants further information or access to accounts or trust documents it is up to the beneficiary to seek them from the trustee.

The trustee should also take reasonable steps to inform an adult beneficiary even if the beneficiary's interest is not vested in possession: being either vested in interest or a future vested yet defeasible or contingent interest, and the general nature of that interest, as soon as reasonably practicable after the interest comes into existence. This is unless the trustee reasonably believes that by reason of the remoteness of the interest the beneficiary has no reasonable prospect of successfully asserting rights to information on demand, or there are other special circumstances (not merely the wish of the settlor to keep the existence of the settlement a secret) justifying a delay in disclosure.

5-6

The trustee's failure to inform the beneficiary of the existence of a settlement and his interest under it is not likely to result in a loss so as to amount to an actionable breach of trust.⁹ Where the trustee fails to pay a fund to a beneficiary who has become absolutely entitled, and fails to inform him of the existence of his interest, they may be charged with compound interest.¹⁰ A trustee exemption clause may afford a defence to a personal claim by the beneficiary, and the trustee may also seek relief under Article 45 of the Trusts (Jersey) Law if the trustee has acted honestly, reasonably and ought fairly to be excused.¹¹ A prolonged failure to comply with the duty to disclose the existence of the settlement could conceivably support a case for a loss of trust and confidence in the trustee, incompetent administration of the trust or an irreparable breakdown in the relationship between the trustee and beneficiaries so as to afford grounds for the trustee's removal.

5-7

While the trustee will find it difficult to justify its refusal to disclose the existence of a trust and the beneficiaries' interest under it, it is inaccurate, for the reasons set out below, to describe the beneficiaries' legitimate expectation to information of this nature as being in the nature of a *right*.¹²

5-8

III. Disclosure by Trustees to Beneficiaries on Demand

The vast majority of the reported Royal Court decisions in this area are not concerned with the innocuous disclosure of the existence of a trust and the interests of the beneficiaries. Beneficiaries may demand from a trustee disclosure of information concerning the trust in a variety of other contexts, not all of which may give rise to concern for the trustee but the following contexts are likely to be familiar to practitioners:

5-9

1. A beneficiary (or a successor trustee on their behalf) may seek information from a trustee (or former trustee) because the beneficiaries may be disgruntled with the way

⁹ *West v Lazard Bros & Co (Jersey) Ltd* [1993 JLR 165].

¹⁰ *Re Emmet's Estate* (1881) 17 ChD 142.

¹¹ See Ch 11.

¹² Para 5-11.

in which the trustee has administered the trust and its assets. The demand for information may be a precursor to a hostile claim for malfeasance against the trustee. The request or demand for information may be a genuine inquiry or little more than a fishing expedition, the purpose of which is to enable the beneficiary to ascertain whether there are grounds for a claim for breach of trust, or perhaps a claim that the trustee has made some unauthorised profit from the trust, or charged excessive fees.

2. Very many Jersey trusts are discretionary, in which the beneficiaries have no vested interest in the trust assets and benefits are conferred by the exercise of discretionary powers vested in the trustee or (sometimes in conjunction) with some other power holder. A beneficiary may be disappointed with the way in which powers or discretions conferred by the trust have been exercised so as to benefit one beneficiary (or group of beneficiaries) over another. The demand for information may be against the background of a family dispute. While the trustee may not, at first, be the target of the beneficiaries' dissatisfaction (the real dispute may be between the warring beneficiaries) it will invariably be the trustee from whom information is demanded, again for the purpose of finding out whether there is ammunition to mount an attack on the exercise of the power exercised by the trustee. If the trustee has exercised (usually but not exclusively) a dispositive power to benefit one beneficiary over another, the trustee's decision-making process in the exercise of that power will come under scrutiny and the trustee may be at risk of a personal claim for breach of trust if the trustee has parted with assets pursuant to the exercise of the power that may later be found to have been exercised improperly or defectively.
 3. An alternative scenario is that of an attack upon the trust by a beneficiary, perhaps under an entitlement to assets settled into trust contrary to forced heirship rights or by way of matrimonial proceedings in a jurisdiction other than Jersey. The trustee may be caught on the horns of a dilemma; in being obliging and providing information to the beneficiary it may be providing the beneficiary with grounds to criticise the trustee which will not be used just against the trustee, but potentially against the trust or the trust assets.
- 5-10** Other than for those categories of documents that the trustee cannot reasonably refuse to provide to a beneficiary, the trustee may find itself in a difficult situation. A trustee faced with demands for information in circumstances such as those mentioned above are often advised, where they have real concerns that disclosure will be detrimental to the interests of the beneficiaries as a whole, or there is real doubt whether disclosure should be made, to seek the Royal Court's authoritative direction as to what should be disclosed and to minimise the risk for them of an adverse costs order with which they may be faced if they pursue a policy of disclosing little or nothing, leaving the beneficiaries to seek redress from the Court in hostile proceedings. If trustees adopt this course, they should normally be prepared to accept the Court's ruling and not seek to challenge it on appeal.¹³

¹³ Or do so at their own risk as to costs. *In the matter of the R and RA Trusts* (Guernsey CA) 25/2014 approving the dissenting judgment of Salmon LJ in *Londonderry Settlement* [1965] Ch 918 at 936: 'the trustees were fully justified in bringing this appeal. Indeed it was their duty to bring it since they believe rightly that an appeal is essential for the protection of the general body of beneficiaries.'

A. Applicable Principles

Jersey's rules governing the disclosure of information under a trust are derived from both statute¹⁴ and case law. Jersey law has long recognised that the disclosure of trust information and documents is subject to an overriding judicial discretion and not hard-and-fast rules as to the beneficiaries' unassailable *right* or *entitlement* to documents or information.¹⁵ This discretion forms part of the Court's overriding supervisory jurisdiction in relation to trusts and enables the Court to intervene, where necessary, in the administration of a trust to protect the trust from an attempt by beneficiaries to exploit a technical entitlement to information about the trust that may be contrary to the interests of the trust and the beneficial class as a whole.

5-11

The customary law rules are supplemented by Article 29 of the Trusts (Jersey) Law 1984 which provides:

5-12

29 Trustee may refuse to make disclosure

Subject to the terms of the trust and subject to any order of the court, a trustee shall not be required to disclose to any person, any document which –

- (a) discloses the trustee's deliberations as to the manner in which the trustee has exercised a power or discretion or performed a duty conferred or imposed upon him or her;
- (b) discloses the reason for any particular exercise of such power or discretion or performance of duty or the material upon which such reason shall or might have been based;
- (c) relates to the exercise or proposed exercise of such power or discretion or the performance or proposed performance of such duty; or
- (d) relates to or forms part of the accounts of the trust,

unless, in a case to which sub-paragraph (d) applies, that person is a beneficiary under the trust not being a charity, or a charity which is referred to by name in the terms of the trust as a beneficiary under the trust or the enforcer in relation to any non-charitable purposes of the trust.

5-13

This is one of the more awkwardly worded provisions of the Trusts Law, being phrased in the negative. Article 29 does not state what the trustee must disclose but instead states what a trustee is entitled to withhold, subject to the double negative in relation to the accounts of the trust in Article 29(d). It is tolerably clear that when taken in conjunction with the prevailing themes in the case law, the following principles can be derived:

1. The trustee *may* disclose whatever information it considers appropriate to beneficiaries.¹⁶ Article 29 provides only that the trustee is not *required* to disclose trust documents and information to a beneficiary.¹⁷

¹⁴ Trusts (Jersey) Law 1984, Art 29.

¹⁵ The leading Jersey case on the disclosure of trust information by trustees is *Rabaiotti 1989 Settlement* (n 2); the approach adopted was later endorsed by the Judicial Committee of the Privy Council in the leading English decision of *Schmidt v Rosewood Trust Ltd* (n 2), affirmed in Jersey by *Re Internine Trust* [2004 JLR 325]. See also *In re C.A. Settlement* [2002 JLR 312]; *J.P. Morgan Trust Co (Jersey) Ltd v Alhamrani* 2007 JLR N [26]; *In re B Settlement* [2011 JLR 236]; *In re Bird Charitable Trust* [2012 (1) JLR 62].

¹⁶ 'Beneficiary' meaning a person entitled to benefit under a trust or in whose favour a discretion to distribute property held on trust may be exercised, thereby encompassing both discretionary fixed interest beneficiaries; see the Trusts (Jersey) Law 1984, Art 1(1).

¹⁷ Save in respect of documents falling within Art 29(d).

2. The double negative in Article 29 positively requires the trustee to disclose to a beneficiary, or a named charitable beneficiary, or an enforcer of a private purpose trust, any document which relates to or forms part of the accounts of the trust.
3. The trustee is subject to a general duty to preserve the confidentiality of the trust's affairs from outsiders to the trust.¹⁸
4. The Court has discretion to override any decision of the trustee to disclose or not to disclose information or documents about the trust to any person including the scope of such disclosure, whether the documents should be disclosed in a complete or in a redacted form and what safeguards it should impose¹⁹ to limit the use which may be made of documents or information disclosed under the order of the Court.²⁰

- 5-14** In determining whether, what and how disclosure should be made to a beneficiary under the above principles, it is the author's view that the court is exercising its own discretion in supervising, and intervening in, the administration of trusts. The Court's function is not limited simply to reviewing the trustee's exercise of its own discretion and giving its blessing so as to limit its jurisdiction to order or restrict disclosure only to cases where it is proved that the trustee's decision or proposed decision on disclosure is of a kind that no reasonable trustee could reach.²¹ That said, the decision whether, what and how disclosure should be made to a beneficiary, in the first instance, is the trustee's decision and will usually stand in the absence of a successful challenge to the decision or successful invocation of the supervisory jurisdiction. The Court has a concurrent inherent and statutory jurisdiction to intervene in the administration of the trust but will only do so on a sensible and principled basis.²²
- 5-15** The States of Jersey is currently consulting on a seventh amendment to the Trusts (Jersey) Law 1984 which would radically overhaul Article 29 and could potentially replace it with a new provision modelled on the equivalent statutory provision in Guernsey, section 26 of the Trusts (Guernsey) Law 2007, which provides:

26 Duty to give information

- (1) A trustee shall, at all reasonable times, at the written request of -
 - (a) any enforcer, or
 - (b) subject to the terms of the trust -
 - (i) any beneficiary (including any charity named in the trust),
 - (ii) the settlor, or
 - (iii) any trust official,

provide full and accurate information as to the state and amount of the trust property.

¹⁸ *Viscount v AG* [2002 JLR 268]; *Re The Internine and the Azali Trusts* [2006 JLR 195]; however, see *In Re B* (35/2012) Guernsey CA recognising the exceptions in *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 46: (1) where disclosure is under compulsion by law; (2) where there is a duty to the public to disclose; (3) where the interests of the bank [read trustee] require disclosure and (4) where the disclosure is made by the express or implied consent of the customer.

¹⁹ eg whether by undertakings to the Court, arrangements for professional inspection, or otherwise.

²⁰ *In re C.A. Settlement* (n 15).

²¹ *In re Y Trust* [2014 (1) JLR 199].

²² *In re B Settlement* [2010 JLR N [29]]; see also *Breakspear v Ackland* [2008] EWHC 220 (Ch), [2009] Ch 32 at [69]–[71] where the Court refused to intervene.

(2) Where the terms of the trust prohibit or restrict the provision of any information described in subsection (1), a trustee, beneficiary, trust official or settlor may apply to the Royal Court for an order authorising or requiring the provision of the information.

(3) The person applying to the Royal Court for an order under subsection (2) must show that the provision of the information is necessary or expedient—

- (a) for the proper disposal of any matter before the court,
- (b) for the protection of the interests of any beneficiary, or
- (c) for the proper administration or enforcement of the trust.

This provision is to be read alongside section 38 of the 2007 Law which provides:

5-16

38 Non-disclosure of deliberations or letters of wishes

(1) A trustee is not, subject to the terms of the trust and to any order of the Royal Court, obliged to disclose –

- (a) documents which reveal –
 - (i) his deliberations as to how he should exercise his functions as trustee,
 - (ii) the reasons for any decision made in the exercise of those functions,
 - (iii) any material upon which such a decision was or might have been based,
- (b) any letter of wishes

(2) A ‘letter of wishes’ is a letter or other document intimating how the settlor or beneficiary wishes the trustees to exercise any of their functions.

(3) The person applying to the Royal Court for an order under this section for the disclosure of any document must show that the disclosure is necessary or expedient –

- (a) for the proper disposal of any matter before the court,
- (b) for the protection of the interests of any beneficiary, or
- (c) for the proper administration or enforcement of the trust.

As will be immediately obvious from a summary comparison of the above provisions with Article 29, the Guernsey provisions are a much clearer expression of the actual position under Jersey law; that the beneficiary’s right to certain information is subject to the terms of the trust and to the orders of the Court and can be restricted within the limits of the principle of accountability. The beneficiary may apply to the Court for directions where necessary.

5-17

B. Categories of Trust Documents for Which Disclosure Is Often Sought

While the Court retains an overriding discretion as to whether, what and how disclosure is made to beneficiaries in relation to any document, not all documents that are capable of being disclosed have an equal weighting in terms of the Court’s likelihood of ordering or refusing their disclosure. Certain documents are well within the established bounds of what is readily disclosable and carry, in the absence of good reasons to the contrary, a strong presumption of disclosure while other documents fall into a more peripheral sphere in which the trustee’s decision to refuse disclosure is likely to be given greater latitude. In ascending order, documents that carry a presumption in favour of disclosure are:

5-18

- a) *Category 1*—Those documents clearly falling within squarely within Article 29(d) as documents relating to or forming part of the accounts of the trust; without more.

- b) *Category 2*—Those documents falling within Article 29(a)–(c) which may or do evidence the reasons for which a trustee has exercised their discretion in a particular way.
- c) *Category 3*—Those documents falling within Article 29 but not within Category 2 above, where the interests of the beneficiary seeking disclosure are in conflict with those of other beneficiaries.

i. *Category 1*

- 5-19** The following categories of documents fall within category 1.
- a. Trust Accounts
- 5-20** A trustee must keep clear and distinct accounts of the property he administers, and to be constantly ready with his accounts.²³ It is trite law that a beneficiary is entitled to seek inspection and copies of trust accounts and *prima facie* the trust accounts should be disclosed to all beneficiaries on demand.²⁴ While such an entitlement is not absolute and is always subject to the discretion of the Court to order otherwise,²⁵ in ordinary cases the discretion is heavily weighted in favour of allowing disclosure of trust accounts to a beneficiary on demand because the Court will always seek to give effect to the trustee's fundamental duty of accountability to the beneficiary.²⁶
- 5-21** The only reasons why disclosure of the trust accounts will be excluded or made subject to restrictions or redaction are either that the beneficiary has an interest which is too remote to warrant disclosure in his favour, or that there is a real and substantiated concern that the information disclosed by the accounts will be used by the beneficiary to harm the interests of the beneficiaries as a whole.²⁷ Where a beneficiary persists in seeking to challenge the trust in foreign proceedings, the Court may withhold disclosure even of the trust accounts so long as that challenge exists.²⁸
- 5-22** A beneficiary who has a future interest only in capital will struggle to justify why the trustee should disclose accounts showing the flow of income. Such accounts are not necessary for him to vindicate his interest, having no interest in the income position of the trust. The

²³ *West v Lazard Brothers (Jersey) Limited* [1987–88 JLR 414] defined 'any document which relates to or forms part of the accounts of the trust' very widely to include 'all accounts, vouchers, coupons, documents and correspondence relation to the administration of the trust property or otherwise to the execution of the trust, including a full inventory of the trust assets and all dealing relation to any real property (as defined in *Re Londonderry's Settlement* [1965] Ch 918)' although the scope of the term does not seem to have been argued. However, in *Re A Settlement* [1994 JLR 139] it was held that Art 29(d) is not to be construed so widely as to render the protection of the trustees' confidentiality contained in Art 29(a)–(c) nugatory. We consider 'accounts' to include the accounts of any underlying companies held by the trust; see *In re Lombardo Settlement* [2000 JLR N-67], which defined 'accounts' to be given a common sense interpretation, using normal standards of trust and accountancy practice.

²⁴ *White v Lady Lincoln* (1803) 8 Ves Jr 363; *Pearse v Green* (1819) 1 J & W 135, per Sir T Plumer; see also *Hardwicke v Vernon* (1808) 14 Ves Jr 504; *Springett v Dashwood* (1860) 2 Giff 521; *Kemp v Burn* (1863) 4 Giff 348; *Re Watson* (1904) 49 SJ 54; *Armitage v Nurse* [1998] Ch 241 at 261, CA, per Millett LJ.

²⁵ *Re Rabaiotti's Settlements* (n 2).

²⁶ *Schmidt v Rosewood Trust Ltd* (n 2) at [52].

²⁷ However, even in such cases there is still a strong presumption in favour of disclosure, esp where any concerns can be adequately met by appropriate confidentiality undertakings restricting the disclosure of trust accounts to third parties or their use in other proceedings; see *Re Rabaiotti's Settlements* (n 2).

²⁸ *Re M and L Trusts* [2003 JLR N6] at [22].

same rationale may not be as applicable for income only beneficiaries who will usually be entitled to an account of how their income has been generated. Different beneficiaries of distinct sub-funds within the same overarching trust structure are not usually entitled to seek accounts for the other sub-funds, unless this is justified in order to establish, for example, whether expenses or tax liabilities have been allocated across the sub-funds appropriately.

A trustee should provide the beneficiaries, on request, with an inventory of trust assets (and any title documents), inform the beneficiaries of the trust's investments, their performance and any liabilities, security interests or other charges against the assets. A beneficiary may also seek reasonable information and supporting documents about transactions concerning the trust assets and held by companies owned by the trust entered into by or with the authority of the trustees. A beneficiary is normally entitled to inspect trustees' receipts for their expenditure. While the trustees must give accurate information, they need not answer never-ending lengthy and voluminous enquiries as to the state of the trust beyond what is reasonable having regard to the trustee's time and resources available to respond to such inquiries.²⁹ Where a beneficiary's requests for information require the trustee to incur additional time costs the Court is entitled to take the beneficiary's conduct into account if a dispute arises concerning the additional fees that may be incurred.³⁰

5-23

The accounts to which a discretionary beneficiary is entitled includes a record of all distributions of income and/or capital and the identity of the recipient.³¹ Such a breakdown is, by analogy with trust instruments that record the exercise of dispositive powers, necessary so as to enable the beneficiary making the request for disclosure to hold the trustee to account that the trust monies are all properly accounted for and put at the disposal of those entitled to benefit under the trust.³² The authors also consider that the beneficiary will be entitled to copies of the written resolutions of the trustee at which it resolved to make distributions, to show the fact of the making of the distribution, as distinct from the reasons for the distribution³³ provided it is possible to disclose those resolutions (whether or not in a redacted form) without disclosing the reasons or materials upon which it is based.

5-24

b. Trust Documents

There is little doubt that the Court, if called upon, would exercise its discretion to order disclosure of the trust instrument to a beneficiary.³⁴ The same approach will likely be taken to other supplementary trust instruments³⁵ such as instruments of addition of property, instruments exercising powers, instruments of appointment and retirement of trustees,³⁶

5-25

²⁹ *Gray v Guardian Trust Australia* [2003] NSWSC 704 at [39].

³⁰ *Parujian v Atlantic Trustees* 2003 JLR N [11].

³¹ Or at least a description of its general purpose if not made directly to the beneficiary, eg school fees.

³² *Re Fortis Aviation Group Employee Benefit Trust*, unreported, 10 October 2006, (Guernsey RC) at [40]; cf *Re A Settlement* [2011] JRC 109 at [32]–[35] though in the circumstances of that case the issue was what distributions had been made from various trusts rather than which particular beneficiaries had had the benefit of distributions.

³³ Following by implication from *Re Londonderry's Settlement* (n 13) at 939–40, CA, where minutes of trustee meetings were exempted from disclosure to the extent only that they disclosed reasons.

³⁴ *In Rabaiotti (1989) Settlement* (n 2) at 67.

³⁵ *Re The Avalon Trust* [2006] JLR N19], [2006] JRC 105a; *Stuart-Hutcheson v Spread Trustee Co Ltd* [2002] WTLR 1213 at [32], (Guernsey CA).

³⁶ *Stuart-Hutcheson v Spread Trustee Co Ltd* (n 35) at [32]; *Bathurst (Countess) v Kleinwort Benson (Channel Islands) Trustees Ltd* (Guernsey RC) 38/2004, 2003–04 GLR N [32].

instruments of indemnity in favour of outgoing or former trustees,³⁷ instruments of appointment or advancement that evidence the exercise of dispositive powers,³⁸ instruments varying the terms of the trust, instruments restricting, releasing or enlarging the powers of the trustee (or other power holder) and instruments that add or exclude objects from the beneficial class.³⁹ A trustee is not normally to be required to disclose drafts or unexecuted versions of trust instruments since they have no effect.⁴⁰ A beneficiary of one trust cannot usually seek disclosure of the trust instruments of another trust even if both trusts have the same trustee. The beneficiary is a stranger to the second trust to which the trustee owes a duty of confidence.⁴¹ If the requesting beneficiary is a beneficiary of both trusts he should seek disclosure in his capacity as beneficiary. If the beneficiary suspects that his trustee is also trustee of another settlement under which the beneficiary may also be interested, a trustee is generally bound to disclose the existence of a settlement to a beneficiary as trustee of the other settlement.⁴² While the core trust documents are well within the scope of documents that are readily disclosable upon the beneficiary's request, there is scope for the trustee to exercise a discretion as to the mode and extent of the disclosure. A sensible trustee will usually comply with any reasonable request by a beneficiary to see the core trust documents, even if, following *Schmidt v Rosewood*, there is strictly no legal entitlement to them, as the relationship of trust should be based on mutual trust.⁴³ It is not necessary, in an age where documents are often held digitally, for the trustee to provide hard copies of the core trust documents. Nor is he generally required to produce the 'wet ink' originals.⁴⁴ Nor is the trustee required, without being satisfied as to the explanation or purpose for which they are sought, to provide certified copies of the documents. Trust documents are usually provided on the beneficiary's express undertaking that they are to remain confidential. Where there is a substantiated concern that an undertaking will not sufficiently protect the interests of other beneficiaries in keeping the document confidential then the trustee may be able to insist on professional inspection only or inspection without the provision of copies.⁴⁵

- 5-26** Where a trust instrument constitutes different trusts for different beneficiaries in respect of distinct parts of or shares in the fund, there may well be a good case for disclosure of redacted copies of the trust instrument, omitting parts of the trust instrument relating solely to the parts or shares in the trust fund held on trusts for beneficiaries other than the beneficiary seeking disclosure. However, a reasonable and proper comprehension of a beneficiary's interest or rights under a series of provisions generally requires knowledge of the trusts and powers as a whole, of which the beneficiary's interest or rights form part.

³⁷ *Bathurst (Countess) v Kleinwort Benson (Channel Islands) Trustees Ltd* (n 36) at [133].

³⁸ *Re Londonderry's Settlement* (n 13) at 930.

³⁹ *Stuart-Hucheson v Spread Trustee Co Ltd* (n 36) at [32].

⁴⁰ *Re Avalon Trust* (n 35) at [13].

⁴¹ *Re Internine Trust and Azali Trust* (n 18), although the case was decided by reference to principles of discovery in civil procedure rather than on disclosure under trust law principles.

⁴² See above.

⁴³ *J.P. Morgan Trust Company (Jersey) Limited v Alhamrani* (n 15).

⁴⁴ If the beneficiary is concerned about the veracity of the copies produced, the appropriate course is for the beneficiary or his advocate to inspect the originals.

⁴⁵ Such a situation may arise where the beneficiary (or someone into whose hands the documents are likely to come) is under an obligation, usually in another jurisdiction, to give disclosure of any documents it receives to the Court.

Where an instrument effects an appointment to a beneficiary under a fiduciary or special power, the trustee should be mindful that it owes duties to objects of such a power, and every beneficiary who is a potential object of such a power has a legitimate interest in seeking access to an instrument exercising such a power, regardless of whether he benefits from it. The rationale for this proposition is that the beneficiary is entitled to be satisfied that the trustee's duties owed to him have been performed. Beneficiaries can object to the redaction of the identity of the object of the trustee's discretion on the basis that, without identification of the other beneficiaries, the beneficiary seeking disclosure is unable to assess whether any appointment or advancement under the trust otherwise than in favour or for the benefit of himself is made within the scope of the trust.

5-27

The settlor's wishes recorded either in the recitals to a trust instrument or in the main body of the document do not have the same presumption of confidentiality as a settlor's letter of wishes and there are no proper grounds to insist upon their redaction before disclosure.⁴⁶

5-28

Redaction may be appropriate in some circumstances.⁴⁷ It is reasonable for the trustees to inquire why disclosure is being sought of parts of the trust instruments under which the beneficiary seeking disclosure cannot benefit. The beneficiary may have a good reason which, if they are to be persuasive, needs to be supported by reference to how knowledge of the other provisions of the trust instruments affect his interest.

5-29

c. Information about Trust Charges, Fees and Remuneration

5-30

A beneficiary is entitled to seek detailed breakdown and supporting documents in relation to fees and expenses of the trustees,⁴⁸ including fees and expenses charged to companies owned by the trust that is sufficient to enable the beneficiary to form a reasonably informed view of whether they are reasonable.⁴⁹ The Court may order the production of documents by a trustee to enable beneficiaries to decide whether to challenge trustees' fees.⁵⁰ A trustee is required, both under the general trust law principles, and under the Codes of Practice issued to regulated trust companies by the Jersey Financial Services Commission to be open and transparent about its fees and charges.⁵¹

ii. Category 2

5-31

The following categories of documents fall within category 2.

a. Documents that Disclose, in Whole or in Part, the Deliberations of the Trustees as to whether and the Manner in Which They Should Exercise Their Powers

5-32

As a general proposition, a trustee that exercises a power or discretion⁵² is not obliged to disclose the reasons for or documents that show their reasons for exercising a particular

⁴⁶ *Hartigan Nominees Pty Limited v Rydge* (1992) 29 NSWLR 405 at 445.

⁴⁷ *Schmidt v Rosewood Trust Ltd* (n 2) at [54].

⁴⁸ *Caversham Trustees Limited v Patel and Ors* [2007] JLR Note 30]. The Court has an inherent jurisdiction to vary the remuneration of trustees; *Landau v Anburn Trustees Ltd* [2007] JLR 250].

⁴⁹ *J.P. Morgan Trust Co (Jersey) Ltd v Alhamrani* (n 15). As to disclosure in relation to companies, see para 5-59.

⁵⁰ *EE v Royal Bank of Canada Trust Co (Jersey) Ltd* 2014 (1) JLR N [27].

⁵¹ *In re Carafe Trust* 2005 JLR 159; see also JFSC Codes of Practice for Trust Company Business, para 4.3.

⁵² There does not appear to be a distinction between administrative and dispositive powers.

power or discretion to beneficiaries.⁵³ This is the so-called *Re Londonderry*⁵⁴ exception upon which the formulation in Article 29(a)–(c) of the Trusts (Jersey) Law 1984 and section 38 of the Trusts (Guernsey) Law 2007 is based. The settled position in Jersey is that there is a *prima facie* presumption (and we put it no higher than that)⁵⁵ that the Court will not exercise its discretion to order disclosure of documents to beneficiaries that show, in whole or in part, the reasons for the exercise of powers by trustees if the trustees do not wish to disclose those documents. However, the trustee's entitlement to withhold documents falling within Article 29(a)–(c) is not absolute and the presumption against disclosure will yield to a court order to the contrary if the Court deems such disclosure to be in the best interests of the beneficiaries as a whole.⁵⁶ Just as beneficiaries have no absolute right to disclosure of certain documents from the trustee, the trustee has no absolute right to withhold certain document from the beneficiary.

- 5-33 Most of the Jersey cases on the scope of the *Re Londonderry* exception concern 'material upon which such reasons were or might have been based'. It is, at first sight, odd to except from disclosure documents which might have formed the basis for the trustee's reasons for a particular decision given the principle that disclosure to the beneficiaries is a necessary part and parcel of being able to properly hold the trustee to account.
- 5-34 The rationale for the *Re Londonderry* exception is to protect the autonomy of the trustee's decision-making process. In our view, material within Article 29(b) would include material held by the trustee concerning the personal circumstances of the beneficiaries who are objects of the trustee's discretionary dispositive powers. Outwith the 'material upon which such reasons were or might have been based' are likely a summary of the current state of the trust fund or statements as to past distributions, valuations of trust assets, investment policy guidelines,⁵⁷ generic investment or asset management advice.⁵⁸
- 5-35 On one view there is little to commend there being a strong presumption against disclosure of material upon which such reasons were or might have been based. The material is one step removed from the issue the beneficiaries are actually concerned about as it contains neither the reasons for the decision reached nor the deliberations of the trustees. At most, the material upon which the reasons might be based is no more than material from which it might be inferred that the decision was based. There remains the possibility that the material disclosed might not in fact have been the material upon which a particular decision was based. A situation that well show the subordinate importance of the material upon which reasons may or may not be based is where the trustee volunteered its reasons but refused to disclose the material upon which it is based. In those circumstances, the Court is more

⁵³ *Trilogy Management Ltd v YT Charitable Foundation (Intl) Ltd* [2015 (2) JLR 15]; *Re A Settlement* (n 23) at 146; *Re Rabaiotti's Settlements* (n 2) at 965–66.

⁵⁴ [1965] Ch 918.

⁵⁵ Art 29(a)–(c) is phrased in terms of a *prima facie* entitlement to withhold information and documents falling within those provisions. It follows that *prima facie*, the Court should not displace that entitlement unless it is satisfied that such entitlement cannot be justified by reference to the reasons for which such an entitlement exists.

⁵⁶ *Re Rabaiotti's Settlements* (n 2).

⁵⁷ Although material that goes to the reasons for the trustee's decision to set such guidelines probably is within the exception.

⁵⁸ *Re Londonderry Settlements* (n 13) at 933. However, specific investment advice, obtained in respect of a particular investment position probably is.

likely, absence a cogent explanation to the contrary, to order the disclosure of the material upon which the stated reasons are based.⁵⁹ Within Articles 29(a)–(c) are:

Internal Trust Correspondence and Records

Re Londonderry established a general *prima facie* exception to the presumption of disclosure⁶⁰ of certain correspondence and other documents, internal to the trust, that are created in the course of its administration.⁶¹ Correspondence extends to any means of written or electronic communication. It appears from the authorities that the rationale for protecting certain correspondence from disclosure is to protect the confidentiality in the documents and to avoid the potential for rancour (that appears to have been assumed to have been inevitable) disrupting the smooth administration of the trust were the documents to be disclosed.⁶² Even taking the potential for rancour at its highest, in the author's view there is no sound basis why communications that concern administrative matters only, rather than going to the exercise of dispositive powers of the trustees, should attract the same presumption of confidentiality.⁶³ Neither does there seem to be a sound basis to justify why a beneficiary cannot obtain disclosure of correspondence between himself and the trustee, distinct from correspondence between the trustee and other beneficiaries, which will usually remain confidential.⁶⁴ Notwithstanding these reservations as to the scope of the principle that justifies the presumption against disclosure (which owes as much to practicality as it does to principle) it must be remembered that the *Re Londonderry* exemption is only a presumption which can yield if the circumstances of individual cases demand it.

5-36

Letters and Memoranda of Wishes

It is well established that a letter of wishes⁶⁵ to the trustee is a relevant consideration⁶⁶ in relation to the exercise of the trustee's powers and discretions.⁶⁷ The fact that a trustee takes into account a letter of wishes (or follows it closely, if not slavishly) in and of itself does

5-37

⁵⁹ If only to allow the beneficiaries to verify that the conclusions reached are coherent with the material the trustee's considered.

⁶⁰ Which is again subject to any contrary order of the Court, although it appears that the exception of these documents is not justified on the basis of the documents containing or evidencing reasons for the decisions of the trustee.

⁶¹ See the order which excepts: correspondence passing between the trustees, beneficiaries and 'appointors', agendas of meetings of the trustee (to the extent that they contain the reasons for a decision or material upon which such reasons could have been based), correspondence passing between the trustees, if more than one (and by extension between those making decisions for the trustee), between the trustees and protector, if any, and between the trustee(s), protector(s) and the beneficiaries.

⁶² See *J.P. Morgan Trust Co (Jersey) Ltd v Alhamrani* (n 15); *Re The Avalon Trust* (n 35); *Schmidt v Rosewood* (n 2) at 49. In *Londonderry's Settlements* (n 13) at 935–36 above, Danckwerts LJ put it as high as suggesting it would be 'impossible' to execute the trusts if such disclosure was ordered.

⁶³ Correspondence between a beneficiary and a trustee requesting an update from the trustees as to the current net asset value of the trust assets is clearly qualitatively different (and far closer to material that would normally be readily disclosable) from a begging letter asking for and setting out a case for a distribution.

⁶⁴ *Re The Avalon Trust* (n 35); *In The Matter of the Y Trust* [2011] JLR 464; and *Re A Settlement* (n 32) at [20].

⁶⁵ Commonly a letter of wishes is written by the settlor but theoretically a letter of wishes may be written by any person to the trustees.

⁶⁶ The trustee is bound to consider, but is not bound to follow, a letter of wishes, which will form part of the matrix of relevant considerations the trustee is required to consider in reaching and making an independent decisions on the exercise of their powers.

⁶⁷ *Re Rabiaotti's Settlements* (n 2) at 968.

not show that the trustee has done anything wrong nor does it put the validity of the trust into question.⁶⁸ However, disclosure of the settlor's letter of wishes is often sought (with the importance of disclosure having gained a particular prominence in divorce cases) because, it is often thought, that it will unlock (or provide the basis upon which the Court can draw an inference as to) the true basis upon which the trust is run and will be an accurate indicator as to the trustee's past decision-making or a predictor as to future decision-making. The importance of the settlor's letter of wishes to the trustee's decision-making process may be overstated. Inevitably, the circumstances in which a letter of wishes will have weight and applicability to the trustee's decision-making will vary from case to case. Even if followed closely by the trustee, a letter of wishes is of a fundamentally different character to the constitutive core trust documents, which are readily disclosable to the beneficiaries. The trust documents *are* the terms upon which the trust operates and the source of the trustee's powers and discretions. A letter of wishes can only take effect within the bounds created by the constitutive documents and exists in furtherance of the trustee's powers and discretions (and restrictions) created by those documents. A trustee is not generally obliged to disclose a letter of wishes and may keep it confidential from the beneficiaries unless the Court considers there is a good reason in favour of disclosure.⁶⁹ The Court's reluctance to order the disclosure of the letter of wishes has been the consistent trend in the Jersey authorities.⁷⁰ That reluctance is based upon the presumption that a letter of wishes is confidential as between its maker and the trustee⁷¹ and, like the presumption that applies to correspondence discussed above, falls squarely within the *Londonderry* category 3 exception from disclosure.⁷² The defining characteristic of a letter of wishes is that by its nature it contains (or is likely to contain) material which its maker wishes the trustee to take into account in exercising its powers and having been having been brought into existence for that purpose, it is protected from disclosure by the same presumption of secrecy that attaches to the trustee's decision-making process, the reasons for decisions and the material upon which such reasons are or may be based. A letter of wishes will normally only ordered to be disclosed if the Court considers disclosure to be in the best interests of the beneficiaries as a whole and will further the sound administration of the trust. Indeed one of the reasons for the presumption against disclosure is an assumption that the smooth administration of the trust is likely to be disrupted were there to be disclosure. Generally disclosure is not usually dependent upon the context in which the beneficiaries' demand arises or the reasons behind it (eg dissatisfaction with a particular decision of the trustee or divorce proceedings). However, where disclosure is sought for the purposes of evaluating the beneficiary's prospects in the context of an application for ancillary relief, disclosure of the letter of wishes may well be ordered for the following reasons:⁷³

⁶⁸ *Re Esteem Settlement* [2003] JRC 092 at [162]–[167] and at [218]. A document describing itself as a letter of wishes was deemed to be effective to vary a trust under the rule in *Saunders v Vautier* if signed by all the adult, ascertained beneficiaries in *Re Turino Consolidated Ltd Retirement Trust* 2008 JLR N [27].

⁶⁹ *In Re Rabaiotti's Settlements* (n 2); *In Re Avalon Trust* (n 35), which is also the position under English law; *Breakspear v Ackland* (n 22).

⁷⁰ *In Re Rabaiotti's Settlements* (n 2); *In Re Avalon Trust* (n 35).

⁷¹ See the presumption against the disclosure of correspondence between the trustee and beneficiaries above.

⁷² *In Re Rabaiotti's Settlements* (n 2) at 970; however, *Londonderry* itself was not concerned with a letter of wishes.

⁷³ *Re Rabaiotti's Settlements* (n 2) at 971–72; *In Re Avalon Trust* (n 35) at [9]–[12]; *Re H Trust* 2006 JRC 057.

1. to forestall a foreign court from drawing an adverse inference from non-disclosure;
2. to ensure the foreign court does not come to an inaccurate conclusion as to the beneficiaries' expectation of benefit in the absence of evidence to the contrary; or
3. to ensure a foreign court does not make a more burdensome ancillary relief order against a beneficiary than it might otherwise have done.

The unifying theme is to ensure the Court does not have a false impression as to the resources available to one party to the divorce proceedings such as that a husband stands to substantially benefit from a trust where, upon reading the letter of wishes, the husband has a remote chance of benefit and the children of the marriage are the 'real' beneficiaries.

While great weight is given to the principle that a letter of wishes is intended and is often expressed by the settlor to be confidential and not to be disclosed to the beneficiaries, we doubt whether the Court would, simply by reason of that fact, be prohibited from ordering the disclosure of a letter of wishes.⁷⁴ Very often such stipulations of confidentiality are not expressed to be absolute but will be expressed as the letter having been given to the trustee to be used and referred to in accordance with their best judgment and discretion. Stipulations of confidentiality are often expressed in such a cautious way so as to preclude the suggestion, by anyone who might obtain a copy and seek to challenge the trust, that the settlor has fettered the trustee's discretion or has any measure of control over the trustee. It follows that any relaxation of the confidence in which the letter is held by the trustees is a matter for the trustee's (and ultimately the Court's) discretion.

It follows that the confidence in a letter of wishes given to trustees may be asymmetric in that the trustee may be able to insist on the confidentiality of the letter as against the settlor (if the settlor wished to disclose it to the beneficiaries but the trustees did not) but the settlor would not necessarily be able to restrain the trustee from doing the same.

The better view is that the confidentiality that is afforded to a letter of wishes exists, not for the benefit of the settlor, who after constituting the trust may⁷⁵ depart the scene and to whom the trustee owes no duty, but for the benefit of the sound administration of the trust as a whole. Where the sound administration of the trust in issue, the Court will usually order the disclosure of a letter of wishes if it is in the interests of the beneficiaries as a whole to do and can be expected to support the trustee's position of withholding it where it would not be so beneficial.

The Court retains a discretion as to the manner in which a letter of wishes is disclosed. An order for disclosure of a letter of wishes is usually subject to undertakings that it will remain confidential in the hands of the beneficiary to whom it is disclosed and used only for the limited purpose for which it is sought.⁷⁶ Where there is a sound basis to suggest that such an undertaking will be inadequate, disclosure may be made for inspection of the letter by a professional.⁷⁷ A letter of wishes may also contain highly personal or confidential information

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⁷⁴ *Re Rabaiotti's Settlements* (n 2) at 969–70 and *Bathurst (Countess) v Kleinwort Benson (Channel Islands) Trustees Ltd* (n 36); see also *Breakspear v Ackland* (n 22).

⁷⁵ or may not, if the settlor is a beneficiary.

⁷⁶ eg that it will not be referred to by the beneficiary beyond the any family proceedings in which it is sought to be disclosed without the permission of the Court. See *M Trust* [2012] (2) JLR 51].

⁷⁷ *Bathurst (Countess) v Kleinwort Benson (Channel Islands) Trustees Ltd* (n 36).

concerning the beneficiaries which may merit redaction. The Court may also order the redaction of the letter so far as its provisions relate to other beneficiaries which are not relevant to the rights of the beneficiary seeking disclosure of the letter.

- 5-43** The issue of disclosure of a letter of wishes can come before the Court via one of two routes: either by proceedings commenced by the trustee for directions as to whether or not to disclose the letter⁷⁸ or in proceedings commenced by a beneficiary. Where proceedings are commenced by the trustee, the trustee is obligated to give full and frank disclosure to the Court if it wishes to obtain the Court's direction as to how to proceed.⁷⁹ Where the beneficiaries are convened to the proceedings, as will usually be the case, the trustee will have to carefully consider how the letter of wishes is admitted into the proceedings (which will usually be in private and protected by a privacy order) without destroying the confidentiality in it.⁸⁰ Where the trustee is considering, or has already refused, to disclose the letter to the beneficiaries and is seeking either a blessing of that decision (or that decision is being challenged) the trustee will have to give its reasons for refusal to the Court. As we have already discussed, the trustee is entitled to withhold its reasons for decisions from the beneficiaries. The usual practice is to adopt a procedure sometimes encountered in Beddoe proceedings where a hostile beneficiary has been convened to the trustee's Beddoe application.⁸¹ The material sought to be disclosed should be treated in the same way as any privileged material against the beneficiary in the action that is the subject of a Beddoe hearing and should be exhibited to the trustee's affidavit but the material itself should not be served on the beneficiary.
- 5-44** The beneficiary seeking disclosure (and their legal representative) is usually excluded from the courtroom when the content of the material and reasons against disclosure action are discussed between the trustee's advocate and the court. The beneficiary will be permitted to address the Court on any arguments they may wish concerning disclosure of the material and will be permitted to participate fully in the proceedings save where their exclusion is necessary to preserve the confidentiality in the documents sought to be disclosed.⁸² This procedure has been held in England not to be incompatible with Article 6 of the European Convention on Human Rights.⁸³ However, where a trustee seeks the Court's blessing of a decision to exercise dispositive powers, in which a letter of wishes would undoubtedly be disclosed to the Court, the Court may elect to short-circuit the general presumption against the disclosure of a letter of wishes to beneficiaries by the instituting a separate procedure for excluding the beneficiaries from seeing the letter of wishes in order to avoid a multiplicity of proceedings.⁸⁴

⁷⁸ Such an application may or may not involve a surrender of the trustee's discretion but given the circumstances in which the Court will accept such a surrender are relatively narrow (see *In re B Settlement* [2010] JLR 653] and Ch 3, para 3-19) the basis upon which the application will usually be made is where the trustee has decided against disclosure and seeks the Court's blessing of that position.

⁷⁹ *In re L & M Trusts* [2003] JLR N6]; *In re A & B Trusts* [2007] JLR 444]; *In re Broere Trusts* 2004 JLR N2 (CA).

⁸⁰ It is a contempt of court to disclose, without the leave of the Court, any documents that have been disclosed in proceedings seeking directions save to the extent that they were in possession of such documents independently of those proceedings; *In the matter of the M & Ors* (n 76).

⁸¹ *Breakspear v Ackland* (n 22) at [68]

⁸² *Kleanthous v Paphitis* [2011] EWHC 2287 (Ch) at [44].

⁸³ *Three Individual Present Professional Trustees of Two Trusts v An Infant Prospective Beneficiary of One Trust* [2007] EWHC 1922 (Ch), [2007] WTLR 1631.

⁸⁴ See *Breakspear v Ackland* (n 22) at [70] and [90]–[101].

It may be the case that the letter of wishes itself will have a bearing on whether (and to what extent) disclosure of the letter of wishes and other documents within Articles 29(a)–(c) should be disclosed to the beneficiaries.⁸⁵ In those circumstances, the Court will have to take a view for itself as to whether to review the letter of wishes and whether it should be disclosed (and on what terms) to the beneficiaries before deciding whether to order disclosure.⁸⁶

5-45

Legal Advice and Communications with Lawyers

Where legal advice has been obtained by the trustee, at the expense of the trust, to guide the trustee in the discharge of its functions, powers⁸⁷ or discretions as trustee, the Court will normally order disclosure of legal advice and accompanying instructions to the beneficiaries.⁸⁸ Such advice has normally been obtained to assist the trustee in the good administration of the trust and is *prima facie* obtained for the benefit of the beneficiaries. The lawyer who provided the legal advice will not disclose it to the beneficiary without the consent of the trustee. The trustee, rather than the beneficiary, is the lawyer's client and it is with the trustee rather than the beneficiary, that the lawyer will have his retainer. The privilege that attaches to the advice is not the lawyer's but the trustee's to waive.⁸⁹

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It follows that the range of communications with lawyers that are usually disclosable to beneficiaries on demand is relatively narrow,⁹⁰ falling in the gap between communications protected by legal advice privileged, communications that pertain to the reasons for the exercise of a power or discretion (so as to fall inside the *Re Londonderry* exception) and communications which are protected by litigation privilege (taking place within the context of or in contemplation of hostile litigation with the trustee).

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Where extensive disclosure of inter-trustee/lawyer communications is demanded by beneficiaries in the context of an application for directions by the trustee, while there was a strong presumption in favour of disclosure, the Court may nevertheless exercise its discretion to limit disclosure only to documents the beneficiaries need to make fully informed decisions at the directions hearing.⁹¹ The Court has recognised there is a premium that attaches to trustees, who have found themselves in need of directions from the Court, being able to communicate with their lawyers without feeling inhibited by the fear of having to disclose those communications with beneficiaries convened to the hearing.⁹² The factors the Court will consider in deciding whether, what and in what form, to order disclosure of material in the hands of the trustee in a directions hearing are as follows:⁹³

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1. the context of the application, including the state of the relationship between the trustee and the beneficiaries, whether proceedings were afoot and if so for what;

⁸⁵ eg where the letter of wishes reveals that a settlor wishes a particular beneficiary to only be considered as an object of the trustee's dispositive powers in the event of a remote contingency.

⁸⁶ *Breakspear v Ackland* (n 22) at [95]–[97].

⁸⁷ *Re Londonderry's Settlement* (n 13) at 940.

⁸⁸ ibid, at 931–32; *Trustee 1 v AG* [2014] (CA Bda 3 Civ at [23], [29], [36]).

⁸⁹ *Cunningham v Cunningham* [2010] JRC 074.

⁹⁰ *Re Londonderry's Settlement* (n 13) at 934.

⁹¹ *In re B Settlement* (n 15).

⁹² *ibid*.

⁹³ *ibid*, at [11].

2. the capacity in which the beneficiary was seeking disclosure, whether, as in the present case, as a party convened to proceedings (in which case the test was for him to have sufficient information to make fully informed decisions) or simply as a beneficiary against the trustee (in which case there was a strong presumption in favour of disclosure, requiring good reason for refusal);
3. whether the disclosure sought was relevant to any current or potential issues;
4. the purpose for which disclosure was sought;
5. whether the application was a substantive request for specific documents and information or a fishing expedition which would engender further correspondence, additional requests and significant costs, to the detriment of the other beneficiaries;
6. whether the documents concerned third parties and, if so, whether their interests needed to be protected; and
7. whether an order for disclosure amounts to pre-action discovery.⁹⁴

5-49 Where the Court is sitting in a supervisory capacity under Article 51, the Court can direct the trustee to waive privilege in any legal advice. Alternatively it may accept a surrender of the trustee's discretion and waive any privilege in the advice of its own accord.⁹⁵ The privilege in such advice is held not for the personal benefit of the trustee but for the benefit of the beneficiaries as a whole.⁹⁶ Accordingly, privilege cannot be asserted as an absolutely defence against a beneficiary's demand for disclosure of the advice. However, legal advice which is obtained to support the reasons for the exercise of the trustee's powers or discretions in a particular way (as opposed to legal advice, say, as to the scope of a particular power) is not generally disclosable to beneficiaries on demand, even if paid for from the trust fund since such advice is properly to be regarded as material upon which the trustee's decisions are or might be based and is within the *Londonderry* exception.⁹⁷ However, there are borderline examples of legal advice that may have been obtained in respect of a specific exercise of powers but which are directed at the overall framework in which the power is exercised and are therefore analogous to the sort of legal advice that would at least have the potential to fall outside the *Londonderry* exception as it may be of such a general character so as not to be the basis for a reason for the exercise of particular powers or discretions. One example of such advice is generic advice concerning, for example, the impact of changes in tax law on the trust fund or the scope of the trustee's powers to mitigate the tax exposure of the fund or particular beneficiaries. Likewise, legal advice as to what are relevant and irrelevant considerations in relation to the exercise of a particular power or whether the exercise of a power in a particular way would amount to a fraud on a power, while closer to the *reasons* for which the power is exercised, is unlikely to be withheld from a beneficiary by the Court if the beneficiary requests them.

⁹⁴ *In re B Settlement* (n 18).

⁹⁵ *Cunningham v Cunningham* 2010 JLR N [24].

⁹⁶ *In the matter of the M & Ors* (n 76)—the privilege in the advice will not be lost by disclosure of the advice to the Court in the context of an application for directions by the trustee.

⁹⁷ *Re Londonderry's Settlement* (n 13) at 928F–G, 933B–D, 934G, 935G–936C, G.

Disclosure of Communications with Lawyers in the Context of Hostile Proceedings with the Trustee

A trustee who is sued for breach of trust or for other relief⁹⁸ in hostile proceedings is not liable to have legal advice and their other communications with their lawyers disclosed to beneficiaries on demand.⁹⁹ A trustee who is sued for breach of trust is prohibited from paying for the costs of their defence from trust assets.¹⁰⁰ A trustee who, deliberately or inadvertently expends trust money on legal advice for its own personal benefits commits a breach of trust and is liable to repay the sum expended on the advice to the trust fund¹⁰¹ but the effect of using trust money in this way is not to deprive the trustee of right to assert privilege in the communications and advice as a defence to their disclosure.¹⁰²

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iii. Category 3

The following categories of documents fall within category 3 (those documents falling within Article 29 but not within Category 2 above, where the interests of the beneficiary seeking disclosure are in conflict with those of other beneficiaries).

a. Company Documents

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The Court's inherent jurisdiction to order disclosure of trust documents extends only as between beneficiaries and trustees, qua beneficiary and trustee and does not extend, despite earlier authority to the contrary,¹⁰³ to trustees or beneficiaries who hold documents in another role, such as directors of a company, even if the trust has an interest in that company.¹⁰⁴ Company directors owe duties to their company, not to the beneficiaries of a trust that ultimately owns the shares of the company and will risk acting improperly, even if acting together, if they release confidential information concerning the company to an outsider, such as a beneficiary, without shareholder ratification of that decision. The Royal Court has held that it is not permissible to invoke the supervisory jurisdiction to order disclosure of documents directly against the directors of a company, even if they are also beneficiaries and are before the Court in that capacity.¹⁰⁵ The foundation of the Court's supervisory jurisdiction lies in the nexus between trustee and beneficiary arising out of the trust relationship. The fact that a person is a beneficiary is not of itself sufficient to

⁹⁸ Such as their removal

⁹⁹ *Re Londonderry* (n 13) at 931–32, *Thommensen v Butterfield Trust (Guernsey) Limited* 2009–10 GLR 102 (a hostile action by the settlor for the trustee's removal). Such communications are protected by privilege belonging to the trustee personally.

¹⁰⁰ *Re Londonderry* (n 13) at 931–32; *Alsop Wilkinson v Neary* [1996] 1 WLR 1220.

¹⁰¹ Which has been held to amount to such serious misconduct as to justify its removal; see *Parujan v Atlantic Western Trustees Limited* (n 31).

¹⁰² The source of the money used to pay for legal advice is not a component in the test as to whether such material is legally privileged. The privilege is absolute and may not be waived by the Court without a surrender of the trustee's discretion except when the privileged communication was itself the means of carrying out a fraud; see *Cunningham v Cunningham & Ors* (n 95), affirming *Hume v AG* 2006 JLR N [36].

¹⁰³ *In The Matter of the B, C and D Settlements* [2010] JLR 653.

¹⁰⁴ ibid; overturning the decision at first instance at [2010] JRC 085. However, note the difference in approach to disclosure by the same judge in the later Guernsey decision of *In the matter of the R and RA Trusts (Guernsey CA)* 25/2014, albeit without the interposition of a corporate structure.

¹⁰⁵ *In The Matter of the B, C and D Settlements* (n 103).

justify the making of an order: the order must be made for the purpose of vindicating, or at least promoting, some right or interest arising directly out of the trust relationship.¹⁰⁶ The authors are of the view that this is not the final word on the principles applicable to the scope of the Court's power to authorise the production of companies under Article 51.

- 5-52** The approach of the Jersey Royal Court is currently more restrictive than the approach taken in neighbouring Guernsey following the Guernsey Court of Appeal's decision *In the matter of the R and RA Trusts* which demonstrates a preference to maintain flexibility in the scope of the inherent jurisdiction to order the production of documents and is likely to be highly influential when the decision in *In The Matter of the B, C and D Settlements* comes back for reconsideration before the Jersey Royal Court.
- 5-53** Company documents belong to the company itself and the beneficiaries have long been held to have no proprietary interest in them.¹⁰⁷ The Court will respect the integrity of the separate corporate personality of any company in which the trust holds an interest and will be reluctant to make an order that disregards the company's rights. That said, whether the Court will order disclosure remains a matter of the Court's discretion. The English Court of Appeal decision of *Butt v Kelson*¹⁰⁸ established the following principles:
1. The beneficiary must specify with precision which company documents he wishes to see.
 2. The beneficiary must have a proper case for seeing the documents.
 3. There must be no valid objection by the other beneficiaries or from the company's directors (on its behalf).
 4. The beneficiary should give assurances that he will not disclose the documents or copies to any third party.¹⁰⁹
- 5-54** If the trustee is, directly or indirectly, the shareholder of the company whose documents are sought to be disclosed, the appropriate course is not, outside of the principles espoused in *Butt v Kelson*, to provide a short-circuit for the trustee to give that disclosure. Instead the appropriate course is for the trustee, qua shareholder, to use its voting rights in general meeting either to compel disclosure or to modify any restriction in the company's articles of association that prevents disclosure to shareholders of the company.¹¹⁰ A beneficiary seeking disclosure via the trustee, qua shareholder, should seek an order that 'the trustee procure the documents by asserting such rights as it has under company law to obtain disclosure from the directors of the company'.
- 5-55** Once the documents are in the hands of the trustee, qua trustee, the Court may order the disclosure of the document to any person, not just a beneficiary, if it considers it

¹⁰⁶ *ibid* at [41].

¹⁰⁷ A proprietary analysis of the beneficiaries' entitlement to trust documents was abandoned by *Schmidt v Rosewood*.

¹⁰⁸ [1952] Ch 197, considered in *In The Matter of the B, C and D Settlements* (n 106) to be an affirmation of the proposition that the formalities imposed by a company structure operated by trustees must be properly observed; see [45].

¹⁰⁹ Other than the beneficiaries' legal advisors.

¹¹⁰ The Companies (Standard Table) (Jersey) Order 1992, Art 100 provides that: 'No member shall (as such) have any right of inspecting any accounting records or other book or document of the company except as conferred by law or authorized by the directors or by ordinary resolution of the company'.

appropriate.¹¹¹ Such disclosure may be subject to appropriate protections, such as undertakings as to the documents' confidentiality, in order to protect the confidentiality of the company's affairs that would not otherwise be known to outsiders to the company.

Where, as is common in many Jersey trust structures, the underlying trust assets are vested in a wholly owned holding company, rather than in the trustee directly, and where the trustee appoints the directors of the holding company, there seems to us a good argument that there is no substantive difference between that arrangement and one where the assets are held by the trustee directly and so while taking account of the proper mechanisms in obtaining information from a corporate structure, the fact that there is an intervening corporate entity between the trustee and the assets should make little difference to the exercise of the Court's discretion as to what it should order the trustee be disclosed.¹¹²

In our view, *anti-Bartlett*¹¹³ type clauses, common in many Jersey trust instruments, have no impact on the scope of the disclosure the Court can order a trustee, qua trustee, to produce on the basis that such clauses, are, subject to contrary drafting, directed at protecting a trustee from liability if it does not intervene in the affairs of a company in which the trust has an interest and do not, in the main, positively oblige the trustee not to do so.

Where the trust has an interest in a company that is not wholly owned by the trust, there is a stronger presumption that the Court will not order disclosure of company documents to the beneficiaries. The beneficiaries may reasonably seek disclosure of the company's balance sheet and profit and loss account, if not otherwise publicly available.¹¹⁴ The Court may, it seems, even order disclosure of the shareholder and board minutes¹¹⁵ but there is usually no jurisdiction to order the disclosure of documents that show the day-to-day running of a trading company.¹¹⁶ In the Guernsey case of *Bathurst*, the Court's order for disclosure was expressly on the basis that the companies were 'wholly-owned by the trusts [...] in real terms, each company was, in all probability, a creature of the trusts'. It should be remembered that a trustee that has less than a controlling interest in an underlying company may not be in a position to require the company in which the trust has an interest to do anything. In those circumstances, the Court has no power either under its inherent jurisdiction or under the Trusts (Jersey) Law 1984 to convene or compel the company to give disclosure of its internal workings.

C. Locus to Demand Trust Documents and Information

i. Discretionary Beneficiaries

A beneficiary of a discretionary trust and other objects of fiduciary powers are *prima facie* entitled (although their entitlement is not strictly in the nature of right) to seek disclosure

¹¹¹ *In Re C.A. Settlement* (n 15).

¹¹² *Schmidt v Rosewood Trust Ltd* (n 2) at [65(2)].

¹¹³ A clause that negatives the effect of the decision in *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515, so that a trustee is required to interfere in the management or conduct of the business of any company in which the trustee holds shares.

¹¹⁴ *Bathurst (Countess) v Kleinwort Benson (Channel Islands) Trustees Ltd* (n 36) at [142].

¹¹⁵ *ibid*, at [142].

¹¹⁶ Such information is usually commercially sensitive and would not be disclosed to a beneficiary that had a competing business to the company from whom disclosure is sought.

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of information and documents concerning the trust.¹¹⁷ Even in cases where as a matter of principle there is a strong presumption in favour of disclosure, such as accounts or the trust instrument, the issue for the trustee, when a discretionary beneficiary makes a request for documentation, is whether any disclosure should be made at all. The trustee's risk is in judging when, if such disclosure is refused and the demand is renewed in proceedings before the Royal Court, the Court will reach a different conclusion from the trustee so as to put the trustee at risk as to costs.¹¹⁸ In many cases the Court will have no difficulty in concluding that a discretionary beneficiary ought to be granted relief.

- 5-60** The plaintiff beneficiary seeking disclosure bears the burden of proving that his or her prospects of benefiting from the trust are sufficiently real to merit the Court's intervention in ordering disclosure. We consider that the evidential burden shifts from the beneficiary to the trustee who is resisting disclosure once the beneficiary has discharged the burden on him to show his expectation of benefit was real and substantial.
- 5-61** The extent of the discretionary object's expectation to information and disclosure of documents pertaining to the trust are relevant also to the extent of the relief the Court can be expected to grant. Where the expectation of benefit is more than theoretical but nonetheless real, the Court is more likely to order limited disclosure of, say, accounts relevant to the beneficiaries' interest but there is likely to be a presumption against more detailed disclosure and disclosure of sensitive confidential information which would likely remain beyond the beneficiaries' reach.

ii. Unascertained Beneficiaries or Beneficiaries with a Mere Future Expectation of Interest

- 5-62** A beneficiary of a trust whose interest is based upon being a member of a class of persons that is to be ascertained in the future (in contrast with a beneficiary who has a present but contingent interest) has no present entitlement or locus before the Court to protection of his interest by a court order for disclosure of documents and information.

iii. Beneficiaries with an Existing but Remote Fixed Interest under the Trust

- 5-63** The position of a beneficiary who has a present but defeasible or contingent interest can be contrasted again with a beneficiary who will, if they live long enough, take under a fixed interest trust. A beneficiary in the first category is entitled, by virtue of their position, to seek disclosure under the principles in *Re Rabaiotti* and *Schmidt v Rosewood*. Whether the Court will order disclosure and its extent is another matter.
- 5-64** In vindicating a beneficiaries' right to information, the Court will make an evaluation of the remoteness of the beneficiaries' entitlement to benefit from the trust. Where the beneficiary's interest is contingent upon the happening of some remote event that is outside the control of the trustees or other persons upon whom powers are conferred, the approach of the Court is likely to be similar to that when a question arises of distribution on the footing

¹¹⁷ *Schmidt v Rosewood* (n 2); *In re Rabaiotti 1989 Settlement* (n 2).

¹¹⁸ See cost risk.

that a highly improbable event will not occur.¹¹⁹ Where the interest may be dependent instead on the non-exercise of a power conferred by the trust instrument, the approach of the Court is likely to be similar to that adopted by the Court in the case of disclosure to any other discretionary object.

iv. Minor Beneficiaries

In ordinary circumstances, trustees may disclose information and documents to parents or guardians having parental responsibility for minor beneficiaries in the same way as if those beneficiaries were of full age and capacity. If the trustee fails to do so, parents or those with parental responsibility have no locus before the Jersey courts to commence proceedings for disclosure in their own name. The appropriate procedure is to commence proceedings in the name of the minor as their guardian ad litem.¹²⁰ It is likely to be appropriate for the trustee to insist that the parent agree to ensure any material disclosed remains confidential. The trustee should satisfy itself that the person seeking disclosure on behalf of a minor beneficiary has parental responsibility for the minor beneficiary. Where there is more than one person with parental responsibility for a minor beneficiary, the trustees should not give disclosure without the written consent of the person with whom parental responsibility is shared. The trustees should exercise extreme caution and may instead surrender their decision to the Court rather than take the risk of a decision themselves, if the request for information is made by a parent in the context of an existing or pending parental or matrimonial dispute where the resources available to a minor beneficiary are relevant in any application between the parents concerning the maintenance of children.

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v. Former Beneficiaries and those with Doubtful Status as Beneficiaries

There is no reason in principle why a person who has ceased to be a beneficiary is not entitled to seek an order for disclosure of information and documents that pertain to the period for which they were still a beneficiary and for which period the trustee remains, subject to prescription, accountable. A person that becomes excluded from the beneficial class pursuant to powers in the trust instrument is, we think, entitled to seek and obtain disclosure of the instrument in which such powers is exercised. Where there is no challenge to the validity of the beneficiary's removal, as was the case in the *Re Internine Trust*, a court will err on the side of not ordering disclosure of accounts and information about the trust after the date of removal where the trust is likely to continue after the removal of the beneficiary.¹²¹

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¹¹⁹ See *Blackburn v Russell-Hills*, unreported, 24 July 1990, in reliance on *Re Westminster Bank Ltd's Declaration of Trust* [1963] 1 WLR 820; but see authorities not cited in *Blackburn* that suggest that in the context of an application by the trustee to make distributions to a beneficiary the Court will not deprive any other person of the possibility of taking, however remote and improbable; see *Re Hocking* [1898] 2 Ch 567, CA; *Teague v The Trustees, Executors and Agency Co Ltd* (1923) 23 CLR 252, Aus HC; *Re Deloitte* [1926] Ch 56; *Macrae v Walsh* (1927) 27 SR (NSW) 290; *Trustees, Executors and Agency Co Ltd v Margottini* [1960] VR 417; *Figg v Clarke* [1997] STC 247. (Note, however, the suggestion in *Berry v Geen* [1938] AC 575 at 584, HL that *Re Deloitte* might require reconsideration.)

¹²⁰ RCR 2004, r 4/ 2.

¹²¹ *Bathurst v Kleinwort Benson Trustees Limited* (n 36) at [141].

- 5-67** A plaintiff who seeks a determination as to his interest or rights as a beneficiary is entitled, by the litigation process, to obtain disclosure of documents relevant to his claim to the extent permitted by r 6/17 RCR 2004¹²² but not, usually, under the Court's supervisory jurisdiction. However, the Royal Court, with the approval of the Court of Appeal, has ordered disclosure to a person in relation to a period in which a person's status as a beneficiary was in dispute in circumstances where the beneficiary had undeniably been a beneficiary and where it would be many years before the identity of those in the beneficial class would be finally determined.¹²³

D. Procedure in Applications for Disclosure of Trust Documents and Information

- 5-68** An application to the Court, whether by the trustee or by a beneficiary seeking disclosure, will normally be made by way of Representation under the Court's inherent jurisdiction to give a direction as to the execution or the administration a trust. Applications for disclosure of trust information, particularly if the information that is sought to be disclosed is sensitive are usually heard in private.¹²⁴ It is the usual practice to join the beneficiaries that have an interest in the outcome of the demand for disclosure although there is no automatic rule that all the beneficiaries should be joined as parties to the proceedings.¹²⁵ While the Royal Court may refer the assessment of a trustee's fees for reasonableness to the Master, only the Royal Court sitting in the Inferior Number and not the Master,¹²⁶ may exercise the Court's inherent jurisdiction to order the disclosure of trust documents.¹²⁷ Therefore, if the beneficiaries seek disclosure from the trustee in order to consider whether or not to challenge a trustee's fees on the basis that they have been unreasonably incurred, the scope of the beneficiaries' right to the information, is an issue that needs to be determined by the Royal Court.

E. Disclosure and The Data Protection (Jersey) Law 2005

- 5-69** A detailed examination of the provisions of the Data Protection (Jersey) Law 2005 is well beyond the scope of this work but will need to be considered alongside the principles under general trust law set out in this chapter. A trustee is a data controller¹²⁸ of personal data¹²⁹ for the purposes of the Data Protection (Jersey) Law 2005, which places restrictions on the

¹²² Discovery and inspection of documents.

¹²³ *Re Internine Trust and Intertraders Trust* [2004] JCA 158; however, the jurisdiction to do so is to be regarded as requiring exceptional circumstances and any question as to disclosure would ordinarily be deferred until any issue as to whether or not a party was a beneficiary was determined.

¹²⁴ *In re Esteem Settlement* [1995] JLR 266]. Short of a private hearing, the Court may order non-publication of the judgment and suppression of details in the Act of Court.

¹²⁵ *In re A Settlement* (n 23).

¹²⁶ *Landau v Anburn Trustees Ltd* (n 48).

¹²⁷ *EE v Royal Bank of Canada Trust Company (Jersey) Limited* (n 50); *Vieira v Kordas* [2013] JRC 251.

¹²⁸ Data Protection (Jersey) Law 2005, Art 1(1): 'a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed'.

¹²⁹ Defined in Art 1(1) and possibly also sensitive personal data defined in Art 2.

processing¹³⁰ of personal data and confers statutory rights on a person (the data subject) to personal data relating to himself.¹³¹ The 2005 law does not confer any general right on a data subject to seek information relating to any other person and a trustee may well resist disclosing such information voluntarily citing its obligations as a data controller for that individual data subject.

F. Restrictions on Disclosure in the Trust Instrument

Article 29 expressly provides for the possibility that even the beneficiary's entitlement under Article 29(d) to demand any document which relates to or forms part of the accounts of the trust is subject to contrary provision in the trust instrument itself. It seems to us perfectly possible that the trust may provide for an enlargement of the beneficiaries' entitlement to documents and information concerning the trust, for example by providing an absolute right to see trust accounts in place of the Court's overriding discretion. The phrasing of Article 29 suggests that a settlor may theoretically 'contract out' of or restrict the beneficiary's *prima facie* entitlement to such documents. However, disclosure to beneficiaries under the trust is the principal mechanism by which the trustee is held to account. This is part of the fundamental and irreducible core of obligations at the heart of the trust relationship.¹³² It seems more likely that a blanket prohibition on the beneficiaries' access to accounts and information will be held to be ineffective, amounting, as it does, to an impermissible fetter on the Court's inherent jurisdiction. It is probably not permissible to exclude the accountability of trustees at the instance of some or all of the beneficiaries who will be unable to seek accounts if they know nothing of the existence of the settlement or their interests under it.¹³³

The real issue is what restrictions are permissible. Restrictions on the information that may be disclosed, distinct from a general exclusion of accountability, are likely to be valid provided they do not purport to encroach upon the overarching supervisory jurisdiction of the Court. Such a provision does not oust the beneficiary from seeking to vindicate their information rights before the Court where the mechanism that is provided for in the trust instrument does not result in disclosure. The Court has power to order disclosure to the beneficiary if it is satisfied that the beneficiary has made out a case for disclosure of the information or documents sought.¹³⁴ Elaborate mechanisms by which disclosure requires the consent of a third party, such as seeking the approval of the Court, or the approval of a protector, may have the desired effect of deterring beneficiaries from persisting with demands for information. However, a power to consent to the disclosure of information, vested in a protector, is liable to be categorised as at least a special if not a fiduciary power to be exercised in the best interests of the beneficiaries as a whole unless clearly drafted to

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¹³⁰ Defined in Art 1(1) to include obtaining, disclosing, recording, holding, using, erasing or destroying personal data.

¹³¹ *ibid*, Art 7 and 8.

¹³² 'The rights of beneficiaries to information regarding a trust', Jersey Law Commission Consultation Paper No 1, February 1998 (the 'Consultation Paper'); *Armitage v Nurse & Ors* [1997] EWCA Civ 1279.

¹³³ Suggested as much in *Rabaiotti 1989 Settlement* (n 2) at [31] but as yet untested in Jersey.

¹³⁴ *Re an Application for Information about a Trust* 2013–14 16 ITELR 955.

the contrary.¹³⁵ Where the Court's consent is required before disclosure can be made, it seems to us that the Court will proceed to make an order in accordance with the principles of *Schmidt v Rosewood* if no specific parameters or exclusions are prescribed. In our view, while it may be possible to restrict the trustee's disclosure obligations, the Court will closely scrutinise such provision in the trust instrument which will always be subject to the Court's jealously guarded overriding discretion to regulate the issue of disclosure.

G. The Proper Law Governing the Principles of Disclosure of Trust Information

- 5-72** The right of a beneficiary to seek disclosure of trust documents and information is, unless there is provision for *dépeçage*¹³⁶ in relation to the trust's administration, governed by the proper law of the trust.¹³⁷ Where the proper law of the trust is Jersey, any question concerning the disclosure of documents is protected by the firewall provisions in Article 9(1)(d) of the Trusts (Jersey) Law 1984, as a question concerning the administration of a trust, which require the question of disclosure to be determined in accordance with the principles of Jersey law before any request for disclosure will be given effect to by an order of the Royal Court. The authors are doubtful whether the Court's supervisory jurisdiction to intervene in the trust's administration either to order or restrict disclosure of trust documents and information can circumvent restrictions in the proper law on disclosure existing under the applicable proper law.

H. The Costs of a Demand for Trust Documents and Information

- 5-73** There are two issues as to the costs of complying with a demand for the disclosure of documents. The first is who pays for the physical production of the documents. The second is who pays for the costs of any legal proceedings that are commenced because the trustee refuses to give disclosure of documents on demand. Where copies of documents are held and easily produced in electronic rather than a hardcopy format, the costs of producing documents in electronic form is usually negligible. Where a beneficiary insists upon hard copies of documents, it will be for the trustee and beneficiary to negotiate an agreed sum which represents the trustee's actual cost of their production. The cost of drawing up the trust's accounts is a cost properly and reasonably incurred in the execution of the trust and can be reimbursed from the fund by way of the trustee's indemnity.¹³⁸ There is English authority that the costs of preparing copies of the accounts for a beneficiary should properly be borne by the beneficiary and not the trust.¹³⁹
- 5-74** A separate issue is the cost risk in bringing a dispute about disclosure of trust documents and information to court. A trustee who unreasonably refuses to disclose documents to a

¹³⁵ *ibid.*

¹³⁶ A concept in the conflict of laws whereby different issues within a particular case or written instrument may be governed by different proper laws.

¹³⁷ Hague Convention on the Law Applicable to Trusts and on their Recognition, Art 8.

¹³⁸ *ibid*, Art 26(2).

¹³⁹ *Ottley v Gilby* (1845) 8 Beavan 602.

beneficiary and therefore causes the beneficiary to incur unnecessary legal cost in seeking orders for disclosure is on risk as to costs and will usually be required to pay the beneficiary's costs of that application on the indemnity basis and will not be permitted its own costs from the fund.¹⁴⁰ If a trustee has a genuine doubt about revealing confidential information, the correct course is for the trustee to apply to the Court for directions at an early stage. Such an application will usually involve either a complete surrender of the trustee's discretion as to whether to give disclosure to the Court¹⁴¹ or alternatively, the application may seek a blessing of the trustee's momentous decision to grant disclosure or withhold it, in whole or in part.

I. Disclosure of Trust Documents to Settlors and Protectors

A settlor is not entitled to disclosure of documents or information concerning a trust simply by virtue of being the settlor.¹⁴² There must be provision in the trust instrument that confers a right to disclosure from the trustees to provide a basis on which to be given information, either by consent, or for the Court to grant relief. The settlor who is also a beneficiary, whether under the terms of the trust, or by virtue of a resulting trust upon the termination of the trust period, is entitled to seek the disclosure of information or documents, qua beneficiary.¹⁴³

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A settlor who reserves to himself, or has conferred upon him, fiduciary or special powers¹⁴⁴ in relation to the trust, is in principle, entitled to seek information and have access to documents which are reasonably incidental to the exercise of his powers and functions and be given such access by the trustees, subject to similar conditions as to the preservation of confidentiality, as applies to beneficiaries. In the authors' view the same principles apply to disclosure to a protector who is not the settlor. It follows that where a settlor or protector has functions in relation to the trust, the beneficiaries may, on the basis of the principles in *Schmidt v Rosewood*, seek disclosure of trust information and documents held by the settlor or protector in connection with those functions.¹⁴⁵ However, such information and documents that go to the reasons for which the settlor or protector have made a decision, as in the case of trustees, is protected by the principles already discussed in *Re Londonderry's Settlement*.

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Where trustees are bound to have regard to the settlor's wishes concerning the administration of the trusts, rather than, as is more usual, merely being entitled to have regard to

5-77

¹⁴⁰ *Hogg v Williamson And Strathaven Incorporated* [2003] JLR N 38].

¹⁴¹ *Public Trustee v Cooper* [2001] WTLR 901 'category 1'.

¹⁴² Settlors have a statutory entitlement to information concerning their trust conferred by ss 26(1)(b)(iii) and 26(2) of the Trusts Guernsey Law 2007, which has no equivalent in Jersey.

¹⁴³ See Trusts (Jersey) Law 1984, Art 42. Although the settlor's beneficial entitlement under a resulting trust upon the exhaustion of the trust period or upon the deaths of every member of the nominated beneficial class may be so remote for the Court to approach the question of disclosure on the same basis as that of an event that is highly unlikely to occur.

¹⁴⁴ Note the broad range of powers, some of which may or may not be fiduciary in the Trusts (Jersey) Law 1984, Art 9A.

¹⁴⁵ *Re HHH Employee Trust* 2012 JRC 127B; *Bathurst (Countess) v Kleinwort Benson (Channel Islands) Trustees Ltd* (n 36).

those wishes, there is likely to be a stronger basis for the settlor seeking and (if he pressed the matter to proceedings) being entitled to information concerning the trust. Such a situation is similar to the involvement of settlor in the administration of the trust by virtue of having powers conferred upon him. If the trustees are to be bound to have regard to the settlor's wishes, it is more rather than less likely to be in the interests of the beneficiaries if the settlor's expressed wishes are informed.

- 5-78** Trustees should not disclose documents and information to the settlor if such disclosure cannot be reasonably justified by reference to their administration of the trust. Trustees should not succumb to a desire to placate a settlor by providing disclosure to them safe in the knowledge that such letters of wishes they receive back are not binding upon them. Trustees who do so may be in breach of their duty of confidentiality to the beneficiaries. Where the trustee suspect that the settlor's demands for information are based on a desire to interfere or control the trustee's decision-making process rather than just provide the trustee with his informed wishes, the Court is likely to uphold the trustee's decision to refuse disclosure if the settlor were to bring proceedings for disclosure orders.
- 5-79** Where there is no question of a tax liability impacting upon the trust property, there will normally be no objection to disclosure to the settlor concerning the trust to enable the settlor to discharge his tax liabilities, subject again to appropriate safeguards as to confidentiality. Where such disclosure would give rise to a negative impact upon the trust property, the question is more finely balanced and may legitimately require an application for directions. While the trustees may not owe any duties to the settlor qua settlor, it may not be in the interests of the beneficiaries for the trustee's refusal to give disclosure to the settlor to lead to a confrontation between the settlor and the fiscal authorities if that situation has the potential to lead to the greater exposure of the fund.

J. Disclosure by Outgoing Trustees to their Successors

- 5-80** An incoming trustee, whether appointed by court order or under the provisions of the trust instrument is entitled to require the former trustee to deliver up all records, books and other papers pertaining to the trust which the incoming trustee may reasonable require to administer the trust.¹⁴⁶ The incoming trustee is also entitled to inspect and copy other papers in the hands of the former trustee so far as they contain information that relates to

¹⁴⁶ *In the matter of the Bird Charitable Trust and the Bird Purpose Trust* (n 15) at [26]; *Tiger v Barclays Bank Limited* [1952] 1 All ER 85. Practical guidance on the classes of documents that should normally be surrendered or made available to an incoming trustee are listed in R Williams, A Straker and T Graham, *A Practical Guide to the Transfer of Trusteeships*, 2nd edn (STEP, 2011) but will usually include: (1) the governing documents including the trust instrument, any dispositive instruments, all instruments transferring trusteeship, instruments of indemnity and release, formal notices of assignment of beneficial interests, letters of wishes, minutes of the trustee's meetings, trustee resolutions (and all supporting materials) instruments of appointment or retirement of protectors or other power holders, correspondence with the protectors or other power holders; (2) the trust accounts (for at least the last 3 years, including accounts for all underlying entities, book keeping ledgers from the last year end to date (including a trial balance), tax certificates and tax returns for at least the last 3 years, current investment valuations and bank statements, documentation concerning loans to beneficiaries or from third parties, all contracts with third parties); (3) documents of title to trust assets, documents relating to undertakings, guarantees or indemnity, security documentation, leases); and (4) legal documents (including documentation concerning any

the trust.¹⁴⁷ The papers which the incoming trustee is entitled to see and obtain copies of include the minutes or memoranda of the meetings of the trustee and the former trustee's correspondence files.¹⁴⁸ In the exercise of its overriding supervisory jurisdiction the Court may qualify the incoming trustee's entitlement to delivery up and disclosure. Where the papers may be voluminous, the Court is likely to take a practical or staged approach to disclosure and will order as a starting point, that the outgoing trustee, so far as they are reasonably able, provide the incoming trustee with sufficient information to enable it to administer the assets, with an explanation supported by affidavit if they are not reasonably so able, with liberty to apply if further disclosure is required.¹⁴⁹ The incoming trustee is not obliged to embark upon an exhaustive search for breaches of trust by its predecessor but is obliged to undertake a reasonable review and investigate if a breach of trust comes to his notice.¹⁵⁰ Where the documents provided by the outgoing trustee do not contain information and explanations that may be sought by the incoming trustee, the incoming trustee is entitled to request such information if the request is reasonable and the outgoing trustee is obliged to cooperate and supply the information.¹⁵¹ The outgoing trustee is under a duty to take reasonable care that the information it does supply is accurate.¹⁵² Where the outgoing trustee does comply with its duties in the provision of information and documents the incoming trustee may seek a court order to force compliance by way of summons or by way of Representation.¹⁵³

K. Disclosure to Foreign Revenue Authorities

Jersey is a party to 37 separate Tax Information Exchange Agreements (TIEAs).¹⁵⁴ A TIEA is a bilateral international agreement between the States of Jersey and other jurisdictions to

5-81

legal proceedings in which the trustee has been engaged on behalf of the trust, instructions to counsel. An outgoing trustee can usually be expected to retain and make available upon request the correspondence files, historic asset valuations and bank statements, trust accounts and accounts for underlying entities older than 3 years and the trustee's KYC documentation.

¹⁴⁷ *Tiger v Barclays Bank Ltd* (n 146).

¹⁴⁸ *Sovereign Trust International Limited v WJB Chilterns Trust Company* [2005] JRC 004, which confirms the outgoing trustee is entitled to its reasonable fees and expenses to provide the information and records.

¹⁴⁹ *Dick-Stock v Pantrust & Ors* [2015] JRC 223 at [12]–[20].

¹⁵⁰ *Volaw Trustees Limited v Trustcorp (Jersey) Limited* [2013] JRC 028 at [23].

¹⁵¹ *Ogier Trustee (Jersey) Limited v CI Law Trustees Ltd* [2006] JRC 158 at [7].

¹⁵² *Mond v Hyde* [1997] BPIR 250 at 262D.

¹⁵³ A summons will only be possible where there are already extant proceeding within which to have a summons issued. Where there are no proceedings on foot, the incoming trustee will have to institute proceeding by way of a Representation.

¹⁵⁴ Argentina (9 December 2011), Australia (5 January 2010), Austria (1 June 2013), Belgium (Not yet in force), Brazil (Not yet in force), Canada (19 December 2011), China (10 November 2011), Czech Republic (14 March 2012), Denmark (6 June 2009), Faroe Isles (21 August 2009), Finland (3 August 2009), France (11 October 2010), Germany (28 August 2009), Greenland (6 June 2009), Hungary (13 February 2015), Iceland (3 December 2009), India (8 May 2012), Indonesia (22 September 2014), Ireland (5 May 2010), Italy (26 January 2015), Japan (30 August 2013), South Korea (Not yet in force), Latvia (1 March 2014), Mexico (22 March 2012), the Netherlands (1 March 2008), New Zealand (27 October 2010), Norway (7 October 2009), Poland (1 November 2012), Portugal (9 November 2011), Romania (Not yet in force), Slovenia (24 June 2014), South Africa (29 February 2012), Sweden (23 December 2009), Switzerland (14 October 2014), Turkey (11 September 2013), the United Kingdom (27 November 2009) and the United States of America (23 May 2006). The dates refer to the date on which the TIEA came first came into force.

exchange information relevant to their domestic tax laws. In order to comply with international standards of financial regulation, anti-money laundering and combating the financing of terrorism, Jersey has been an early adopter of the principles set out in the OECD Model Tax Convention upon which all of Jersey's TIEAs are based.¹⁵⁵ TIEAs are entered into pursuant to the provisions of the Taxation (Exchange of Information with Third Countries) Regulations 2008, as amended.¹⁵⁶ A TIEA is not a tool by which private parties to civil proceeding may obtain disclosure of tax information from Jersey, but is primarily used at an intergovernmental level. A TIEA does not permit the enforcement of foreign revenue claims in Jersey¹⁵⁷ but the information obtained by the Comptroller and provided to a foreign government pursuant to a TIEA is directed at the enforcement of the requesting state's domestic tax laws. In Jersey, requests from a foreign government with whom Jersey has a TIEA must be made to the Comptroller of Taxes.

i. Scope of Information under a TIEA

- 5-82 The scope of information that can be obtained under each TIEA is broadly the same although the individual taxes covered may vary in each TIEA as agreed between the countries party to them. In order to be able to request assistance a requesting state must prove that the requested information is foreseeably relevant: to the administration and enforcement of the domestic laws of the parties concerning the taxes covered by the TIEA; and to the determination, assessment, enforcement or collection of tax or to the investigation of tax matters or prosecution of criminal tax matters. There is no obligation to provide information which is not either held by or in the possession of the Comptroller or is obtainable by persons who are within Jersey.
- 5-83 Pursuant to the Regulations the Comptroller has authority within Jersey to obtain and provide upon request, tax information held by banks, other financial institutions and any person, including nominees and trustees, acting in an agency or fiduciary capacity; as well as information regarding the ownership of companies, partnerships, collective investment schemes, trusts, foundations and other persons, including information on all persons in an ownership chain, and in the case of trusts (even trusts that are not Jersey law trusts), information on settlors, trustees, protectors and beneficiaries. Notwithstanding that neither the enabling 2004 legislation nor the 2008 Regulations themselves contain any positive power for the Comptroller to transmit tax information to a foreign competent authority under a TEIA, that is not a valid basis for challenge; the power of the Comptroller to provide information under a TIEA is to be implied as necessarily ancillary to the power to obtain

¹⁵⁵ 'Financial enterprises and financial transactions are increasingly international ... It is therefore of the greatest importance that national financial regulators co-operate, particularly where there are suspicions or allegations of financial fraud or other misconduct'; *R (on application of ABN International SA) v FSA* [2010] EWCA Civ 123 at [38], per Stanley Burnton LJ.

¹⁵⁶ Made pursuant to the Taxation (Implementation)(Jersey) Law 2004, Art 2, which provides for the States of Jersey to give effect to the OECD Convention on Mutual Administrative Assistance in Tax Matters.

¹⁵⁷ Art 3(2) of the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 expressing the principle in *Government of India v Taylor* [1955] AC 491, repeatedly applied in Jersey: *Re Walmsley* (1983) 1 JLR 35; *Le Marquand v Chiltmead Ltd* [1987-88 JLR 86]; *Re Tucker* [1987-88 JLR 473]; *Clapham v Le Mesurier* [1991 JLR 5]; *Re Charlton* [1993 JLR 360].

that information.¹⁵⁸ Where the request for information includes information foreseeably relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims (ie civil tax matters), the request can only be made for matters arising on or after the date of execution of the TIEA.¹⁵⁹ Requests for information concerning criminal tax matters can be made for any period prior to or after the execution of the TIEA.¹⁶⁰ However, there appears to be no restriction on the use to which information obtained in the course of a criminal tax investigation may be used within the scope of Article 1, such as a civil tax assessment.¹⁶¹ Tax Information is defined as

any fact, statement, document or record in whatever form or within an individual's knowledge or belief that is foreseeably relevant to the determination, assessment and collection of taxes within the scope of the TIEA; the recovery and enforcement of such taxes; the recovery and enforcement of tax claims; or the investigation or prosecution of tax matters.¹⁶²

ii. Requests for Information

Each TIEA sets out what a request should contain with emphasis placed upon the 'greatest detail' being provided by the requesting state; however, there are a uniform set of requirements for any request. Each request must be in writing and must contain:

5-84

1. the identity of the person under examination or investigation;
2. the period for which the information is requested;
3. the nature of the information requested and the form in which the requesting state would prefer to receive it;
4. the tax purpose for which the information is sought;
5. the reasons for believing that the information requested is foreseeably relevant to the tax administration and enforcement of the requesting state, with respect to the person identified in number (1) of this list;
6. grounds for believing that the information requested is in the possession of the Comptroller or is in the possession of or obtainable by a person within Jersey;
7. to the extent known, the name and address of any person believed to be in possession of or able to obtain the information requested;
8. a statement that the request conforms with the laws and administrative practice of the requesting state, that if the requested information was within the jurisdiction of the requesting state then the competent authority of the requesting state would be able to obtain the information under the laws of the requesting state or in the normal course of administrative practice and that the request is in conformity with the TIEA; and

¹⁵⁸ *Volaw & Ors v Comptroller of Taxes & States of Jersey* [2015] JRC 244, applying *Inco Europe Ltd v First Choice Distribution Ltd* [2000] 1 WLR 586.

¹⁵⁹ *Volaw Trust and Corporate Services Limited and Larsen v Office of the Comptroller of Taxes* [2013] JRC 095; *Larsen v Comptroller of Income Tax* [2013] JCA 239; *APEF Management Company 5 Ltd v Comptroller of Income Tax* [2013] JRC 262; *Volaw Trust and Corporate Services Limited v Larsen* [2013] JRC 148C.

¹⁶⁰ *ibid*

¹⁶¹ I Brown and H Jones, 'Will It All End In TIEAS? Tax Information Exchange Agreements: an Introduction to the Channel Islands Context' (2014) 2 *Jersey and Guernsey Law Review* at 104–05.

¹⁶² *Taxation (Exchange of Information with Third Countries) Regulations 2008*, Art 1A.

9. a statement that the requesting state has pursued all means available in its own territory to obtain the information, except where that would give rise to disproportionate difficulty.

- 5-85** The Jersey Court of Appeal has observed that at the heart of the TIEA regime is tension between the private interest in commercial confidentiality and the public interest in international co-operation in the investigation of potential tax evasion.¹⁶³ There is no mandatory standard template for procedures under a TIEA: ‘The question is whether a less intrusive measure could have been used without unacceptably compromising the objective’.¹⁶⁴ Margins of appreciation must be accorded to legislatures sensitive to and sensible of local circumstances. The proper question is whether in their current form those regulations are: first, within the enabling power; second, compatible with the Human Rights Law and, third, proportionate.¹⁶⁵ It has been held that the 2008 Regulations, as amended, are compatible with the Human Rights (Jersey) Law 2000¹⁶⁶
- 5-86** If a request is not compliant with the above, the Comptroller may decline to assist. Where a foreign authority cannot provide the Comptroller with any reasonable basis for believing that the person subject to any tax investigation will have any useful information, the Comptroller may decline to provide the information requested.¹⁶⁷ That said, the evidential threshold that the Comptroller needs to satisfy himself of in respect of the matters in Regulation 3 is whether there are ‘reasonable grounds for believing’ they are satisfied. The Comptroller is under no obligation to require the production of evidence in support of facts of which he is informed in order to verify them for himself.

iii. Notices Issued by the Comptroller

- 5-87** There are two categories of notices that the Comptroller is able to issue under the Regulations upon receipt of a request from a foreign competent authority that he deems reasonable to progress: (1) notices issued direct to taxpayers (ie the individuals or entities that are the subject of the request from the foreign competent authority); or (2) notices issued to third parties (‘Third Party Notice’) in relation to information regarding a taxpayer. These notices must be issued in writing. Where a Third Party Notice is issued, the Comptroller must provide the taxpayer in question with a copy of the Third Party Notice within seven days. However, the Regulations provide for circumstances where the Comptroller need not provide the taxpayer with a copy of the notice, and indeed, prohibit the third party in question from disclosing the Third Party Notice to the taxpayer or any information relating thereto. A recipient of a notice will not incur any civil or criminal liability by reason of compliance with the notice and providing information to the Comptroller.¹⁶⁸ The Comptroller would not need to disclose the Third Party Notice to the taxpayer if he is satisfied

¹⁶³ *Volaw Trust and Corporate Services Limited and Larsen v Comptroller of Taxes* (n 159) at 2.

¹⁶⁴ *Bank Mellat v HM Treasury* [2013] UKSC 39, [2014] AC 700 per Lord Sumption at [20] and [75].

¹⁶⁵ *Volaw & Ors v Comptroller of Taxes & States of Jersey* (n 158).

¹⁶⁶ *ibid.*

¹⁶⁷ The Update to Art 26 of the OECD Model Tax Convention provides useful guidance on what constitutes a fishing expedition, and lists examples where requests constitute fishing expeditions.

¹⁶⁸ Reg 10A(3) of the Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008, as amended.

that, for example, (1) the taxpayer has committed a criminal offence; (2) disclosure to the taxpayer would prejudice the assessment, collection or recovery of tax or the investigation or prosecution of tax matters; or (3) the requesting foreign competent authority requests that the taxpayer not be informed due to concerns similar to (1) and (2) above. Where a third party is prohibited from disclosing the notice to the taxpayer, it cannot do so unless it is able to obtain written consent from the Comptroller or the Royal Court of Jersey. Breach of the prohibition is a criminal offence. The Third Party Notice need not name the taxpayer to whom it relates provided that it states an account number or other, similar, identification for the tax information required. In the event that the Third Party Notice does not name a taxpayer or at the time the Third Party Notice is given, the Comptroller does not know the taxpayer's name and address, the Comptroller would need to provide the taxpayer with a copy of the Third Party Notice within seven days from receiving the response and information from the third party (unless the Comptroller has reasons not to notify the taxpayer as set out above).

iv. Challenges to Notices Issued by the Comptroller

Upon receipt of a notice, the taxpayer or a third party can choose to (1) comply with the requirements of the notice and produce the information requested within 15 days of receipt of the notice; or (2) challenge the notice. Failure to respond to the notice within the time frame provided, or making any statements in any response that are false, misleading or deceptive are offences under the Regulations (and individuals guilty of such offences would be liable to 12 months' imprisonment and a fine). There are additional offences listed in the Regulations, including aiding and abetting, or liability of directors, managers and partners of body corporates and partnerships who commit offences. On 6 November 2013, the Taxation (Exchange of Information with Third Countries) (Amendment No 7) (Jersey) Regulations 2013 came into force which introduced a number of material amendments to the Regulations. A series of amendments to the 2008 Regulations in 2013 greatly reduced the procedural rights accorded to taxpayers when compared with the 2008 Regulations in their original form. The position in Jersey can be compared with the United Kingdom whereby greater rights are accorded where requests are made under a TIEA.¹⁶⁹ The 2008 Regulations as amended provide that no reasons are required for the sending of notices; Regulation 14 introduces a 14-day time limit in which to bring proceedings to challenge a notice, Regulation 14(2) excludes certain grounds for judicial review from the scope of such challenge, makes compliance with a notice mandatory notwithstanding inception of judicial review proceedings; and the right of appeal from a judicial review is to the Privy Council directly which will apply its own determination as to whether leave should be granted. Most importantly, the purpose of the amendments was to narrow the scope of challenge to notices, by forcing a taxpayer or third party into a judicial review of the Comptroller's decision, ie establishing that the Comptroller was acting illegally, irrationally, unreasonably or his decision-making was procedurally improper. Prior to this amendment, if a taxpayer or third party was to challenge a notice, it did so by way of an administrative appeal, and the Court would consider the matter 'de novo' (or afresh). Additionally, the amendments have removed the requirement on the Comptroller to provide the taxpayer with his 'reasons' for

5-88

¹⁶⁹ *R (on the Application of Derrin Brother Properties) v HMRC [2014] EWHC 1152 (Admin).*

issuing the notice, thereby limiting the information presented to recipients of notices and making it more difficult to challenge notices received from the Comptroller. A third party will also not be able to use a prohibition or failure to notify a taxpayer as a ground of challenge. Therefore the Regulations now provide that any challenge must be made by way of judicial review, within 14 days of receipt of the notice. It is important to note that where a party wishes to challenge the notice, they are still required to provide the response and information requested to the Comptroller within the time frame stipulated in the notice, or 15 days if no deadline is given. Further, if an application for judicial review is unsuccessful, an appeal can only be made to the Privy Council, provided that leave to appeal is granted. Accordingly, there shall be no right of appeal to Jersey's Court of Appeal. The Comptroller must not provide to the foreign competent authority the tax information provided by the taxpayer or third party until the time period for commencing an application for judicial review has expired, the application for judicial review has been withdrawn or dismissed, or he is permitted to do so by the Royal Court.

- 5-89** Prior to the amendment of the Regulations, the only authority concerning challenges of notices was the *Volaw* case, where it was held that

It is no part of the Comptroller's function when deciding whether to issue a Regulation 3 notice in response to a request under the TIEA, or this Court's function on any appeal from such a decision, to resolve contentious issues of Norwegian tax law or to reach definitive conclusions about whether the person the subject of the request is or is not liable to Norwegian tax. Indeed, in the ordinary way it is unlikely that the Comptroller would have expert evidence of Norwegian tax law in front of him at the time when he is called upon to make his decision...and it would be impractical that he should be required to obtain such evidence and undertake a process of detailed evaluation before coming to a conclusion.

- 5-90** The threshold which the Comptroller therefore had to meet was low. It has to be seen how the Royal Court treats the decision-making process of the Comptroller in the context of a judicial review. The authors are currently involved in a judicial review application which, we believe, will be the first under the Regulations, as amended.

IV. Disclosure of Trust Documents and Information in Hostile Proceedings against the Trustee

- 5-91** The rules described above, for the disclosure of information and documents under the Court's supervisory jurisdiction are distinct¹⁷⁰ from the rules on discovery set out in the Royal Court Rules 2004¹⁷¹ applicable to proceedings commenced against the current or former trustee for breach of trust, or challenging the trustee's decisions other than those pertaining to the disclosure of documents or information under the supervisory jurisdiction.

¹⁷⁰ *Schmidt v Rosewood Trust Limited* (n 2) at [60]; *Re Internine Trust* (n 18); *In re C.A. Settlement* (n 15).

¹⁷¹ RCR 2004, r 6/17.

A. Pre-action Discovery of Documents

Jersey's rules of civil procedure do not currently permit for pre-action discovery of documents in trust litigation¹⁷² (other than in limited circumstances against non-parties under Jersey's equivalent to the *Norwich Pharmacal/Bankers Trust* jurisdiction).¹⁷³ Notwithstanding that the Royal Court has power to compel the disclosure of any document by a trustee to any person under its inherent jurisdiction, which the Court will not permit to be used as a backdoor route to pre-action discovery against a trustee,¹⁷⁴ the Royal Court Rules do not admit of an equivalent pre-action protocol procedure as found in the English civil procedure whereby parties are positively encouraged to exchange information and documents prior to the commencement of proceedings in order to narrow the issues between them.¹⁷⁵

5-92

B. *Norwich Pharmacal* and *Bankers Trust* Orders

The Royal Court has jurisdiction to make an order under the jurisdiction established in the English case of *Norwich Pharmacal v Customs & Excise Commissioners*.¹⁷⁶ A *Norwich Pharmacal* order requires the person against whom it is made to give disclosure of information and documents to a plaintiff to enable the plaintiff to identify the correct defendant and possibly so as to make a correct claim and obtain justice. The *Norwich Pharmacal* jurisdiction was originally a means to obtain information to identify a defendant, but this relief now has a wider application extending to the obtaining of information to substantiate a cause of action as well as to the discovery and protection of tracing claims.¹⁷⁷ This jurisdiction is available to permit the making of interlocutory orders against third parties requiring them to give disclosure regarding the assets of wrongdoers.¹⁷⁸ A third party that becomes involved in an attempt by a defendant to make himself judgment-proof or to defraud creditors, may be ordered to give full disclosure about assets (whether held in the defendant's name or the name of the third party) under the *Norwich Pharmacal* jurisdiction to assist the plaintiff in the vindication of his proprietary rights.¹⁷⁹

5-93

¹⁷² RCR 2004, r 6/18 and the Law Reform (Disclosure and Conduct before Action) (Jersey) Law 1999, Art 2 are confined to actions for personal injuries or death.

¹⁷³ [1974] AC 133; *Macdoel Invs Ltd v Brazil (Federal Republic)* [2007 JLR 201].

¹⁷⁴ *Re C.A. Settlement* (n 15); *In re B Settlement* (n 18); *In re Internine Trust* (n 18); *In re HHH Trust* 2012 (1) JLR N [6].

¹⁷⁵ *In re C.A. Settlement* (n 15).

¹⁷⁶ [1974] AC 133, affirmed and the scope of the jurisdiction extended in *Federal Republic of Brazil and Municipality of Sao Paulo v Citibank NA* [2006 JLR 478]; *Macdoel Investments Limited v Federal Republic of Brazil* (n 173).

¹⁷⁷ *IBL Ltd v Planet Financial and Legal Services Ltd* [1990 JLR 294]; *Grupo Torras SA v Royal Bank of Scotland plc* [1994 JLR 41]; *Federal Republic of Brazil and Municipality of Sao Paulo v Citibank NA* (n 176); *Macdoel Investments Ltd, Sun Diamond Ltd, Durant International Corporation and Kildare Finance Ltd v Federal Republic of Brazil* (n 173).

¹⁷⁸ *Macdoel Investments Ltd, Sun Diamond Ltd, Durant International Corporation and Kildare Finance Ltd v Federal Republic of Brazil* (n 173); *Federal Republic of Brazil and Municipality of Sao Paulo v Citibank NA* (n 177); and *IBL Ltd v Planet Financial and Legal Services Ltd* (n 177) at 302; *Grupo Torras SA v Royal Bank of Scotland plc* (n 177); *Re Lucas 1981 JJ 83; O'Brien v Jersey Evening Post Ltd* [1985-86 JLR N3]. See further *Mitsui and Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch), [2005] 3 All ER 511; and *Alhamrani v Alhamrani, sub nom Re Internine Trust* [2008] JRC 32A, [2008 JLR N11].

¹⁷⁹ *Bankers Trust Co v Shapira* [1980] 1 WLR 274, CA, applied in *IBL Ltd v Planet Financial and Legal Services Ltd* (n 177); *Grupo Torras SA v Royal Bank of Scotland plc* (n 177). For the basis on which disclosure orders are made, see *Federal Republic of Brazil and Municipality of Sao Paulo v Citibank NA* (n 176).

5-94 Where the Court is asked to make an order, it will consider:¹⁸⁰

1. whether it was satisfied that there was a good arguable case that the plaintiff was the victim of wrongdoing;
2. whether it was satisfied, to the same standard, that the defendant was ‘mixed up’ in that wrongdoing; and
3. whether, as a matter of discretion, it was in the interests of justice to order the defendant to make disclosure.

5-95 In *New Media Holding Company LLC v Capita Fiduciary Group Limited*,¹⁸¹ the Royal Court took the opportunity to make the following observations about the jurisdiction:

1. The *Norwich Pharmacal* jurisdiction is an extraordinary one which should be exercised lightly.
2. Although there was no formal requirement that a plaintiff has to establish that it was necessary for the Court to make a *Norwich Pharmacal* order because there was no other way to gain access to the information sought, if a plaintiff had a straightforward and available alternative means of obtaining the information it would probably not be a reasonable exercise of discretion for the court to make a *Norwich Pharmacal* order.
3. The Court would have to consider carefully the purposes for which a *Norwich Pharmacal* order was sought (which could be for the identification of potential defendants in litigation, or for other purposes, whether in connection with other litigation which was continuing or for the purpose of taking other lawful steps, albeit not steps in a court of law).
4. A defendant in *Norwich Pharmacal* proceedings need not have been innocently involved in the wrongdoing of which the plaintiff complained and may be a wrongdoer himself.
5. The Court would have to consider very carefully an application for a *Norwich Pharmacal* order against an alleged wrongdoer because, other than the disclosure permitted under the Law Reform (Disclosure and Conduct before Action) (Jersey) Law 1999,¹⁸² pre-action discovery was not permitted under Jersey law. It would be very unlikely that a *Norwich Pharmacal* order would be made if the Court were satisfied that its primary purpose was to obtain pre-action discovery. The *Norwich Pharmacal* jurisdiction does not impose upon ‘mixed up’ third parties a general obligation to give discovery or information when the identity of the defendant is already known.¹⁸³
6. In an appropriate case, a *Norwich Pharmacal* order could be made to assist proceedings in another court, whether in Jersey or overseas. *Norwich Pharmacal* relief would be available to identify a potential defendant in foreign proceedings or to establish a cause of action or tracing claim for the purposes of foreign proceedings but it would not be granted if the predominant purpose was to supplement the disclosure process in an overseas court.¹⁸⁴ A foreign court would be permitted to exercise its own jurisdiction over the disclosure that it required to do justice in the substantive case before it.

¹⁸⁰ *New Media Holding Company LLC v Capita Fiduciary Group Ltd* [2010] JLR 272].

¹⁸¹ ibid.

¹⁸² Legislation which pertains only to actions in respect of personal injuries or death.

¹⁸³ *Arab Monetary Fund v Hashim* (No 5) [1992] 2 All ER at 914; *New Media Holding Company LLC v Capita Fiduciary Group Limited* (n 180).

¹⁸⁴ *Omar v Foreign Secretary* [2012] EWHC 1737, which states that *Norwich Pharmacal* relief cannot be used to obtain evidence for foreign proceedings, and that only the statutory regime of letters of request etc may be used

7. The Royal Court has expressed itself as regarding the jurisdiction to order the production of banking documents under the *Bankers Trust* jurisdiction as deriving from the principles that underpin the *Norwich Pharmacal* jurisdiction to such an extent that the two original jurisdictions overlap to such a very considerable extent that the *Bankers Trust* jurisdiction has in practice been subsumed almost entirely by the *Norwich Pharmacal* jurisdiction.¹⁸⁵ In the ordinary case, where a person can be ordered to give information under the equitable jurisdiction to help preserve and protect traceable funds, it is hard to imagine that he will not also have become 'mixed up' in the wrong-doing. If there are cases in which there is a meaningful distinction between the jurisdictional limits of the *Norwich Pharmacal* jurisdiction and the *Bankers Trust* jurisdiction, it has been held that the limits of the *Bankers Trust* jurisdiction are that the jurisdiction rests upon the proposition that unless the assets in question can be located and secured, the ultimate determination of ownership of those assets may be frustrated by their removal or dissipation and there will be no point in calling on the third party at the trial to produce the required documents or give the requested information. In a *Bankers Trust*¹⁸⁶ application, the plaintiff must demonstrate a real prospect that the information may lead to the location or preservation of assets to which he is making a proprietary claim.¹⁸⁷

i. Procedure to Obtain Norwich Pharmacal Relief

Norwich Pharmacal relief is obtained by way of an Order of Justice. The application is therefore a free-standing set of proceedings in their own right from any proceedings in which the disclosure obtained by reason of the *Norwich Pharmacal* proceedings is used. The relief sought is in the nature of a mandatory injunction for disclosure and so the Order of Justice falls within r 20/5 RCR 2004 so as to require the Bailiff's signature before it can be served on the party against whom it is made pursuant to the Royal Court Rules for service of an Order of Justice.¹⁸⁸ The draft Order of Justice must be supported by an affidavit setting out the basis upon which the relief is sought. The relief may be obtained ex parte in urgent cases or where there is a credible risk that documents would be lost or destroyed were notice to be given, in which case the plaintiff is under a duty of full and frank disclosure,¹⁸⁹ but more

5-96

for that purpose, although in *Systems Design Ltd v The President of Equatorial Guinea* 2005–06 GLR 65 at 59 the Guernsey Court of Appeal held that the Royal Court of Guernsey did have jurisdiction to grant *Norwich Pharmacal* proceedings in aid of foreign proceeding on the basis that the jurisdiction should be widely interpreted. It was important for Guernsey as a financial services centre to ensure it did not become a safe haven for those who sought to evade financial liabilities. The contention was not pursued in the Privy Council ([2006] UKPC 7) which determined the appeal on other issues.

¹⁸⁵ *Federal Republic of Brazil and Municipality of Sao Paulo v Citibank NA* (n 181) per Hoffmann J in *Arab Monetary Fund v Hashim* (No 5) (n 188) and *MacKinnon v Donaldson, Lufkin & Jenrette Secs Corp* [1986] Ch. 482, per Lord Denning.

¹⁸⁶ *Bankers Trust Co v Shapira* (n 179).

¹⁸⁷ *Arab Monetary Fund v Hashim* (No 5) (n 188), per Hoffmann J.

¹⁸⁸ See Ch 1, paras 1-31 to 1-35.

¹⁸⁹ *Goldtron v Most Investments Limited* [2002 JLR 424]; this obligation is absolute and encompasses facts known to the plaintiff and facts which would be known if the proper inquiries had been made; see *1900 Trustee co Limited v Nurnberg Co Limited* [1998 JLR N13a].

commonly the proceedings are commenced on notice to the defendant (usually a regulated and reputable financial institution).¹⁹⁰

C. Discovery of Documents during the Course of Proceedings

- 5-97** The applicable rules of discovery in the Royal Court Rules 2004 are those concerning the discovery and inspection of documents under r 6/17 RCR 2004 and those concerning provision for discovery by interrogatories under r 6/16 RCR 2004. Both of these sets of rules are based upon the former RSC Ord 26 and RSC Ord 24. As under the former Ord 26 discovery under r 6/17 RCR 2004 requires discovery of all documents¹⁹¹ relating to the matters in question that are in the possession, custody or power of the party making discovery.¹⁹² A party gives discovery of a document by stating whether the document exists or has existed in their possession, custody or power.¹⁹³ A beneficiary subject to discovery obligations under r 6/17 RCR 2004 must discover all documents in their possession, custody or control regardless of whether the discoverable documents are held in a capacity other than as a beneficiary in the proceedings in which the obligation arises.¹⁹⁴ It should be noted that ownership of documents is not relevant to a party's discovery obligations in respect of them. The confidentiality of the documents, as distinct from any privilege in the documents, is not a basis upon which discovery and inspection may be withheld.¹⁹⁵ In many, if not most, cases a beneficiary joined to proceedings (that does not already physically possess originals or copies) will not have trust documents within their control capable of being discovered. That is because a beneficiary does not have an automatic right to trust documents from the trustee.¹⁹⁶ The beneficiary's control of the documents for the purposes of giving discovery of them (other than where the beneficiary physically possess them) is formally dependent upon the exercise of the trustee's discretion to disclose the document to a beneficiary.¹⁹⁷ Documents in the hands of the beneficiary obtained from the trustee in the course of or as a result of a directions hearing under Article 51 of the Trusts (Jersey) Law 1984 cannot be disclosed by the beneficiary outside those proceedings (who will commit a contempt of court) without the consent of the Jersey court.¹⁹⁸
- 5-98** The usual order for discovery under r 6/17 RCR 2004 is for standard discovery although the Court has discretion to make a wider order.¹⁹⁹ Standard discovery is discovery of any

¹⁹⁰ *Templeton v Knox* [2011] JRC 205].

¹⁹¹ Civil Evidence (Jersey) Law 2003, Art 1(1) echoing *Grant v Southwestern and County Properties Ltd* [1975] Ch 185 at 190E, per Walton J: 'the derivation of the word is from the Latin "documentum": it is something which instructs or provides information.'

¹⁹² *Victor Hanby Associates Limited and Hanby v Oliver* [1990] JLR 337], following *Compagnie Financiere du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, CA.

¹⁹³ PD RC 05/4 provides for the form in which discovery is to be made.

¹⁹⁴ *In re Broere Trusts* 2004 JLR N [2], by implication the same rule must apply to trustees, although the trustee may seek to raise the confidentiality of the documents it holds as trustee of a trust in which capacity it is not a party to proceedings; see *In re Internine Trust* (n 18).

¹⁹⁵ *Dixon v Jefferson Seal* [1996] JLR N2b].

¹⁹⁶ See Trusts (Jersey) Law 1984, Art 29 and the principles espoused in *Schmidt v Rosewood Trust Ltd* (n 2) and *Rabaiotti 1989 Settlement* (n 2) discussed above.

¹⁹⁷ *North Shore Ventures Ltd v Anstead Holdings Inc* [2012] EWCA Civ 11.

¹⁹⁸ *In the matter of the M & Ors* (n 76).

¹⁹⁹ RCR 2004, r 6/17(2); *Alhamrani v Alhamrani* [2008] JLR N11]. Discovery is to be made in accordance with PD RC 05/04.

document which may help or hinder the party's case.²⁰⁰ Documents will be exempted from inspection but not discovery that fall within the recognised heads of privilege.²⁰¹ An order for specific discovery can be made by summons at any time and need not follow from deficiencies in the list.²⁰² Discovery in Jersey is a continuing obligation on parties to litigation.²⁰³

D. Discovery and the Court's Inherent Supervisory Jurisdiction

The Royal Court has held that it may order the production of any document or information held by a trustee to any person under its inherent supervisory jurisdiction²⁰⁴ which conceptually may fall outwith the scope of standard discovery. The converse is equally possible: there are categories of documents that the Court can be expected to refuse disclosure of under the supervisory jurisdiction but which, if it falls within the scope of r.6/17, are discoverable and cannot be withheld on the basis of their confidentiality.²⁰⁵ While confidentiality per se may be cited as a reason why the Court should not exercise its jurisdiction to order the disclosure of a document under the supervisory jurisdiction, the confidentiality of a document (that is not privileged) is not usually a ground upon which the document can be excluded from discovery or inspection.²⁰⁶

5-99

E. Discovery against Former Trustees and Non-parties

Jersey's Royal Court Rules, unlike the CPR,²⁰⁷ make no provision (other than certain limited exceptions) to seek discovery of documents as the sole basis for relief from a non-party against whom no cause of action is alleged.²⁰⁸ An action may not be brought in Jersey for discovery alone.²⁰⁹ Neither is it possible, save in limited circumstances, in the ordinary course of civil proceedings to obtain discovery against a non-party.²¹⁰ It is therefore necessary for a beneficiary to join former trustee's to proceedings in order to obtain discovery of documents in their possession, custody or power that have not been transferred to the incumbent trustees. The limited exceptions to the general prohibition against pre-action discovery and discovery from non-parties that are recognised in Jersey in the context of

5-100

²⁰⁰ *Victor Hanby Associates Limited and Hanby v Oliver* (n 192).

²⁰¹ RCR 2004, r 6/17(3); *Bene Ltd v VAR Hanson & Partners* [1997 JLR n10a]¹ *UCC v Bender & Koommen* [2005 JLR 401], affirming *Buttes Gas & Oil Co v Hammer* (No 3) [1981] QB 223 (common interest privilege).

²⁰² *Mehra v Killachand* [1987-88 JLR 421]; *Jones v Atkinson* [1989 JLR N2].

²⁰³ *Taylor v Taylor* [1990 JLR 124].

²⁰⁴ *In re C.A. Settlement* (n 15).

²⁰⁵ eg a letter of wishes.

²⁰⁶ *Deeny (née Dawson) v Health & Social Services Committee* [2003 JLR 138], affirming *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners* (No 2) [1974] AC 405 at 433-34.

²⁰⁷ CPR pt 31, r 31.17.

²⁰⁸ *IBL Ltd v Planet Financial & Legal Servs Ltd* (n 177); however, *Grupo Torras SA v Royal Bank of Scotland plc & Ors* (n 177) identified an exception where it did not apply if (1) without discovery no cause of action could be sustained against the wrongdoers; and (2) such person had, albeit innocently, been involved in the acts of the wrongdoers. See applications for *Norwich Pharmacal* relief para 5-96.

²⁰⁹ *Grupo Torras SA v Royal Bank of Scotland plc* (n 177).

²¹⁰ *B v B* [1978] 3 WLR 624 at 185, affirmed in *R v C* [2008] JRC 179 (restricted).

trust litigation are: discovery under the *Norwich Pharmacal/Bankers Trust*²¹¹ jurisdiction and ancillary orders for disclosure under the Royal Court's jurisdiction to grant Mareva²¹² and Anton Piller²¹³ relief. The Court also has a jurisdiction, on the application by one of the parties to existing proceedings, to issue a *subpoena duces tecum* requiring a person, including a non-party to attend court and produce relevant documents.²¹⁴

F. Discovery in Article 51 Proceedings

- 5-101** The issues arising in discovery of documents given in the course of an application for directions under the inherent supervisory jurisdiction and/or Article 51 of the Trusts (Jersey) Law 1984 are dealt with in Chapter 3.

V. Disclosure of Evidence from Jersey in Support of Foreign Proceedings

- 5-102** As an international finance centre, it is likely that a dispute involving a Jersey trust structure may be litigated in a jurisdiction outside Jersey. Where the forum for litigation is a jurisdiction other than Jersey, it may be imperative to obtain evidence from non-party, Jersey-based witnesses who have not or will not submit to the jurisdiction of the foreign court to give evidence. The principal means by which this is achieved is by letters rogatory, more commonly referred to as letters of request. This section is dedicated to the Jersey procedure for obtaining deposition and other evidence by means of letters of request from non-parties in Jersey. In a civil litigation context, there are three important statutory regimes which authorise and facilitate the taking of evidence within the island.²¹⁵

A. Service of Process and Taking of Evidence (Jersey) Law 1960 ('The 1960 Law')

- 5-103** The 1960 Law is the principal statute governing the mechanism by which requests for the deposition of Jersey witnesses are directed to Jersey from foreign courts. The 1960 Law allows Jersey to meet its obligations under the 1970 Convention on the Taking of

²¹¹ [1974] AC 133, [1980] 1 WLR 1275. The trend in the Jersey authorities has been to regard these 2 authorities as based upon a single underlying doctrine; see *Macdoel Invs Ltd v Brazil (Federal Republic)* (n 177); *New Media Holding Co LLC v Capita Fiduciary Group Ltd* (n 180).

²¹² *Dalemont Ltd v Senatorov* [2012 (1) JLR 168] (which may be made against a party who is not subject to the freezing order); *Dalemont Ltd v Senatorov* [2012 (1) JLR 108] (a lower threshold for worldwide disclosure orders in post-judgment cases).

²¹³ [1976] Ch 55; *Nautech Servs Ltd v CSS Ltd* 2013 (1) JLR 462; *Nautech Servs Ltd v Island Info Tech Centre Ltd* 2014 (2) JLR N[13].

²¹⁴ *P v C* [2002] JLR N 26], setting out the requirements that must be complied with.

²¹⁵ Service of Process and Taking of Evidence (Jersey) Law 1960; Bankers' Books Evidence (Jersey) Law 1986; and Bankruptcy (Désastre) (Jersey) Law 1990.

Evidence abroad in Civil or Commercial Matters (the Hague Evidence Convention).²¹⁶ The Royal Court has recently observed that there have been a number of practical changes in the way letters of request are processed in Jersey since the 1960 Law and Service of Process Rules 1994 were enacted which have not been reflected by amendments to the legislation.²¹⁷ In this part is a procedural summary of how oral evidence may be obtained under the 1960 Law/The Hague Evidence Convention for use in foreign proceedings. However, this procedure also applies, *mutatis mutandis*, to requests emanating from non-Hague Evidence Convention jurisdictions²¹⁸ and to those arising under the other enactments listed above.²¹⁹

Part 2 of the Service of Process and Taking of Evidence (Jersey) Law 1960 provides for the taking of evidence in Jersey in proceedings pending or in contemplation before courts outside the island (referred to as 'the requesting court'). The proceedings to which the request relates must be related to civil or commercial matters²²⁰ arising in a court or tribunal having jurisdiction in the relevant country or territory.²²¹ Where these criteria are met, the requesting court may apply to the Royal Court²²² for assistance in obtaining evidence. The Royal Court is empowered with a wide discretion to make such provision for the obtaining of evidence in Jersey as may appear to it to be appropriate but may not make provision beyond the terms of the 1960 Law.²²³ The relevance of evidence obtained under Articles 3 and 4 is to be adjudged under the law of the requesting court.²²⁴ Evidence will be relevant, as per the Jersey test, if it makes the matter which requires proof more or less probable.²²⁵ The Royal Court has no power under the 1960 Law to accede to a request for it to conduct its own factual investigation into matters regarding which the foreign court seeks evidence. The Royal Court's procedure is adversarial and not inquisitorial.²²⁶ An order for judicial

5-104

²¹⁶ The English equivalent of the 1960 Law, as amended, is the Evidence (Proceedings in Other Jurisdictions) Act 1975 with the equivalent procedural procedure set out in the now repealed RSC Ord 70 (CPR pt 34 and PD 34 r 6).

²¹⁷ *J v K & Ors* [2016] JRC110.

²¹⁸ The signatories to the Hague Evidence Convention are: Albania, Argentina, Armenia, Australia, Barbados, Belarus, Bosnia and Herzegovina, Brazil, Bulgaria, China, Cyprus, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Israel, Italy, Kuwait, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Montenegro, Mexico, Morocco, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Seychelles, Singapore, Slovakia, Slovenia, South Africa, South Korea, Spain, Sri Lanka, Sweden, Switzerland, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela.

²¹⁹ The 1960 Law as originally enacted and as preserved by the 1985 amendment (pt II, Art 3) permitted the Royal Court to render discretionary assistance to *any court or tribunal of competent jurisdiction outside the Island*. Hence, such assistance may likewise be rendered to non-Convention countries though it is suggested that non-Convention countries might profitably apply Hague Convention requirements as a model.

²²⁰ Service of Process and Taking of Evidence (Jersey) Law 1960, Art 3(6). What is a civil or commercial matter depends on a classification of those proceedings according to a combination of the law of the requesting court and Jersey law. The Royal Court's jurisdiction under the 1960 Law (as the English High Court's jurisdiction under the equivalent 1975 Act) was not affected by the rule that the English courts would not enforce an action for the enforcement of a foreign revenue law, see *Re State of Norway's Application (Nos 1 and 2)* [1990] AC 723.

²²¹ 1960 Law, Art 3. In *Wadman v Dick* [1993 JLR 63], the Court concluded that foreign matrimonial proceedings fell within the ambit of civil matter, although the point does not appear to have been argued. The authorities on s 1(b) of the 1975 Act are likely to be instructive in delineating the scope of civil or commercial matters in Jersey.

²²² The Royal Court is the designated central authority in Jersey able to execute letters of request under Article 25 of the Hague Evidence Convention.

²²³ 1960 Law, Art 4(1).

²²⁴ *Wadman v Dick* [1993 JLR 52].

²²⁵ Lord Simon of Glaisdale in *DPP v Kilbourne* [1973] AC at 756, approved in *Wadman v Dick* (n 224) at 67.

²²⁶ *Heinrichs v Parkes-Heinrichs* [1997 JLR N-9].

assistance cannot require any steps to be taken unless they could be required to be taken for the purpose of obtaining evidence in civil proceedings in Jersey.²²⁷ As a matter of principle, the requested court should always strive to give effect to letters of request.²²⁸ It should decline to comply with a foreign request only in so far as it was not proper or permissible or practicable under its own law to give effect to it. It is not within the power of the Royal Court to restructure, re-cast or re-phrase the letter of request (for example by changing the description of categories of documents) so that it becomes different in substance from the original request.²²⁹ The Court may only amend the request by excision, or by adding or substituting words in order to clarify what is being sought without altering the substance of the request.²³⁰

i. Issuing a Request to the Royal Court

- 5-105** When a foreign judicial authority has issued a letter of request, the letter should be remitted with the sealed, original order of the requesting court, usually via official channels, to Jersey's Attorney General on behalf of the Royal Court. It is not a substantive basis of objection to a letter of request that the request is not transmitted to the Royal Court via the UK Home Office as per the Service of Process (Jersey) Rules 1994.²³¹ The Law Officers' Department will advise whether it will progress the request within the Department or whether outside legal representation from the Jersey bar must be engaged for this purpose. A request that contains, for example, a short list of particular questions might be processed entirely in-house by the Law Officers' Department whereas a request that requires the in-depth examination of a witness is likely to need to be referred to a local legal practitioner. The Law Officers' Department may also suggest whether a request needs refinement in any way so as to comply with any of the necessary requirements.

ii. Contents of a Request

- 5-106** A letter of request should be in English or French (accompanied by an English translation) and must specify:
1. the identity and address of the sender;
 2. the foreign authority requesting its execution;
 3. any date by which the request needs to be acted upon;
 4. the names and addresses of the parties to the foreign proceedings and their legal representatives;

²²⁷ 1960 Law, Art 4(3).

²²⁸ *Wadman v Dick* (n 224); *Seyfang v G.D. Searle & Co* [1973] QB 148 at 151, [1973] 1 All ER 290, per Cooke J at 293, 'We ought to afford foreign Courts the fullest benefit we can'; *Desilla v Fells* (1879) 40 LT 423, per Cockburn CJ at 424; *Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1978] AC 547 at 560, [1977] 3 All ER 703, per Lord Denning MR at 708.

²²⁹ *In re State of Norway's Application (Nos 1 & 2)* (n 220).

²³⁰ [1993 JLR 52].

²³¹ *J v K* [2010] JRC 110; *C.F. AD v The C Trust and PW* [2010] JRC 001 at [12]. It appears from the former decision that the Royal Court may be prepared to accept a letter of request addressed directly to the Royal Court or Attorney General if there is substantive compliance with 1965 Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil Law Commercial Matters.

5. whether the parties to the foreign proceedings and/or their legal representatives are to be notified of the arrangements made for the Jersey examination;²³²
6. the nature of the foreign proceedings;
7. the evidence sought to be obtained by the request and the means of obtaining it;
8. the names and addresses of the persons to be examined;
9. the questions to be put to the persons to be examined (or a statement of the subject matter about which they are to be examined);
10. details of documents (or property) sought to be inspected; and
11. whether the request requires the giving of evidence on oath or otherwise

Additionally, so as to facilitate the expeditious execution of a letter of request, it (or instructions accompanying it) should confirm:

1. whether foreign counsel are to appear in, or be present at, the Jersey examination;
2. what documents are to be served on the witness and whether he may be provided with prior sight of the questions to be put to him;
3. what arrangements are to be made to discharge necessary disbursements;
4. whether an interpreter will be required at the Jersey examination;
5. whether a sound recordist, shorthand-writer or transcriber will be required (or will be provided by the requesting party);
6. what arrangements are to be made for the production of the transcript;
7. how the transcript is to be authenticated;
8. to whom the transcript is to be transmitted, and by what means;
9. whether the parties may be provided with a copy of the transcript; and
10. what privileges may be claimed by the witness in the requesting jurisdiction

A letter of request that is too widely drawn or strays into areas, access to which is forbidden by the law of Jersey, may have those offending sections exercised.²³³

iii. Form and Execution of a Request

Subject to the mandatory contents set out above, a letter of request may be in such form as the requesting court deems expedient. The Royal Court is itself likely to be flexible as to the actual format of a letter of request, though of course such format may be prescribed within the territory of the requesting court by regulations applicable there.²³⁴ Article 9 of the Hague Convention requires letters of request to be executed expeditiously and in any event, as already seen, the request should specify any date by which the transcript of evidence is sought.

5-107

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²³² Art 7 of the Hague Evidence Convention requires, upon request, notice of the time and place of the examination to be sent to the requesting authority, or direct to the parties, to enable the latter, or their representatives, to be present. Under the Convention, such notice can, effectively, be given either by the Law Officers' Department or the Presiding Officer but, in practice, the Presiding Officer delegates any such duty to the parties' local representative(s). See further para 5-114 below.

²³³ *Wadman v Dick* (n 224).

²³⁴ In 1985, the Special Commission of the Conference on the Operation of the Hague Convention revised a model Letter of Request recommended for use in applying the Convention.

iv. Types and Extent of Examination

- 5-110** In granting a request for such assistance the Royal Court has a discretion to order such provision as it considers appropriate²³⁵ for:
1. the examination of witnesses, either orally or in writing;
 2. the production of documents;
 3. the inspection or protection of any property;
 4. the taking of property samples;
 5. the medical examination of any person; and
 6. the taking of blood samples from any person
- 5-111** However, an order made under the 1960 Law cannot require any steps to be taken in aid that could not be taken in the context of civil proceedings in the Royal Court itself. But in acceding to a request under the 1960 Law, the Royal Court may permit a person to give evidence other than on oath²³⁶ if this is sought by the requesting court.

v. Documents Disclosable

- 5-112** As in England and Wales, the discovery process in Jersey sets its face against ‘fishing expeditions’ and, as in England and Wales,²³⁷ but unlike many jurisdictions in the USA, pre-trial discovery is not available in Jersey.²³⁸ It must be shown that the proposed witness who is to give oral evidence has relevant evidence to give.²³⁹ If there was, on the evidence, sufficient ground for believing that the intended witness might have relevant evidence to give on topics relevant to an issue in the action, there could be no objection on the grounds that it was a ‘fishing’ exercise.²⁴⁰ An order made under the 1960 Law may not require a person to state what relevant documents are, or have been, in his possession, custody or power.²⁴¹ He may only be required to produce particular documents specified in the order as documents appearing to the Royal Court to be in his possession, custody or power.²⁴² However, in a proper case, the Court may dispense with the statutory strictures of the 1960 Law and permit disclosure in its widest where, without discovery of the information in the

²³⁵ 1960 Law, Art 4.

²³⁶ Evidence given *viva voce* in proceedings before the Royal Court is given on oath or by affirmation. (Note that by Art 7 of the 1960 Law, it is however an offence to give false testimony when that testimony is given otherwise than on oath.)

²³⁷ *Rio Tinto Zinc Corp v Westinghouse Electric Corp (Nos 1 and 2)* (n 228) at 610, 654.

²³⁸ *Wigley and others v Dick* [1989] JLR 318] at [71]: ‘An investigation in the family law jurisdiction to ascertain the spouse’s property for purposes of ancillary relief is not one party to matrimonial proceedings casting the net to catch fresh fish from litigious waters, but identification of the fish already caught in the network of the murky sea of financial manipulations effected during the parties’ marriage’. As to fishing, see the *State of Norway* litigation by Kerr and Glidewell, LJ, on one side, and Ralph Gibson and Woolf, LJ, on the other; see also the speech of Lord Goff of Chieveley [1990] 1 AC at 810. In ratifying the 1970 Hague Convention, the UK declared, pursuant to Art 23, that it would not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents.

²³⁹ *Rio Tinto Zinc Corp v Westinghouse Electric Corp (Nos 1 and 2)* (n 228) at 610, 654.

²⁴⁰ *First American Co v Sheikh Zayed Al-Nahyan* [1999] 1 WLR 1154, CA.

²⁴¹ 1960 Law, Art 4(4).

²⁴² *ibid*, Art (4) represents a specific reservation made by the island in this regard under Art 23 of the Hague Convention.

possession of the person against whom discovery was sought, no action could be begun against a wrongdoer; and where such person had himself, albeit innocently, been involved in the acts of the wrongdoer so as to facilitate them. In such circumstances, the Court may order the person in possession of the documents to assist the person who had been wronged by giving full information and disclosing the identity of the wrongdoer.²⁴³

vi. Summoning the Witness

By rule 6/20(8) RCR 2004, as amended, any party required to give evidence before the Royal Court shall be summoned to appear at least two clear days (excluding Saturday, Sunday and Public Holidays)²⁴⁴ before the day on which his appearance is required. In most cases, it will thus be necessary to summon the witness through the Viscount's Officer (the Officer) accordingly.²⁴⁵ The route of service of a summons to appear does not exclude the possibility of a witness attending to be examined by agreement, in which event counsel may decide to forgo the formality (and protection) of issuing a summons. It is usually advisable for counsel for the party at whose behest the request has been issued to confirm with any witness, the witness' availability prior to issuing a summons. Clearly, a busy professional person (for example, a banking officer) may well feel unable to prepare himself adequately to give evidence and produce documents in a complicated commercial matter, within the short period of notice allowable under rule 6/20(8) RCR 2004. A witness who finds himself unable reasonably to respond to the terms of a summons requiring him to attend for examination may apply to the Presiding Officer for an adjournment of the examination.

5-113

vii. Record of Service

The witness having been duly summoned, the Viscount's official Record of Service will be provided by the Viscount to the applicant party. The Record of Service should also be copied by the applicant party (or by the Viscount) to the Presiding Officer. Thereafter, parties' representatives in the requesting jurisdiction are normally to be notified of the date fixed for the Jersey examination, in accordance with the terms of the request. In practice, it is for the parties' Jersey counsel to ensure that this notification takes place.

5-114

viii. Open or Closed Proceedings?

Notwithstanding that the examination of witnesses normally takes place in a court-room, formally such proceedings take place in chambers and the public has no right of admission.²⁴⁶ It would be illogical if this were not so since such proceedings invariably precede the trial of the issue in question in the country or territory of the requesting court.

5-115

²⁴³ *IBL Ltd v Planet Financial & Legal Servs Ltd* (n 177), although in that case disclosure was ordered in accordance with *Norwich Pharmacal* principles.

²⁴⁴ RCR 2004, r 1/3; as to day counting and Jersey's public holidays; see Ch 1 paras 1-70 and 1-71.

²⁴⁵ The Viscount's Department should be told and provided with whatever documents are to be served along with the summons: these might include a copy of the original order of the requesting court, the letter of request and any questions that are disclosable to the witness beforehand.

²⁴⁶ This is the same as the position which applies in England and Wales; see *Wright v Wilkin* (1858) 6 ER 643.

ix. Presiding Officer

- 5-116** Article 3(1) of the 1960 Law permits the Royal Court to appoint any person named in its order to act as Presiding Officer. The Court may also sit as an examining body to take evidence itself. In practice, the Royal Court normally appoints the Viscount or the Judicial Greffier (the Master) to take the examination of any witness required to give evidence under the 1960 Law.²⁴⁷

x. Order and Exclusion of Witnesses

- 5-117** Where there is more than one witness to be examined the witnesses will be examined in the order agreed by the parties, or failing such agreement, in the order that the applicant party requests. Upon the request of the applicant party, witnesses will be excluded from hearing each other's testimony, in accordance with general principles in Jersey.

xi. Proceedings at the Examination

- 5-118** The form of the proceedings at which evidence is taken is to some extent determined by the request for assistance. If a request which has been approved by the Royal Court simply requires the witness to answer a number of particular questions (ie interrogatories²⁴⁸), then the entire examination may be conducted by the Presiding Officer.²⁴⁹ However, much will depend upon the requirements for the admission and proof of evidence in the requesting court. As indicated, not all jurisdictions are dependent upon the processes of examination-in-chief, cross-examination and re-examination, which is the customary way of adducing live evidence in Jersey (and in most common law jurisdictions): indeed, in foreign courts that operate an inquisitorial model, the Court alone questions the witness. In any event, the parties to foreign litigation often wish to be present when evidence is taken in Jersey and the customary approach is the one most commonly adopted.

xii. Who May Appear to Conduct the Examination of Witnesses?

- 5-119** In *Wigley & Ors v Dick*,²⁵⁰ contrary to the then practice whereby only a Jersey advocate could appear before the Bar of the Royal Court, foreign counsel was authorised to appear before the Viscount, as Presiding Officer, in order personally to conduct the examination of Jersey witnesses. Foreign counsel, who will often have conduct of the matter before the requesting court, have frequently availed themselves of this option since. However, it is usually advisable for a Jersey advocate or solicitor also to be present so as to introduce the proceedings to the Presiding Officer and to deal with any aspects of Jersey law or procedure which may arise. However, foreign counsel may not appear when the Royal Court, rather than the Viscount, sits to take evidence at the request of a foreign court for use in proceedings.²⁵¹ Neither is foreign counsel permitted to appear before the Bar to argue objections taken by a witness to answering questions.

²⁴⁷ RCR 2004, r 17.3(g).

²⁴⁸ A request seeking authority to ask particular questions should always seek to include a more general power of examination in relation to such questions. Such a facility would specifically enable background and supplementary issues also to be explored at least to a limited extent.

²⁴⁹ Or by counsel from the Law Officers' Department appearing before the Presiding Officer for that purpose.

²⁵⁰ [1989 JLR 318].

²⁵¹ *Dick v Dick* [1993] JLR [N] 1b].

xiii. Compellability of Witnesses

A witness formally and properly summoned to appear to give evidence is bound to comply with the terms of the summons served upon him, anyone competent to give evidence under Jersey law being generally compellable to do so. However, it should be borne in mind that, albeit rarely, certain categories of witness—such as a spouse of an accused party in criminal proceedings, those holding information the disclosure of which would be prejudicial to State security²⁵² or, it seems, even the Jersey Comptroller of Income Tax²⁵³—may actually be non-compellable as a matter of Jersey law, or may seek to establish such a claim either before the Royal Court or the Presiding Officer. Any such matter should always be resolved prior to the hearing before the Presiding Officer. If the parties are unable to resolve the issue themselves, the practice is for the Presiding Officer to refer any such application to the Royal Court.

5-120

xiv. Objections to Answering Questions

When a compellable witness is giving evidence pursuant to an order made under the 1960 Law, such witness cannot be compelled to give any evidence which he could not be compelled to give in civil proceedings in the island or in such proceedings in the country or territory in which the requesting court exercises jurisdiction.²⁵⁴ Such privilege is not claimable unless the claim to it is either supported by a statement contained in the request itself or is conceded by the applicant party. Nonetheless, Article 4 permits the taking of the evidence provisionally where neither avenue is available (the witness answers the questions put to him but the requesting court is left to decide upon the validity of the objection and the admissibility of the evidence in the requesting court). The practical result of the protection given by Article 4(3) is that a witness will normally be able to claim both a privilege against self-incrimination and legal professional privilege. It is axiomatic that outside the scope of the 1960 Law, a Jersey witness will in any event be able to claim both privileges from the standpoint of domestic procedure in Jersey; and, on the same basis, he will also be able to claim objection to answering questions on the grounds of irrelevance and unwarranted breach of third party confidentiality.²⁵⁵ The basis for objection is not limited to information protected by legal privilege but includes requests that are oppressive, that, if answered, would breach confidentiality or the answer to which is irrelevant.²⁵⁶ The confidentiality of information is not, *per se*, a bar to it being disclosed pursuant to the 1960 Law. The value in preserving confidential information is to be weighed in the balance with the information's financial importance to the party in the requesting court.²⁵⁷ When any privilege or objection is claimed or raised by a witness during the course of his examination, the Presiding Officer has no power to direct the witness to answer the question. Neither is the Viscount empowered to accede to or determine any privilege or objection raised by the witness, the witness is able to make such objections as it pleases and the procedure is for the Presiding Officer to make a note of the claim or objection and the ground for it. If necessary, the

5-121

²⁵² 1960 Law, Art 4A(3).

²⁵³ Income Tax (Jersey) Law 1961, as amended (1st Sch).

²⁵⁴ 1960 Law, Art 4(3).

²⁵⁵ *Wadman v Dick* (n 224).

²⁵⁶ *ibid*, at 64.

²⁵⁷ *ibid*.

matter will be referred up to the Royal Court for a decision on whether the witness must indeed answer the question in issue.²⁵⁸ The Royal Court retained the right, in support of civil proceedings, on completion of the examination, to compel a witness to answer a question to which objection is taken.²⁵⁹ Foreign counsel may not argue objections before Royal Court.²⁶⁰

xv. Representation of the Witness

- 5-122 Contrary to the usual rule in Jersey civil proceedings whereby a witness who is not a party is not entitled to have their counsel present during their examination, a witness summonsed pursuant to a letter of request may be represented by counsel. If this right were not accorded to the witness it might well be impossible for a witness properly to raise claims of privilege or objection to answering questions. Such a situation would entail unfairness to the witness and impose an undesirable burden on the Presiding Officer who would be the only person left to protect the witness. Nonetheless, a witness' counsel's function is purely protective: it is not open to the witness to confer with, or seek advice from their counsel as to how the witness should answer the questions put to him.²⁶¹ Neither is it appropriate for counsel for the witness to raise questions relating to the validity of the Act of the Royal Court. The Presiding Officer will not go behind an Act of the Royal Court and enquire into its validity.²⁶² All such questions should either be raised with the Royal Court or resolved between counsel for the parties and for the witness prior to the examination.

xvi. Recording and Transcribing Evidence

- 5-123 The normal mode of adducing evidence before the Royal Court is by oral examination. The usual method of recording such evidence in Jersey is by tape recording. It follows that the evidence of witnesses heard before the Presiding Officer pursuant to a letter of request will generally be so recorded by the Royal Court. In ordinary circumstances, those staff would also provide a transcription service. However, circumstances may arise in which it is beyond the resources of the Royal Court to provide a transcription service when acting in aid of a requesting court. In such circumstances and in others, such as where the transcript of the proceedings is urgently required, the usual available alternatives are that:
1. the Royal Court will provide a sound recording service only. Copy tapes will then be sent to transcription specialists in England; or
 2. the parties to the proceedings themselves engage a specialist stenographer (if necessary utilising a Computer Aided Transcription System—which would provide for the production of an instantaneous transcription).

- 5-124 The present position is that a letter of request must specifically request for proceedings before the Presiding Officer to be video-taped and such request is always subject to the discretion of the Presiding Officer. Circumstances may arise where the requesting court

²⁵⁸ *In re State of Norway's Application (No 1)* (n 220), per Ralph Gibson, LJ.

²⁵⁹ *Wadman v Dick* (n 224).

²⁶⁰ *Dick v Dick* (n 251), although foreign counsel may appear as an expert witness.

²⁶¹ *Wigley and others v Dick* (n 238) at 329.

²⁶² Such as that the Act of Court, as issued, is too widely framed.

seeks the supply of both a video-tape and a written transcript of the Jersey proceedings. This is the standard procedure applied in England and Wales. It will be apparent that other than in cases where the Royal Court has found it possible to provide a sound recording and transcription service in-house (where specified fees will apply) all disbursements relating to providing any of the alternative services mentioned will be payable by the applicant party.

xvii. Privacy and 'Gagging' Orders

The examination of witnesses pursuant to the 1960 Law takes place in private.²⁶³ However, in appropriate circumstances privacy and 'gagging' orders will be obtainable in Jersey (for example) to prevent the witness from disclosing to any party that he has been subjected to examination in Jersey. Such an order can also extend to preventing the unauthorised use, copying or dissemination of the transcript of the Jersey proceedings. In *re C Ltd*²⁶⁴ information disclosed to the Royal Court but deemed to be otherwise confidential was withheld from persons convened to give evidence in an application arising under Article 48 of the 1990 Law. All such requests should be included in the letter of request. There have been cases where it has been suggested that an order made by the Royal Court preventing unauthorised copying or dissemination of the content of a Jersey examination may be subsequently disregarded in that the content of the Jersey examination becomes public domain material once introduced into the proceedings in the requesting court. It is submitted that this is a specious argument. Orders of the Royal Court should be complied with even if they are difficult to enforce in the territory of the requesting court. Impliedly, it is a condition of the grant of assistance by the Royal Court to the requesting court that orders of the Royal Court will be respected within the territory of the requesting court. The correct procedure in circumstances such as those outlined is for Jersey counsel to make an application to the Royal Court seeking a variation of any confidentiality order earlier made by it. Leaving aside the question of enforceability, should such an order of the Royal Court be ignored within the territory of the requesting court, such conduct might well be taken into account in any subsequent application to the Royal Court from a court in the requesting territory.

5-125

xviii. Completion of Testimony

Normally, the completion of a witness' examination serves to finalise his testimony. However, circumstances may arise in which it may be preferable for counsel to seek to reserve before the Presiding Officer any purported rights of further examination and recall: in such circumstances, it may be prudent for counsel to ask for the examination to stand adjourned *sine die* rather than for his evidence to be acknowledged as complete.

5-126

xix. Signing and Transmission of the Deposition

Subject to any special requirements of the requesting court, once the witness has approved the transcript of his evidence he will be required to appear before the Presiding Officer in chambers to authenticate the transcript by signing it. The Presiding Officer will then

5-127

²⁶³ *Jersey Evening Post Ltd v Al Thani* [2002] JLR 542.

²⁶⁴ [1997] JLR N8].

countersign the deposition in the presence of the witness. Counsel are not normally present when a deposition is authenticated in this way though they will usually have been provided with a draft for information. In cases where a witness becomes unavailable to authenticate his deposition it may be authenticated under the hand of the Presiding Officer alone. It is generally agreed that the parties and/or the witness may be provided with and retain copies of the authenticated transcript. Once authenticated, the original deposition will be transmitted to the requesting court by the means specified in the letter of request.

xx. Costs

- 5-128** When witnesses are being examined in Jersey in a civil or commercial matter it is not appropriate for the Presiding Officer, or even the Royal Court, to make any order as to costs *inter partes*. These will in all cases fall to be determined subsequently by the requesting court.²⁶⁵ However, the Presiding Officer has the power²⁶⁶ to make provision for the reimbursement of, for example, fees paid to experts, interpreters and the expenses of any special procedure adopted when rendering assistance to the requesting court. Further, under Article 26 of the Hague Convention fees and costs incurred in connection with the execution of letters of request, the service of process necessary to compel the attendance of a witness, the costs of attendance of any such witness and the cost of any transcript of evidence are likewise reimbursable. Circumstances may arise in which additional expenditure may have to be incurred within the context of the Jersey proceedings so as to enable those proceedings to actually take place: these may arise, for example, where copy tapes are to be sent to transcription specialists in England or where the parties have agreed to engage a specialist stenographer. All these expenses would appear to be reimbursable under Article 26. By virtue of Articles 14 and 26 it is the requesting state of origin which is technically bound to make the reimbursements. However, in practice, it is clear that the parties must agree to discharge these disbursements before they can be incurred and, indeed, the Act of the Royal Court authorising the taking of evidence in Jersey will have made necessary provision for the discharge of the Presiding Officer's disbursements.

xxi. Witnesses' Allowances and Expenses

- 5-129** Apart from the provision under Article 26 of the Hague Convention providing for the reimbursement of witnesses' costs, attendance allowances and expenses unavoidably incurred in giving evidence in the context of civil proceedings of which a requesting court is seized, these will only be reclaimable by a witness to the extent that a witness in civil proceedings before the Royal Court would be able to claim similar payment.²⁶⁷ However, in our opinion this right will not extend to the repayment of counsel's fee when he appears in representation of a witness since counsel's fee would not be an unavoidable consequence of the witness' attendance. It is recommended that the appropriate party should agree proposals for discharging the allowances and expenses of a witness without the involvement of the Royal Court or the Presiding Officer so as to obviate the need for ancillary applications in the context of the Jersey proceedings.

²⁶⁵ Hague Evidence Convention, Art 14.

²⁶⁶ *ibid.*

²⁶⁷ 1960 Law, Art 6.

B. Bankers' Books Evidence (Jersey) Law 1986 ('The 1986 Law')

Under the 1986 Law a bank, or officer of a bank, shall not, in any legal proceedings to which the bank is not a party, be compellable to produce any bankers' book, unless by order of the Royal Court made for special cause.²⁶⁸ Nonetheless, on the application of any party to a legal proceeding the Royal Court may order that such party be at liberty to inspect and take copies of any entries in a bankers' book for any of the purposes of such proceedings.²⁶⁹ In a civil matter an application for such an order must be made by summons served on the bank and on the other party, supported by an affidavit showing the materiality of the inspection and demonstrating that the application is made in good faith.²⁷⁰ While the 1986 Law seems to have been implemented largely with Jersey proceedings in mind, legal proceeding are defined in the 1986 Law as meaning any civil or criminal proceeding or enquiry in which evidence is, or may be given anywhere in the world, and includes an arbitration. It follows that an application for the production of bankers' book evidence in Jersey can be made to the Royal Court by a party to foreign proceedings or by a foreign court under the terms of the 1986 Law. The power of the Royal Court under Article 6 of the 1986 Law is, along with the closely aligned principles applicable to the grant of an application for *Norwich Pharmacal* relief, entirely discretionary and will in all cases be exercised with caution, and only on the clearest grounds.

5-130

C. Discovery of Documents and Information Ordered in Support of Foreign Insolvency Matters

The Royal Court has a discretionary power to render assistance to prescribed foreign courts in matters of insolvency.²⁷¹ However the Royal Court remains free to exercise an inherent jurisdiction to assist non-prescribed countries, outside the application of Article 49 of the Désastre Law. The Court will exercise its discretion in accordance with the principles of comity and should therefore be willing to grant assistance where there is evidence of reciprocity from the courts of the foreign state.²⁷² Implicitly, foreign insolvency or bankruptcy matters do fall within the definition of a civil or commercial matter for the purposes of the 1960 Law. Although it has been held in England that the UK equivalent of the 1960 Law, the Evidence (Proceedings in Other Jurisdictions) Act 1975, is inapplicable where the foreign proceedings are in the nature of bankruptcy or liquidation proceedings, as the evidence sought by way of the 1975 Act must be sought for trial and not some interlocutory proceeding and in the context of an insolvency, there would never be a trial in the English sense,²⁷³ applications for assistance under Article 49 are made by way of ex parte Representation

5-131

²⁶⁸ Bankers' Books Evidence (Jersey) Law 1986, Art 5.

²⁶⁹ *ibid*, Art 6(1).

²⁷⁰ PD RC 05/2.

²⁷¹ The Bankruptcy (Désastre) (Jersey) Law 1990, Art 49, currently confined to only United Kingdom, the Isle of Man, Guernsey, Australia and Finland as per the Bankruptcy (Désastre) (Jersey) Order 2006.

²⁷² *In re First Intl Bank of Granada Ltd* [2002 JLR N [7]]; *In re F. & O. Finance AG* [2000 JLR N-5].

²⁷³ *Re International Power Industries NV* [1985] BCLC 128, applied in *Re D (In Liquidation)* [1985] PCC 279.

before the usual Friday afternoon sitting of the Samedi Division of the Royal Court.²⁷⁴ It follows that where litigation arises in the context of foreign insolvency or bankruptcy matters that is pending or in contemplation before a court outside Jersey, evidence for use in those proceedings could be obtained in Jersey (as the assistance rendered) pursuant to the procedure described above in relation to letters of request under the 1960 Law. Assistance in the context of Article 49 is wider than the provision of disclosure or evidence in support of foreign proceedings.²⁷⁵ In granting such assistance the Royal Court may exercise, in relation to the matters to which the request relates, any jurisdiction which it or the requesting court could exercise in relation to those matters.²⁷⁶ An applicant for an order for assistance from the Royal Court in insolvency and bankruptcy matters under Article 49 should consult with the Viscount's Department with a view to ensuring that the order sought, while seeking to achieve the objects of the letter of request, is drawn in terms suited to Jersey's domestic bankruptcy legislation.²⁷⁷ Unlike under the 1960 Law, the Law Officers' Department does not usually act as a conduit in relation to insolvency requests under Article 48 and all such applications should be remitted directly to a Jersey lawyer to be progressed. Applications for assistance under Article 49 are made by way of ex parte Representation before the usual Friday afternoon sitting of the Samedi Division of the Royal Court.

- 5-132 The fact of the request for assistance is a weighty factor to be taken into account in granting the assistance sought.²⁷⁸ That said, a request cannot be conclusive as to the manner in which the Royal Court's discretion should be exercised, notwithstanding that the foreign court is likely to be in a better position to state what is required for the proper conduct of a bankruptcy or winding up in its own jurisdiction. It will not normally be appropriate for the Court to inquire into the basis for the views expressed by the foreign court making the request but there is no reason to prevent its considering events subsequent to the letter of request in the exercise of its discretion whether to and the manner in which the Royal Court's discretion is to be exercised.²⁷⁹
- 5-133 The power of the Court to render assistance under Article 49 is limited by the rules of private international law. It is therefore unlikely that the Royal Court will render extensive assistance in relation to, for example, a foreign 'revenue' insolvency.²⁸⁰ Assistance will not, be granted if the foreign Revenue is the sole creditor but it may be granted if there is another ordinary creditor who would benefit thereby, regardless of the size of the ordinary creditor's claim in relation to that of the foreign Revenue authority.²⁸¹
- 5-134 Subject to this caveat, it follows that in the context of a foreign insolvency, witnesses in Jersey may be examined in aid of the foreign insolvency office holder in carrying out his

²⁷⁴ *Re Montrow International Ltd and Likouala SA* [2007] JRC 065; *In The Matter of the Representation of Williams and Clark* [2012] JRC 076.

²⁷⁵ *Warner v Equity Trust (Jersey) Ltd* 2008 JLR N [1]; *In re O.T. Computers* 2002 JLR N [10], 2004 JLR N[4]; *In re Williams* 2009 JLR N [16]; *In re REO (Powerstation) Ltd* 2012 (1) JLR N [13].

²⁷⁶ Bankruptcy (Désastre) (Jersey) Law 1990, Art 49(2).

²⁷⁷ *In re Dick* [2000 JLR N-4]; PD RC 05/17.

²⁷⁸ *Montrow Intl Ltd v Tacon* 2007 JLR N [49].

²⁷⁹ *ibid.*

²⁸⁰ *In re Bomford* 2002 JLR N [34]. This is the well-known principle from *Government of India v Taylor* (n 157).

²⁸¹ *In The Matter Of Williams* [2009 JLR N 16], applying *In re Bomford* (n 280), where 99.8% of the admitted claims were owed to HMRC.

duties. While such an examination would conform, broadly speaking, to the requirements set out in relation to the procedure under the 1960 Law, a Jersey examination in aid of a foreign insolvency may range over a broader topic area. In a domestic insolvency in Jersey (a *désastre*) the Viscount (as the island's equivalent of the Official Receiver) may summon before him any person known or suspected to have in his possession any property, document or knowledge of the affairs of the debtor.²⁸² Material disclosed in this way may be available for more confined usage (in effectively locating, protecting and realising assets) rather than being readily available or relevant for use in any subsequent or connected court proceedings. Special restrictions may therefore be placed by the Royal Court on the further use of information disclosed under Article 49.²⁸³

²⁸² Bankruptcy (Désastre) (Jersey) Law 1990, Art 20.

²⁸³ *Re C Ltd* [1997] JLR N-8].

6

Trusts Arising by Operation of Law: Resulting and Constructive Trusts

I. Introduction

This chapter is concerned with the creation of trusts which are not express trusts, created by a settlor evincing an express or inferred intention of creating a trust whether by way of a declaration of trust, by will or by disposition of property to trustees. Resulting and constructive trusts, especially the latter, are recognised as arising in Jersey law in a wide variety of circumstances. The recognition and adoption of constructive trusts in Jersey law has been primarily as a tool to thwart attempts by wrongdoers to safe harbour their nefariously obtained gains.¹ In crafting its own response to dealing with this problem, the Royal Court has drawn from jurisprudence developed in English law and from other leading Commonwealth jurisdictions. However, the circumstances in which English law will recognise a constructive trust arising are not wholly mirrored in Jersey law. Owing to the Norman customary law principles that underpin the island's law of real property, wholly absent from Jersey's jurisprudence is any equivalent of the rich seam of English case law concerning common-intention constructive trusts that has come to govern the rights of co-owners of immovable property. Resulting trusts are recognised in Jersey as being founded on the basis of a presumed (but rebuttable) intention on the part of the transferor or purchaser of property not to relinquish beneficial ownership in respect of it. Many of the Jersey cases on constructive trusts, on the other hand, are concerned with a situation where a trust is imposed on a person holding property usually against his actual intention.² A constructive trust is imposed by the law in circumstances in which the law requires the holder of the property not to retain it for their own benefit and deny the interests of the true beneficiaries.³

6-1

II. Constructive Trusts and Constructive Trusteeship

A comprehensive definition of the constructive trust in Jersey law is an elusive creature and, as in many jurisdictions that recognise the concept, there is no single unifying principle

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¹ *In re Esteem Settlement* [2002] JLR 53] at [82].

² *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 708C, per Lord Browne-Wilkinson.

³ *Paragon Finance plc v D.B. Thakerar & Co* [1999] 1 All ER 400 at 409b, per Millett LJ.

that runs through all the categories of constructive trust or the circumstances in which the Court will declare a constructive trust to have arisen.⁴ Article 33 of the Trusts (Jersey) Law 1984 defines a constructive trustee in the following terms:

33 Constructive trustee

- (1) Subject to paragraph (2), where a person (in this Article referred to as a constructive trustee) makes or receives any profit, gain or advantage from a breach of trust the person shall be deemed to be a trustee of that profit, gain, or advantage.
- (2) Paragraph (1) shall not apply to a bona fide purchaser of property for value and without notice of a breach of trust.
- (3) A person who is or becomes a constructive trustee shall deliver up the property of which the person is a constructive trustee to the person properly entitled to it.
- (4) This Article shall not be construed as excluding any other circumstances under which a person may be or become a constructive trustee.

- 6-3** As is apparent from the article itself this is not an exhaustive description of the circumstances giving rise to a constructive trust in Jersey nor is it exhaustive of the circumstances in which a person will be described as a constructive trustee. While in a number of instances, the circumstances in which a constructive trust will arise will fall within the ambit of Article 33, in others recourse of customary law principles is necessary to fill the gap.⁵ The intervention of the law by the imposition of a constructive trust is based on principle not the free-wheeling discretion of the Court to achieve justice as it sees fit. There is a close correlation between the imposition of a constructive trust and unconscionable conduct, the former giving rise to the latter, so that the holder of the property subject to the constructive trust is prevented from asserting a beneficial interest in the assets in his hands to the exclusion of the true beneficial owner.⁶ This can be contrasted with the jurisprudence in the United States and Canada, where the basis for the imposition of a constructive trust appears to be to prevent unjust enrichment.⁷ However, the distinction between unconscionability and unjust enrichment as a basis for the imposition of a constructive trust may be more apparent than real, as the enrichment is usually only unjust if it is unconscionable for the recipient to retain the benefit received.⁸ The events giving rise to a constructive trust must be known to the person alleged to be a constructive trustee. The conscience of the defendant being affected is of central importance to the imposition of a constructive trust. While unconscionability may be the benchmark, the imposition of a constructive trust does not have anything to do with punishing the holder of the property for wrongdoing.
- 6-4** There are two recognised categories of constructive trust and constructive trusteeship recognised in Jersey law. The categorisation has been adopted in Jersey from English authority which identified two meanings to the term ‘constructive trust’ for the purposes of

⁴ *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276 at 300, per Edmund Davies LJ.

⁵ As is evident, Art 33 of the Trusts (Jersey) Law 1984 does not encompass a dishonest assistant, who is conventionally described as being liable to account as a constructive trustee, although as will be seen, that description is not necessarily apposite.

⁶ *Westdeutsche Landesbank Girozentrale v Islington LBC* (n 2) at 705, per Lord Browne-Wilkinson.

⁷ *In the Matter of the Esteem Settlement* [2003 JLR 188] at [149].

⁸ ibid, approving P Millett, ‘Equity: the Road Ahead’ (1995) 9 *Trust Law International* 35.

limitation.⁹ Both categories of constructive trust recognised in Jersey are based upon the existence of a fiduciary relationship (to which the defendant constructive trustee may or may not be a party). Jersey law recognises certain well-established categories of relationship as fiduciary, for example trustee and beneficiary, director and company, agent and principal. However it has been recognised that the categories of fiduciary relationship are not closed.

The categorisation of constructive trusts that has become accepted in Jersey is between a constructive trust arising by operation of law based upon a pre-existing fiduciary relationship that is independent of any breach of trust or fiduciary duty giving rise to the constructive trust (known as a 'Type-1' constructive trust) and the imposition of a personal liability to 'account as a constructive trustee' by way of a remedy (known as a 'Type-2' constructive trustee) where there is no pre-existing fiduciary relationship and liability 'as a constructive trustee' arises simultaneously with the acts giving rise to liability.

6-5

A. Fiduciary Relationships

As with the nature of a constructive trust itself, there is no single unifying definition of a fiduciary in Jersey law. A working definition of what a fiduciary is, is that given by Millett LJ in *Mothew v Bristol & West Building Society*.¹⁰

6-6

A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty.

The search for a single, conclusive definition of a fiduciary remains elusive.¹¹ The best that can be achieved is to define the characteristics of a fiduciary relationship. Not all fiduciary relationships give rise to the same fiduciary duties (or for that matter remedies for breach of those duties). There are three broad kinds of fiduciary relationship (which are not necessarily mutually exclusive) each exhibiting different characteristics: (1) relationships of trust and confidence,¹² the core obligation in this kind of fiduciary relationship being one of loyalty; (2) relationships of influence;¹³ and (3) relationships of confidence.

6-7

These broad descriptions of different types of relationship will assist in identifying the characteristics of a relationship that will convert an otherwise arm's length or commercial relationship into a fiduciary relationship. Where one party to a relationship places themselves in a position in which they are unable to prefer their own interest to the interests of the other person, they will have become a fiduciary in relation to that person. Outside a handful of archetypal examples of fiduciary relationships, the paradigm example being that

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⁹ *Bagus Invs Ltd v Kastening* [2010] JLR 355], affirming *Paragon Fin plc v D.B. Thackerar & Co* (n 3) at 408–14, per Millett LJ.

¹⁰ [1996] EWCA Civ 533, affirmed in *In the matter of the E, L, O and R Trusts* [2008] JRC 150 and *MacFirbhisigh v Ching & Ors* [2015] JRC 233.

¹¹ P Millett, 'Equity's Place in the Law of Commerce' (1998) 11 LQR 214.

¹² ie where 1 person volunteers to act in the interests of another person or places themselves in a position where they are obliged to do so. The core obligation is one of loyalty.

¹³ Also referred to as a relationship of ascendancy and corresponding dependency.

between a trustee and beneficiary,¹⁴ the Court is usually reluctant to impute to a person that they have assumed a fiduciary relationship generally in favour of another person in respect of the whole course of dealing between them.

B. Personal and Proprietary Remedies

- 6-9** In response to a breach of fiduciary duty, the law is not primarily concerned to compensate for any loss caused (although it will try to do so).¹⁵ Instead its primary concern is to treat the defaulting fiduciary as though they were still compliant with their duties. The mechanism by which that is achieved is by way of an account of profits, which requires the fiduciary to disclose and pay over all profits arising from the breach.¹⁶ A fiduciary's personal obligation to account affords the beneficiaries of that duty no priority as against the fiduciary's personal creditors in the event of the fiduciary's insolvency. The imposition of a constructive trust will give rise, at least, to a personal liability upon the constructive trustee to account to those for whom they are a constructive trustee. In certain circumstances, the law will recognise the imposition of a constructive trust giving rise to a proprietary remedy in favour of the victim of the breach of fiduciary duty.
- 6-10** The paradigm cases in which a proprietary constructive trust will arise over property is in circumstances where property is transferred to be held by a fiduciary who holds it as a fiduciary, either for the transferor or for beneficiaries (in the case of an express trust). A superficially different situation, but in which the result is the same, is where the asset that is transferred to a fiduciary is substituted by the fiduciary for another asset. The basis upon which a proprietary constructive trust in the substituted asset arises involves a resorting to the principles of tracing.¹⁷ It is uncontroversial that the basis on which a constructive trust arises is on the ownership of the original asset entitling the plaintiff to assert beneficial ownership in the traceable substitute asset.
- 6-11** The issue of central importance between the availability of a proprietary as opposed to a personal remedy against a constructive trustee is the defendant's solvency. If the constructive trustee is sufficiently solvent to satisfy the beneficiaries' claim, there is usually no need to assert a proprietary claim to the assets. However, where the solvency or the ability of the constructive trustee to otherwise satisfy a personal claim is in issue, the beneficiaries should insist upon their proprietary entitlement to the assets. In circumstances where the constructive trust arises from a fraud or theft (which has been the factual scenario in a number of the leading Jersey authorities on the nature of constructive trusts) there is likely to be an insufficiency of assets for the defendant constructive trustee to be able to satisfy all personal claims against him. Assets in the hands of a constructive trustee that are subject

¹⁴ The other archetypal examples being the relationship between agent and principal (*FHR LLP v Cedar Capital LLC* [2014] UKSC 45); director and company (*Lipkin Gorman v Karpnale Ltd* [1991] 2 AC at 565; *In Re Esteem Settlement* (n 1)); solicitor and client (*Hirschfield v Philip Sinel & Co* [1999] JLR 55); *Prince Jefri Bolkiah v KPMG* [1999] 2 AC at 235–36); partnerships (*Cannon v Nichol* [2006] JLR 299); and, possibly, parties to a joint venture (although whether a fiduciary relationship exists is likely to be a question of fact in each case and is not to be judged simply and solely by reference to the existence of the relationship alone).

¹⁵ As to the personal remedies available against trustees, see Ch 7.

¹⁶ See Ch 7 for the procedure by which an account is obtained and proven.

¹⁷ See Ch 13.

to a proprietary constructive trust are set apart from the assets beneficially owned by the defendant constructive trustee. A proprietary claim will therefore survive the insolvency of the constructive trustee and the assets subject to a constructive trust will not fall into a *pari passu* division of the assets beneficially owned by the defendant trustee. Put another way, the plaintiff will maintain priority against the body of the constructive trustee's unsecured creditors to the extent of the asset over which a proprietary interest is claimed. One of the benefits of being able to assert a proprietary remedy against assets in the hands of a constructive trustee is that the plaintiff is entitled to any uplift in value the asset has gone through since it became subject to the constructive trust. In contrast, save for the possible award of interest, a beneficiary asserting a personal claim against a constructive trustee is usually for a fixed sum, representing the plaintiff's loss. Another consequence of a proprietary remedy is that it widens the potential number of claims that may be brought, beyond the constructive trustee; for example, against accessories who knowingly receive the traceable proceeds of the original breach of trust or fiduciary duty or who dishonestly assist in any further failure of the original constructive trustee to account.¹⁸ The trust property remains traceable against any person into whose hands the trust property comes, who is not a bona fides purchaser for value.

C. Type-1 Constructive Trustees: 'True' or 'Institutional' Constructive Trustees

The defining feature of cases in which a Type-1 constructive trusteeship arises is that the defendant constructive trustee has already accepted or assumed the role of a trustee or a fiduciary independently of and preceding the acts giving rise to liability. The imposition of a constructive trust vindicates the rights of those to whom the constructive trustee already owes fiduciary duties. A Type-1 constructive trusteeship arises from the date of the circumstances giving rise to it; the function of the Court is to declare that such a trust has arisen in the past; the constructive trust is institutional and does not arise at the discretion of the Court.¹⁹ A Type-1 constructive trustee is not permitted to receive the property in his own right, the transaction by which he comes by the property is deemed to create a trust from the outset and the trustee's possession of the property is coloured by his pre-existing fiduciary relationship by which he obtained it. The law treats a Type-1 constructive trustee as holding the property concerned on trust for the plaintiff and the plaintiff is usually entitled to assert a proprietary remedy against the traceable assets in the hands of the constructive trustee.

The recognised categories of fiduciary relationship capable of giving rise to a Type-1 constructive trust are those where the defendant constructive trustee has already willingly assumed a fiduciary position. The archetypal example is that of an express trustee but also includes a person purportedly exercising the office of trustee even though improperly appointed (a trustee de son tort) or a person recognised to exercise another fiduciary office,

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¹⁸ *Nolan v Minerva Trust Company Limited* [2014] JRC 078A.

¹⁹ *Westdeutsche Landesbank Girozentrale v Islington LBC* (n 2) at 715–16; *In The Matter of the Esteem Settlement* (n 7).

analogous to that of a trustee, such as the director of a company. A trustee de son tort is a treated as administering the trust property in accordance with the terms of the trust notwithstanding their improper appointment. A director of a company, unlike either an express trustee or a trustee de son tort, is not usually vested with the company's property, but will have de facto control over the company's assets and so is in an analogous position to a trustee in respect of that property, being accountable to their company, being in a position of trust and confidence to their company, being subject to similar rules as trustee concerning unauthorised profits at the expense of their company, conflicts of interest and self-dealing and otherwise dealing with the assets to the detriment of their company. In each of these examples the imposition of a constructive trust bars the fiduciary from claiming the property subject to the trust beneficially; the trust ensures the fiduciary's treatment of the property subject to the constructive trust is consistent with their existing duties.

i. Unauthorised Gains by a Fiduciary and their Proceeds

- 6-14** A Jersey trustee, is not permitted to make a personal gain during the course of their trusteeship without the express authorisation of the beneficiaries, the Court, the terms of the trust instrument or the Trusts (Jersey) Law 1984.²⁰ This rule applies irrespective of whether there has been a misuse of trust property (ie a misappropriation of trust assets for the benefit of the trustee or a third party) or where the trustee (or other fiduciary in an analogous position to a trustee, such as a company director or agent) has otherwise abused his position, for example by receiving a bribe or secret commission²¹ by appropriating for themselves an opportunity which comes to the fiduciary in that capacity. As is explored elsewhere, this rule is applied strictly and irrespective of whether the trustee or fiduciary has acted in good faith, that the gain would not have accrued to the beneficiaries, that the fiduciary has not caused an actionable loss, or that the gain was obtained by reason of the fiduciary's own skills.²² This rule operates to prevent temptation on the part of the fiduciary by automatically appropriating to the beneficiaries the trustee's unauthorised gains and the traceable proceeds deriving from them.
- 6-15** Self-evidently, a trustee is not liable to account as a constructive trustee (whether on a personal or proprietary basis) for every gain that accrues to him. When it comes to identifying the gain for which the constructive trustee must account, the Court will usually allow a deduction for the trustee's reasonable costs and expenses in maintaining the gain. Put another way, the trustee is liable for his net profits not its gross receipts.²³ The defendant is only liable for gains which have been made in his capacity as a fiduciary or by virtue of that fiduciary position. The plaintiff must establish the exact nature and extent of the fiduciary's obligations before it is able to lay claim to the gain by way of a proprietary claim or obtain

²⁰ Trusts (Jersey) Law 1984, Art 21(4); *AG v Guardian Newspapers (No 2)* [1990] 1 AC 109.

²¹ *Lloyds Trust Company (CI) Limited v Fragoso* [2013 (2) JLR 444]; *FHR LLP v Cedar Capital LLC* (n 14); *AG for Hong Kong v Reid* [1994] 1 AC 324.

²² *Boardman v Phipps* [1967] 2 AC 46 (although the court may award the trustee an allowance for his expertise or skill).

²³ ibid; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134. The Royal Court is reluctant to afford the beneficiaries a windfall by effectively permitting the free administration of the trust assets where the trustee would otherwise have been remunerated; *In re Carafe Trust* [2005 JLR 159].

an account of it from the defendant. In cases where the fiduciary duties derive from a particular status, such as a trustee, this is uncontroversial. In other cases, where the fiduciary's status and the scope of his obligations arise from a fact-specific context the position is not as straightforward.

The test of causation, whereby the Court is able to establish a sufficient connection between the breach of duty and the profit or gain derived, is that applicable to any other breach of trust by a trustee.²⁴ The breach must have been the cause of the gain. The breach need not have been the sole cause, nor need it have been the predominant cause.²⁵ The defaulting fiduciary is unable to escape liability for the gain on the basis that he would have made the gain even if there had been no breach of duty.²⁶ The burden is on the defaulting fiduciary to show that the profit is not one for which he should account.²⁷ In effect, this means that once the plaintiff has discharged the burden of proof that there has been a breach of the fiduciary's duty, the burden shifts to the fiduciary to prove that the breach of duty had no causative effect at all and that any gain in his hands came exclusively as a result of activities legitimately undertaken on his own account.²⁸

6-16

ii. Constructive Trusts Arising from a Breach of Confidence

Information coming to a fiduciary in the course of his office is not the property of the trust or principal to whom the fiduciary duty is owed, and may be used by the trustee for his own benefit or the benefit of other trusts unless the information is confidential, ie it is given to the trustee in circumstances which, regardless of his position as a trustee, would make it a breach of confidence for him to communicate to anyone for it has been given to him expressly or impliedly as confidential, or alternatively in a fiduciary capacity, and its use would place him in a position where his duty and his interest might possibly conflict.²⁹ An obligation of confidence arises where a person receives confidential information in the knowledge that it is to be kept confidential. A breach of confidence arises where information that has the necessary quality of confidentiality is imparted in circumstances importing an obligation of confidence and there has been an unauthorised use of the information.³⁰

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Where a trustee of two settlements, the A Trust and the B Trust, holds shares in the same small company, and the trustee learns facts qua trustee of the A Trust about the company which are encouraging, in the absence of special circumstances (such as, for example, that the A Trust wants to buy more shares) there is nothing in principle that makes it improper for the trustee to tell his co-trustees of the B Trust who feel inclined to sell, that the trustee has information that this would be a bad thing to do because the shares in the company

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²⁴ See Ch 7.

²⁵ *Barton v Armstrong* [1976] AC 104 at 118.

²⁶ *Gwembe Valley Development Co Ltd v Koshy* (No 3) [2003] EWCA Civ 1048 at [145]–[146].

²⁷ *Murad v Al Saraj* [2005] EWCA Civ 959 at [77], per Arden LJ.

²⁸ *Manley v Santori* [1927] 1 Ch 157; *Murad v Al Saraj* (n 27); *Gray v New Augarita Porcupine Mines Ltd* [1952] 3 DLR 1, PC (Canada).

²⁹ *Boardman v Phipps* (n 22) per Lord Upjohn at 128–29.

³⁰ *Pell Frischmann Engineering Limited v Bow Valley Iran Limited* [2007] JRC 105A, affirming *Benest v Langlois* [1993 JLR 117] at 145–47, per Le Cras, Lieutenant Bailiff, adopting *Coco v A.N. Clark (Engineers)* [1969] RPC 41 at 47 and 48, per Megarry J.

are likely to appreciate in value. However, where, as trustee of the A Trust, the trustee learns facts that make him and his co-trustees want to sell the shares, clearly the trustee could not communicate this knowledge to his co-trustees of B Trust until the holdings of the A Trust in the company have been sold. To share that information would amount to an obvious conflict, reflected in the prices that might or might possibly be obtained.

- 6-19** Article 31(1) of the Trusts (Jersey) Law 1984 provides that where a trustee acts as trustee for more than one trust, it shall not, in the absence of fraud, be affected by notice of any instrument, matter, fact or thing in relation to any particular trust if the trustee has obtained notice of it by reason of the trustee's acting or having acted for the purposes of another trust. We do not regard this provision as deviating from the principle espoused in the examples of the A and B Trust given above. The trustee of Trust A may share information with himself or his co-trustees of another trust if doing so would be beneficial, but is not obliged to do so and cannot be held at fault by the beneficiaries for having failed to do so or to take advantage of confidential information of which he has notice or has otherwise obtained qua trustee of the A Trust.
- 6-20** Where a trustee is possessed of confidential information, he is not permitted to make use of it to the prejudice of the person from whom the information was received in confidence or to whom the duty of confidence is owed without their consent.³¹ If the trustee or fiduciary does breach his duty of confidence and makes a profit or gain from the information, the trustee must account for the profits obtained.³² There is as yet no Jersey authority in which the Court has imposed a proprietary constructive trust over the profits obtained by a fiduciary in breach of confidence and the Royal Court has yet to declare whether confidential information is property, whether a relationship of confidence is fiduciary, or whether a plaintiff is restricted to a loss-based remedy for damages, rather than a proprietary one.³³

iii. Constructive Trusts Arising on the Taking of a Corporate Opportunity

- 6-21** Unlike in cases where it is possible to identify that the property sought to be subject to a proprietary remedy is either the original property or its traceable proceeds,³⁴ in cases where a fiduciary, such as a director, has taken an opportunity for himself which should have been obtained for the benefit of his company, there is usually no pre-existing ownership in the asset by the principal to whom the duty is owed. Take a case where a director of a property development company, on becoming informed of a sale of land, acquires the land for himself and does not afford the company for whom he is a director the possibility of considering the opportunity; the opportunity of which the company has been deprived would not have appeared in the company's books or financial records, nor would it have

³¹ *Pell Frischmann Engineering Limited v Bow Valley Iran Limited* (n 30), affirming *Seager v Copydex Ltd* [1967] 1 WLR 923, per Lord Denning MR at 931, 932; *Prince Jofri Bolkiah v KPMG* (n 14) at 235–36, cited with approval in *Hirschfield v Philip Sinel & Co* (n 14); *Abacus (C.I.) Ltd v Appleby* [2007] JLR 499].

³² *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1 at [276]; *AG v Guardian Newspapers Ltd (No 2)* (n 20) at 288, per Lord Goff (obiter).

³³ G Virgo, 'Personal and Proprietary Remedies for Breach of Confidence: Nearer to Breach of Fiduciary Duty or Breach of Contract?' University of Cambridge Faculty of Law Research Paper No 33/2014; M Conaglen, 'Thinking about Proprietary Remedies for Breach of Confidence' (2008) 1 *Intellectual Property Quarterly* 82.

³⁴ As to which see Ch 13.

been something that the company was capable of offering as security for its borrowing. It is now clear³⁵ that a proprietary claim will arise in respect of a profit or gain obtained by a fiduciary taking advantage of his position as a fiduciary which is the crucial factor and not whether the opportunity could be described as somehow being the property or belonging to the principal. The fiduciary is estopped from denying that he acquired such assets on behalf of the person to whom the fiduciary owes his duty.³⁶ Is it not a requirement that the advantage or opportunity that is taken includes a misappropriation of an asset that in fact belongs to the principal.³⁷ It includes all opportunities which present themselves to the fiduciary in that capacity and in respect of which he is obliged to consider the interests of those to whom he owes his duties as a fiduciary in preference to his own interests.

iv. Constructive Trusts Arising over Bribes and Secret Commissions

There is no point paying a bribe or secret commission to a person who is not in a position to give effect to or influence a particular outcome. It follows that a fiduciary who receives a bribe or secret commission does so precisely because they are in a fiduciary position. It is in the nature of a bribe or secret commission to induce the recipient to do something they would not otherwise have done, contrary to their duties. It therefore follows that the principles applicable to a case where a fiduciary has received a bribe or secret commission are closely aligned with those applicable to cases in which the fiduciary has deprived their principal of a corporate opportunity. A fiduciary who receives a bribe or secret commission has profited from his office, giving rise to a constructive trust over the sums received or their traceable proceeds.³⁸ It follows that there is no difference in principle between cases where a benefit is obtained by the fiduciary which the fiduciary was bound to obtain for their principal (and which the law vindicates by the imposition of a constructive trust over the benefit, as if the fiduciary had performed their duty) and cases where the benefit was never supposed to have been obtained at all, ie cases of bribes and secret commissions.³⁹

6-22

v. Constructive Trusts Arising on the Transfer of Trust Property to a Third Party in Breach of Trust

Where property is wrongfully transferred by a trustee or other fiduciary to a third party in breach of trust or their fiduciary duty, as well as being able to raise a personal breach of trust claim against the trustee, the original beneficial interest in the misdirected property subsists and the misdirected property remains unless and until the property comes to be transferred to a bona fides purchaser for value without notice.⁴⁰ The trust to which the property that

6-23

³⁵ Some doubt was cast upon the issue by the English Court of Appeal in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347.

³⁶ *Re Cape Breton Co* (1885) LR 29 Ch D 795 at 803–04, per Cotton LJ.

³⁷ Cf *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* (n 35); *Lloyds Trust Company (CI) v Fragoso & Ors* (n 21), considering *FHR European Ventures LLP v Mankarious* [2013] EWCA Civ 17 at [57]–[59], per Lewison LJ, affirmed on appeal in *FHR European Ventures LLP v Cedar Capital Partners LLC* (n 14).

³⁸ *Lloyds Trust Company (CI) v Fragoso & Ors* (n 21), affirming *AG for Hong Kong v Reid* (n 21), later affirmed in *FHR European Ventures LLP v Cedar Capital Partners LLC* (n 14); J Sheedy, 'Who Owns a Bribe' (2014) 3 Jersey and Guernsey Law Review.

³⁹ *FHR European Ventures LLP v Cedar Capital Partners LLC* (n 14).

⁴⁰ *Trusts (Jersey) Law 1984*, Art 33(2).

has been wrongfully transferred attaches is often described as a constructive trust; however, what the law imposes is not truly a new trust but a recognition of the old trust to which the property, notwithstanding the breach, remains subject.⁴¹ While a third party may have trust property transferred to them in breach of trust, it does not follow that the third party's receipt gives rise to any personal liability to account for the property to the plaintiff beneficiaries. Such personal liability to account arises only where the receiving party is or becomes sufficiently cognisant of the breach of trust to render their receipt and continuing retention of the trust property unconscionable.⁴²

D. Type-2 Constructive Trustees: Liability to Account as a Constructive Trustee

- 6-24** The defining feature of Type-2 constructive trusteeship is that liability is not based upon the existence of a pre-existing fiduciary relationship to which the defendant constructive is a party that precedes the acts said to give rise to liability. A Type-2 constructive trustee is said to be accountable or liable 'as if a constructive trustee', which, of course he is not in any meaningful sense. The expression 'constructive trustee' in the context of a Type-2 constructive trustee is nothing more than a formula for personal liability.⁴³
- 6-25** There is no necessary or complete alignment between Type-1 constructive trusteeship and a substantive, proprietary remedy. A Type-1 constructive trustee is both personally liable (as part and parcel of this existing fiduciary duty) to restore to the plaintiff the property subject to the constructive trust (such property being traceable on the principles discussed in Chapter 13) or, if the property can no longer be traced, to restore the commensurate value to the plaintiff. Similarly, neither is it correct to assume that a Type-2 constructive trusteeship, which is in many cases effectively a personal liability to account, cannot give rise to proprietary relief, for example where property is stolen. The defendant to an action for knowing receipt of the proceeds of a breach of trust or for dishonestly procuring or assisting in a breach of trust or other fiduciary duty, even without receipt of any of the trust property are instances of Type-2 constructive trusteeship. In either case liability depends upon the defendant continuing to hold or retain trust property. A knowing recipient is a special case and demonstrates the point above concerning the lack of alignment between a Type-2 constructive trustee and personal liability. A knowing recipient that continues to hold the trust property they have received is subject to a proprietary remedy to recover that property from the recipient. Where the requirements of the cause of action are proven,⁴⁴ a knowing recipient is also personally liable to account even if it has parted with or used up the trust assets they have knowingly received.

⁴¹ *Westdeutsche Landesbank Girozentrale v Islington LBC* (n 2) at 705–07; *Foskett v McKeown* [2001] 1 AC 102 at 1085–89.

⁴² *Federal Republic of Brazil v Durant* [2012] (2) JLR 356]; *Bagus Invs Ltd v Kastening* (n 9) at [49]–[56]. See Ch 9 on liability as a knowing recipient.

⁴³ *Bagus Investments Limited v Kastening* (n 9); *Dubai Aluminium Co v Salaam* [2002] UKHL 48, per Lord Millett at [141]; *Selangor United Rubber Estates v Craddock* (No 3) [1968] 1 WLR 1555 at 1582, per Ungoed-Thomas J.

⁴⁴ See Ch 9.

6-26

However, liability as a Type-2 constructive trustee is not confined only to cases of dishonest assistance and knowing receipt. Nor is the liability of a Type-2 constructive trustee limited only to personal liability. The law will impose a constructive trust and a proprietary remedy which do not arise from a pre-existing fiduciary relationship—the most notable example being those imposed upon property that is obtained by theft,⁴⁵ fraud⁴⁶ or mistake.⁴⁷ While a personal liability will exist anyway, the beneficiary is also able to assert a proprietary interest in the subject matter of the claim.

Detailed consideration of the circumstances in which a person will be liable as a Type-2 constructive trustee for their dishonest assistance⁴⁸ or knowing receipt⁴⁹ is provided elsewhere.

6-27

i. *Constructive Trusts Arising by Reason of Fraudulent Misrepresentation*

6-28

Jersey's contract law is, in a number of respects, quite different from English contract law and the Royal Court has cautioned against an assumption that it can or should declare the law of Jersey by reference to English law principles which have been drawn from a fundamentally different approach to the law of contract.⁵⁰ There are four basic elements necessary to constitute a contract under Jersey law: (1) capacity; (2) consent; (3) *cause*; and (4) *objet*. Jersey's law of contract determines consent by use of the subjective theory of contract.⁵¹ It follows that, for a contractual theory based on the subjective intention of the parties, a mistake is the principle obstacle to a valid contract.⁵² In Jersey law, consent is prevented, amongst other things, by *erreur*.⁵³ *Erreur*, as recognised in Jersey law, is of two kinds: *erreur obstacle* (*erreurs* that prevent the meeting of minds necessary to constitute a contract's creation and cause a contract to be a *nullity absolue*) and *erreur vice du consentement* (a defect of consent where there is consent/meeting of minds but consent is impeachable for some other reason and which causes a contract to be a *nullity relative*). There is recent Jersey authority for the proposition that a *vice du consentement* (and, a fortiori, *erreur obstacle*) will render a contract void *ab initio*, that is to say, it never existed. *Erreur vice du consentement* is said to be relevant in this case.⁵⁴ It follows that unlike English law, a contract is void,

⁴⁵ ‘although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity’; *Westdeutsche Landesbank Girozentrale v Islington LBC* (n 2) at 716, per Lord Browne-Wilkinson.

⁴⁶ *ibid*.

⁴⁷ *ibid*, at 715. It appears that the recipient will not be a constructive trustee for so long as he is ignorant of the mistake, which may be of fact or law; see *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 and *Westdeutsche Landesbank Girozentrale v Islington LBC* (n 2) at 705c–09, per Lord Browne-Wilkinson.

⁴⁸ See Ch 12.

⁴⁹ See Ch 9.

⁵⁰ *Sutton v Insurance Corporation of the Channel Islands* [2011 JLR 80] at [44]–[47].

⁵¹ *Marret v Marret* [2008 JLR 384] (CA) at [58]–[59]; see RJ Pothier, *Treatise on the Law of Obligations or Contracts* (1806, D Evans transl) para 4, at 4; para 91, at 53; para 98, at 59 and app V, at 35; and *Selby v Romeril* [1996 JLR 210]. See also *Mobil Sales & Supply Corp v Transoil (Jersey) Ltd* 1981 JJ 143 and *La Motte Garages Ltd v Morgan* [1989 JLR 312] (which must is now considered *per incuriam* on this specific point in the light of *Selby v Romeril*).

⁵² R Sefton-Green, *Mistake, Fraud & Duties to Inform in European Contract Law* (Cambridge, Cambridge University Press, 2005) at 72.

⁵³ Pothier, *Traité des Obligations* (n 51) paras 17–20, at 13–16; J Domat, *The Civil Law in its Natural Order*, book 1, title 1 (W Strahan trans, 1722) at 53–54; French Civil Code, arts 1109–10.

⁵⁴ *Steelux Holdings Ltd v Edmonstone (née Hall)* [2005 JLR 152], affirmed in *Marret v Marret* (n 51).

as though it never happened and not voidable if induced by fraud.⁵⁵ And so the English authorities⁵⁶ to the effect that a transaction whereby property is transferred must first be rescinded before any question of proprietary rights and claims can be addressed are not applicable in Jersey.⁵⁷ Any transfers of property subject to the void contract should never have been and so are traceable into substituted assets.⁵⁸

ii. Constructive Trusts Arising by Reason of the Theft of Property

- 6-29** It is now settled law in Jersey, although the point has been rehearsed in a number of later judgments by reference to Lord Browne-Wilkinson's rudimentary analogy of a bag of coins, that where property is obtained by fraud (at least where there is a fiduciary relationship between fraudster and victim), equity imposes a constructive trust on the fraudulent recipient allowing the plaintiff to trace his stolen property in accordance with the established rules of tracing in equity.⁵⁹ Strictly speaking it is impossible for the thief to become a constructive trustee, having neither the legal nor beneficial title to the property stolen vested in them. Putting to one side a situation where the fiduciary has stolen the funds (which makes the fiduciary a Type-1 constructive trustee) the approach of the Court is to treat the thief (even a stranger) as a Type-1 constructive trustee, so as to afford the victim of the theft a full suite of remedies against them including a proprietary claim and not merely a personal right to seek an account. It is the act of theft and not any pre-existing fiduciary relationship that allows for the possibility of a proprietary claim. It follows that a plaintiff has a proprietary claim to profits obtained from the use of those stolen monies on the usual tracing principles.⁶⁰

iii. Constructive Trusts and Unjust Enrichment

- 6-30** Where property in respect of which a person has an equitable proprietary interest (the beneficiary) is received by an innocent volunteer, the beneficiary has a personal claim in restitution against the recipient even where the recipient has not been guilty of any 'fault' in receiving the property. The state of mind required for a 'knowing receipt' claim under English law is not required in Jersey. It is a strict restitutionary liability. The beneficiary can only succeed in obtaining restitution for the third party to the extent that the recipient remains unjustly enriched. A defence of change of position is therefore available.⁶¹ The Court has repeatedly emphasised that the liability of the third party is a personal one; the recipient is

⁵⁵ *Nolan v Minerva Trust Co Ltd* [2014] (2) JLR 117.

⁵⁶ *Twinsectra Ltd v Yardley* [2002] AC 164 at 461; *Lonrho plc v Fayed (No 2)* [1992] 1 WLR 1; *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717; *Bristol & West Building Society v Mothew* [1998] Ch 1.

⁵⁷ *Nolan v Minerva Trust Co Ltd* (n 55) consistent with *Halley v Law Society* [2003] EWCA Civ 97 at [47], per Carnworth LJ in cases where the contract is itself an instrument of fraud and fraud not merely the inducement.

⁵⁸ Subject to the principles set out in Ch 13.

⁵⁹ *In re Esteem Settlement* (n 1) at [157], per Bird DB; *Federal Republic Of Brazil v Durant* (n 42), approving *Westdeutsche Landesbank Girozentrale v Islington LBC* (n 2); *Lipkin Gorman v Karpnale Ltd* (n 14) at 565.

⁶⁰ Cf *Lonrho plc v Fayed (No 2)* (n 56) at [12], per Millett J; however, these comments were made in the context of a claim based upon rescission, which is not applicable in Jersey and so the objection to retrospectively subjecting the other contracting party to duties of a fiduciary nature does not arise. See also P McGrath, *Commercial Fraud in Civil Practice*, 2nd edn (Oxford, Oxford University Press, 2014) at 6.261.

⁶¹ *In re Esteem Settlement* (n 1) at [157], per Bird DB.

not a constructive trustee of the property for the beneficiary in any proprietary sense.⁶² It follows that Jersey law does not, as yet, currently recognise the imposition of a constructive trust in the absence of any existing cause of action to remedy unjust enrichment; a so-called remedial constructive trust.⁶³

III. Resulting Trusts

Jersey law will recognise a resulting trust to have arisen in the following circumstances: first, where there is a voluntary payment of money by one person to another to enable the second person to purchase an asset, with the asset then being subject to a resulting trust in favour of the paying party in proportion to their contribution (a presumed resulting trust).⁶⁴ In relation to this type of resulting trust, the trust arises on the presumed intention of the transferor not to make a gratuitous transfer.⁶⁵ The second circumstance in which a resulting trust will arise is where there is a transfer of property on express trusts but the trusts so declared fail or fail to fully exhaust the entire beneficial interest in the property transferred (an automatic resulting trust).⁶⁶ A trust arises by operation of law in order to allocate a beneficial interest which would otherwise be left in limbo; equity abhors a vacuum. In contrast to a presumed resulting trust, an automatic resulting trust does not give effect to an intention on the part of the settlor to retain a beneficial interest but almost always arises in circumstances in which the settlor does not intend or foresee any beneficial interest remaining with him.⁶⁷ A third circumstance in which a resulting trust is recognised is where a person ('A') pays or transfers money or property to *another* ('B') so that B holds the money or property in trust for A subject to a power for B to apply the money or property for a stated purpose.⁶⁸ In any of these circumstances, the resulting trust is enforceable only in so far as the conscience of the trustee is affected by having knowledge of the facts giving rise to the relationship of trustee and beneficiary.⁶⁹

6-31

A. Presumed Resulting Trusts—‘Purchase-money’ Resulting Trusts

Property that is purchased in or transferred into the name of another person will give rise to a rebuttable presumption that the property that has been purchased was not intended

6-32

⁶² *ibid*; *Federal Republic of Brazil v Durant* (n 42); *Flynn v Reid* [2012] (1) JLR 370].

⁶³ *Re the Esteem Settlement* [2003] JRC 092 at [136]–[151].

⁶⁴ *Jones v Plane (née) Ferkin* [2006] JLR 438] CA; *Re Vandervell’s Trusts (No 2)* [1974] Ch 269 at 294–95.

⁶⁵ *Z v Y & Ors* [2014] JRC 170, cautioning that unlike in English law, Jersey law does not have the same requirement of consideration to support a contract; it is sufficient that there should be a *cause* for the validity of a transfer of property.

⁶⁶ *Re Vandervell’s Trusts (No 2)* (n 64), per Megarry J.

⁶⁷ *Vandervell v IRC* [1966] Ch 261 at 275, [1967] 2 AC 291 (HL).

⁶⁸ *Barclays Bank Ltd v Quistclose Invs Ltd* [1970] AC 567; *Twinsectra Ltd v Yardley* (n 56); *In re Exeter Settlement* [2010] JLR 169]; *Nolan v Minerva Trust Co Ltd* (n 55).

⁶⁹ *MacFirbisigh v CI Trustees & Executors Limited* (n 10), affirming *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (n 2) at 705D, per Lord Browne Wilkinson.

to be owned beneficially by the person in whose name it is purchased or transferred but instead that the property was intended to be beneficially owned by the person contributing the money to buy it in the proportion contributed.⁷⁰ However, this is only a presumption which will yield if there is evidence of an actual contrary intention to effect gratuitous transfer of beneficial ownership. The presumption of a resulting trust is also thought to yield to a presumption that a gift is intended, and no beneficial interest results, where an asset is placed or purchased in the name of a child by a father or someone who otherwise stands in a position of loco parentis to the child:⁷¹ the presumption of advancement. There are, as yet, no reported or unreported decisions concerning the presumption of advancement in Jersey. The presumption of advancement will itself yield where there is evidence of an actual intention not to make a gift at the time when the property is purchased. Where the purchase is made in the name of some third party in order to effect a fraudulent or unlawful purpose, then a party to that purpose (if it has been carried out) cannot seek to rely on the improper purpose to establish his beneficial title to the asset if the purpose has been carried out. Where it is sought to rebut the presumption of advancement, a defendant may adduce evidence of the plaintiff's subsequent conduct but if the defendant seeks to raise a defence that a gift was intended, the plaintiff may adduce evidence, including evidence of an proper purpose in order to uphold the resulting trust in their favour.⁷² Where, however, the plaintiff needs to rebut the presumption of advancement in order to establish a beneficial interest, he is not entitled to lead evidence of the improper purpose to rebut the presumption if that purchase has been carried out.⁷³

- 6-33** An important distinction between Jersey law and English law concerning the principle by which a person who contributes money or property to allow a third party to purchase assets in their own or joint names is that the principle is incapable of applying to the purchase of Jersey immovable property.⁷⁴ Jersey's law of immovable property does not recognise the possibility of a concurrent beneficial interest alongside the legal title.⁷⁵

B. Automatic Resulting Trusts—Resulting Trusts Arising from a Failure to Exhaust the Settlor's Beneficial Interest

- 6-34** A resulting trust arises in favour of the settlor, or the settlor's estate where the settlor transfers property to trustees but no trusts are effectively declared or the trusts that are declared

⁷⁰ *Jones v Plane (née) Ferkin* (n 64).

⁷¹ *Bennet v Bennet* (1879) 10 Ch D 474. In English law, the presumption of advancement is now recognised to apply to mothers as it had to fathers; *Musson v Bonner* [2010] WTLR 1369.

⁷² *Tribe v Tribe* [1996] Ch 107 at 133.

⁷³ *Tinsely v Milligan* [1994] 1 AC 340 at 374–375; *Patel v Mirza* [2014] EWCA Civ 1047 at [53]–[54]; *Tribe v Tribe* (n 72).

⁷⁴ Trusts (Jersey) Law 1984, Art 11(2)(a)(iii); *Flynn v Reid* (n 62) (although the Royal Court has suggested (obiter) that a constructive trust may arise in favour of a victim of fraud or breach of trust to prevent Jersey immovable property being used as a safe harbour for misappropriated funds; see *In re Esteem Settlement* (n 1) at [92].

⁷⁵ It is now accepted that the proper analysis applicable to co-ownership disputes in English law is that of a common-intention constructive trust rather than a purchase-money resulting trust; see *Stack v Dowden* [2007] UKHL 17; *Jones v Kernott* [2011] UKSC 53.

fail to exhaust the beneficial interest.⁷⁶ Once the settlor's intention to transfer assets on trust is established that fails to dispose of the settlor's whole beneficial interest in the property transferred, the resulting trust arises.⁷⁷ The resulting trust arises automatically and not on the basis of an actual or presumed intention of the settlor.

Subject to the terms of a trust and subject to any order of the Court, where an interest under a trust lapses, the trust terminates, where there is no beneficiary and no person who can become a beneficiary in accordance with the terms of the trust; or where property is vested in a person which is not for his or her sole benefit and the trusts upon which he or she is to hold the property are not declared or communicated to the person, the interest or property affected by such lapse, termination, want of a beneficiary or lack of declaration or communication of trusts shall be held for the settlor absolutely or for the settlor's estate, passing by will under a residuary gift or if there is no gift of residue, on a partial intestacy.⁷⁸ No resulting trust will arise in circumstances where there is no transfer of property on trust (it is impossible for a person to be a trustee, holding property absolutely for themselves). Where property is settled under a power of appointment or advancement from one trust to another, then if any property in the second settlement falls subject to Article 42 the property advanced or appointed results back to the settlement from which it came.⁷⁹ The settlor for these purposes is the particular person who provided the interest or property affected by the lapse or termination⁸⁰ Since 27 October 2006, unless its terms provide otherwise, a Jersey trust may continue in existence for an unlimited period and no rule against perpetuities or excessive accumulations shall apply to a Jersey trust or to any advancement, appointment, payment or application of assets from a trust.⁸¹ It follows that a Jersey trust will not fail for perpetuity, giving rise to a resulting trust. A trust may still fail for uncertainty of objects giving rise to a resulting trust in favour of the settlor.⁸² A disposition into trust that is reversed on the basis of a mistake either at customary law or the statutory jurisdiction under Article 47B–47H Trusts (Jersey) Law 1984 inclusive, is held on bare trust absolutely for the settlor.⁸³ A trustee of a trust that fails, giving rise to a resulting trust in favour of the settlor, is entitled to take, or retain to the extent already paid, its costs of administration of the trust during the period that it had acted as trustee.⁸⁴

Where property is settled so as to create successive interests, in circumstances where an income or other like interest comes to a premature end and if the interest subsequent to it is not accelerated, there will be a resulting trust of the income arising between the point at which the prior income interest fails and the time of its natural termination, in favour of the settlor (in the absence of any long-stop gift or trust).

6-35

6-36

⁷⁶ *Vandervell v IRC* [1967] 2 AC 291 at 313–14, per Lord Upjohn; *Re Vandervell's Trusts (No 2)* [1974] Ch 269 at 294, per Megarry J, affirmed in *Z v Y & Ors* (n 65).

⁷⁷ *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399, PC.

⁷⁸ Trusts (Jersey) Law 1984, Art 42.

⁷⁹ *Re Abrahams' Will Trusts* [1969] 1 Ch 463 at 485–86; *Re Hastings-Bass* [1975] Ch 25, CA.

⁸⁰ Trusts (Jersey) Law 1984, Art 42(3).

⁸¹ *ibid*, Art 15; Trusts (Amendment No 4) (Jersey) Law 2006.

⁸² *In Re Exeter Settlement* [2010] JRC 012.

⁸³ *In The Matter of the Strathmullen Trust* [2014] (1) JLR 309].

⁸⁴ *ibid*.

C. Quistclose Trusts

- 6-37** If person (A) transfers money to another person (B) subject to a power to apply the sum for a particular purpose (typically for the payment of certain debts of B), not only will the arrangement usually give rise to a personal contractual liability for B to repay A if that purpose is not achieved, but such an arrangement may also give rise to a species of resulting trust known as a Quistclose trust,⁸⁵ in favour of A. A's beneficial interest in the sum advanced to B subsists until the power to apply the money for its particular purpose is validly exercised. The only trust that exists is a resulting trust from the outset in favour of A and the existence of a mere power (and not a trust) to apply the sum advanced for a purpose does not constitute a purpose trust,⁸⁶ although such a private purpose trust is, unlike in English law, capable of existing in Jersey law.⁸⁷ It is not a requirement that the recipient must apply the money in accordance with the stated purpose—the purpose may never arise. What is required is that the money, if applied at all, is applied only for the stated purpose.⁸⁸ In circumstances where the power is not subject to a duty on the recipient to exercise the power, we consider that the power is not in the nature of a full fiduciary or special power.⁸⁹ If the money is applied for that purpose it is freed of the subsisting beneficial interest in favour of A. In default of the power being exercised, the resulting trust continues to subsist by default. The usual principles applicable to ascertaining the certainty of the power still apply. If the power fails for uncertainty the recipient simply has no power to make use of the money and must return it to the transferor when called for. In terms of categorisation, if such an exercise is helpful, a resulting trust arises because of a disposition for an express purpose which, if it fails, fails to exhaust the whole beneficial interest of the transferor.⁹⁰ It follows that the transferor has locus to see that the funds advanced are used for the purpose for which they are designated⁹¹ and to pursue a third party that dishonestly assists in or receives the proceeds of a breach of that trust.⁹² The arising resulting trust affords the transferor priority status as a secured creditor of B in respect of the sums advanced.
- 6-38** A resulting trust will not usually arise simply because money is paid for a particular purpose. The key question in each case is whether the parties intended that the money or property paid over was at the free disposal of the recipient.⁹³ The normal rules of evidence

⁸⁵ *Barclays Bank Ltd v Quistclose Invs Ltd* (n 68), later refined in *Twinsectra Ltd v Yardley* (n 56), per Lord Millett and Lord Hoffmann and acknowledged as a feature of Jersey law in *Nolan v Minerva Trust Co Ltd* (n 55).

⁸⁶ *Twinsectra Ltd v Yardley* (n 56) at [100]–[101].

⁸⁷ Trusts (Jersey) Law 1984, Art 12.

⁸⁸ Although there was a division between Lord Hoffmann and Lord Millett on the nature of the power vested in the recipient of funds, with the latter suggesting that the recipient may (depending on the circumstances) have a duty to apply the money in accordance with the stated purpose for which it is advanced; see *Twinsectra Ltd v Yardley* (n 56) at 98–101.

⁸⁹ eg there is nothing to suggest that the donee of the power is not capable of being exercised for the donee's own benefit.

⁹⁰ *Twinsectra Ltd v Yardley* (n 56) at [90]–[99].

⁹¹ *Barclays Bank Ltd v Quistclose Invs Ltd* (n 68) at 581.

⁹² *Nolan v Minerva Trust Co Ltd* (n 55); *Twinsectra Ltd v Yardley* (n 56).

⁹³ *In re Goldcorp Exchange Ltd* [1995] 1 AC 74 at 100, per Lord Millett, quoted with approval in *Nolan v Minerva Trust Co Ltd* (n 55) at 163.

apply in ascertaining the intention of the parties.⁹⁴ Where what is ascertained is an intention by the parties that the money, once transferred, would be subsumed by the recipient into their general pool of assets and was at the recipient's free disposal then no resulting trust will arise.

D. To whom the Property Results

Where there is no person to whom the trust property may devolve, the trust's Jersey *situs* property results to the Crown in right of Jersey and vests in HM Receiver General. In principle, the Receiver General may also claim property on behalf of the Crown in Jersey as bona vacantia (wherever situated) that belonged to a deceased person domiciled in Jersey or a dissolved Jersey registered company.

6-39

⁹⁴ See Ch 4 for the applicable principles in construing written instruments. In cases where no written instrument is involved, the intention of the parties is to be objectively ascertained from the circumstances of the transaction that show the mutual intention of payer and recipient (and the essence of their bargain); *Barclays Bank Ltd v Quistclose Invs Ltd* (n 68) at 580.

Personal Remedies against Trustees: The Personal Accountability of the Trustee and Liability for Breaches of Trust

The beneficiaries of a Jersey trust are entitled to the proper execution of the trust by the trustee in accordance with the general law and the terms of the trust, for the purposes for which the property was settled.¹ The statutory duties of the trustees are set out in Article 21 of the Trusts (Jersey) Law 1984, the key provisions of which are:

7-1

21 Duties of trustee

(1) A trustee shall in the execution of his or her duties and in the exercise of his or her powers and discretions –

- (a) act –
 - (i) with due diligence,
 - (ii) as would a prudent person,
 - (iii) to the best of the trustee's ability and skill; and
- (b) observe the utmost good faith.

(2) Subject to this Law, a trustee shall carry out and administer the trust in accordance with its terms.

(3) Subject to the terms of the trust, a trustee shall –

- (a) so far as is reasonable preserve the value of the trust property;
- (b) so far as is reasonable enhance the value of the trust property.

(4) Except –

- (a) with the approval of the court; or
- (b) as permitted by this Law or expressly provided by the terms of the trust,

a trustee shall not –

- (i) directly or indirectly profit from the trustee's trusteeship;
- (ii) cause or permit any other person to profit directly or indirectly from such trusteeship; or
- (iii) on the trustee's own account enter into any transaction with the trustees or relating to the trust property which may result in such profit.

¹ *Trilogy Management Limited v YT & Ors* [2014] JRC 214, approving *Letterstedt v Broers* [1884] 9 App Cas 371.

(5) A trustee shall keep accurate accounts and records of the trustee's trusteeship.

(6) A trustee shall keep trust property separate from his or her personal property and separately identifiable from any other property of which he or she is a trustee

- 7-2** The trustee's failure, whether by positive act or omission, to administer the trust in accordance with its terms or comply with any duty imposed on a trustee by the 1984 Law will amount to a breach of trust,² which, if it causes a loss to the trust fund, or to the beneficiaries personally, is actionable by the beneficiaries for compensation in the nature of damages from the trustee to personally make good the loss caused.³ The beneficiaries' claim for compensation or for an order that the trustee account is not the only possible remedy available where a breach of trust has occurred. Alongside a personal remedy against the trustee for reparation for the loss, it may be possible to assert a proprietary remedy by tracing the trust property held by the trustee or into the hands of a third party.⁴ A third party to the trust may also become personally liable for their dishonest assistance or knowing receipt of trust assets misapplied in breach of trust.⁵ A claim for dishonest assistance or knowing receipt is premised on a breach of trust or fiduciary duty and the personal liability of the trustee for a breach of trust or fiduciary duty that causes loss to the fund which (assuming the trustee is able to recover the assets or otherwise satisfy that liability) is the primary claim to be considered in this chapter. A breach of trust has the potential to undermine the trust and confidence of the beneficiaries so that the trustee's continuation in office becomes detrimental to the good administration of the trust and is recognised as a proper basis upon which the court may remove a trustee if it fails to resign voluntarily.⁶

I. Actions for an Account

- 7-3** An action for breach of trust is brought by way of a claim that the trustee account to the beneficiaries for the loss sustained in their administration of the trust.⁷ Claims alleging a breach of trust should ordinarily be commenced by way of Order of Justice, requiring full particulars as to the breaches of duty alleged.⁸ In very many cases, the amount of the loss will be quantifiable (either by way of admission or proved at trial) without the need for the taking of a separate account of the trustee's administration and the claim is simply brought for a monetary remedy by way of equitable compensation in the nature of damages or for the return of the missing trust property to make whole the loss.⁹ Where the loss is not obviously quantifiable, the Court may order the trustee, as part of a court-supervised process, to provide an account to the beneficiary of the trustee's administration of the trust. It should be remembered that the account itself is not the remedy that will restore the loss

² Trusts (Jersey) Law 1984, Art 1(1).

³ A breach of trust may still be actionable even if no loss is caused. 'Loss' can include profits that would have been made but for breach of trust by improper investment of trust funds; see *Midland Bank Trust Co (Jersey) Ltd v Federated Pension Services* [1994] JLR 276].

⁴ See Ch 13 on proprietary remedies.

⁵ As to claims for secondary liability, see Chs 9 and 12.

⁶ See Ch 10.

⁷ P Millett, 'Equity's Place in the Law of Commerce' (1998) 114 LQR 214.

⁸ *In re G* [2010] JLR N [27]].

⁹ *Mocha Invs Ltd v Crills* [1990] JLR N-10]; *Midland Bank Trust Co (Jersey) Ltd v Federated Pension Services* (n 3).

to the fund; it is the mechanism by which the amount of the loss and the trustee's personal liability to make good that loss is ascertained.

A court-ordered account serves the purpose of allowing the beneficiaries to know what assets the trustee has received, what the trustee has done with those assets over time by way of re-sale, investment or distribution to the beneficiaries, what income or gains the assets have yielded and the current status of the trust fund. The account may identify specific assets of which the beneficiaries may have been unaware in respect of which the beneficiaries may be entitled to proprietary relief. The procedure also enables the beneficiaries to ascertain what, if any, personal liability the trustee has arising from its maladministration.¹⁰ Where the trustee no longer has an asset which it should have (because the trustee cannot account for whether the asset has been sold, invested or distributed) the account serves to convert the obligation to restore the asset into a personal obligation to pay an equivalent sum as an equitable debt or liability in the nature of debt.¹¹ The same principle applies to third parties who receive misdirected trust assets with sufficient knowledge of their wrongful provenance who are described as being liable as a constructive trustee and are personally accountable in the same sense.¹²

The Royal Court has jurisdiction to order the giving of an account in common form and on the basis of wilful default.¹³ The usual form of order for an account, referred to as an order for an account in common form, requires the defendant to account only for what he or she has actually received, the trustee's expenses and any disbursements. The taking of an account in common form does not imply wrongdoing by the trustee against whom it is made, it is simply part and parcel of the fundamental requirement of the office of trustee to account to their beneficiaries.¹⁴ Once the account is prepared, it is open to the beneficiaries to seek orders to surcharge or falsify particular transactions in the account. Where entries in the account are falsified or surcharged, at the conclusion of the account being taken, the result will be an excess of assets that are deemed to be what the trustee should still be holding, as against what is actually in its hands. The trustee is personally liable to make up the shortfall, usually restoring to the trust fund a monetary sum of commensurate value to the shortfall.

7-4

7-5

A. Proceedings for an Account in Common Form

There are no reported decisions, procedural rules or practice directions in Jersey as to how an account in common form or an account on the basis of wilful default is to be conducted. In the absence of local procedural rules, recourse may properly be had to the English procedural rules.¹⁵ A claim for an account of the trustee's administration of a trust is conventionally

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¹⁰ *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2012] Ch 453 at [45].

¹¹ *Ex parte Adamson* (1878) 8 ChD 807 (CA) at 819.

¹² *Nolan v Minerva Trust Co Ltd* [2014] (2) JLR 117] (dishonest assistance); *Federal Republic of Brazil v Durant International Corp* [2012] (2) JLR 356] (knowing receipt); *John v Dodwell and Company* [1918] AC 563 (PC) at 569 ('a transmitted fiduciary obligation to account'); *British America Elevator Company Ltd v Bank of British North America* [1919] AC 658 (PC) at 663–64; *Arthur v AG of Turks & Caicos Islands* [2012] UKPC 30 at [37].

¹³ *Butler v Axco Trustees Limited* [1997] JLR N17a]; *Nabaro v Axco Trustees Limited* 1997/230A (Jersey) unreported.

¹⁴ *Ahmed Angullia bin Hadjee Mohamed Salleh Angullia v Estate and Trust Agencies* (1927) Ltd [1938] AC 624, PC.

¹⁵ *Atkin's Court Forms*, 2nd edn (London, LexisNexis, 2012) vol 1, 'Accounts'. CPR PD 40A or its equivalent under the former RSC Ord 43. See *Brown v Silvera* [2011] ABCA 109 at [152] for a description of the practice in Alberta Canada, which represents the practice in England and, in the absence of any kind of practice direction or rule in Jersey, is likely to be a template for the procedure on an account before the Royal Court.

divided into three stages. The first stage concerns the plaintiff beneficiaries' entitlement to an account and on what basis. The second is the taking of the account which may be a separate set of proceedings from the trial and for which directions and further evidence may be ordered (the taking of the account may, in simple cases, be delegated from the Inferior Number to the Master)¹⁶ and which results in a verified settled account covering the period for which the account is given. The third stage (where the account yields a discrepancy between what the trustee actually has and what they should have) is for relief, usually in the form of an order for payment.

B. The Beneficiary's Entitlement to an Account

- 7-7 The trustee's liability to account to the beneficiaries arises automatically from the trustee's receipt of property as trustee.¹⁷ The liability to account in common form does not depend on the defendant having mishandled the property or otherwise breached their trust.¹⁸ The beneficiaries may allege and seek to prove specific irregularities in the account and if they succeed then the order will direct that the accounts be taken in light of the Court's findings. The Court's jurisdiction to order an account is within the discretion of the Court and the Court may refuse to do so where an account in common form is unnecessary or unlikely to be fruitful.¹⁹ However, given the fundamental nature of an account to the relationship between a trustee and beneficiary, for the Court to refuse to order an account would require special circumstances.

C. Settled Accounts

- 7-8 A trustee is not obliged to provide an account if they have already been released from their duty to account by having already delivered an account that has been settled.²⁰ The beneficiaries can only hope to circumvent this defence if able to prove the settlement was obtained by fraud or imposition,²¹ or that it contains sufficient errors of sufficient magnitude to warrant setting it aside and taking the account afresh.²² If the beneficiary can only prove errors of a lesser number or magnitude then they will normally be granted leave to surcharge or

¹⁶ However given the restrictions on what the Master may determine on his own (matters falling within the RCR 2004, pt 8 (Interim Payments) are reserved to the Inferior Number), and that an account on the basis of wilful default entails factual findings of fault against the trustee, an account on the basis of wilful default may have to be determined before the Royal Court sitting in the Inferior Number.

¹⁷ *Butler v Axco Trustees Ltd* (n 13); *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* (n 10) at [45]; *Friends of Burbage School Ltd v Woodhams* [2012] EWHC 1511 (QB) at [10].

¹⁸ *Partington v Reynolds* (1858) 4 Drew 253, at 255–56, 62 ER 98 ('it is sufficient that the Defendant holds the office').

¹⁹ eg where the beneficiary is able to identify clearly the quantum of the loss arising, in which case the beneficiary may not wish to proceed with the time and expense of an account and instead proceed to seek an order that the trustee restore the sum proved to be due forthwith.

²⁰ *Re Webb* [1894] 1 Ch 73 (CA) at [80]. The duty to account is owed to the beneficiaries and cannot be satisfied by a settlement between co-trustees; *Re Fish* [1893] 2 Ch 413 (CA).

²¹ ibid, at [80] 'some fraud, some pressure, some overcharge, something wrong to cloak up which the release has been obtained'.

²² *Williamson v Barbour* (1877) 9 ChD 529.

falsify the account in respect of the errors. The onus falls upon the beneficiary to rectify specific errors and the Court will not usually allow the beneficiary to assume a roving commission to seek out fresh breaches of trust.²³

D. Taking the Account

The trustee is expected to submit their verified accounts and supporting documents, and the beneficiary may then raise any specific objections they may have. Objections to an account presented to the Court as complete by the trustee are either by way of surcharge or falsification. To surcharge the accounts is to credit the account with a transaction (or credit more than is admitted by the trustee's own account) on the incoming side of the account. To falsify the account is to seek to treat as expunged an item of discharge or loss to the fund that has been wrongly inserted into the outgoings side of the account by the trustee—the beneficiary alleging that the entry in the account showing as a debit was improperly recorded as properly paid out.

In an account in common form, the beneficiary has the burden of proving surcharges and the trustee carries the burden of proving their discharge.²⁴ The trustee must be prepared to document each item, and presumptions may be made against them if they have not kept proper records or have destroyed them. The Court should lean particularly hard against a professional who has kept inadequate records as well as against a trustee who has destroyed trust records in bad faith.

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7-12

i. Accounting for the Income of the Trust

The account will consist of so-called 'items of charge' and 'items of discharge'. Items of charge are items that are debited against the trustee on the incoming side of the account (ie sums received). An accountable party must 'charge themselves' with any property actually received in their capacity as trustee, whether personally or through an agent, as well as the fruits of that property or property exchanged for the original property as the trustee invests and reinvests the sums received. The criterion of whether property is received by the trustee is the trustee's control of it.²⁵ Where there are multiple trustees, the receipts of one trustee are not to be vicariously imputed to another for this purpose.²⁶

Where the basis upon which a sum has been paid out from the trust fund is not clear, a claim that the beneficiaries are entitled to falsify the accounts may put the burden on the trustee to explain the payment in or out of the trust without the beneficiary having to specify the precise nature of the breach. However, where the trustee provides the beneficiaries with a detailed breakdown of its receipts, costs and fees and distributions from the fund, the beneficiaries are expected to state their objections to particular items in the account.²⁷

²³ *Caversham Trustees Limited v Patel* [2007] JLR N-30]; *Re Stevens* [1898] 1 Ch 162 at 172, CA, per Chitty LJ.

²⁴ *Ahmed Angullia bin Hadjee Mohamed Salleh Angullia v Estate and Trust Agencies* (n 14) at 637; *Exsus Travel Ltd v Turner* [2014] EWCA Civ 1331 at [22].

²⁵ *Re Barney* [1892] 2 Ch 265.

²⁶ *Townley v Sherborne* (1633) 1 Bridge 35, 123 ER 1181; note that Jersey law has never contained any statutory equivalent to s 30(1) of the Trustee Act 1925, since repealed; Trustee Act 2000, Sch 4(II), para 1.

²⁷ *Caversham Trustees Limited v Patel* (n 23), considering *Wells v Wells* [1962] 1 WLR 397; on appeal, [1962] 1 WLR 874.

ii. Accounting for the Outgoings from the Trust

- 7-13 On the other side of the account are items of discharge which operate to extinguish the trustee's personal responsibility for their receipts or items of charge. A trustee is entitled to a discharge in respect of all payments and transfers of trust property received as items of charge that are necessary to carry out any of the duties and powers. There are recognised to be three types of discharge: discharges for proper payments to the beneficiary; discharges for proper administrative outlays,²⁸ and, discharges for property lost or stolen through no fault of the trustee. Where the trustee validly exercises a power of sale over a trust asset or investment, this is treated in the account as the trustee being charged with the proceeds of sale or investment in place of the original item of charge in respect of the property received by the trustee and used to acquire the new investment. Where a trustee has entered into a transaction that is not authorised by the trust instrument or by the general law, it is disallowed on the taking of the account by it being falsified. By falsifying the transaction, the account is then taken as if the expenditure had not been made, and as if the unauthorised investment had not formed part of the assets of the trust. That creates a deficit in the account that the trustee is personally liable to make whole. Where the trustee has misapplied the trust property the trustee's liability to restore it is strict, and does not depend on proof of causation. Therefore, where for example an investment may be acquired by the trustee with the consent of a protector and such consent is not forthcoming, if the trustee acquires the investment which then falls in value, the trustee is personally liable to restore the value the investment was acquired for and is not to be given credit for any extraneous factor that might have caused a loss of value in any event had the investment been authorised (like a sudden collapse in share prices).

iii. Accounting for the Misapplication of Trust Assets

- 7-14 The trustee is not entitled to a discharge for dispositions of property not authorised by the terms of the trust or made in breach of the general law. Unauthorised outlays by the trustee are liable to be struck from the account and the account falsified so as to be taken on the basis that the asset or money used to meet the outlay had remained in trust.²⁹ When the account is finalised, this will give rise to a discrepancy between what the trustee has and what the trustee ought to have that the trustee will have to make up from its own funds. Disallowed items of discharge can include the trustee's consumption, discard of or destruction of the trust property; giving it to a person not entitled to it under the trust; the misapplication or appropriation of the trust property for their own purposes or the making of an unauthorised investment.³⁰ The breach does not need to be pleaded, but can simply be raised as an objection to the account, and the resulting personal liability is not a species of damages.³¹ The trustee is required to make good the deficiency in the account from their

²⁸ Trusts (Jersey) Law 1984, Art 26(2) including the cost to the trustee of employing or delegating to any person in the Trusts (Jersey) Law 1984, Art 25.

²⁹ *Re Salmon* (1889) 42 ChD 351 (CA) at 357; *Re Duckwari (No 2)* [1999] Ch 268 at 272.

³⁰ Cases of unauthorised investments are rare because of the breadth of the investment powers conferred upon trustees by trust instruments and by the general law; see Trusts (Jersey) Law 1984, Art 24(1).

³¹ *British American Elevator Co v Bank of British North America* [1919] AC 658 (PC); *Anguilla v Estate and Trust Agencies* (1927) Ltd [1938] AC 624 (PC) 637. The award is sometimes called equitable compensation, but it is not compensation for loss but for restitution; see *Libertarian Investments Ltd v Hall* [2014] 1 HKC 368 (CFA), at [168].

own pocket. Alternatively, the beneficiary may elect to ratify the unauthorised transaction if it has fortuitously resulted in valuable proceeds or a gain.³² Usually the misapplied assets are accounted for at values on the date when the account is taken and not the earlier date on which they were misapplied.³³

iv. Consequential Relief upon the Taking of the Account

Usually beneficiaries will seek consequential relief which is the final stage of the account. In each case where by reason of their misconduct the balance of the account is greater than the funds actually held by the trustee, the trustee is required to make good the difference with a monetary payment from their own pocket.

7-15

E. Accounts on the Footing of Wilful Default

In contrast to an account in common form, an account ordered on the basis of wilful default is grounded on the trustee's misconduct.³⁴ If the complaint is that the trustee has omitted to do something which a prudent trustee ought to have done, an account on the footing of wilful default, this is an account of which he might have received but for the trustee's wilful default.³⁵ In order to obtain an order for taking of an account on the basis of wilful default the plaintiff beneficiary must show there has been a loss of assets received by the trustee or assets which might have been received.³⁶ The availability of an account on the basis of wilful default is not confined to cases of conscious wrongdoing by the trustee.³⁷ An account on the basis of wilful default casts a far more substantial burden of proof on the trustee than applies in an account in common form. The onus is on the trustee to justify the account where the beneficiary seeks to falsify or surcharge an entry. An account on the footing of a wilful default leads to an order requiring the trustee to replenish funds wrongfully depleted by him or her and in that sense to make restitution for the benefit of the plaintiff beneficiary.

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To obtain an account on the footing of wilful default, the beneficiaries must make out a special case by pleading and proving that the past conduct of the trustees raises a *prima facie* inference that other breaches, not yet known to the beneficiary or the Court, have occurred.³⁸ The Court may order an account on the basis of wilful default upon proof of at least one instance of wilful default;³⁹ however, it would have to be a very telling instance.⁴⁰ The Court may also take into account evidence of bad faith as well as the trustees'

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³² *Foskett v McKeown* [2001] AC 102.

³³ *West v Lazard Bros & Co (Jersey) Ltd* [1993] JLR 165].

³⁴ *Partington v Reynolds* (n 18) at 255–56.

³⁵ *ibid*, at 255–56; *Nabaro v Axco Trustees Limited* (n 13).

³⁶ *Re Stevens* (n 23) at 171.

³⁷ *Bartlett v Barclays Trust Co Limited* [1980] 1 Ch 515 at 546.

³⁸ *Re Tebbs* [1976] 2 All ER 858 at 863; *Re Stevens* (n 24).

³⁹ *Re Tebbs* (n 39) at 863: 'is the past conduct of the trustees such as to give rise to a reasonable, *prima facie* inference that other breaches of trust, not yet known to the plaintiff or the court have occurred'; *Re Stevens* (n 23) at 432, per North J: 'Possibly one clear case might be enough; but it is desirable to have more'.

⁴⁰ *Coulter v Disco Mix Club Ltd* [2000] 1 WLR 707 at 733.

conduct in the litigation.⁴¹ Poor or inadequate record keeping is not thought to be a sufficient basis to seek an account.⁴² If the admissions and proofs before the Court are conflicting or raise only a weak suspicion then an inquiry may be directed in order to gather further evidence. Where individual instances of wilful default are proven but the evidence is not strong enough to support an order for a general account, the Court may give relief in respect of the proven breaches only.⁴³

i. Orders for an Account on the Basis of Wilful Default

- 7-18 The term wilful default is synonymous with breach of trust: A failure to meet the applicable standard of care will constitute wilful default as much as intentional wrongdoing whether the trustee knows it to constitute a breach of duty or not.⁴⁴ The emphasis in an account on the basis of wilful default is whether the trustee has failed to discharge its duty rather than whether the plaintiff beneficiary has established any active misconduct in breach of its duties (although proof of this will be sufficient to justify an order). However there is no alignment between what might be termed 'active' and 'passive' breaches of trust and the basis of the account that may be ordered.⁴⁵ The true distinction is between an order for administration (the account in common form), which arises from the Court's jurisdiction to supervise the trustee's administration of the fund and fails to do so properly (if this can be called a passive breach by not doing what the trustee ought to have done), and an order for an account to replenish the fund where the complaint is about specific instances of wrongdoing by the trustee (which might be referred to as active breaches, although 'active' may mean non-feasance as well as misfeasance).⁴⁶
- 7-19 An account on the basis of wilful default covers the same ground as an account in common form but additionally the trustee is surcharged with items of charge that the trustee would have received but for the trustee's wilful default. The Court is granted a roving commission to inquire into all aspects of the trustee's administration of the trust.⁴⁷ The purpose of an account on the basis of wilful default is to discover concealed misconduct by the trustee and to put mismanaged trusts in order. Misconduct may be investigated in the course of an account on the basis of wilful default that was neither pleaded nor mentioned at the hearing at which the account was directed. A direction that an account be taken on the basis of wilful default is not a common order to make. It has been described as 'drastic' and 'a very strong' order to make.⁴⁸ There are no reported (or unreported) decisions in Jersey where an account on this basis has been ordered and in practice (owing to the limited judicial

⁴¹ *Re Tebbs* (n 38) at 863–64.

⁴² *Meehan v Glazier Holdings Pty Ltd* (2002) 54 NSWLR 146 at [66]; *Nabaro v Axco Trustees Limited* (n 13).

⁴³ *Re Tebbs* (n 38) at 863; *Re Stevens* (n 23) at 433.

⁴⁴ *Midland Bank Trust Co (Jersey) Ltd v Federated Pension Services* (n 3); *Speight v Gaunt* (1883) 9 App Cas 1, 14; *Re Chapman* [1896] 2 Ch 763 (CA) at 776, 779–80; *Armitage v Nurse* [1998] Ch 241 (CA) at 252.

⁴⁵ *Re Tebbs* (n 38) (active misconduct regarded as a wilful default); *Bartlett v Barclays Trust Co Limited* (mixed active misconduct and passive conduct in failing to intervene regarded as wilful default); *Re Chapman* (n 44) (trustee imprudently invests funds on a loss-making but authorised security is chargeable on the basis of wilful default although the misconduct is active).

⁴⁶ *Glazier v Australian Men's Health (No 2)* 2001 NSWSC 6.

⁴⁷ *Re Stevens* (n 23) at 432.

⁴⁸ *Re Tebbs* (n 38) at 864; *Re Stevens* (n 23) at 432.

resources that would need to be dedicated to what has the potential to be extremely time-consuming) the Court is likely to be reluctant to make such an order unless persuaded of the clear need for it.⁴⁹ The Court may refuse to make an order if it considers that an account on this basis would be oppressive or wasteful⁵⁰ or an account in common form would be more proportionate and appropriate use of resources.

Where a trustee is found to have caused the fund to suffer a loss through their wilful default, the beneficiaries will usually seek to surcharge the account in the amount of the loss giving rise to a discrepancy between what the trustee actually holds and what it is recorded as holding that the trustee is liable to make good from their own resources. The loss is accounted for on the incoming/item of charge side of the account as if the trustee had received more. However, this does not mean that the surcharge represents a receipt that never materialised. It is not only breaches of the trustee's duty that may result in the trustee not receiving an asset that they would have received if they had done their duty that are accounted for in this way. For example, a trustee may be charged on the basis of wilful default where they invest the fund negligently, or where they fail to safeguard the fund by monitoring others.⁵¹ The governing concept is compensation for loss caused by breach of duty.⁵²

7-20

F. Rescission of Transactions and an Account of Profits

Where a transaction has been entered into by the trustee, in breach of his fiduciary duties to the beneficiaries, the beneficiaries may be able to seek a rescission of the transaction and an account of profits in the hands of the trustee, such as to put the trust fund in the same financial position it was in before the breach of duty occurred.⁵³ Where a trustee has made a profit from the trust fund the profit is imbued with a constructive trust in favour of the beneficiaries and so usually no question of personal liability arises, the beneficiaries (subject to the doctrine of notice) have an unassailable proprietary entitlement to the profit in the hands of the trustee or a third party, if it still exists. However, the beneficiaries are not entitled to recover both the profits and the loss suffered by the fund; they must elect which to pursue.⁵⁴

7-21

II. The Basic Rule for the Personal Liability of the Trustee

A trustee is liable for a breach of trust either committed by the trustee or in which the trustee has actively or by omission concurred.⁵⁵ The basic rule on the personal liability of a trustee for breach of trust is that he must restore to the trust fund (rather than the beneficiary

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⁴⁹ *Nabaro v Axco Trustees Limited* (n 13).

⁵⁰ *Re Tebbs* (n 39) at 863; *Campbell v Gillespie* [1900] 1 Ch 225.

⁵¹ *Re Chapman* (n 44).

⁵² *Meehan v Glazier Holdings Pty Ltd* (n 43) at [14]; *Grace v Grace* [2012] NSWSC 976 at [215]–[220].

⁵³ Rescission is only possible where *restitutio integrum* is possible.

⁵⁴ *Tang Man Sit v Capacious Investments Limited* [1996] 1 AC 514 (PC).

⁵⁵ Trusts (Jersey) Law 1984, Art 30(1) subject to Art 30(5) where a breach of trust is committed by a co-trustee.

bringing the action personally) either the value of the assets which have been lost by reason of the breach of trust, or the monetary value of the profit, if any, which would have accrued to the trust property if there had been no such breach.⁵⁶ A plaintiff in a breach of trust action must prove both the fact and the amount of loss suffered.⁵⁷ The trustee's personal liability continues in existence after trust has been terminated. A trustee cannot therefore seek to mitigate the quantum of their liability by bringing the trust to an end. Where the trusts are no longer subsisting at the date of trial, the award of compensation is made to the beneficiary or beneficiaries absolutely entitled or possibly by way of a reconstitution of the trust fund.⁵⁸ At such point, there is no longer a right to specific restitution of the trust estate. If specific restitution of the trust property is not possible, the trustee must pay sufficient compensation to put the estate back to what it would have been had the breach not been committed.⁵⁹ A trustee is not be liable for a breach of trust committed prior to the trustee's appointment, but a trustee who becomes aware of a breach of trust committed prior to their appointment is obliged to take all reasonable steps to have such breach investigated and remedied.⁶⁰

A. What Loss Is Recoverable?

- 7-23** A breach is only actionable where a loss has been caused by the breach. 'Loss' for this purpose includes opportunity or profits that would have been made but for breach of trust by improper investment of trust funds.⁶¹ A breach of trust does not necessarily give rise to an actionable loss. There are circumstances where a trustee may commit a judicious breach of their duties or act beyond their powers⁶² but cause no loss, for example by making an investment in a class of asset which is prohibited by the trust instrument but which nonetheless increases in value. Whilst a beneficiary may require such trustee to sell the unauthorised investment and reinvest the process in an authorised manner, no loss will have been suffered.

B. Causation and Loss

- 7-24** Is a trustee that commits a breach of trust liable to compensate the beneficiaries only for losses caused by the breach, or also for losses which would have been suffered in any event even if there had been no breach? Put another way, what are the rules of causation of loss in

⁵⁶ *ibid*, Art 30(2).

⁵⁷ *West v Lazard Bros & Co (Jersey) Ltd* (n 33).

⁵⁸ *Target Holdings Ltd v Redfearn*s [1996] AC 421 at 435, citing with approval *Bartlett v Barclays Bank Trust Co Ltd (No 1 and 2)* (n 37). In *Target Holdings*, Lord Browne Wilkinson left open the possibility whether the right may still be to a reconstitution of the trust fund.

⁵⁹ *ibid*, at 435.

⁶⁰ Trusts (Jersey) Law 1984, Art 30(4) and 30(9).

⁶¹ *Midland Bank Trust Co (Jersey) Ltd v Federated Pension Servs* (n 3); *West v Lazard Bros & Co (Jersey) Ltd* (n 33).

⁶² *Target Holdings Ltd v Redfearn*s (n 58) at 433 although such a description may not be appropriate for a reckless breach of duty that happens to turn out well; see *Jeffrey v Gretton* [2011] WTLR 809 at [84].

a claim for breach of trust? The House of Lords (affirmed in Jersey and since reaffirmed by the UK Supreme Court) has held that the test is one of ‘but for’ causation.⁶³ Where the loss would have been caused in any event, there is no right to compensation. The position may be different in the case of a subsisting trust, where the loss would be that of the fund, and all of the beneficiaries would need to be compensated for the breach. It should therefore be borne in mind that the recoverable loss will often depend on the nature of the trust and on whether it is subsisting at the date of trial.

The test as to whether compensation may be recovered is the same where there is a dishonest breach, and the Court is then not precluded by authority or by principle from asking whether the loss would have occurred in any event simply because there is an element of dishonesty in the defendant’s conduct.⁶⁴ Where, however, rescission of a transaction is available, say because of a non-disclosure by a fiduciary, it is irrelevant what would have happened if the relevant disclosure had been made.

7-25

The trustee is liable for all loss which would not have been suffered but for the breach. Therefore the principles as to causation, foreseeability and remoteness of loss are not to be applied in the assessment of the compensation payable.⁶⁵ The trustee is liable for the whole loss, however unexpected the result. The trustee’s performance must, however, not be judged with hindsight. The exception to the principle of strict liability for loss is where a trustee is in breach of the equitable or statutory⁶⁶ duty of skill and care. Compensation may be sought for loss arising from a negligent breach of trust but the compensation sought is more akin to damages and so the principles of causation and remoteness are reintroduced to determine the measure of damages that apply. This is because the award of equitable compensation in such a case is equivalent to the award of damages (for breach of contract or in tort) at common law.⁶⁷ Where a breach of the duty of care is alleged, the plaintiff must show that the loss would have been avoided if the breach had not occurred (ie that alleged breaches of duty were the cause of the loss for which compensation is claimed) and that the scope and purpose of the equitable duty of care concerned is to prevent the type of loss that has been sustained.

7-26

C. Valuation of the Loss

The quantum of compensation is that required to restore the trust to its value as if the breach had not taken place.⁶⁸ Where the breach consists of an omission to act, compensation is to be calculated on the basis of what a prudent trustee would have achieved had the omission not occurred. As a general rule, there is no element of penalty in the assessment of compensation.⁶⁹ The loss is assessed at trial with the full benefit of hindsight and not

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⁶³ *West v Lazard Bros & Co (Jersey) Ltd* (n 33).

⁶⁴ *Gwembe Valley Development Co Ltd v Koshy* [2003] EWCA Civ 1048.

⁶⁵ *Target Holdings Ltd v Redfers* (n 58) at 434–35, affirmed in *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58; *West v Lazard Bros & Co (Jersey) Ltd* (n 33).

⁶⁶ Trusts (Jersey) Law 1984, Art 21(1).

⁶⁷ *Bristol and West Building Society v Mothew* [1996] EWCA Civ 533.

⁶⁸ *West v Lazard Bros & Co (Jersey) Ltd* (n 33).

⁶⁹ ibid. Although the Court has declined to state definitively that there are no circumstances in which exemplary or punitive damages were appropriate under Jersey law.

the date of loss.⁷⁰ However, a trustee who improperly parts with trust assets is not bound to restore the highest value that they attained between the breach of trust and the trial, but only their value at trial.⁷¹ That is not the approach adopted to valuation of the loss where the action is for an account of profits wrongfully obtained by the trustee in breach of fiduciary duty. The amount recoverable in an action claiming an account of profits is dependent upon the profit made by the fiduciary, not (as in a breach of trust claim) where it is dependent upon the loss suffered by the beneficiaries.

D. Setting off Losses Against Gains

- 7-28** A breach of trust need not necessarily result in a loss to the trust fund. For example, a trustee may invest in a particular asset class prohibited by the trust instrument that fortuitously yields a gain. A trustee liable for a loss caused by a breach of trust cannot raise as a defence to their obligation to reconstitute the fund, a profit or gain arising in respect of another part of the trust fund.⁷² There is English authority to the effect that this prohibition on set-off depends upon whether the breaches are unconnected (where no set-off is permitted) or connected (where set-off may be possible).⁷³ However, there are no Jersey authorities that have affirmed this principle. The prohibition on set-off applies irrespective of the proximity the breaches have to one another.

E. Breach of Duty in Relation to Companies in Which the Trust Has an Interest

- 7-29** Claims against the trustee for loss sustained by a company in which the trustee holds an interest and the application of the principle of reflective loss to such claims is discussed in Chapter 12.

F. Interest

- 7-30** In any proceedings for the recovery of any debt or damages, the Royal Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given, simple interest at such rate as it thinks fit on the whole or any part of the debt or damages in respect of which judgment is given, or, if payment is made before judgment, for the whole or any part of the period between the date on which the cause of action arose and the date of judgment (or the date of payment if earlier).⁷⁴ A claim for breach of trust is a claim for damages for

⁷⁰ *Target Holdings Ltd v Redfearn* (n 58) at 438, affirmed in *AIB Group (UK) plc v Mark Redler & Co Solicitors* (n 65); *West v Lazard Bros & Co (Jersey) Ltd* (n 33).

⁷¹ *Target Holdings Ltd v Redfearn* (n 58) at 440.

⁷² *Trusts (Jersey) Law 1984*, Art 30(3).

⁷³ *Bartlett v Barclays Bank Trust Co Ltd* (n 37); *Snell's Equity*, 33rd edn (London, Sweet and Maxwell, 2014) para 30-018.

⁷⁴ *Interest on Debts and Damages (Jersey) Law 1996*.

this purpose.⁷⁵ The Royal Court will generally awards interest, subject to this discretion, on any compensation that a trustee is ordered to pay for a breach of trust. The 1996 Law does not permit the Royal Court to award interest upon interest; it follows that only simple interest may be awarded under the 1996 Law.⁷⁶ Even where the breach is an improper payment made bona fides under a mistake of law, the trustee is regarded as still having the money in his own hands and is accordingly liable to pay interest as well as capital.

The Royal Court has said that its preference is to adopt an interest rate based on bank base rates, with an uplift of 1 per cent to reflect obtainable market rates on bank deposits.⁷⁷ It has been the longstanding practice of the Jersey courts to award interest at a slightly higher rate than the English courts.⁷⁸ In circumstances where, as has been the case since 2009, the Bank of England's base rate has stood at 0.5 per cent for a prolonged period, the Court is likely to award interest at base rate, or at such rate as can be shown to have been reasonably available to depositors during the period of the loss plus 1 per cent. It is not the purpose of an award of interest to penalise a defendant.⁷⁹ Jersey follows the English practice of applying US Prime Rate when making awards in US dollars in commercial cases.⁸⁰

It is open to the plaintiff beneficiaries to plead and prove actual interest losses caused by late payment of a debt which might include an element of compound interest, and that such losses would be subject to the principles governing all claims for damages for breach of contract.⁸¹ Such a situation may arise where, for example, an investment wrongfully sold out was yielding more than the pre-judgment court rate of 2 per cent, in which case the trustees may be held chargeable with the rate of interest that it was yielding.

Pre-judgment interest, that is interest on a sum for which judgment is given in a breach of trust action, is not to be confused with the judgment debt rate of interest, at which the judgment sum (inclusive of pre-judgment interest) will accrue if not paid, which is currently capped at 2 per cent above the prevailing UK selected retail banks short-term money rates (base rate), interest per annum.⁸² It appears to have been the practice for some time in Jersey (albeit prior to the collapse in interest rates seen since the 2008/09 financial crisis) that pre-judgment and post-judgments rates of interests were in alignment.⁸³

G. Compound Interest

The Royal Court has a discretionary power to award compound interest against a constructive trustee under Article 33 of the Trusts (Jersey) Law 1984 and under its general equitable

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⁷⁵ *Mocha Invs Ltd v Crills* (n 9).

⁷⁶ Interest on Debts and Damages (Jersey) Law 1996, Art 2(4); *Doorstop Limited v Gillman and Lepervier Holdings Limited* [2012 (2) JLR 297].

⁷⁷ *Viberts v Golder* [1995] JLR 223.

⁷⁸ *Brazil (Fed Rep) v Durant Intl Corp* [2013 (1) JLR 103].

⁷⁹ *ibid*; *Pell Frischmann v Bow Valley Iran Limited* [2007] JRC 155A, affirming the principles discussed in *Kuwait Airways Corp & Anor v Kuwait Insurance Co SAK & Ors* [2000] 1 All ER 972, per Langley J.

⁸⁰ *Brazil (Fed Rep) v Durant Intl Corp* (n 78).

⁸¹ *Sempra Metals Limited (formerly Metallgesellschaft Limited) v Inland Revenue Commissioners and Another* [2008] 1 AC 561, affirmed in *Doorstop Limited v Gillman* (n 76).

⁸² PD RC 05/06.

⁸³ *Pell Frischmann v Bow Valley Iran Limited* (n 79) at [9].

jurisdiction to award compound interest in cases of fraud or breach of fiduciary duty.⁸⁴ Compound interest will often be ordered as a substitute for ordering a disgorgement of profits but the Royal Court has stated that is reluctant to lay down any rigid rules as to the circumstances in which it will make an award of compound interest. The Royal Court has recently affirmed the principle that in assessing a proper measure of compensation, which an award of interest is intended to do, the Court should apply restitutive principles so as to put the plaintiff back into the position he would have enjoyed but for the breach of trust.⁸⁵ Interest normally runs from the date of the breach⁸⁶ but in certain circumstances, fairness might dictate that interest should not start to run until a defendant was aware that a claim was to be made against him. However, the plaintiff's delay in commencing proceedings from the accrual of the cause of action will not always impact on the date from which interest was ordered to run.⁸⁷ Compound interest may be ordered with the number of rests per year at the Court's discretion.⁸⁸

III. The Personal Liability of Protectors

- 7-35 As a matter of principle, as equitable compensation is available as a remedy for breach of fiduciary duty generally, there seems to the author no reason why a protector who has breached a fiduciary duty by failing to properly exercise a fiduciary or special power cannot be personally liable for the loss to the fund arising from such a breach. However, the functions of a protector and the nature of their powers varies sufficiently from trust to trust to such an extent that it is not possible to lay down a general proposition to the effect that a protector owes an equitable duty of care to the beneficiaries. It would have to be demonstrated with sufficient clarity on the facts of a particular case that the protector has assumed a duty of care for the beneficiaries' interests for the protector to be liable for breach of a duty of care and skill.

IV. Procedure and Parties

- 7-36 A claim against a trustee (or trustees where there is more than one) for breach of trust is typically commenced by way of an Order of Justice rather than by way of Representation,

⁸⁴ *Brazil (Fed Rep) v Durant Intl Corp* (n 78); *United Capital Corp Ltd v Bender* [2006] JRC 034A at [53], [2006 JLR N7].

⁸⁵ *West v Lazard Bros & Co (Jersey) Ltd* (n 33); *Doorstop Limited v Gillman* (n 77), referring to what the Court described as the underlying rationale in most of the speeches in the House of Lords in *Sempra Metals Limited v Inland Revenue Commissioners and Another* (n 81); Lord Hope at 588, Lord Nicholls at 592 and Lord Walker at 628.

⁸⁶ Interest on Debts and Damages (Jersey) Law 1996, Art 2(1).

⁸⁷ *Durant Intl. Corp v Brazil (Fed Rep)* [2013 (1) JLR 273] (CA); cf Langley J in *Kuwait Airways Corp. & Anor v Kuwait Insurance Co SAK & Ors* (n 79), affirmed and applied in *Pell Frischmann v Bow Valley Iran Limited* (n 79) (but in that case the delay was compensated for by reducing the rate at which interest accrued rather than the date from which loss occurred).

⁸⁸ *Brazil (Fed Rep) v Durant Intl Corp* [2013 (1) JLR 103] (monthly, although the point was not subject to argument).

since the trustee is entitled to know by way of a fully pleaded case⁸⁹ precisely what is alleged against it.⁹⁰ In a claim for breach of trust, at least one of the current trustees must be a party to ensure there is someone able to receive any compensation that is ordered.⁹¹ Where an order is sought that compensation be paid to the trust fund (ie a claim for reconstitution), the author's view is that the claim is only properly constituted if all the trustees in office at the time of the breach are joined as parties either as defendants, or as plaintiffs (in the case where a co-trustee or former trustee sues another incumbent or former trustee for breaches of trust).⁹² The liability of co-trustees for a breach of trust is joint and several and therefore all the trustees at the time of the breach are likely to be necessary and proper parties for the purposes of joinder.⁹³ No party may be joined as a plaintiff against their will.⁹⁴ Where relief is not sought to reconstitute the trust fund but to compensate the beneficiaries personally (because the breach predates the termination of the trust) there is old English authority to the effect that a claim may be brought against the defaulting trustee alone without joining former co-trustees.⁹⁵ In the author's view, plaintiff beneficiaries intending to reserve their right to sue another trustee whom is not joined as a party to proceedings for breach of trust from the outset should expressly state the basis upon which they have not joined the trustee, otherwise the subsequent proceedings against a trustee not originally joined are likely to be vulnerable to an application to strike out.⁹⁶

A. Joinder of Beneficiaries

The plaintiff in a claim for breach of trust is usually a beneficiary or a new trustee. A beneficiary of a discretionary trust has sufficient locus standi to sue their trustee for breach of trust and seek reconstitution of the trust fund if they are an object of a fiduciary, special or mere power or have a contingent interest under an ultimate default trust.⁹⁷ Any plaintiff to a breach of trust claim, whether a trustee or beneficiary, must give an address for service in Jersey.⁹⁸ As a general rule, those parties named in proceedings are bound by any judgment or order delivered in those proceedings and are not able to re-open any issue which is

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⁸⁹ RCR 2004, r 6/8.

⁹⁰ *Mocha Invs v Crills* (n 9) (a breach of trust claim should not be commenced by summons; it is a claim for damages and did not become a claim for a debt or a liquidated demand merely because a sum was specified); *Papadimitriou v Quorum Management Ltd* [2004 JLR N38]; *Macrae (née Tudhope) v Jersey Golf Hotels Ltd* [1973] JJ 2313; *Caversham Trustees Ltd v Patel* (n 23); *Brazil (Fed Rep) v Durant Intl Corp* 2011 JLR N [19]; for the requirements of a pleadings alleging dishonesty or fraud, see *Cunningham v Cunningham* [2009 JLR 227].

⁹¹ *Re Jordan* [1904] 1 Ch 260; see guidance on the joinder of parties in para 7-36.

⁹² *Underhill and Hayton, Law of Trusts and Trustees*, 18th edn (London, LexisNexis, 2010) at § 88.1 maintains that all the actual trustees or the personal representative of the last surviving trustee are necessary parties to a claim for all breach of trust, still citing *Re Jordan* (n 91) as authority for this proposition.

⁹³ *Trusts (Jersey) Law 1984*, Art 30(8); see RCR 2004, r 6/36.

⁹⁴ RCR 2004, r 6/36(b).

⁹⁵ *Charitable Corp v Sutton* (1742) 2 Atk 400 at 406, per Lord Hardwicke LC; *Fletcher v Green* (1864) 33 Beav 426 at 429–30; *Re Biddulph* (1869) LR 4 Ch App 280 at 287, CA.

⁹⁶ *Henderson v Henderson* (1843) 3 Hare 100. The Royal Court has expressed its view that it is desirable in the efficient administration of justice for as many issues as possible to be resolved in the same proceedings. The Court may direct separate but related actions be tried together rather than formally consolidate them under RCR 2004, r 6/11(1); *Mayo Associates SA v Anagram (Bermuda) Ltd* [1995 JLR N-2].

⁹⁷ *Freeman v Ansbacher Trustees (Jersey) Ltd* [2009 JLR 1].

⁹⁸ RCR 2004, r 4/1 (1)–(2) upon penalty of strike out, r 4/1(3).

subject to a *chose jugée*. A compromise of the claim for breach of trust will be binding on those who are privy to it for the same reason.

- 7-38 Where the plaintiff to the action is the trustee, the trustee may prosecute the claim without joining any of beneficiaries.⁹⁹ Any judgment or order given or made in those proceedings shall be binding on the beneficiaries unless the Court in the same or other proceedings otherwise orders. The Court may only do so on the ground that the trustees could not or did not in fact represent the interests of those persons in the first mentioned proceedings.¹⁰⁰ There is usually no need for the trustee to join beneficiaries as additional defendants unless the relief that is sought prejudices or affects them distinctly from the other beneficiaries.¹⁰¹
- 7-39 Where the plaintiff to the action is brought by the beneficiaries, it is not necessary for all beneficiaries to be named as plaintiffs (if it is even possible to do so)¹⁰² as all beneficiaries will, at least in most circumstances, have a privity of interest in the proceedings as there will be a sufficient degree of identity between them such that all will be bound. The Court may if it considers it expedient to do so, appoint one or more named parties to the proceedings to represent any person or class of persons who is or may be interested or otherwise affected by the proceedings. Where the Court makes such an order, any judgment or order of the Court given or made when the person or persons appointed in exercise of that power are before the Court shall be binding on the person or class represented by the person or persons so appointed.¹⁰³ Where one or more beneficiaries have a demonstrably separate interest from that of other beneficiaries, such as where one class of beneficiaries will not benefit from any compensation recovered or may have their interests defeated, they will not be bound by any judgment given in proceedings to which they are not parties and may appear separately. The Royal Court may also order that any judgment or order made in proceedings in which the trustee appears as a party purportedly representing the interests of the beneficiaries does not bind those beneficiaries where the trustee could not or did not in fact represent the interests of those persons in the first mentioned proceedings, acts fraudulently, or colludes with the other party to the proceedings.¹⁰⁴
- 7-40 Where beneficiaries who are not parties wish actively to participate in the dispute, for example because they do not agree with the way in which the claim is being prosecuted, they should apply by way of summons to be joined at the earliest possible opportunity, but in being joined will be bound once a judgment is delivered.¹⁰⁵ This is particularly so where the defendant trustee proposes to settle on terms which one or more beneficiaries consider to be disadvantageous.
- 7-41 Royal Court rule 4/4(4) provides that where the Court has made an order under that rule and any compromise of the proceedings is proposed and some of the persons who are interested in, or who may be affected by, the compromise are not parties to the proceedings (including unborn or unascertained persons) the Court, if satisfied that the compromise

⁹⁹ *ibid*, r 4/5(1).

¹⁰⁰ *ibid*, r 4/5(1).

¹⁰¹ As to which see below.

¹⁰² ie in the case of unascertained beneficiaries such as unborn persons or a disparate class of beneficiaries. See RCR 2004, r 4/4

¹⁰³ RCR 2004, r 4/4(3).

¹⁰⁴ *ibid*, r 4/5(1).

¹⁰⁵ *ibid*, r 6/36.

will be for the benefit of the absent persons and that it is expedient to exercise this power, may approve the compromise and order that it shall be binding on the absent persons, and they shall be bound accordingly except where the order has been obtained by fraud or non-disclosure of material facts. The Court may only approve a settlement of the proceedings if there is some other person with the same interest as a party convened before the Court who agrees to the compromise or on whose behalf the Court sanctions the compromise; or the absent persons are represented by a person appointed under rule 4/4(1) RCR 2004 who so agrees.

The beneficiaries who are not joined to the proceedings may apply by way of summons to take over the conduct of the claim from the trustee, as we consider that if they fail to do so and a compromise is reached, it will be too late for them to start a new claim, unless their interest is not bound by the judgment. If they are bound, and are dissatisfied with the compromise made by the trustee, the beneficiaries have a remedy against the trustee for his conduct of the claim, not against the trustee against whom the claim was brought.

7-42

B. Locus Standi for a Breach of Trust Action

Only beneficiaries,¹⁰⁶ that is those to whom the trustee is liable to account,¹⁰⁷ and any other trustee of the trust, have standing to take proceedings in respect of a breach of trust. This excludes those with whom the trustee does not stand in a fiduciary relationship from bringing a claim but who might otherwise be interested in the outcome such as a protector, the settlor or an excluded beneficiary (for breaches occurring after their exclusion). A beneficiary for this purpose includes a beneficiary with a vested interest in the trust or a contingent beneficiary, however remote the contingency.¹⁰⁸ An object of a fiduciary power—whether a trust power (ie a power that the trustee was required to exercise) or a mere power (ie a power that the trustee had merely to consider from time to time whether or not to exercise)¹⁰⁹—had locus standi to bring proceedings for breach of trust and seek relief, including the reconstitution of the trust fund if loss had been caused to it by a trustee's breach of trust. It would be a matter of discretion for the court, in a particular case, as to what relief, if any, should be granted.¹¹⁰ The Royal Court in *Ansbacher* also expressed the view that where a party with standing to bring a claim for breach of trust failed to do so and allowed his claim to become statute barred, and later procured a beneficiary to bring the claim as his 'stool pigeon', relief may be refused as a matter of discretion.¹¹¹

7-43

¹⁰⁶ Defined in the Trusts (Jersey) Law 1984, Art 1(1) as 'a person entitled to benefit under a trust or in whose favour a discretion to distribute property held on trust may be exercised'; see *Freeman v Ansbacher Trustees (Jersey) Ltd* (n 97).

¹⁰⁷ *Armitage v Nurse* (n 44) at 253–54.

¹⁰⁸ *Re Parsons* (1890) 45 ChD 51 at 59, per Kay J ('the veriest scintilla of interest will entitle a person to maintain such a suit').

¹⁰⁹ Contra to the position stated in Tucker, Le Poidevin, Brightwell, *Lewin on Trusts*, 19th edn (London, Sweet & Maxwell, 2014) at para 39-074.

¹¹⁰ *Freeman v Ansbacher Trustees (Jersey) Limited* (n 97) where an analogy was made with the jurisdiction of the Court to supervise and where necessary intervene in the administration of the trust to protect the interest or rights of that beneficiary; *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709.

¹¹¹ [2009] JLR 1] at [49].

- 7-44** Where there is a trustee capable of bringing a claim for breach of trust against a co-trustee or a former trustee, it is inappropriate for the beneficiaries to commence the action for breach of trust and the claim will be improperly constituted unless circumstances exist that make it appropriate for the beneficiaries to bring a derivative claim. No beneficiary has any entitlement as of right to bring a derivative action at the expense of the trust fund.¹¹² In a derivative action, the beneficiary would be acting as a trustee and the trustee would in effect be a third party—if it were to lose, damages would be payable by it to the trust fund rather than to the beneficiary.¹¹³ In appropriate cases, an action by a beneficiary might lie against an agent of a trustee if the agent were aware that the beneficiary might rely on his negligent advice and therefore suffered economic loss, or if the agent assumed responsibility to the beneficiaries.¹¹⁴
- 7-45** It follows that a beneficiary cannot invite the Court to intervene to vindicate his interest in the trust if the beneficiary has no interest and so no locus to bring a breach of trust claim in respect of trust capital or income in which he has no or no potential interest. A beneficiary with an interest in part of the trust fund cannot complain of a breach of trust in respect of another part of the trust property held on trusts for other beneficiaries and which cannot accrue to the part of the trust property in which he is interested. A beneficial interest that is validly assigned will permit the assignee to stand in the position of the original beneficiary and have the same locus as the original beneficiary to seek a remedy for a breach of trust. Where the beneficial interest is resettled on new or sub-trusts, it is the trustee of that second settlement that will have locus to sue the trustees of the head-settlement. The beneficiaries of the second settlement may be able to bring a derivative claim against the trustees of the head-settlement for breach of trust if there are special circumstances.¹¹⁵

C. Claims by Trustees

- 7-46** The other trustees (if there is more than one) have locus to take proceedings against a defaulting trustees.¹¹⁶ The trustees can (indeed are obliged) to get in the lost assets or monetary compensation of commensurate value even though they were themselves implicated in the breach of trust. The object is to secure the return of the trust property for the benefit of all the beneficiaries according to their respective interests. The fact that the defaulting trustee may have a defence as against an individual beneficiary is irrelevant.¹¹⁷

¹¹² *In The Matter of the X Trust* [2012 (2) JLR 260]. The Court may authorise the bringing of a derivative action and the rights of the beneficiaries to be indemnified for their costs in the same way as a trustee would, were the trustee bringing the claim under Art 51(3) of the Trusts (Jersey) Law 1984. Leave to bring a derivative claim should be commenced by way of separate proceedings commenced by Representation; see Ch 3 and Ch 12.

¹¹³ *In The Matter of the X Trust* (n 112).

¹¹⁴ *ibid.*

¹¹⁵ *Hayim v Citibank NA* [1987] AC 730.

¹¹⁶ *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072 at 1074, PC.

¹¹⁷ *West v Lazard Bros & Co (Jersey) Ltd* (n 33).

V. Personal Liability for Breaches of Trust as between Co-trustees

A trustee of a Jersey trust is not liable for a breach of trust committed by a co-trustee unless the trustee becomes aware or ought to have become aware of the commission of such breach or of the intention or threat of his or her co-trustee to commit a breach of trust; and the trustee actively conceals such breach or such intention or fails within a reasonable time to take active measures to protect the fund and the beneficiaries' interests or restore the trust property or prevent such breach.¹¹⁸ The trustee's failure to do any of these things will make the trustee concurrent in the co-trustee's breach. The practical importance of the principle that a trustee is not generally liable for the acts or defaults of a co-trustee is limited by the principle that where there is more than one trustee, trusteeship is a joint and continuous office and that trustees must act jointly in the execution of the trust.¹¹⁹ Where two or more trustees are liable in respect of a breach of trust, they shall be liable jointly and severally.¹²⁰ If the breach of trust has already been committed and comes to light a co-trustee should bring an action for the restoration of the trust fund or, at least, take such other active measures as in all the circumstances may be most prudent. A trustee who discovers a breach of trust by his co-trustee is usually well advised to seek directions from the Court as to what, if any, steps he should take to remedy it.

7-47

Where co-trustees are jointly liable for a breach of trust, the beneficiaries (or trustee) may seek to satisfy a judgment against any one of the trustees. The trustee(s) against whom judgment is sought to be satisfied may be able to claim a contribution from the other trustees who are also liable. A contribution may be ordered in appropriate cases under the inherent power of the Court. Jersey's statutory regime governing the right of a party to seek a contribution is confined only to underlying claims between parties that are jointly and severally liable in tort.¹²¹ In England, the equivalent statutory provision was section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935. The report of the Law Commission (Law Comm No 79) in 1977 recommended that the statutory right to obtain a contribution should be widened to cover the situation where one or other of the parties (or both) was not a tortfeasor but was liable to the plaintiff for breach of contract, breach of trust or other breach of duty. That was achieved by the passing of the Civil Liability (Contribution) Act 1978. But in Jersey the position remains unaltered. It follows that the defendant trustee may only seek a contribution from his co-trustee either under the jurisdiction that may exist at customary law to order a contribution as between those equally liable (whether jointly or jointly and severally) to the plaintiff for a common debt that existed at English common law prior to the passage of the 1978 Act, or if the co-trustee could be liable in tort to the plaintiff, if sued, in respect of the damage which is the subject of the claim in the Order of Justice.¹²² Conceivably a claim for contribution might be brought in respect of a breach of the trustee's duties of care and skill which is analogous to a tortious duty of care but that proposition is, as yet, unsupported by authority.

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¹¹⁸ Trusts (Jersey) Law 1984, Art 30(5).

¹¹⁹ *ibid*, Art 22.

¹²⁰ *ibid*, Art 30(8).

¹²¹ Law Reform (Miscellaneous Provisions) (Jersey) Law 1960, Art 3.

¹²² *Jersey Electricity Co Limited v Brocken & Fitzpatrick Limited* [2004 JLR 289].

A. Assessing the Contribution

- 7-49** The contribution to be paid by a trustee is such as may be found by the Court to be just and equitable having regard to the extent of that trustee's responsibility for the damage for which the compensation is payable. Where the trustees are equally blameworthy, the Court will no doubt generally order contributions such that they suffer the compensation in equal shares. In other cases, the Court can exempt a trustee from liability to make any contribution, or direct the payment of a complete indemnity. The extent of a trustee's liability for a breach of trust can be measured according to the trustee's blameworthiness for the breach as well as his proximity to it.¹²³ It is thought that court will be slow to order a contribution by a trustee who was in active breach of trust to another who was in passive breach on the basis that it would discourage trustees from playing the active part they are expected to in administering their trusts.¹²⁴ Where all the trustees are equally guilty, there is usually no reason the Court would not direct an equal apportionment.

VI. Trustee's Responsibility for Asset Managers, Agents and Companies

- 7-50** Subject to the terms of the trust, a trustee may delegate the execution or exercise of any of his or her trusts or administrative or dispositive powers (which may be sub-delegated).¹²⁵ Unless the terms of the trust specifically provide to the contrary, a Jersey trustee may delegate management of any trust property to and employ investment managers whom the trustee reasonably considers competent and qualified to manage the investment of trust property and may employ accountants, advocates, attorneys, bankers, brokers, custodians, investment advisors, nominees, property agents, solicitors and other professional agents or persons to act in relation to any of the affairs of the trust or to hold any of the trust property.¹²⁶ A trustee shall not be liable for any loss to the trust arising from a delegation or appointment under Article 25 of the Trusts (Jersey) Law 1984 who, in good faith and without neglect, makes such delegation or appointment or permits the continuation thereof.¹²⁷ The effect of Article 25(3) is to throw the burden of proof upon the persons seeking to charge the trustee with a loss caused by an agent whom he had properly employed although the trustee bears the burden of establishing he acted in good faith and without neglect. The provision applies both to the appointment of the agent and, as well, to the supervision of the person to whom the trustee has delegated the functions in Article 25(2). An agent

¹²³ *Baker v Willoughby* [1970] AC 467 at 490.

¹²⁴ Whether or not it orders a contribution, the Court may absolve a trustee who acts honestly and reasonably and ought to be excused from liability under Art 45; see Ch 11. Note the comments in *Bahin v Hughes* (1886) 21 Ch D 390 at 398, per Fry LJ: 'it would act as an opiate upon the consciences of the trustees; so that instead of the cestui que trust having the benefit of several acting trustees, each trustee would be looking to the other or others for a right of indemnity, and so neglect the performance of his duties.'

¹²⁵ Trusts (Jersey) Law 1984, Art 25(1).

¹²⁶ *ibid*, Art 25(2).

¹²⁷ *ibid*, Art 25(3).

appointed by the trustee under Article 25, or a company within the same group as the corporate trustee, acting within the scope of the authority conferred by trustee is not liable as a trustee de son tort¹²⁸ and an agent will (unless it assumes a duty of care towards the beneficiaries directly) have no direct liability to the beneficiaries of the trust.¹²⁹ If a trustee were to refuse to enforce a claim against a defaulting agent, eg because of a close association with the agent, the beneficiaries of a trust could either bring an administrative action seeking a direction from the Court that the trustee take the necessary action (or, perhaps, that the trustee should be replaced) or, in special circumstances, they might be permitted to bring a derivative action on behalf of the trust.¹³⁰

VII. Defences of Concurrence and Release by a Beneficiary

A beneficiary of full age and capacity with full knowledge of all material facts may freely consent to a breach of trust or may waive his right to sue his trustee.¹³¹ Having consented to the breach or waived his rights, the beneficiary is not later permitted to sue for the breach. The beneficiary's participation in the breach or where the beneficiary gives his consent to the breach, will afford the trustee a defence. The beneficiary may also formally release his claim against the trustee. The facts relied on in order to establish any of the defences considered above must be specifically pleaded.¹³²

7-51

A beneficiary who concurs in the acts that constitute a breach of trust by the trustee is estopped from proceeding against the trustee for the consequences that arise from the breach. This is so whether or not the beneficiary knew that the act constituted a breach of trust¹³³ and whether or not the beneficiary derived benefit from the breach.¹³⁴ Where a trustee commits a breach of trust at the instigation or at the request or with the consent of a beneficiary, the Court may by order impound all or part of the interest of the beneficiary by way of indemnity to the trustee or any person claiming through the trustee.¹³⁵ The Court will consider all the circumstances in order to determine whether it is fair and equitable to allow the beneficiary to sue the trustee for a breach in which the beneficiary has concurred. In particular, the Court will focus on whether the beneficiary understood what he was concurring in.¹³⁶ No estoppel will arise where the beneficiary is a minor unless possibly where the beneficiary falsely claims to be of age in order to induce the trustee to breach its duties.¹³⁷

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¹²⁸ *Cunningham v Cunningham* (n 90).

¹²⁹ *Chvetsov v BNP Paribas Jersey Trust Corp Ltd* [2009] JLR 217].

¹³⁰ *ibid.*

¹³¹ Trusts (Jersey) Law 1984, Art 30(7).

¹³² RCR 2004, r 6/8(1).

¹³³ *Re Pauling's Settlement Trusts* [1962] 1 WLR 86 at 106–07.

¹³⁴ *Fletcher v Collis* [1905] 2 Ch 24, CA.

¹³⁵ Trusts (Jersey) Law 1984, Art 46. See Ch 11.

¹³⁶ *Re Pauling's Settlement Trusts* (n 134) at 107, per Wilberforce J.

¹³⁷ *Overton v Banister* (1844) 3 Hare 303; and see *Wright v Snowe* (1848) 2 De G & Sm 321; *Nelson v Stocker* (1859) 4 De G & J 458.

A. The Requirements for a Valid Release

7-53 For a release or confirmation to be valid the following conditions must be satisfied:¹³⁸

1. The beneficiary must be of full age and capacity.
2. The beneficiary must have full knowledge of all material facts.
3. The release must not improperly induced by the trustee to give the release.

7-54 The test regarding the degree of knowledge required of a beneficiary has been stated as follows:¹³⁹

The ... court has to consider all the circumstances in which the concurrence of the [beneficiary] of the trust was given with a view to seeing whether it is fair and equitable that, having given his concurrence, he should afterwards turn round and sue the trustees; ... subject to this, it is not necessary that he should know that what he is concurring in is a breach of trust, provided that he fully understands what he is concurring in, and ... it is not necessary that he should himself have directly benefited by the breach of trust.

B. Effect of Concurrence and Release

7-55 A beneficiary who concurs in a breach of trust or who relieves a trustee from liability, is forever barred from suing the trustee. A beneficiary's interest under the trust may be impounded by the trustee to indemnify the trustee who committed the breach¹⁴⁰ in making whole the loss claimed by the beneficiaries. The release or concurrence of one beneficiary does not prevent another beneficiary, who has not so waived the right to sue, from bringing a claim for breach of trust. A new trustee, having a privity of interest with the beneficiaries in respect of a breach of trust is in no better position than them and if all have acquiesced in a breach of trust, then the trustee will have no claim.

7-56 Does a beneficiary who has lost the right to sue the trustee by reason of concurrence or release have a right to benefit in the future from the fruits of any claim brought back into the trust resulting from a claim brought by another beneficiary. The obvious practical problem is that the compensation paid by the trustee to reconstitute the fund is likely to be mixed with assets already held by the trustee, such that it may not be possible to ascertain with any degree of certainty whether an appointment out is of assets recovered following a successful claim for a breach of trust to which the beneficiary had concurred. It may be open to the Court to make a declaration that the trustee may not appoint out in favour of one or more objects who concurred in a breach, thus requiring the trustee to maintain a segregated fund comprised only of the compensation. The author does not consider there to be any principled basis to suggest there should be a reduction in the amount of compensation payable on the grounds that a beneficiary had concurred in the breach as there can be no certainty that the acquiescing beneficiary would ever have received the sum paid by way of compensation, and it is hard to see how it could be just to deprive the other beneficiaries of the full amount recovered from a claim against the trustee.

¹³⁸ Trusts (Jersey) Law 1984, Art 30(7).

¹³⁹ *Re Pauling's Settlement Trusts* (n 133).

¹⁴⁰ Trusts (Jersey) Law 1984, Art 45.

VIII. Defence under Exculpatory Provisions in the Trust Instrument

The statutory and customary law defences available to a trustee charged with a breach of trust may be extended by the express terms of the trust.¹⁴¹ An effective defence may be achieved by provisions in the trust instrument which, either alone or in combination, enlarge the powers of trustee, abridge the duties of the trustee, exclude the trustee's liability for breach of trust or enlarge rights of indemnity in respect of liabilities to third parties incurred by a trustee in the administration of a trust.

7-57

A. Enlarging the Powers of the Trustees

The express terms of a trust may enlarge the powers of trustees so as to authorise some act in the administration of the trust which would not otherwise be authorised. A very common example was an extended investment power. However, Jersey law has long provided that a trustee, in relation to the trust property, has all the powers of a natural person acting as the beneficial owner of such property.¹⁴² A trustee acting in accordance with an extended power or in accordance with a power reserved to a third party under Article 9A will not be liable for breach of trust in respect of his action because there is no breach of trust.¹⁴³ As is discussed elsewhere, whether the actions taken in accordance with the terms of the trust are authorised or not has no impact on whether the trustee is entitled to its indemnity out of the trust property in respect of liabilities, costs and expenses properly incurred by it in connection with its action.¹⁴⁴ Whether a trustee acts within the four corners of the power conferred is a separate question to whether it acts in accordance with its duties of diligence, as would a prudent person, to the best of the trustee's ability and skill while observing the trustee's duty of utmost good faith.¹⁴⁵ If some act or transaction, though within the scope of the power, is in the particular circumstances of the case one that a prudent trustee would not have exercised, the trustee cannot seek to rely upon the extended power as authorising the act or transaction.¹⁴⁶

7-58

B. Abridged Duties of Trustees

The provisions of the trust instrument may also abridge the ordinary duties of the trustees.¹⁴⁷ A common example of the abridgement of the duties of trustees is a provision

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¹⁴¹ *ibid*, Art 30.

¹⁴² Trusts (Jersey) Law 1984, Art 24.

¹⁴³ *ibid*, Art 1(1): 'breach of trust' means a breach of any duty imposed on a trustee by this Law or by the terms of the trust.

¹⁴⁴ *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2014 GLR 371]; see Ch 11.

¹⁴⁵ Trusts (Jersey) Law 1984, Art 21.

¹⁴⁶ *Bartlett v Barclays Bank Trust Co Ltd (No 2)* (n 38) at 536–37.

¹⁴⁷ Subject to para 7-65 below.

limiting the duty to interfere in the management of a company in which the trust is a substantial shareholder so that a trustee has no duty to interfere if he has no notice of any act of dishonesty or misappropriation by the directors, known as an anti-*Bartlett* clause.¹⁴⁸ While the trustee's duties in Article 21(3) and (4) are stated to be subject to the terms of the trust, the duties in Article 21(1) are not similarly qualified suggesting that these core duties are not capable of being excluded either expressly or impliedly by the terms of the trust. Trust provisions which enlarge trustees' powers or abridge their duties have the effect of making what would otherwise make the trustee liable for breach of trust, lawful so that where such a provision is engaged, there is no unauthorised act or breach of duty.

C. Anti-*Bartlett* Clauses

- 7-60 The vast majority of professional Jersey trustees are unlikely to have either the inclination or necessary commercial experience to either manage or exercise a controlling shareholding in a trading company in which the trust has an interest. The vast majority of professionally drafted trust deeds (dating from the early 1980s) include clauses that have the effect of negating the trustee's duty to enquire into or interfere in the conduct of a company in which the trustee has an interest, at any rate unless they are aware of circumstances calling for enquiry. Such clauses are known colloquially as 'anti-*Bartlett*'¹⁴⁹ clauses.
- 7-61 The wording of anti-*Bartlett* clauses varies. A clause that simply gives the trustee a power to leave the conduct of the company's affairs to its directors, is, on a conventional analysis, a trust power like any other, to be exercised for the benefit of the beneficiaries. Such a clause will not afford the trustee any protection if it never gives any thought to whether it should exercise any control, since such a power, if it is to be effective, must be consciously exercised. Usually, an anti-*Bartlett* clause will exclude the trustee's duty to enquire and supervise in the affairs of any company in which the trust has an interest. Such a provision is not properly to be regarded as an exemption clause as it presupposes no breach of trust: but a restriction on the trustee's duties. A clause worded so as to relieve the trustee of any duty of enquiry unless he has knowledge of circumstances which call for an enquiry, excludes the preliminary duty on the trustee of keeping abreast of the company's affairs. But if the trustee does become aware of circumstances which call for enquiry, the clause will afford the trustee no protection thereafter if it does not intervene.
- 7-62 Even if an anti-*Bartlett* clause relieves the trustee of any duty to interfere, it will afford the trustee no protection if the trustee decides to intervene. Where a trustee's own employees or directors are appointed as directors of a company held by the trust, the trustee will have chosen to have conduct of the company's affairs and may be held liable accordingly and an anti-*Bartlett* clause will afford no protection to the trustee.
- 7-63 Where provision is made in the trust instrument for the settlor or a third party to give binding directions as to the exercise of the trustee's rights as shareholder it is not unusual to also find clauses in the trust instrument that go further than negating the trustee's duty

¹⁴⁸ Thereby reversing the effect of the judgment in *Bartlett v Barclays Bank Trust Co Ltd (No 2)* (n 37).

¹⁴⁹ After the English Court of Appeal case of *Bartlett v Barclays Bank Trust Co Ltd (No 2)* (n 37) the outcome of which causes are intended to reverse.

but impose a positive duty on the trustees not to interfere in the management of the company, at any rate in the absence of knowledge of dishonesty on the part of the directors. The retention of such a power is not of itself objectionable¹⁵⁰ but opens the issue as to whether the power to give directions is fiduciary in nature, in which case the trustee may continue to owe a duty to bring the matter before the Court.¹⁵¹ Whether or not the trustee's duties are curtailed by way of an anti-*Bartlett* clause, the directors of such a company will still owe duties to and be liable on those duties to the company as directors, to which an anti-*Bartlett* clause is no answer. A beneficiary may prevail upon the trustee to exercise its control as shareholder to procure the company to sue its directors where they have acted in breach of their duties. Where the trustee has, through its own directors or employees, had conduct of the company's affairs so as to give rise to a conflict of interest, that may afford the beneficiaries grounds to seek relief by way of a derivative claim.¹⁵²

As well as the risk of civil liability, a trustee that shuts its eyes to criminal conduct of a company (or its directors) in which the trust has an interest exposes itself to the risk of committing a criminal offence of being involved in a prohibited arrangement if the trustee shut its eyes to what is going on.¹⁵³

7-64

i. An Irreducible Core of Obligations

There are limits beyond which the abridgement of trustees' duties cannot go. To do so would be wholly to negate the trustees' duties such that there would be no trust at all. The English Court of Appeal has referred to the 'irreducible core of obligations' of the trustee upon which no encroachment is permitted.¹⁵⁴ It seems from the drafting of Article 21(1) that the terms of a trust may not negate the trustee's fiduciary duty to act in utmost good faith, and the trustee's duty to act with due diligence, as would a prudent person, to the best of the trustee's ability and skill.

7-65

D. Excluding the Trustee's Liability for Breach of Trust—Trustee Exemption Clauses

A different kind of protection from that afforded by a provision abridging the trustee's duties or extending its powers, is often afforded to trustees of Jersey trusts by an express provision in the trust instrument that excludes or limits the trustee's personal liability for breaches of trust. An exemption clause does not have the same effect of a clause enlarging the powers or abridging the duties of the trustee which is to make the act authorised. An exemption clause has the effect of saving the trustee from the personal liability to pay

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¹⁵⁰ Trusts (Jersey) Law 1984, Art 9A.

¹⁵¹ It is to be noted that Art 9A(3) provides that 'where a power mentioned [...] has been reserved or granted by the settlor, a trustee who acts in accordance with the exercise of the power is not acting in breach of trust'. Notwithstanding such provision, in the authors' view it is wrong in principle to assume that the trustee is under no liability if it is complicit in or otherwise gives effect to an exercise or direction that is harmful to the beneficiaries' interests without question.

¹⁵² As to which see Ch 12.

¹⁵³ See Ch 14; Proceeds of Crime (Jersey) Law 1999, Art 30(3).

¹⁵⁴ *Armitage v Nurse* (n 45) at 253H–254A.

compensation for breach of trust, and so may, to that extent, have a practical effect similar to that of a provision extending powers or abridging duties. An exemption clause does not usually have the effect of negating the beneficiaries' cause of action altogether. Nor does such a clause have the effect of conferring a good title on a person to whom the trustee has made an unauthorised distribution so as to protect such a person from a tracing claim, or perhaps even a personal remedy for knowing receipt.¹⁵⁵ Nor does an exemption clause allow a trustee to retain unauthorised profits for which he would otherwise be accountable at any rate in the absence of special wording in the trust instrument.¹⁵⁶ A trustee may consciously rely on the latter provisions to justify their acts or omissions. But a trustee may not consciously rely upon an exemption clause to justify a departure from the trusts, for a trustee who relies on such a clause to justify what he proposes to do will thereby lose its protection.¹⁵⁷ Many professionally drafted trust instruments exclude liability for the trustee's ordinary negligence so that in order to make a trustee liable some element of bad faith, reckless indifference or gross negligence to the terms of the trust must be established.¹⁵⁸ An exemption clause is usually to be construed as availing former trustees as well as incumbent trustees. Commensurate with an outgoing trustee's continuing right of indemnity for costs reasonable incurred, an exemption clause forms part of the terms on which a trustee accepts office and provides protection in respect of his conduct as a trustee.

i. The Scope of Exemption Clauses

- 7-67 The rule of general application is that an exemption clause in a trust instrument can exclude liability for everything except the trustee's own fraud, wilful misconduct or gross negligence.¹⁵⁹ It should be noted that the position in Jersey is stricter than the prevailing position in English law where it is possible to exclude liability for everything up to the trustee's fraud, including gross negligence.¹⁶⁰ Absent specific wording to the contrary, an exemption clause which excludes the liability of the trustee will not also exclude the liability of agents under the contractual or common law duties they may owe to the trustee. Gross negligence means a serious or flagrant degree of negligence which amounts to an unusual and marked departure from the normal standards of professional trustees and does not import any requirement to prove deliberate or reckless fault which is associated with wilful misconduct; the two concepts are not synonymous.¹⁶¹ It is clear that the term 'wilful default' in the context of exemption clauses does not have the same technical meaning in which that term is used as the basis upon which an account may be ordered.¹⁶² A common formulation for limiting the scope of an exemption clause is to exclude liability for 'wilful

¹⁵⁵ While it is a prerequisite for liability on the ground of knowing receipt that there should have been a transfer of property in breach of trust, there is no requirement that the trustees must be personally liable to pay compensation for the breach of trust. By the same principle a third party may be liable for dishonest assistance in a case where the trustee, because of an exemption clause, cannot be pursued for compensation.

¹⁵⁶ Trusts (Jersey) Law 1984, Art 21(4).

¹⁵⁷ *Armitage v Nurse* (n 45).

¹⁵⁸ Trusts (Jersey) Law 1984, Art 30(10).

¹⁵⁹ *ibid*, Art 30(10).

¹⁶⁰ *Armitage v Nurse* (n 44) at 251–56.

¹⁶¹ *Midland Bank Trust Co (Jersey) Ltd v Federated Pension Services* [1995 JLR 352].

¹⁶² *ibid*.

default'. The potential for confusion arises because, as discussed above, the court may order a trustee to account on the basis of 'wilful default', and 'wilful default' in the context of an account, includes default on the basis of the trustee's ordinary negligence.¹⁶³ In the context of exemption clauses, however, 'wilful default' has a similar meaning to wilful misconduct in this context and is to be equated with consciousness that the act or omission complained of is a breach of duty, or recklessness as to whether that act or omission is a breach of duty.¹⁶⁴ The limiting words 'wilful breach of this trust' refer to deliberately and purposely doing something which the trustee knows, when he does it, amounts to a breach of trust, consisting in his failure to perform his duty as trustee. 'Wilful ... wrongdoing' is a reference to a deliberate breach of trust.¹⁶⁵ Thus, where 'wilful default' and 'wilful misconduct' occur it is not clear whether recklessness would suffice to take the trustee outside the protection of the exemption clause. The meaning of the limiting words 'gross negligence' in the context of an exemption clause is problematic, it having been said that English lawyers have a healthy disrespect for the distinction between negligence and gross negligence, and that it is merely one of degree which is a serious, unusual and marked departure from the normal standards of professional trustees.

It has been held that a trustee whose exemption from liability does not extend to a 'breach of trust knowingly and wilfully committed' is liable if he knowingly and wilfully (ie intentionally) does something which is a breach of trust, even though he does not know it to be a breach of trust.¹⁶⁶ This is in contrast to the position in English law in relation to limiting words such as 'wilful default', 'wilful misconduct' and 'wilful breach of trust' where it is suggested that it is not enough that the trustee intentionally does something which is a breach of trust, but that, in addition, the trustee must know that his acts are unauthorised and so a breach of trust, or be reckless in that regard. If a trustee embarks upon a course of action knowing it is unauthorised, then, in the context of 'wilful default', 'wilful misconduct' and 'wilful breach of trust' the trustee will have disqualified himself from coming within the scope of the exemption clause. Trustees who knowingly set out to achieve a result which they knew were not authorised by the terms of the trust may be acting dishonestly. A trustee will not be protected, even if his liability is limited to actual fraud, if he makes a distribution to someone whom he knows is not a beneficiary, and through ignorance of the law does not know what fraud or dishonesty means.¹⁶⁷

Fraud in this context connotes, at minimum, an intention on the part of the trustee to pursue a particular course of action, either knowing that it is contrary to the interests of the beneficiaries, or being recklessly indifferent as to whether it is contrary to their interests or not.¹⁶⁸ Fraud in this context is inclusive of but not co-extensive with the concept of fraud

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¹⁶³ *Re Chapman* (n 44).

¹⁶⁴ *Re Trusts of Leeds City Brewery Ltd's Debenture Stock Trust Deed* (1921) [1925] Ch 532 at 533, CA; *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407, Romer J and CA; *Re Munton* [1927] 1 Ch 262; *Re Vickery* [1931] 1 Ch 572 at 583; *Armitage v Nurse* (n 44) at 252. See too *Woodland-Ferrari v UCL Group Retirement Benefits Scheme* [2002] EWHC 1354 (Ch), [2003] Ch 115 at [68] (wilful default is not the same as fraudulent breach of trust).

¹⁶⁵ *Barnes v Tomlinson* [2006] EWHC 3115 (Ch), [2007] WTLR 377 at [77].

¹⁶⁶ *Midland Bank Trustees (Jersey) Ltd v Federated Pension Services Ltd* (n 3) at 196–201.

¹⁶⁷ *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, PC.

¹⁶⁸ *Armitage v Nurse* (n 44) at 251D–E; *West v Lazard Bros & Co (Jersey) Ltd* (n 33); *Kitchen v Royal Air Force Assn* [1958] 2 All ER at 249, per Lord Evershed MR.

in Jersey's customary law.¹⁶⁹ To count as fraud, there is no requirement that the trustee should benefit personally from the wrongful distribution. In the context of an exemption clause fraud means dishonesty.¹⁷⁰ It is for the Court to determine what are the normally acceptable standards of honest conduct and the fact that the trustee concerned genuinely believes that he has not fallen below those standards is irrelevant.¹⁷¹ Not all deliberate breaches of trust will be fraudulent. A trustee may deliberately exceeds his powers in good faith and in the belief, which does not fall below the normally acceptable standards of honest conduct, that he is acting in the interests of the beneficiaries is not committing a fraud.¹⁷² However, if no reasonable trustee could have thought that what it was doing was for the benefit of the beneficiaries will not be honest even though the trustee's belief in its own honesty was actually held.¹⁷³

- 7-70** In a case where the breach of trust relates not to investment or administration of the trust fund but to distribution, a distinction needs to be drawn between two kinds of case. It will be a fraudulent breach of trust if the trustee makes a distribution of trust assets to a person whom he knows is not entitled or is recklessly indifferent whether that person is entitled or not. However, where the trustee makes a distribution to a person whom he believes in good faith to be entitled, though greater care might have revealed that his belief was not well founded, is not fraud, though if a trustee were to receive legal advice to the effect that the doubts as to beneficial entitlement are so serious that the proper course is to seek directions from the Court, and ignores that advice, the trustee risks committing a fraudulent breach of trust, on the ground that he has acted with reckless indifference.

ii. Interpretation of Exemption Clauses

- 7-71** An exemption clause is to be restrictively construed and anything that is not clearly written in should be treating as falling outside it.¹⁷⁴ It is for the trustee to show that the case against them fell within the ambit of an exculpation clause with any doubt being resolved against it; any ambiguity in the meaning of the words used would also be resolved against it.¹⁷⁵ The approach of the Jersey courts to the construction of clauses by which exculpation from liability is sought to be achieved is therefore similar to that of the English courts.¹⁷⁶ There is no Jersey equivalent to the Unfair Contract Terms Act 1977 under which an exemption clause may be declared inapplicable if it fails to meet the statutory test of reasonableness.
- 7-72** The most narrow limiting words permissible are for 'fraud', 'wilful misconduct' or 'gross negligence', and these words should be construed in the ways considered above concerning the permitted scope of exemption clauses. We doubt whether the limiting word 'actual

¹⁶⁹ *West v Lazard Bros & Co (Jersey) Ltd* (n 33).

¹⁷⁰ *Barnes v Tomlinson* (n 165).

¹⁷¹ *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37; *Cunningham v Cunningham* (n 90); *Nolan v Minerva Trust Co Ltd* (n 12).

¹⁷² *Armitage v Nurse* (n 44) at 251B–D and 252G.

¹⁷³ *Walker v Stones* [2001] QB 902 at 936–41, CA.

¹⁷⁴ *Midland Bank Trust Co (Jersey) Ltd v Federated Pension Servs* (n 161); *Armitage v Nurse* (n 44) at 255G–256A.

¹⁷⁵ *Midland Bank Trustees (Jersey) Ltd v Federated Pension Services Ltd* (n 161).

¹⁷⁶ *ibid*, at 373.

'fraud' adds anything significant.¹⁷⁷ The limiting words which cause the greatest difficulty are those which purport to include 'wilful default' within the scope of the exemption. 'Wilful default' was the formulation used in Article 30 of the Trusts (Jersey) Law 1984 prior to 1989 before it was replaced with 'wilful misconduct'.¹⁷⁸ The potential for confusion arises because in the context of a trustee being made accountable on the footing of 'wilful default', he is made liable to account for money which he could with reasonable diligence have received, and so the term 'wilful default' includes ordinary negligence, which Article 30 would suggest is within the permissible scope of an exemption clause.¹⁷⁹ 'Default' means failing to do something which duty or law requires and which is something which the trustee ought, in all reasonableness, to do, having regard to the relationship that exists. What is reasonable will depend on the circumstances of the case. If a trustee knows what he ought to be doing, knows what is reasonable in the circumstances and, in that knowledge, fails to do it then he is in default.¹⁸⁰ 'Wilful' only means that the action taken is done intentionally as a spontaneous act of will and one which the person was not under compulsion to take. It does not, in the view of the Royal Court, imply dishonesty and probably means no more than that a reasonable man viewing the decision taken would not have taken the decision under those circumstances. It follows that wilful default goes no further than a test of 'want of ordinary prudence' or negligence test¹⁸¹

In the context of exemption clauses, 'wilful default' or 'wilful misconduct' is to be equated with consciousness on the part of the trustee that the act or omission complained of is wrong on his part or a breach of duty, or recklessness as to whether that act or omission is a breach of duty.¹⁸² Though the limiting words 'wilful default' do not extend to negligence, they appear to be wider than 'fraud' and 'gross negligence' in that a trustee who deliberately does something which he knows to be a breach of trust is not protected, even if he honestly believes that the breach of trust is in the interests of the beneficiaries. It is the author's view is that the formulation in the current legislation, 'wilful misconduct', is consistent with the interpretation of the meaning of wilful default in the context of exemption clauses considered by the Jersey Court of Appeal in *Midland Bank Trustees (Jersey) Ltd v Federated Pension Services*.

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¹⁷⁷ See *Armitage v Nurse* (n 44) at 250C; *West v Lazard Bros & Co (Jersey) Ltd* (n 33). Fraud in this context is thought not to be equated with equitable fraud which generally covers matters which are outside the scope of exemption clauses anyway; see *Midland Bank Trustees (Jersey) Ltd v Federated Pension Services Ltd* (n 3) at 297; *Armitage v Nurse* (n 44) at 252H–253E.

¹⁷⁸ Trusts (Amendment) (Jersey) Law 1989; P Matthews and T Sowden, *The Jersey Law of Trusts*, 3rd edn (London, Key Haven, 1993) para 9.19, at 104–05: 'Trusts which came into effect before 21 July 1989 containing an indemnity struck down by Art 30(3) do not have the invalidated provisions restored to life by the repeal of Art 30(3) (Interpretation (Jersey) Law 1954, Art 17(2)(a),(c)), so that if two trusts were made before the repeal, one complying with Art 30(3) and one infringing it, but otherwise identical, the effect of them was identical before 21 July 1989 and ought not to be different now'.

¹⁷⁹ P Matthews, 'The Efficacy of Trustee Exemption Clauses in English Law' (1989) *The Conveyancer & Property Lawyer* 44–45, cited in *West v Lazard Bros & Co (Jersey) Ltd* (n 33).

¹⁸⁰ 'Knowing' does not necessarily mean actual knowledge but includes shutting one's mind to the obvious. This is well illustrated by *In re Montagu's Settlement Trusts, Duke of Manchester v National Westminster Bank Ltd* [1987] Ch 264 at 323, per Megarry VC, cited in *Midland Bank Trustees (Jersey) Ltd v Federated Pension Servs Ltd* (n 3).

¹⁸¹ *In re Cocks v Chapman* [1896] 2 Ch 763, cited with approval in *Midland Bank Trustees (Jersey) Ltd v Federated Pension Servs* (n 3).

¹⁸² *Midland Bank Trust Co (Jersey) Ltd v Federated Pension Servs* (n 161), preferring *In re, City Equitable Fire Ins Co Ltd* [1925] Ch 407, per Pollock, MR at 521–25, per Warrington, LJ.

- 7-74 The meaning of 'gross negligence' in the context of an exemption clause, as distinct from ordinary negligence is merely one of degree.¹⁸³ The Jersey Court of Appeal has said that gross negligence involves a serious or flagrant degree of negligence, which is a serious, unusual and marked departure from the normal standards of professional trustees.¹⁸⁴

E. Enlarged Rights of Indemnity in Respect of Liabilities to Third Parties

- 7-75 At customary law, which is mirrored in the terms of Article 26 of the Trusts (Jersey) Law 1984, a trustee is not entitled to indemnity out of the trust property in respect of liabilities to third parties and costs and expenses incurred in consequence of unauthorised acts.¹⁸⁵ This default position is subject to any contrary provision in the trust instrument which expressly enlarges a trustee's rights of indemnity in respect of liabilities to third parties, not only by enlarging the powers of the trustee, but also by entitling a trustee to be indemnified in respect of unauthorised acts generally, or specified unauthorised acts, entered into in good faith.
- 7-76 In the author's view, unless the court adopts a less strict approach to the construction of exemption clauses than is usually adopted the common form of exemption clause will not assist a trustee who in good faith enters into an unauthorised contract and faces a personal claim from avoiding liability to the other contracting party. Liability at the instance of beneficiaries for breach of trust in respect of a loss to the trust fund (which is the traditional providence of an exemption clause) is one thing. Entitlement against the beneficiaries to indemnity out of the trust property in respect of personal liabilities of trustees to third parties is quite another. The question will not be whether the beneficiaries can sue him for breach of trust, but whether he can pay or recover the amount of the liability from the trust fund. The effect of the trustee's limited liability to third parties, which has the potential to operate in a similar fashion to an exemption clause in respect of liability to third parties, is discussed elsewhere.¹⁸⁶

IX. Power of Court to Relieve a Trustee from Personal Liability

- 7-77 The Royal Court has a statutory jurisdiction under Article 45 of the Trusts (Jersey) Law 1984,¹⁸⁷ which provides:

45 Power to relieve trustee from personal liability

- (1) The court may relieve a trustee either wholly or partly from personal liability for a breach of trust where it appears to the court that –

¹⁸³ *Midland Bank Trustees (Jersey) Ltd v Federated Pension Services Ltd* (n 161); *Freeman v Ansbacher Trustees (Jersey) Ltd* [2009] JRC 003.

¹⁸⁴ *ibid.*

¹⁸⁵ As to the scope of the trustee's indemnity, see Ch 11.

¹⁸⁶ See Ch 11.

¹⁸⁷ The English equivalent provision is the Trustee Act 1925, s 61.

- (a) the trustee is or may be personally liable for the breach of trust;
- (a) the trustee has acted honestly and reasonably;
- (b) the trustee ought fairly to be excused –
 - (i) for the breach of trust, or
 - (ii) for omitting to obtain the directions of the court in the matter in which such breach arose.

(2) Paragraph (1) shall apply whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Law.

Article 45 is not confined only to express trustees but includes trustees de son tort.¹⁸⁸ The formulation in Article 45(1)(a) means that relief may be granted for actual or potential past liability incurred by the trustee but the Court cannot forgive a future liability. If there has been no breach of trust, Article 45 cannot be invoked by the trustee. Article 45 is a provision that is internal to the relationship between the trustee and beneficiaries and does not operate to excuse a trustee from liability to a third party to the trust contract.¹⁸⁹ Article 45 is not limited only to trusts that have beneficiaries capable of enforcing the duties of the trustee and so also applies to charitable and private purpose trusts.

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A. The Power is Discretionary

Article 45 confers a discretion upon the Court and it is not possible to lay down strict rules as to the way in which the Court will exercise it, the merits of each case being governed by its own circumstances. Indeed there are few reported cases in which the scope of Article 45 has been explored in any depth. The English case law arising from the mirror discretion conferred by section 61 of the Trustee Act 1925 is likely to be instructive as a guide. Being an exercise in discretion, the Court of Appeal is likely to be reluctant to interfere with the exercise of its discretion by the Royal Court.¹⁹⁰

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i. Honestly and Reasonably

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The burden of proving that the trustee acted reasonably, as well as honestly, lies with the trustee seeking relief.¹⁹¹ Whether a trustee seeking to rely on Article 45 has acted reasonably and honestly is a question of fact in each case.¹⁹² There is high English authority that the equivalent jurisdiction in English law was intended to protect honest trustees and ought not to be narrowly construed.¹⁹³ It is unlikely that the Jersey court would seek to apply an artificially high restrictive or high threshold to the question of the trustee's reasonableness, given Jersey's importance as an international financial centre for trust company business. The threshold for relief is conjunctive. A trustee must have acted honestly and reasonably.

¹⁸⁸ *In The Matter of the Representation of BB, A and C* (n 13) at 43; and *In the Matter of the Z Trusts* [2016] JRC048 at [50].

¹⁸⁹ *Segbedzi v Segbedzi* [2002] WTLR 83, CA.

¹⁹⁰ *Marsden v Regan* [1954] 1 WLR 423, CA.

¹⁹¹ *Re Turner* [1897] 1 Ch 536; *In Re Stuart* [1897] 2 Ch 583.

¹⁹² *Marsden v Regan* (n 147); *In Re Stuart* (n 148).

¹⁹³ *Re Grindley* [1898] 2 Ch 593, CA; *Re Allsop* [1914] Ch 1 at 11, CA.

Honest folly is not to be excused.¹⁹⁴ When considering whether a trustee has acted honestly, the particular transaction is not to be viewed in isolation from others and the knowledge of the trustee's officers is cumulative.¹⁹⁵

a. Conduct Held Unreasonable

- 7-81** Every case turns on its own facts considered as a whole; without being exhaustive in the slightest, the following are examples of conduct which has been held not to have been reasonable. A trustee that fails to obtain appropriate advice where this is called for does not act reasonably.¹⁹⁶ However, the trustee's reliance on legal advice is not, without more, a basis to seek relief.¹⁹⁷ Where the trustee has committed a breach of trust because it reasonably and honestly relied on legal advice, the trustee is expected to attempt to recover the loss caused from the legal advisor for their negligence. For the trustee not to do so and expect absolution from the Court is unreasonable.¹⁹⁸
1. Allowing a co-trustee to receive trust money without inquiring as to its application.¹⁹⁹
 2. Allowing a co-trustee to act without check or inquiry.²⁰⁰
 3. Never really considering the question whether the security taken for a loan was one which in its nature it was prudent and right for a trustee to take; or making an investment without the consent made requisite by the settlement.²⁰¹
 4. Failing to keep in touch with the affairs of a company in which the trust held all but a few of the shares.²⁰²
 5. Failing to take skilled professional advice on the construction of an obscure trust instrument where the amount of the estate justified it.²⁰³
 6. Lending money on a mere personal promise to pay, though authorised by the investment power.²⁰⁴
- 7-82** A strict causation test should not be applied, although conduct which is completely irrelevant to the loss suffered will usually not be taken into account.²⁰⁵ A departure from

¹⁹⁴ *Re Turner* (n 148); *In Re Stuart* (n 148); *Mitchell v Halliwell* [2005] EWHC 937 (Ch) at 49; *Re Clapham* [2005] EWHC 3387 (Ch) at [98].

¹⁹⁵ *Nolan v Minerva Trust Co Ltd* [2014] (2) JLR 117.

¹⁹⁶ *Berglitter v Cohen* [2006] EWHC 123 (Ch) at [39]–[42].

¹⁹⁷ *Marsden v Regan* (n 147).

¹⁹⁸ *ibid*; *Santander UK plc v RA Legal Solicitors* [2014] EWCA Civ 183; *National Trustees Company of Australasia Ltd v General Finance Company of Australasia Ltd* [1905] AC 373 PC. This principle may have wider application to co-trustees; see *Berglitter v Cohen* (n 153) at [42].

¹⁹⁹ *Wynne v Tempest* (1897) 13 TLR 360.

²⁰⁰ *Re Turner* (n 148).

²⁰¹ *Chapman v Browne* [1902] 1 Ch 785, CA, esp at 804–06; *Khoo Tek Keong v Ch'ng Joo Tuan Neoh* [1934] AC 539, PC.

²⁰² *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515. However, the vast majority of professionally drafted Jersey trusts that post-date this decision have anti-*Bartlett* provisions that protect the trustee from interfering in the affairs of a company held by the trustee. Where the trustee is on notice of facts that require them to intervene to protect the trust asset then they may still be held liable for unreasonably failing to do so.

²⁰³ *Re Allsop* (n 150) at 12–13.

²⁰⁴ *Khoo Tek Keong v Ch'ng Joo Tuan Neoh* (n 158); see also *Lloyds TSB Bank plc v Markandan & Uddin* [2012] EWCA Civ 65.

²⁰⁵ *Santander UK plc v RA Legal Solicitors* (n 155).

best or reasonable practice which increases the risk of loss from fraud is still a relevant consideration for the Court when considering reasonableness even where the fraudster would have achieved his goal even if the trustee had acted reasonably. Where one trustee is wholly relieved from liability but the other is not, that other trustee will bear the whole loss and is not usually entitled to a contribution or indemnity.²⁰⁶ There is English authority pertaining to the liability of officers and auditors of companies, which may, by analogy, be applicable to trustees, to the effect that it is not a bar to relief that the breach involves a want of reasonable care and skill. A trustee who has committed a negligent breach of trust may still, in all the circumstances, have acted reasonably.²⁰⁷

b. Conduct Held Reasonable

The following is a non-exhaustive list of examples of conduct where the trustee was held to have been reasonable: 7-83

1. Where trustees make a distribution or otherwise act on the footing of an understanding of the law subsequently held on appeal to be erroneous.²⁰⁸
2. Reasonably thinking that it had been properly appointed as trustee and having failed to have acted as trustee after its purported resignation.²⁰⁹
3. Where trustees, acting on erroneous legal advice, make an unauthorised distribution.²¹⁰
4. Erroneously assuming that the trustee had a power of sale but the sale would have been a proper one if they had in fact possessed a power of sale.²¹¹
5. Where payment had been made to the wrong person on a reasonable misinterpretation of the trust instrument.²¹²
6. Where a trustee ceases to act as trustee having purported to transfer trusteeship to new trustees on the basis of an appointment that appeared on its face to be formally valid but which was found not to be.²¹³
7. Where a trustee ceases to act as trustee having purported to transfer trusteeship pursuant to the exercise of a power that is set aside on the basis of the statutory jurisdiction under Article 47H of the Trusts (Jersey) Law 1984.²¹⁴
8. Wilfully compromising, abandoning or otherwise settling any debt or claim owed to the trust where the trustee had reasonable grounds to believe pursuing proceedings would have been ineffectual.²¹⁵

²⁰⁶ *Fales v Canada Permanent Trust Co* (1977) 70 DLR (3d) 257, Can SC.

²⁰⁷ *Re D'Jan of London Ltd* [1994] 1 BCLC 561 at 564 and *Barings plc (in liquidation) v Coopers & Lybrand (a firm)* (No 7) [2003] EWHC 1319 (Ch) at [1125]–[1148], considering Companies Act 1985, s 727 (now Companies Act 2006, s 1157). The equivalent provision in Jersey law is the Companies (Jersey) Law 1991, Art 212).

²⁰⁸ *Re Turner* (n 148); *Re Kay* [1897] 2 Ch 518; *Re Wightwick's Will Trusts* [1950] Ch 260.

²⁰⁹ *In The Matter of the Representation of BB, A and C* (n 13); *In the Matter of the Z Trusts* (n 145) at [50].

²¹⁰ *National Trustees Company of Australasia Ltd v General Finance Company of Australasia Ltd* (n 155); *Re Evans* [1999] 2 All ER 777.

²¹¹ *Perrins v Bellamy* [1898] 2 Ch 521, affirmed in [1899] 1 Ch 797; *Re Allsop* (n 150).

²¹² *Re Allsop* (n 150) at 11.

²¹³ *In The Matter of the Representation of BB, A and C* (n 13); *In the Matter of the Z Trusts* (n 145).

²¹⁴ *In the Matter of the Z Trusts* (n 145) (although the Court did not relieve the incoming trustees from personal liability for breaches of trust for which they would have been liable had they been validly appointed as trustees, thereby preserving any claims the beneficiaries may have against the purported trustees for breach of trust assuming they had been validly appointed).

²¹⁵ *Re Grindley* (n 150).

- 7-84** A careful and conscientious and thorough trustee who conducts a transaction by the book in all respects but fails to discover a fraud is likely to be relieved by the Court.²¹⁶ The question is whether the trustee acted reasonably, not whether best practice was adhered to in all respects.²¹⁷

ii. The Court's Discretion as to whether the Trustee Ought Fairly to be Excused

- 7-85** Even where the trustee's conduct has been honest and reasonable, the Court still has to consider whether the trustee should fairly be excused, both for the breach of trust and for the trustee's failure to obtain the direction of the Court in the matter in which he committed the breach of trust²¹⁸—that is to say in fairness both to the trustee and to others who may suffer detriment (such as the beneficiaries) if the relief is granted.²¹⁹
- 7-86** In many of the English cases, one of the recurring factors to which the Court has regard is whether the trustee seeking relief is lay or a professional, remunerated trustee. These cases arise from a context in which, at least traditionally, trusteeship was a gratuitous office. A lay, unremunerated trustee may be excused where they take decisions within the limits of their experience and knowledge, listen to reason, and do not act irrationally or obdurately.²²⁰ The norm (although not universal) is that trustees of Jersey trusts are regulated professional trustees. While the duties of a lay and a professional trustee are the same under Article 21, a professional trustee's duty of reasonable skill and care is to be judged as reasonable having regard to any knowledge or experience that it is objectively reasonable to expect a professional trustee to have.²²¹ Further, where a trustee deliberately places itself in a position where its duties as trustee do or are likely to conflict with its interest in a personal capacity (for example by maintaining a business relationship with the settlor, a particular risk for institutional trustees that are banks), the Court will be very reluctant to relieve the trustee from liability.²²²
- 7-87** Many of the cases concern the liability of the trustee for losses caused to the trust arising from a breach of trust. There is nothing in Article 45 to prevent the application of the article where the trustee has breached his duty by making a profit for himself or a third party from his office as trustee. It is difficult to visualise circumstances in which a court would conclude that a trustee who has made a profit from their office would have acted honestly and reasonably in not returning that profit to the fund. Clearly where a proprietary claim to such profit is still in prospect there is no reason to see why the Court would be moved to protect the trustee.

²¹⁶ *Lloyds TSB Bank plc v Markandan & Uddin* (n 161).

²¹⁷ *Nationwide Building Society v Davisons Solicitors* [2013] EWCA Civ 1626 at [48], a case involving a solicitor trustee.

²¹⁸ *National Trustees Company of Australasia Ltd v General Finance Company of Australasia Ltd* (n 155).

²¹⁹ *Marsden v Regan* (n 147); *Santander UK plc v RA Legal Solicitors* (n 155).

²²⁰ *Fales v Canada Permanent Trust Co* (n 163).

²²¹ *Midland Bank Trust Co (Jersey) Ltd v Federated Pension Servs* [1994 JLR 276], affirming *Re Waterman's Will Trusts* [1952] 2 All ER 1054; *Cherney v Neuman* [2011] EWHC 2156 (Ch) at [321]; *Santander UK plc v RA Legal Solicitors* (n 155) at [30]; *National Trustees Company of Australasia Ltd v General Finance Company of Australasia Ltd* (n 155).

²²² *Re Pauling's Settlement Trusts* [1964] Ch 303 at 339.

iii. Practice

Relief under Article 45 may be granted in breach of trust proceedings against the trustee commenced by way of Order of Justice but may also be granted in proceedings commenced by Representation under the Court's supervisory jurisdiction. A trustee that fails to plead its reliance on Article 45 (and the factual basis for such reliance) in its Answer is likely to be in difficulties in obtaining relief under it.²²³ Relief under Article 45 may also be claimed in proceedings that would be commenced by Representation by a trustee de son tort seeking to regularise a defective appointment.²²⁴

²²³ RCR 2004, r 6/8 (1): 'every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for that party's claim or defence'.

²²⁴ *In The Matter of the Representation of BB, A and C* (n 13).

Conflicts of Interest and Unauthorised Profits

I. Introduction

The beneficiaries of a Jersey trust are entitled to the undivided loyalty of their trustee.¹ A duty of fidelity or utmost good faith² is the defining characteristic of a fiduciary, of which a trustee is the archetypical (although not the only) example.³ A resulting trustee and a category one constructive trustee⁴ may also owe fiduciary duties to the beneficiaries but normally only where the trustee becomes aware of the circumstances giving rise to the trust for whose benefit the property is subject.⁵ A trustee's duty of loyalty (or other fiduciary in an analogous position, such as a company director, agent⁶ or public servant)⁷ gives rise to certain specific obligations.⁸ The first is that a trustee is not, without authorisation,⁹ permitted to retain a benefit or profit from the trust property or by virtue of trusteeship.¹⁰ The common effect of this rule, which does not depend on there being any fraud or absence of good faith on the trustee's part,¹¹ is that a trustee is not allowed to derive any personal advantage or confer any advantage on a third party to the trust from its office. This is the no-profit rule. But the trustee's obligations go further than that: the trustee is not allowed to place itself in a position where its personal interest is allowed to conflict with its duties as a fiduciary, or allow the performance of its obligations in one capacity to be influenced by

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¹ *Dick v Pantrust International SA & Ors* [2015] JRC208; *Crociani v Crociani* [2015 (2) JLR N 5]; *Bristol & W Bldg Socy v Mothew* [1996] 4 All ER 698 at 710–15, per Millett LJ, affirmed in *In re E, L, O & R Trusts* [2008 JLR 360] at [26(iii)].

² Trusts (Jersey) Law 1984, Art 21(1)(b).

³ *Bristol & W Bldg Socy v Mothew* (n 1) at 710–15, per Millett LJ, affirmed in *In re E, L, O & R Trusts* (n 1) at [26].

⁴ As to the categorisation of constructive trusteeship, see Ch 6.

⁵ *Lonrho plc v Fayed (No 2)* [1992] 1 WLR 1 at 11–12; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 705–06, cited with approval in *In re Esteem Settlement* [2003 JLR 188].

⁶ *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45.

⁷ *AG for Hong Kong v Reid* [1994] 1 AC 324, approved in *In re Rex Trust* [2013 (2) JLR 444].

⁸ *Bristol & W Bldg Socy v Mothew* (n 1) at 18, per Millett LJ.

⁹ Trusts (Jersey) Law 1984, Art 21(4).

¹⁰ This rule finds expression in Art 21(4)(a)(i)–(iii) of the Trusts (Jersey) Law 1984, which prohibits the trustee from entering into an arrangement that causes or permits a third party to profit directly or indirectly from such trusteeship.

¹¹ *Bray v Ford* [1896] AC 44 at 51, per Lord Herschell, affirmed in *Del Amo v Viberts, Collas Crill, S. Moralee & Ors* [2012 (1) JLR 180] at [16].

his obligations in another capacity.¹² This is the no-conflict rule. The principle which is in play in this rule is that the fiduciary must not be inhibited by the existence of his personal interests or other employment from serving the sole interests of his beneficiaries as faithfully and effectively as if the beneficiaries were the only ones to whom the trustee is responsible.¹³ As can be seen from Article 21(4) of the Trusts (Jersey) Law 1984, the trustee's fiduciary duties are proscriptive rather than prescriptive in nature, informing the trustee what it must not do, rather than what it should. Conduct which is in breach of these rules need not be dishonest but it must be intentional for the consequences of the breach to bite.¹⁴ Thus a trustee who acts loyally but incompetently is not in breach of its fiduciary obligations to the beneficiaries, although may be in breach of its parallel duty to exercise diligence, prudence and skill and care.¹⁵ The objective in the operation of these two rules, which may in practice and conceptually overlap,¹⁶ is to preclude the trustee from succumbing to the temptation to abuse its position to its own advantage and to preserve the trustee's obligations of fidelity.¹⁷

- 8-2** The vast majority of Jersey trustees are corporate entities rather than individuals. The assets the trustee will be holding will often be shares in corporate vehicles, whether trading or not, forming part of an underlying structure. This proliferation of corporations requires a careful analysis as to whether the conflict that is alleged to have arisen (and its consequences) concerns the duties owed by the legal or natural persons who run the corporate trustee or the duties owed by the directors of corporate entities within a trust structure (who will have no fiduciary duties to the beneficiaries) or by the trustee itself to the beneficiaries. In each case, what is required is a meticulous examination of the factual matrix to identify both the fiduciary and non-fiduciary duties that are actually engaged, where in the trust structure they arise and to whom such duties are owed.
- 8-3** The subject of conflicts of interest and conflicts of duties in regulated trust company businesses has been the subject of intense interest in recent years (from a regulatory standpoint) from the Jersey Financial Services Commission.¹⁸ The Commission's concern arises from the potential for conflicts of interest to strike at the heart of the fiduciary nature of trusteeship but also because conflicts have a tendency to undermine the confidence of those who use Jersey trust structures in the quality of the services provided, thereby diminishing the attractiveness of Jersey as an international financial centre.¹⁹ The Commission has sought to test whether regulated trust company businesses' internal policies and procedures are

¹² This rule finds partial expression in Art 21(4) (so far as the trustee's own interests are concerned) and a prohibition on a trustee in conflict with its duties in another capacity is recognised in *In The Matter of the E, L, O and R Trusts* (n 1).

¹³ *Bristol & W Bldg Socy v Mothew* (n 1).

¹⁴ *ibid*, at [19].

¹⁵ *ibid*, at [16], [18]. See the trustee's duties at the Trusts (Jersey) Law 1984, Art 21(1)(a).

¹⁶ Although there will be cases where there is a conflict (likely a conflict of duties) but from which no issue of profit arises, eg *In re E, L, O & R Trusts* (n 1).

¹⁷ Trusts (Jersey) Law 1984, Art 21(1)(b); *Chan v Zacharia* (1984) 154 CLR 178 at 198, cited with approval in *Don King Productions Inc v Warren* [2000] Ch 2914 at [40].

¹⁸ Jersey Financial Services Commission, Conflicts of Interest, Dear CEO Letter (22 October 2010): 'our experience is that trust companies often afford too narrow an interpretation of what represents a conflict, thereby exposing the business to a variety of unnecessary risks which, if not appropriately managed, could have serious consequences'.

¹⁹ Financial Services Commission (Jersey) Law 1998, Art 7.

sufficiently robust to identify and be able to deal with a range of conflicts as they arise, citing the following examples:

1. The acceptance of a gift (above a *de minimis* value) from a client structure or relationship, or from a client, by an employee (or a relative of the employee) of the trust company.
2. Retrocession fee arrangements (including shared fee/commission arrangements) entered into by the trust company.²⁰
3. Acting as a director or trustee of two or more structures in circumstances where a dispute arises between clients with interests in those structures.²¹
4. An employee of the trust company (or, relative of the employee) securing a personal loan, or financing of any description, from a client structure, or, directly from a client.
5. A trust company, or an employee of the trust company (or, relative of the employee) arranging to make a loan, or to arrange financing of any description, to a client structure, client entity or to a client directly.
6. Employees of the trust company (or, relative of the employee) co-investing with a client structure, or, with a client.
7. Employees of the trust company providing a service to a client structure or to a client in a private capacity that is not associated with or connected to the trust company.

As will be apparent from these specific examples, what the Commission and general law is concerned to guard against is not only that that an actual or potential conflict should not arise between the personal interests of the trustee (or individuals within it) and the interests of the beneficiaries or corporations to whom fiduciary duties are owed but also that an actual or potential conflict of duties in different capacities (a conflict of duties) does not also arise. A robust approach to on-site inspections and regulatory guidance notwithstanding, the Commission's role is as a macro-prudential financial services regulator and it will not embroil itself in the management and legal consequences of specific instances of conflict that arise day-to-day in regulated trust company businesses, the resolution of which is a matter for the general law.²²

It is striking that while the prohibition on a conflict of interest or a conflict of duties features in a number of reported decisions of the Royal Court, in the main, those decisions concern the exercise of discretions or powers alleged to be vitiated by a conflict or the continuation in office of a conflicted trustee. There are relatively few reported decisions in which the Court has explored in detail the principles governing a trustee's conflict of interest on particular transactions in which the trustee is engaged. There is also a surprising dearth of Jersey authority on the treatment of unauthorised profits by trustees or those associated with them. Given the examples cited by the Commission in its guidance, it is not thought that the dearth of reported decisions is attributable to conflicts of interest not being a source of difficulty for professional trustees.

Such Jersey authorities as there are on the issue of conflicts of interest take the principles espoused in English and those of other Commonwealth jurisdictions as their starting point.

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²⁰ We would also include within this type of arrangement: interest rate spreads, payments in the nature of secret commissions, gratuities, incentive payments, benefit kick-backs and bribes however described.

²¹ *In re E, L, O & R Trusts* (n 1).

²² Although the Commission is capable of bringing significant pressure to bear on regulated business.

However, the Royal Court will be mindful of the need to adapt them to meet local circumstances such as:

1. That trusteeship in Jersey is and always has been a professionalised and regulated (since 1998) activity which forms a significant portion of the island's hugely profitable financial services industry²³ and, as a corollary, trusteeship in Jersey is expected to be a remunerated and not a gratuitous office.²⁴
2. That one of the consequences of the consolidation in the market for professional trustee services in recent years has been the emergence of large, institutional trustees that often serve as trustee for numerous (sometimes related) trust and corporate structures as well as providing a range of other financial products and services to trustees.²⁵
3. That the employees or directors of a corporate trustee will often sit as directors on the boards of companies whose shares are held by the trust, giving rise to a potential for a conflict of duties between their obligations to the company of which they are directors, and their duties as employees or directors of the corporate trustee.²⁶

II. Conflicts of Interest

- 8-7** While unlike the related principle that the trustee should not, without authorisation, profit from its office, which is stated expressly to be contrary to the trustee's duties in the terms of the Trusts (Jersey) Law 1984,²⁷ the no-conflict rule is not but exists as part of the general law governing fiduciaries. The no-profit rule is part of a wider principle that a person in a fiduciary position, of which a trustee is the archetypal example, is not permitted to put itself in a position where his interest and his duty do or possibly may conflict.²⁸ The test as to whether the trustee's duty and interest does or may conflict is an objective test adopting the perspective of a reasonable man, who, looking at the relevant circumstances would think that there was a real sensible possibility of conflict.²⁹
- 8-8** The no-conflict rules that applies to trustees of Jersey trusts is based on the very realistic approach that, human nature being what it is, there is danger, in such circumstances, of

²³ And in relation to which the JFSC is mandated to protect the reputation and integrity of Jersey in financial and commercial matters. See Code of Practice for Trust Company Business, principle 2.2: 'A registered person must have the highest regard for the interests of its customers'.

²⁴ Trusts (Jersey) Law 1984, Art 26. Trustee Act 2000, pt V, ss 28–33 providing, on a statutory footing for the first time, that a trustee is entitled to remuneration if provided for in the trust instrument or if a trustee acts in a 'professional capacity'.

²⁵ The issue of conflicts of interest in trust administration is not confined to large institutions; striking infringements of the no-conflict principle have involved smaller, older, owner-managed trust companies without a sophisticated compliance function and often with smaller client basis often connected through business, familial or fraternal ties. See *Dick v Pantrust International SA & Ors* [2016] JRC 021.

²⁶ As to the mechanisms managing conflicts of interest between directors and their companies, see Arts 75 and 76 of the Companies (Jersey) Law 1991, for which there is no equivalent for trustees.

²⁷ Trusts (Jersey) Law 1984, Art 21(4), discussed below at para 8-17.

²⁸ *Bray v Ford* (n 11) at 51; *Wright v Morgan* [1926] AC 788 at 797.

²⁹ *Boardman v Phipps* [1967] 2 AC 46 at 124.

the trustee being swayed by its personal interest rather than by its duty to the beneficiaries.³⁰ That reality is a particular feature of trusteeship in a jurisdiction like Jersey in which trusteeship is very much a business. By having a personal interest in a transaction which conflicts with its fiduciary duty a trustee puts itself in such a position that it may be tempted to stray from the straight and narrow path.

The no-conflict principal has been described as having a prophylactic quality³¹ in that for the rule to bite it is enough that the trustee does something that has a tendency to interfere with its overriding duty of fidelity to the beneficiaries. Indeed a fiduciary may be in breach of the no-conflict rule in circumstances where the conduct engaged in has actually been to the benefit of the object of the trustee's duty.³² The rule is based upon a generalised consideration of risk, rather than one which requires a detailed assessment of whether the fiduciary has actually succumbed to temptation with all the ancillary difficulty there may be in actually determining that fact.³³ A fiduciary can be in breach of the no-conflict rule even though his or her conduct has been to the benefit of the beneficiaries. With this in mind it becomes clear that the fairness or otherwise of the transaction is generally not a relevant consideration as to whether the rule has been engaged.³⁴ Nor is it relevant whether any gain by the trustee was one that the beneficiaries could not have obtained for themselves.³⁵ The honesty or otherwise of the fiduciary is also irrelevant to the operation of the rule.³⁶ Also irrelevant is any question of morality on behalf of the trustee who may breach his fiduciary duty without any subjective consciousness of wrongdoing.³⁷

The no-conflict rule cannot be avoided by the fiduciary arranging a transaction in such a way as to ensure a third party benefits from the conflict³⁸ if there is an 'understanding or agreement in honour, or in any other shape'³⁹ with the effect that the third party is in fact acting on behalf of the fiduciary.⁴⁰

The no-conflict rule has very few exceptions. By statute, the trustee may only profit from his office, in breach of the no-conflict principle with the approval of the Court or as authorised by the Trusts (Jersey) Law 1984 or the terms of the trust instrument.⁴¹ The trustee may also be absolved from liability for what would otherwise be a breach of fiduciary duty by obtaining the fully informed consent from the beneficiaries to act. The directors of Jersey companies are also required to declare the existence, nature and extent of their interest in a transaction with the company in which they are interested to other company directors, usually with accompanying authorisation to act from the other directors.⁴²

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³⁰ *Bray v Ford* (n 11) at 51.

³¹ *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10 at [414]–[415].

³² *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 at 153; *Boardman v Phipps* (n 29) at 129.

³³ *Ex parte Lacey* (1802) 31 ER 1228 at 1229.

³⁴ *Wright v Morgan* (n 28) at 798; *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461.

³⁵ *Keech v Sandford* (1726) Sel Cas t King 61 at 62 (25 ER 223 at 223); *Regal (Hastings) Ltd v Gulliver* (n 32) at 144, 149, 155, 158 and 159; *Boardman v Phipps* (n 29) at 109.

³⁶ *Bray v Ford* (n 11) at 48.

³⁷ *ibid*, at 52.

³⁸ Trusts (Jersey) Law 1984, Art 21(4)(b)(ii).

³⁹ *Re Postlethwaite* (1888) 37 WR 200 at 202.

⁴⁰ *McPherson v Watt* (1877) 3 AppCas 254 at 263, 266 and 272.

⁴¹ Trusts (Jersey) Law 1984, Art 21(4). As for defences generally, see para 8-49.

⁴² Companies (Jersey) Law 1991, Art 75.

- 8-12** A trustee's conflict of interest is not generally cured, so as to release the trustee from liability by making full disclosure to the beneficiaries without more. Rather, the trustee's obligation is to desist from acting in a way that involves a conflict between its duty and its interest. Full and frank disclosure coupled with the beneficiaries' informed consent is one of the mechanisms by which the fiduciary can avoid liability and continue to act (if it wishes to do so). While a trustee cannot be said to have preferred its interest to its duty in circumstances where it is completely unaware of its interest, that is not to say that a trustee cannot hope to avoid the effect of the no-conflict rule by deliberately shutting its eyes or refraining from acquiring information about a conflicting interest, or where it ought to have recognised the conflict. There are countless conceivable examples in which the no-conflict rule is engaged. Several of the scenarios in which the no-conflict rule is engaged have become sufficiently common in practice to have developed into recognised limbs of the no-conflict rule: the prohibition against the trustee 'self-dealing' and the so called 'fair-dealing' rule. The distinction between these rules, which clearly overlap, is that in the former instance the trustee is transacting with itself while in the latter it is not.⁴³ Both the self-dealing and fair-dealing rules are essentially rules of equity that subject the trustee to a disability in respect of transactions falling within their scope. This characterisation means that breaches of the rules have been held⁴⁴ (*per curiam*) in England not to fall within the scope of the six-year limitation period in section 21 of the Limitation Act 1980. There is no Jersey authority as to whether a breach of the self-dealing rule falls within or without the scope of Article 57(2) of the Trusts (Jersey) Law 1984.⁴⁵

A. Self-dealing

- 8-13** The prohibition on a trustee self-dealing⁴⁶ is that if a trustee sells the trust property to himself, the sale is voidable by any beneficiary as of right, however fair the transaction.⁴⁷ That is not to say that the trustee may never purchase the trust property but that the purchase is always vulnerable to being set aside.⁴⁸ That is so even if it was for a price higher than that obtainable on the open market, or on terms which are generous to the trust.⁴⁹ Any beneficiary may have the transaction set aside within a reasonable time after he discovers the circumstances.⁵⁰ This is the classic formulation of the prohibition on a trustee self-dealing; however, the underlying principle clearly has a wider application to transactions other than

⁴³ *Tito v Waddell (No 2)* [1977] Ch 106 at 224–25, 240–44, per Megarry VC.

⁴⁴ *ibid*, at 247–51.

⁴⁵ A breach of trust is defined as a breach of any duty imposed on a trustee by this Law or by the terms of the trust and Art 21(4) could be read as encompassing the self-dealing rule so that an action founded on a breach of that article might be read as falling with Art 57(2). A breach of the self-dealing rule does not necessarily fit easily within the definition of fraud for the purposes of Art 51(1) (although often such breaches will be deliberate rather than negligent) but may encompass a claim to recover the trust property from the trustee (if the trustee is under disability from acquiring the trust property by virtue of the self-dealing rule itself).

⁴⁶ See the prohibition against self-dealing: Trusts (Jersey) Law 1984, Art 21(4)(b)(i)–(iii).

⁴⁷ *Tito v Waddell (No 2)* (n 43) at 241.

⁴⁸ *Holder v Holder* [1968] Ch 353 at 398.

⁴⁹ *Re Thompson's Settlement* [1986] 1 Ch 99 at 118.

⁵⁰ *Beningfield v Baxter* (1886) 12 AppCas 167; *Randall v Errington* (1805) 10 Ves 423 (32 ER 909).

the purchase of trust property, for example a loan transaction⁵¹ or the vesting of trust property in a company of which the trustee, or an individual behind the trustee, is a director.⁵² The self-dealing principle is engaged not only in a case where the trustee purports to enter a transaction on its own account, in its own name, or through an agent or nominee,⁵³ but also in a case where the trustee transacts with what appears to be a third party on a contract or understanding that the third party will resell the trust property or otherwise indirectly benefit the trustee. It will be an infringement of the self-dealing rule for the trustee to sell trust property to a company which he has created for the purchase, if the company is the alter ego for the trustee.⁵⁴ A transaction between the trustee and a company in which the trustee is a director is subject to the self-dealing rule as the trustee is acting on both sides of the transaction.⁵⁵ Such a transaction is also likely to amount to a conflict of duties. The self-dealing rule will still apply whether the purchase by the trustee was from himself alone, or from a co-trustee.⁵⁶ However, if, instead of selling to himself, the trustee sells to a third party, the trustee may repurchase the property from the third party without infringing the rule against self-dealing provided that there was no arrangement or understanding between the trustee and third party and that original sale was bona fides.⁵⁷

Subject to the statutory derogation now found in Article 31(3) of the Trusts (Jersey) Law 1984, a transaction in which a sole trustee purchases the trust property from himself may be rendered void by the rule in Jersey law which requires there to be at least two parties to a contract.⁵⁸ Article 31(3) permits a trustee to contract with itself when contracting in their capacity as trustee of different trusts. Where a trustee takes advantage of this provision, it is still subject to its duties in Article 21. There is, as yet, no authority in Jersey as to how Article 31(3) and Article 21 can be reconciled; such a transaction is permeated by a conflict of interest. At the time of going to press the States of Jersey has consulted as to whether Article 31(3) should be extended to allow a trustee to purchase trust property on its own account as well. The qualification to Article 31 suggests that the provision is directed at avoiding the effect of the technical rule that a contract without at least two parties to it is void. However, the patent conflict of interest in such a transaction will usually be sufficient to allow the beneficiary to avoid the transaction before recourse need be made to the technical two-party rule.⁵⁹

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B. Fair-dealing

The fair-dealing rule is that instead of purchasing the trust property, the trustee purchases the beneficial interest of any of his beneficiaries. The transaction is not voidable *ex debito*

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⁵¹ *Dick Stock v Pantrust International SA & Ors* [2016] JRC021.

⁵² *Re Thompson's Settlement* (n 49).

⁵³ Which may also come to be challenged on the basis that the transaction is not a genuine transaction conducted at arm's length.

⁵⁴ *Newgate Stud Co v Penfold* [2004] EWHC 2993 (Ch) at [234]–[244].

⁵⁵ *Re Thompson's Settlement* (n 49) at 115.

⁵⁶ *Wright v Morgan* (n 28).

⁵⁷ *Christoforides v Terry* [1924] AC 566 at 570.

⁵⁸ *Ingram v Inland Revenue Commissioners* [1997] 4 All ER 395 at 425.

⁵⁹ *ibid*, at 426 (upheld on appeal: [2000] 1 AC 293 at 305, 310); *Re Thompson's Settlement* (n 49) at 115; *Wright v Morgan* (n 28) at 797.

justitiae, but may be set aside by the beneficiary unless the trustee can show that it has taken no advantage of its position and has made full disclosure to the beneficiary, and that the transaction is fair and honest.⁶⁰ In reality, a scenario in which the fair-dealing rule will be engaged is likely to be rare in Jersey as it is difficult to imagine circumstances in which a professional trustee would have cause to purchase the beneficial interest of its beneficiary, which, in the vast majority of cases is an interest of no value whatsoever if the beneficiary is merely an object of the trustee's discretionary power.⁶¹

- 8-16** The fair-dealing rule and the self-dealing rule apply to different sorts of situations and are therefore treated as distinct rules.⁶² However, the distinction between them is not one of principle.⁶³ Both are concerned with the conflict between the trustee's duty and its interest. Under both rules the transaction may be saved but only if the trustee proves that the beneficiaries consented after the trustee having made full and frank disclosure of all material facts. The reference to fairness in respect of the self-dealing rule is not substantive fairness in the transaction but the objective evidence as to what was disclosed so as to assist the court scrutinising the transaction in determining whether the beneficiaries' consent was fully informed.⁶⁴ A fair-dealing transaction may be upheld notwithstanding an unequal exchange of value provided the beneficiaries consented with full information to the transaction in that form.⁶⁵ Like a self-dealing situation, a fair-dealing transaction is said to be one of great delicacy, and one which the Court can be expected to scrutinise very closely to determine whether the beneficiary's consent truly was fully informed.

C. Profits by the Trustee

- 8-17** The second of the two major themes of fiduciary loyalty is the no-profit rule. It has long been acknowledged that a trustee who obtains for itself an opportunity or advantage that arises by virtue of its trusteeship or knowledge derived from that trusteeship⁶⁶ is deemed to be a constructive trustee of the opportunity obtained.⁶⁷ The rule is the foundation of a broad general principle that a trustee is not permitted to make or retain any unauthorised profit or personal advantage for himself or for a third party by way of his position as trustee. This prohibition is encapsulated in Article 21(4)(b) of the Trusts (Jersey) Law 1984 which provides that a trustee must not directly or indirectly profit from the trustee's trusteeship; cause or permit any other person to profit directly or indirectly from such trusteeship; or on the trustee's own account enter into any transaction with the trustees or relating to the trust

⁶⁰ *Tito v Waddell* (No 2) (n 43) at 241.

⁶¹ *In the Matter of the Realisable Property of R Tantular* [2014] (2) JLR 25.

⁶² *Tito v Waddell* (No 2) (n 43) at 241.

⁶³ M Conaglen, 'A Re-Appraisal of the Fiduciary Self-Dealing and Fair-Dealing Rules' (2006) 65(2) *Cambridge Law Journal* 366.

⁶⁴ *Ex parte James* (1803) 8 Ves 337 at 353 (32 ER 385 at 391); *Downes v Grazebrook* (1817) 3 Mer 200 at 208–09 (36 ER 77 at 80).

⁶⁵ *Lord Selsey v Rhoades* (1824) 2 Sim & St 41 at 49–50 (57 ER 260 at 263–64).

⁶⁶ *Phipps v Boardman* [1967] 2 AC 46, HL.

⁶⁷ Adapted from the rule in *Keech v Sandford* (n 35). Described by Lord Cranworth LC in *Aberdeen Railway Co v Blaikie Brothers* (n 34) as 'a rule of universal application, that no one, having such duties to discharge, shall

property which may result in such profit. The no-profit rule may be regarded as a sub-rule of the no-conflict rule as a trustee who is given the opportunity or who actually obtains a profit in a transaction by virtue of their office inevitably places themselves in a position where they prefer their own interest to their duty.

The essence of the no profit rule is that a fiduciary acts in breach of fiduciary duty where he or she makes a profit by reason or in virtue of the fiduciary office or otherwise within the scope of a fiduciary office.⁶⁸ A trustee that does obtain an authorised profit is liable to account for any benefit or gain obtained or received. The crucial point is not that the profit that is made is the fruit of the trust property or the trusteeship (although in many cases the trustee will also have taken advantage of the trust property or its position as trustee), but that it is made in circumstances where a conflict exists and the profit falls within the scope and ambit of the conflicting duty.

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The rule will bite on the mere fact of the unauthorised profit having been made. As soon as the advantage in question is shown to have been acquired by virtue of the trusteeship, the trustee will hold it for the benefit of the beneficiaries.⁶⁹ In the absence of express authorisation from the trust instrument or by the Court, the effect of the rule is that a trustee is simply disabled from retaining the benefit of the opportunity arising on its own account.⁷⁰ This disability is absolute and irrebuttable. It is irrelevant to the strict operation of this principle that the trustee acted in good or bad faith or whether the actions of the trustee were clandestine, whether or not the making of the profit involved skill or risk taking on the part of the trustee; and whether or not the profit would have arisen for the benefit of the beneficiaries in any event.⁷¹ This is because if a fiduciary could justify his or her conduct on such a basis the temptation would be for the trustee to hold back from pressing the best interests of the beneficiaries as strongly as it might otherwise do (which could itself amount to a breach of duty) knowing that, if it did not meet its obligations, an opportunity to profit for itself might then present itself. It is also irrelevant whether the fiduciary's conduct has caused any loss to the trust fund⁷² as the beneficiaries may elect to require the trustee to

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be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interest of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into, affirmed in *Boultting and Another v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606, per Lord Denning MR; *Bray v Ford* (n 11) at 51, affirmed in *Anthony Paul Del Amo v Viberts & Ors* [2012] JRC 038; *Dick Stock v Pantrust International SA & Ors* (n 51) at 26; *In re E, L, O & R Trusts* (n 1); *In re VR Family Trust* [2009] JLR 202; *In re Esteem Settlement* [2002] JLR 53].

⁶⁸ *Regal (Hastings) Ltd v Gulliver* (n 32) at 144, 149, 153, 154 and 158; *Brown v Inland Revenue Commissioners* [1965] AC 244 at 256 and 265; *Boardman v Phipps* (n 29) at 103, 105 and 115.

⁶⁹ *Phipps v Boardman* (n 66); AG for Hong Kong v Reid (n 7) (approved of and applied in *Lloyds Trust Company (Channel Islands) Limited v Fragoso and Ors* [2013] (2) JLR 444); *FHR European Ventures LLP v Cedar Capital Partners LLC* (n 6)—the English Court of Appeal's decision in *FHR European Ventures LLP v Mankarious* [2013] EWCA Civ 17 being considered and approved of in *Fragoso*.

⁷⁰ Hence the indefinite period of prescription that applies to actions to recover trust property from the trustee; see the Trusts (Jersey) Law 1984, Art 57(1). It is not that the retention of trust property by the trustee is so heinous as to merit indefinite liability; it is simply that the trustee is legally prohibited from converting the trust property for its own use.

⁷¹ *Regal (Hastings) Ltd v Gulliver* (n 32) at 144 (approved in *Dick Stock v Pantrust International SA & Ors* [2016] JRC053); *Phipps v Boardman* (n 66); *Keech v Sandford* (n 35) at 62.

⁷² *Regal (Hastings) Ltd v Gulliver* (n 32) at 154.

account for its profits to the beneficiaries even though it acted in good faith and, purportedly, in their interests.⁷³

i. Renewal of Leases

- 8-20** As Jersey law does not admit of the possibility that Jersey immovable property may be held directly by a trustee, the Royal Court has not expressed a view as to whether the principles espoused in *Keech v Sandford*,⁷⁴ the leading decision on the renewal of leases, and in *Protheroe v Protheroe*,⁷⁵ the leading decision on the purchase of reversions, have any direct application as part of Jersey law. That said, the principles in *Keech v Sandford*, while on its facts directly not relevant in Jersey, are not entirely without application and may be relevant when considering whether the no-profit rule is engaged by the trustee's renewal of a lease in its own name outside Jersey. While the treatment of leases in Jersey trust law is one thing, the broad principle found in *Keech v Sandford*, that a trustee may not make an unauthorised profit from his fiduciary position has been applied in a wide variety of other scenarios.

ii. Bribes and Secret Commissions

- 8-21** It is a clear breach of fiduciary duty for a trustee to take a bribe, secret commissions, or other like payment by whatever name, of a similar nature.⁷⁶ The prohibition on receipt of bribes or secret commissions applies to fiduciaries other than trustees as well.⁷⁷ Absent fully informed consent a director is liable to account for any profit which he makes personally using his position as director of a company. An agent who takes a secret profit in the course of his agency must account for it to his principal.⁷⁸ A bribe consists in a commission or other inducement, which is given by a third party to a fiduciary as such, and which is secret from the person to whom the fiduciary owes its duties. It is immaterial for these purposes whether the bribe was effective so as to actually influence the fiduciary's conduct.⁷⁹ It is in the nature of a bribe or secret commission that it is intended to induce the fiduciary to do something it might not otherwise do.⁸⁰ A bribe or secret commission is also recoverable under the no-profit rule as it amounts to an unauthorised payment obtained by the fiduciary as a result of its fiduciary position, and so it is unnecessary to show the bribe as being effective so as to give rise to an actual conflict between duty and interest; the mere fact of the bribe is sufficient.⁸¹ It is irrelevant whether the paying party acted with a corrupt

⁷³ *ibid*, at 153.

⁷⁴ (1726) Sel Cas t King 61 at 62 (25 ER 223 at 223).

⁷⁵ [1968] 1 WLR 519 at 521, followed in *Thompson's Trustee in Bankruptcy v Heaton* [1974] 1 WLR 605 at 612–13; *Popat v Shonchhatra* [1995] 1 WLR 908 at 916–17 (upheld as to this point on appeal: [1997] 1 WLR 1367 at 1375).

⁷⁶ AG for *Hong Long v Reid* (n 7) at 330, affirmed and adopted in *In re Rex Trust* (n 7); *FHR European Ventures LLP v Cedar Capital Partners LLC* (n 6); *Reading v Attorney General* [1951] AC 507.

⁷⁷ AG for *Hong Long v Reid* (n 7) (public servants); *FHR European Ventures LLP v Cedar Capital Partners LLC* (n 6) (agents); *CMC Holdings Limited & Anor v Forster and Ors* [2016] JRC 149 (company directors).

⁷⁸ *FHR European Ventures LLP v Mankarious* [2011] EWHC 2308 (Ch).

⁷⁹ *Shipway v Broadwood* [1899] 1 QB 369 at 373.

⁸⁰ *FHR European Ventures LLP v Cedar Capital Partners LLC* (n 6) at [37].

⁸¹ *Parker v McKenna*(1874–75) LR 10 Ch App 96 at 118.

motive or intent.⁸² The trustee's honesty is also irrelevant to his liability to account to the beneficiaries.⁸³

Without authorisation, a trustee is required to disgorge any profit he gains by using his position as trustee to procure for itself remunerative employment. This is a particular risk for Jersey trustees where a trustee that itself or as part of a group also provides regulated funds or investment services which it procures in which to invest the trust assets. Another example would be where a trustee appoints itself, or one of its own directors or employees, as a remunerated director of an underlying company by using the voting rights attached to shares which form part of the trust fund. Where a trustee receives a payment from an incoming trustee who replaces him as trustee, the payment, in so far as it does not amount to reasonable security for the trustee's reasonable remuneration and costs reasonably incurred, to which the trustee is entitled,⁸⁴ is deemed to be an impermissible profit which had come to it only as a result of its fiduciary position and is therefore taken in breach of fiduciary duty and is subject to the remedies available in respect of breach of the no-profit rule.

The obligation to account for the bribe arises from the fiduciary relationship, rather than from any principle of privity of contract, and so binds sub-agents and the principal between whom no privity may exist.⁸⁵ A Jersey trustee may authorise an agent to whom it can delegate management of the trust property to retain any commission or other payment usually payable in relation to any transaction.⁸⁶ However, the trustee remains accountable to the beneficiaries for any such authorisation.

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iii. Use of Trust Property to Trustee's own Benefit

If a trustee makes use of the trust fund in a commercial venture in which it is also personally involved or uses it to speculate, the trustee will be liable for all the losses and the beneficiary will be entitled to all gains arising thereon. If a trustee buys a debt against the trust estate for less than its nominal value, the trustee is accountable for the profit it has made unless it had first obtained the beneficiary's fully informed consent.⁸⁷ Similarly, if a trustee receives a benefit as a result of the fact that he holds the trust property, he must account for that benefit to the beneficiaries. An example of the latter would be the historic practice of pooling trust treasury functions to obtain the benefit of a higher interest rate. If the benefit of that higher rate resulted in a financial return by way of an undisclosed retrocession arrangement with the bank, the trustee would be liable to account for that.

⁸² *Ross River Ltd v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch) at [205] and [218].

⁸³ *ibid*, at [218].

⁸⁴ *Trusts (Jersey) Law 1984*, Art 34(2).

⁸⁵ *Markel International Insurance Co Ltd v Surety Guarantee Consultants Ltd* [2008] EWHC 1135 (Comm) at [224]–[229]. Regarding the agents to trustees, see *Australian Securities Commission v AS Nominees Ltd* (1995) 62 FCR 504 at 521.

⁸⁶ *Trusts (Jersey) Law 1984*, Art 25(4).

⁸⁷ *Pooley v Quilter* (1858) 2 De G & J 327 at 344 (44 ER 1016 at 1023).

III. Conflicts of Duties

- 8-25** A fiduciary who acts for two principals to whom he owes conflicting duties, without the informed consent of both, acts in breach of fiduciary duty.⁸⁸ The possibility for a conflict of duties arising in a Jersey trust structure may become particularly acute where officers or employees of the corporate trustee serve as directors on boards of underlying companies forming part of the trust structure or on boards of client companies outside the trust. Regardless of what may be going on within the trust structure that could give rise to a conflict, such individuals are in an inherent position of conflict as they will owe duties to both their ultimate employer but also (and which must take primacy) to the companies on which they serve as directors.
- 8-26** A conflict of duties arises where, instead of the trustee in its personal capacity being party to the impugned transaction, the trustee acts as principal (as trustee) or in some other representative capacity. The concern is not so much the potential for temptation on the part of the conflicted trustee, but that the trustee, who is under a duty to act in the best interests of both principals, cannot hope to discharge that obligation of undivided loyalty equally. In the discharge of its duties it must inevitably further the interests of one set of beneficiaries to the prejudice of the interests of the others. Thus the doctrine prohibits a trustee from acting, not only where there is a conflict between the trustee's duty and its interest, but also where there is a conflict between the trustee's duties to multiple sets of beneficiaries.
- 8-27** The leading Jersey authority on the conflicts of duties is *In re E, L, O & R Trusts*.⁸⁹ The case concerns 12 family trusts sharing a single trustee. Four of the trusts (the H Trusts) were for the benefit of one branch of the family, the other eight were held for the benefit of the other half (the J Trusts). The trusts between them held the same asset; a majority shareholding in a UK holding company, the first four trusts holding approximately 20 per cent of the shares and the remaining eight trusts holding 69 per cent. The trustee did not divide the family shareholding in the company as that would have reduced the overall value of the trusts. One of the beneficiaries of the latter eight trusts was the company's chairman and CEO. In 2006, a dispute arose between the H and J Trust beneficiaries concerning the affairs of the company and proceedings for unfair prejudice before the English High Court had been threatened. The beneficiaries of the H and J Trusts had attempted to reach a settlement. If they succeeded, negotiations would be necessary on behalf of all the family trusts to enable a division or buy-out of the shares in the company, in which the trustee would owe conflicting duties to the beneficiaries of the H and J family trusts as it held all the shares in the underlying company. When requested to do so on the grounds of its conflicted position, the trustee refused to resign but acknowledged that there was potential for a conflict and, in view of the competing interests of the beneficiaries of the family trusts, proposed to seek the directions of the Court as to whether it should resign. In early 2007, the trustee unexpectedly withdrew its Representation for directions and maintained its refusal to resign. Later in 2007, the beneficiaries brought fresh proceedings seeking the trustee's removal citing its

⁸⁸ *In re E, L, O & R Trusts* (n 1), citing, with approval *Bristol & W Bldg Socy v Mothew* (n 1) at 710–15, per Millett LJ.

⁸⁹ [2008 JLR 360].

conflicted position. Shortly before that Representation was due to be heard in mid-2008, the trustee agreed to resign on terms that its remuneration and legal costs incurred in connection with the two sets of proceedings should be paid out of the trust funds.

It was held that the trustee had been in a position of obvious conflict of duties and should have retired when the dispute between the H and J Trusts arose as the beneficiaries had conflicting interests: there was a real prospect of litigation, in which the H and J trusts were likely to be opposing parties.⁹⁰ The trustee owed a duty of loyalty to the beneficiaries of both the H and the J family trusts and when exercising its powers and duties in respect of each of the family trusts, the trustee had to have regard solely to the interests of the beneficiaries of those trusts. A fiduciary who acted for two principals⁹¹ with conflicting interests without their informed consent to do so is in breach of its obligation of undivided loyalty to each. *In re E, L, O & R Trusts* the conflict of duties has escalated to an actual conflict. However, the Court held that even if a fiduciary properly acted for two principals with potentially conflicting interests it should not be inhibited by the existence of its other duties from serving the interests of one principal as faithfully and effectively as if it were its sole principal. In a case such as this where an actual conflict of duties had materialised prior to the trustee taking the necessary steps to avoid it, the trustee might have no alternative but to cease to act for one or preferably both trusts.

In the present case, the conflict of interest had been so obvious that the trustee's refusal to retire without the directions of the Court had been unreasonable. When requested to retire, the trustee should have considered the principles applied by the Court on an application to remove a trustee—namely, that it would be guided by the welfare of the beneficiaries and the competent administration of the trust in their favour: a trustee would be removed for misconduct which endangered the trust property or showed a want of honesty, proper capacity to execute his duties or reasonable fidelity; and a trustee would not be removed for mere friction or hostility with the beneficiaries unless it was caused by the trustee's administration of the trust. The court could, of course, remove a trustee who failed to recognise a conflict of interest.

As the conflict of duties had been so obvious, there had been no justification for the trustee's Representation seeking the directions of the Court. The costs of that Representation were therefore unreasonably incurred and outwith the scope the trustee's right of indemnity and the trustee was not entitled to charge remuneration for its time incurred in respect of them. The trustee was also ordered to pay the costs of the other parties incurred in those proceedings. As the second Representation had only been brought because of the trustee's unreasonable refusal to retire, the trustee was ordered to bear its own costs and not to charge for time spent on the Representation. It would also be ordered to pay the costs of the other parties on the indemnity basis.

The Court was keen to stress that although the conflict in *In re E, L, O & R Trusts* had been very obvious and it had been unreasonable of the trustee not to have retired as soon as that conflict materialised or the possibility of it became apparent, a trustee faced with an

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⁹⁰ In fact the only active parties to any unfair prejudice application would be the trustee as both the minority and majority shareholder; plaintiff and defendant respectively.

⁹¹ The judgment refers to the beneficiaries as the trustee's principal; however, this is not technically accurate as the trustee is not an agent for the beneficiaries and always acts as principal.

allegation of conflict of interest was entitled to make reasonable inquiries and to take legal advice on whether a conflict existed and whether he should retire. He should respond reasonably promptly to such an allegation but it would not necessarily be reasonable to expect him to reach a decision forthwith. It would often be entirely reasonable for a trustee to seek a decision from the Court before agreeing to retire or resolving to oppose an application for his removal. Whether it is reasonable to seek directions depends upon the tenability of the trustee's position. In many cases, even if the Court decided that the trustee should retire or be removed, it would not conclude that he should be deprived of his costs or remuneration if the trustee's conduct had otherwise been reasonable. In general, a trustee acting in good faith in what he perceived to be the best interests of the trust and the beneficiaries as a whole would not be deprived of his costs unless he acted unreasonably.

- 8-32** *In re E, L, O & R Trusts* one of the grounds on which the beneficiaries insisted the trustee resign was that the trustee was or would be privy to information concerning the underlying dispute in one capacity that would be relevant to the interests of its other beneficiaries. However, there appears to be no reliance upon or discussion in the judgment of the application of the provision in Article 31(1) of the Trusts (Jersey) Law 1984 that a trustee who acts as trustee of more than one trust shall not, in the absence of fraud, be affected by notice of any instrument, matter, fact or thing in relation to any particular trust if the trustee has obtained notice of it by reason of it acting or having acted for the purposes of another trust.

A. Potential Conflict of Duties

- 8-33** It will be an automatic breach of the trustee's fiduciary duty to act for beneficiaries who have potentially conflicting interests without their informed consent.⁹² It is unnecessary for the two interests, and the duties which the fiduciary therefore owes to each, *actually* to be in conflict. It is sufficient to constitute a breach of fiduciary duty if the fiduciary puts itself in a position where its duty to one set of beneficiaries *may* conflict with his duty to the other.⁹³
- 8-34** Even with the beneficiaries' informed consent to act, the trustee is nonetheless obliged to act in good faith and in the best interests of each and must not act with the intention of furthering the interests of one to the prejudice of the interests of the other.⁹⁴ A fiduciary need not act dishonestly⁹⁵ to still be held in breach of this requirement (although dishonesty will do) but nonetheless act intentionally or consciously in favour of one side over the other. However, the rule will not be breached where there is incompetence as this will amount only to an unconscious omission.⁹⁶ In *Bristol & West Building Society v Mothew*, the principle that was said to be engaged by the prohibition on acting in conflict of duties is that the fiduciary must not be inhibited by the existence of his other employment from serving the interests of his principal as faithfully and effectively as if he were the only employer. Where the trustee acts, unconscious of the conflict of duties, he will not be consciously preferring the interests of one master over those of another.

⁹² *Bristol & West Building Society v Mothew* [1995] Ch 1 at 18–19.

⁹³ *ibid*, at 18.

⁹⁴ *ibid*, at 19.

⁹⁵ *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400).

⁹⁶ *Bristol & West Building Society v Mothew* [1998] Ch 1 at 19.

Even if a trustee has properly obtained the informed consent of its beneficiaries to act in circumstances where it would otherwise be subject to a conflict of duties, and has not intentionally favoured the interests of one set of beneficiaries over those of the other, the trustee must take care not to find itself in a position where there is, as in *In re E, L, O & R Trusts*, an *actual* conflict of duty so that it cannot actually, or even hope to, fulfil its obligations to one set of beneficiaries without failing in its obligations to the other beneficiaries.⁹⁷ A fiduciary who finds himself in such a position will generally be required to cease acting in at least one capacity and potentially both, and preferably both.⁹⁸ The fact that he cannot fulfil his obligations to one principal without acting in breach of his obligations to the other is not a defence.⁹⁹

IV. Conflicts of Interest in the Exercise of Powers

The precise application of the no-conflict, no-profit and self-dealing rules to the exercise of powers vested in trustees or other power holders under Article 9A of the Trusts (Jersey) Law 1984 requires a careful analysis as to the precise construction and nature of the power. Whether the no-conflict rule applied at all to the exercise of powers has, in the past, been closely aligned with an analysis as to whether the power (whether administrative or dispositive) is fiduciary in character or not. If the power was fiduciary, then it was said that the trustee could not exercise it in his own favour, thereby avoiding the issue of engagement with the no-conflict rule.¹⁰⁰ Conversely when the power was non-fiduciary in character the no-conflict rule had no application. There is no necessary or easy correlation between whether a power is fiduciary, special, limited or personal (sometimes seen described as a beneficial or simple power) in nature and whether the power is administrative or dispositive.¹⁰¹ The inclusion of the donee of the power within the class of persons capable of benefiting from its exercise may, on an argument as to the construction of the power, be used to suggest it was not intended to be fiduciary but the donee's inclusion does not, as a matter of principle, prevent the power from being fiduciary in nature if the settlor has so designated it to be so. The traditional shortcut analysis has in any event been thrown into doubt in light of the English Court of Appeal decision in *Edge v Pensions Ombudsman*.¹⁰²

The prohibition against trustees self-dealing or profiting themselves has no application to the exercise of beneficial or limited powers since the holders of such powers have, generally, no fiduciary duties in relation to their exercise. While the exercise of limited powers is still subject to the doctrine of fraud on a power and the requirement that the donee is required

⁹⁷ *Bristol & W Bldg Socy v Mothew* (n 1) at 710–15, per Millett LJ, affirmed in *In re E, L, O & R Trusts* (n 1) at 26(iv).

⁹⁸ *Bristol & West Building Socy v Mothew* (n 96) at 19; *In re E, L, O & R Trusts* (n 1); *Goody v Baring* [1956] 1 WLR 448 at 450; *Moody v Cox* [1917] 2 Ch 71 at 81.

⁹⁹ *Bristol & West Building Society v Mothew* (n 96) at 19; *Hilton v Barker Booth & Eastwood* [2005] UKHL 8, [2005] 1 WLR 567 at [35], [38], [41] and [44].

¹⁰⁰ *Re Edward's Will Trusts* [1947] 2 All ER 521 at 524; *Taylor v Allhusen* [1905] 1 Ch 529; *In Re Penrose* [1933] Ch 793; *Re Wills Trust Deeds* [1964] Ch 219 at 228, per Buckley J.

¹⁰¹ *In re VR Family Trust* (n 68).

¹⁰² [2000] Ch 602.

to exercise it bona fides for an authorised object,¹⁰³ if the donee of a non-fiduciary power is, as a matter of construction, an object of it, then the power is properly to be classed as a beneficial power, and the doctrine of fraud on a power does not operate to preclude an exercise in favour of the donee.¹⁰⁴

A. Administrative Powers

- 8-38** Where the relevant power is an administrative power the general duty of the trustee is to act in the best interests of the trust for the benefit of the beneficiaries as a whole, acting impartially as between them, including themselves if the trustee is a beneficiary. The no-conflict rule is capable of applying to administrative powers and it is not difficult to imagine examples where, absent the no-conflict rule, an abuse of the trustee's position might occur. For example, if the no-conflict rule did not apply the trustee could exercise its powers of investment to invest the trust property in its own financial products or business or exercise a power of amendment to increase the trustee's remuneration¹⁰⁵ or exercise a power to borrow money from the trustee or the trustee's associated companies at interest.¹⁰⁶
- 8-39** The application of the principle that a trustee or other fiduciary, such as a protector, should not exercise a power vested in them where to do so would be in breach of the no-conflict rule presupposes that the power holder is authorised to act. The approach to be taken in the case of administrative powers is that a donee of such a power may only act in a way in which the donee is authorised to act by the terms of the power. If the terms of the trust or power expressly or impliedly prohibit the exercise of the power then any exercise that is outside the four corners of the power is void as ultra vires. On one view, the effect of the no-conflict rule is therefore to be considered as impliedly excluding the power holder from the category of persons in whose favour, or with whom, the power holder can lawfully deal.¹⁰⁷ If the purported exercise of the power is ultra vires then *ipso facto* its exercise contrary to the no-conflict rule is not an issue. Put another way, as it applies to fiduciary or special powers, it may be instructive to regard the no-conflict rule as operating in a similar fashion to the rule against excessive execution of powers. However, this analysis is quite reductionist and the generally accepted view is that the exercise of a power contrary to the prohibition on a fiduciary exercising a power in breach of the no-conflict rule is that the power is voidable at the insistence of the beneficiaries and not void.¹⁰⁸

B. Dispositive Powers

- 8-40** Where the power is dispositive, such as powers of advancement or powers of appointment, the question of a conflict in its exercise becomes relevant because the trustee is entitled to

¹⁰³ *In re Bird Charitable Trust* [2008] JLR 1]; *In re VR Family Trust* (n 68).

¹⁰⁴ *Taylor v Allhusen* (n 100); *Re Penrose* (n 100).

¹⁰⁵ *HSBC Trustees Ltd v Rearden* [2005] JRC 130.

¹⁰⁶ *Dick Stock v Pantrust International SA & Ors* (n 51).

¹⁰⁷ *Ingram v IRC* (n 58) at 425, per Millett LJ: 'a trustee's power of sale does not authorise the trustee to sell the trust property except to someone with whom the trustee can deal at arm's length'.

¹⁰⁸ *Tito v Waddell* (No 2) (n 43) at 241; *Ingram v IRC* (n 58) at 424–25; *Wright v Morgan* (n 28).

be partial in the exercise of such powers. It is not at all clear whether the no-conflict rule operates in the same way in relation to dispositive powers as it does to administrative powers and it may be that the analysis to be had has a closer affinity with that applicable to beneficial powers. Unlike a beneficial power, in relation to dispositive powers the donee's discretion is tempered by the requirement for them to exercise such powers from time to time, and to exercise them in good faith, taking into account relevant considerations but excluding from its mind irrelevant, irrational or improper considerations.¹⁰⁹ Where the donee of a dispositive power is outside the class of persons in whose favour it may be exercised and purports to exercise it for its own benefit, the power is void as either excessive or fraudulent. If the donee of the dispositive power is within the class then the no-conflict rule has no application as it is the manifest intention of the creator of the power that the donee is capable of benefiting from an exercise of it in its own favour.

There is English Court of Appeal authority¹¹⁰ to the effect that it is possible, in the terms of the trust instrument itself, to authorise a trustee who is also a beneficiary, to exercise a dispositive power under which the trustee himself can benefit (or benefit from its non-exercise) even though such a power is usually properly to be regarded as fully fiduciary. Where such a situation arises, the extent of the trustee's duties are modified but the effect is not to free the trustee from any fiduciary obligations in relation to the exercise (or non-exercise) of the power. That a trustee is also an object of the power under which it is able to benefit does not impose upon the trustee a heightened burden to show the exercise is rational and proper. That burden falls to those seeking to challenge its exercise.¹¹¹ However, where there is no express authorisation in the trust instrument for the trustee to benefit itself, a trustee is usually barred from exercising fiduciary dispositive powers in its own favour, and any purported exercise of the power in favour of a trustee is either void, or voidable as of right on the application of a beneficiary prejudiced by it.¹¹² It would seem then that irrespective of whether the power in question is fiduciary or not, any challenge to its exercise is less to do with the no-conflict rule and more to do with whether the exercise is excessive or fraudulent.¹¹³

In the context of private trusts, it has been recognised that a trustee might be capable of benefiting under a power vested in the trustees while at the same time being subject to duties which do not apply in the case of merely personal powers.¹¹⁴ Taken as a whole, the modern English authorities, which in the absence of Jersey authority are likely to be persuasive,¹¹⁵ do recognise that a trustee can be authorised by the terms of the trust instrument to exercise a power vested in them (including dispositive powers) by virtue of being trustee in their own favour. The older analysis with its automatic bifurcation of the nature of the

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¹⁰⁹ In Jersey, the principles that underpin the rule formerly known as the Rule in *Re Hastings Bass* extend to both fiduciary and administrative powers; see *In re Seaton Trustees Ltd* [2009] JLR N [15].

¹¹⁰ *Edge v Pensions Ombudsman* [1998] Ch 512 at 523B–C, affd [2000] Ch 602 at 622D–E; see also *Re Beatty* [1990] 1 WLR 1503.

¹¹¹ *Edge v Pensions Ombudsman* [2000] Ch 602 at 630–33.

¹¹² *Re Skeats' Settlement* (1889) 42 Ch D 522 at 527, per Kay J.

¹¹³ ie an exercise which is not intended by the settlor is rendered excessive. This may achieve a similar result as the no-conflict rule.

¹¹⁴ *Re Beatty* (n 110) at 1506; and see *Blair v Valley* [2000] WTLR 615 at 639, NZ SC.

¹¹⁵ *Ex parte Viscount Wimborne* 1983 JJ 17.

power in question being dependent upon its object is no longer to be regarded as good law. A power that a trustee may exercise in favour of itself does not automatically render that power a personal or beneficial power. It is possible to have a power vested in a trustee by virtue of its office which is subject to the general duties applicable to fiduciary powers (such as the duty to consider periodically whether or not to exercise the power) while simultaneously including the trustee within the class of eligible objects in whose favour the power may be exercised—or who may benefit from its non-exercise.

- 8-43** The fact that a power is capable of being exercised in favour of a person upon whom it is conferred is usually an important, but not necessarily determinative indicator whether a power is to be construed as a mere personal power or a fiduciary power. Where a power of appointment or other dispositive power is conferred on a trustee by virtue of their office, it is a fiduciary power. While that may determine whether the power is fiduciary in character, as discussed above, that does not determine the question as to whether a trustee can benefit under it.
- 8-44** It might be thought that the question whether a trustee is eligible to benefit under a fiduciary dispositive power is purely one of construction of the relevant power, as in the case of a personal power, so that if as a matter of construction the trustee is an object of the power it may be exercised in his favour, otherwise not. If as a matter of construction a trustee was an object of a fiduciary dispositive power, it could be exercised in his favour because it is an object. The self-dealing rule would have no application as its effect would be to thwart the settlor's intention. If as a matter of construction, the trustee was not an object of such a power, the question of the application of the self-dealing rule does not arise, as the trustee is in any event not an object of the power and ineligible to benefit from its exercise. While this is the approach in respect of non-fiduciary powers of appointment, it is not the approach to be adopted in respect of dispositive powers conferred on trustees by virtue of their office, which are fiduciary in character.
- 8-45** The self-dealing rule is not confined only to the exercise of administrative powers.¹¹⁶ A number of the authorities indicate that the self-dealing rule applies to the exercise of fiduciary dispositive powers as well.¹¹⁷ A power conferred on trustees, for example, to distribute a fund to such persons as they think fit, is likely to be limited by the self-dealing rule so as to prevent the trustee from distributing the trust fund to itself.¹¹⁸ The breadth of such a fiduciary dispositive power is limited by the self-dealing rule in the same way as an administrative fiduciary power to appoint a new trustee is to be read as preventing the donee appointing itself, even if, as a matter of pure construction of the relevant power there appears nothing on the face of the power which shows that it is not to be exercised in favour of the donee.¹¹⁹
- 8-46** While by default the self-dealing rule may limit the exercise of a fiduciary dispositive power, the self-dealing rule may be excluded by the terms of the trust instrument so as to enable a trustee to benefit from its exercise (or non-exercise).¹²⁰ Two exceptions are of particular

¹¹⁶ *Bray v Ford* (n 11) at 51–52; *Re Thompson's Settlement* (n 49) at 115, per Vinelott J.

¹¹⁷ *Re Beatty* (n 110) at 1506B; *Re William Makin & Son Ltd* [1993] OPLR 171 at 176–77; *Re Drexel Burnham Lambert UK Pension Plan* [1995] 1 WLR 32; *Public Trustee v Cooper* [2001] WTLR 901 at 933B; *Breakspear v Ackland* [2008] EWHC 220, [2009] Ch 32 at [114]; *Rafferty v Philp* [2011] EWHC 709 (Ch) at [34]–[35], [69].

¹¹⁸ *Re Beatty* (n 110).

¹¹⁹ *Re Skeats' Settlement* (n 112).

¹²⁰ *Edge v Pensions Ombudsman* [1998] Ch 512, [2000] Ch 602.

significance that authorise the trustees to benefit under them. One is that the rule does not apply where the trustee has not placed himself in the position of conflict but has been placed in that position by the terms of trust. The other is that the rule may be excluded by the terms of the trust. The self-dealing rule has been described, in the context of dispositive powers, as one under which a trustee cannot act if he finds himself in a position where he owes conflicting duties, or where his duty conflicts with his interest.¹²¹ But the more accurate description of the rule is that a trustee is not allowed to place himself in a position where there is a conflict between his duty and interest, or his duty in different capacities. The self-dealing rule therefore does not apply where the trustee has not placed himself in a position of conflict but that the conflict has been thrust upon the trustee by the terms of the trust. Where this exception to the self-dealing rule applies, a fiduciary dispositive power is capable of exercise in favour of the trustee.¹²² The conflict is the product of the terms of the trust, not the result of the trustees *placing* themselves in a position of conflict of interest thereby excluding the self-dealing rule and apparently also the no-profit rule. Another example of the operation of this exception is where a fiduciary power is conferred on the trustee exercisable in favour of beneficiaries other than the trustee, but the trustee is interested in default of exercise of the power. A conflict will inevitably arise between the trustee's interest in not exercising the power and his duty in considering its exercise.¹²³

In the context of fiduciary dispositive powers, the self-dealing and no-profit rules may be expressly excluded by the terms of the trust¹²⁴ or impliedly excluded where that is necessary in order to give efficacy to the terms of the trust.¹²⁵ Whether these exclusions to the no-conflict rule apply, the powers in question remain fiduciary notwithstanding that they may be exercised in the donee's favour and so the donee must still give proper periodic consideration to their exercise in favour of other beneficiaries, and cannot simply have regard to their own interests, as is permissible in the case of a personal power in respect of which the donee is an object.

Where the self-dealing rule is or may be engaged by the proposed exercise of a dispositive power, the Royal Court has jurisdiction to direct the trustee to exercise the power notwithstanding that in exercising it the trustee will benefit. Such a direction is obtained by way of a Representation under Article 51(2)(a)(ii) of the Trusts (Jersey) Law 1984.¹²⁶ The Royal Court will only do so in a proper case, and will usually give preliminary directions that all interested parties are to be separately represented. There is extensive case law in Jersey that the Court will refuse an application for directions by a trustee in a *Public Trustee v Cooper*¹²⁷ category two case (a momentous decision) where the trustee is subject to a conflict of interest.¹²⁸ To obtain the relief the trustee may have to surrender a full discretion to the

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¹²¹ *Thompson's Settlement* (n 49) at 115F; *Bristol and West Building Society v Mothew* (n 96) at 19G–H per Millett LJ.

¹²² *Edge v Pensions Ombudsman* [1998] Ch 512 at 539–41 (affd [2000] Ch 602, CA).

¹²³ *Breakspear v Ackland* (n 117) at [122].

¹²⁴ *ibid*, at [114] and [117]–[125].

¹²⁵ *Edge v Pensions Ombudsman* [1998] Ch 512 at 540B–D, affd [2000] Ch 602.

¹²⁶ *Crociani v Crociani* (n 1).

¹²⁷ Affirmed in *In re S Settlement* [2001] JLR N [37].

¹²⁸ *In re Y Trust* [2011] JLR 464]; *In re Y Trust* [2014 (1) JLR 199]; *Kan v HSBC Intl Trustee Ltd* [2015 (1) JLR N [31]].

Court,¹²⁹ although such cases are likely to generate more expense and take longer to resolve.¹³⁰ The Court may only exercise its jurisdiction to give directions in a case where the trustee is not an object of the power. What the Court is doing in supplying its approval to the proposed course is to remove the disability applying to the trustee by reason of the no-conflict rule. The Court does not have jurisdiction (outside Article 47 and then only with the approval of all the adult beneficiaries) to extend the dispositive powers already in existence in the terms of the trust.

V. Defences

A. Authorisation by Trust Instrument

- 8-49** The terms of a trust instrument may expressly or impliedly authorise a trustee to act in circumstances where its interests and its duties conflict.¹³¹

B. Concurrence of the Beneficiaries

- 8-50** A trustee's fiduciary duties exist to protect the beneficiaries' interests and the beneficiaries may elect to forgo that protection but authorising or directing the trustee to act in a way that would otherwise be prohibited by the trustee's fiduciary duties.¹³² To provide the trustee with a complete release and defence to any claim for breach duty, the beneficiaries' consent must be fully informed and freely given.¹³³ The trustee will be unable to obtain a full release if the beneficial class is not closed and/or, at the time consent is sought, it contains minor or interdict beneficiaries who are unable to give consent.¹³⁴ The trustee bears the burden of establishing that the beneficiaries' consent is informed and freely given.¹³⁵ However, consent may be inferred from circumstances that are sufficiently clear to justify it.¹³⁶ Subscribing to the principle that sunlight is often the best disinfectant, the trustee is required to provide the beneficiaries with full and frank disclosure of all material facts pertaining to the conflict and the Court will jealously guard the beneficiaries' consent.¹³⁷ The

¹²⁹ *In re H Trust* [2007] JLR 569]; *A Trustees Ltd v W* [2008] JLR N [25]]; *In re B Settlement* [2012 (1) JLR N [11]].

¹³⁰ *HSBC Trustees Ltd v Rerarden* (n 105).

¹³¹ Trusts (Jersey) Law 1984, Art 21(4)(b); *Brown v Inland Revenue Commissioners* (n 68) at 256; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1318].

¹³² *Bouling v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 at 636, per Upjohn LJ: 'the rule, however is essential for the protection for he persons to whom the duty is owed...It cannot be used as a shield by the person owing the duty...it is a sword and as such only can it be used by the person entitled to the benefit of it, and he may sheath the weapon.'

¹³³ *Boardman v Phipps* (n 29) at 109; *Regal (Hastings) Ltd v Gulliver* (n 32) at 150, 157; *Brown v Inland Revenue Commissioners* (n 68) at 263, 265, 266 and 267.

¹³⁴ The presence of minor beneficiaries may also have implications for the applicable prescription period for a claim against the trustee, as to which see Ch 16.

¹³⁵ *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299 at [35].

¹³⁶ *Bristol & W Bldg Socy v Mothew* (n 1) at 18–19.

¹³⁷ *Northampton Regional Livestock Centre Co Ltd v Cowling* [2014] EWHC 30 (QB) at [6]; *Ex parte Lacey* (n 33); *AB Jnr v MB Grand Court of the Cayman Islands*, 13 August 2012 at 285, per Smellie CJ.

information that the trustee is required to disclose to the beneficiaries goes wider than that which would be decisive (which obviously must be disclosed) and includes anything that *may* have affected the beneficiaries' willingness to consent.¹³⁸ It is therefore not a defence for the trustee, having failed to give full disclosure, to seek to argue that the beneficiaries would have consented notwithstanding the non-disclosure.¹³⁹ The trustee is required to disclose the nature and extent of its interest in the transaction and not merely the existence of an interest that conflicts with its duty.¹⁴⁰ It has increasingly been the tendency of the Commission to regard disclosure that is undertaken in a formulistic rather than functional way as being inadequate as a tool for managing conflicts of interest and the trustee should not make formulistic assumptions about the intelligence or sophistication of the beneficiaries.

C. Authorisation by the Court

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The Royal Court may sanction a transaction or proposed course of conduct by the trustee that would otherwise constitute a breach of the trustee's fiduciary duty.¹⁴¹ Proceedings for such approval are typically commenced by way of Representation. Such approval is discretionary, not as of right and is typically sought in advance of the particular transaction. The Court must be persuaded that the trustee has not taken advantage of its position and has not been influenced by the conflict in its position. It is a consistent criterion in the Jersey authorities concerning the Court's jurisdiction to sanction or bless a momentous decision of the trustee that the trustee has come to the Court without conflict.¹⁴² Where the trustee is operating under a conflict of interest, it must disclose this to the Court and may, by reason of that conflict, have limited practical options that are palatably alternative to surrendering its discretion to the Court.¹⁴³ The Court is likely to be unsympathetic and may refuse to sanction the trustee's conflict or to give the trustee directions where directions are sought after the fact, particularly where the conflict is an obvious one.¹⁴⁴

VI. Trustees' Remuneration

A. General Rule

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Unless authorised by the Court,¹⁴⁵ the terms of a charging clause contained in the trust instrument or with the approval of all the beneficiaries under the rule in *Saunders*

¹³⁸ *FHR European Ventures LLP v Mankarious* (n 78) at 79.

¹³⁹ *Swindle v Harrison* [1997] 4 All ER 705 at 733.

¹⁴⁰ *Gwembe Valley Development Co Ltd v Koshy* (No 3) [2003] EWCA Civ 1478.

¹⁴¹ Trusts (Jersey) Law 1984, Art 21(4)(a).

¹⁴² *In re E, L, O & R Trusts* (n 1); *In re Y Trust* [2011 JLR 464]; *Kan v HSBC Intl Trustee Ltd* (n 128); *C Trust Co Ltd v Temple* [2009 JLR N [13]]; *In re S Settlement* (n 127).

¹⁴³ *In re H Trust* (n 129); *Abacus (C.I.) Ltd v Hirschfield* [2001 JLR 530]; *A Trustees Ltd v W* [2008 JLR N [25]].

¹⁴⁴ *In re E, L, O & R Trusts* (n 1), in which the Court refused the trustee's request for its costs of the proceedings from the trust fund and the trustee was ordered to pay the costs of the other parties.

¹⁴⁵ *Landau v Anburn Trustees Ltd* [2007 JLR 250].

v *Vautier*,¹⁴⁶ a lay trustee of a Jersey is not be entitled to remuneration for its services.¹⁴⁷ However, where the terms of a trust are silent as to his or her remuneration, a professional trustee is entitled to reasonable remuneration for services that the professional trustee provides.¹⁴⁸ In practice, trusteeship in Jersey is and has always been a remunerated and not a gratuitous office. Statutory provision for the remuneration of trustees is a significant exception to the prohibition in Article 21(4)(b)(i) that a trustee must not profit from its office. Article 26(1A) therefore places a professional trustee in the position of being able to charge for their services by default. This is a more generous position than that currently prevailing in England under the Trustee Act 2000, which provides that a professional trustee is not entitled, in the absence of express authorisation by the terms of the trust instrument or by order of the court or by the beneficiaries (and apart from one exception in the case of a solicitor-trustee), to charge for its services.

B. Remuneration of Director of Corporate Trustee

- 8-53** A director of a corporate trustee who is engaged and paid by the trustee to act in connection with the trust is not directly accountable to the beneficiaries for such remuneration, and the trustee may recover the director's remuneration as an expense of the trust reasonably incurred, if such fees come within the scope of expenses allowed by the terms and conditions on which the trustee acts.

C. Nature of Trustee's Rights under Remuneration Provisions

- 8-54** The right of a trustee to remuneration under an express provision in the trust instrument is to some extent regarded as a beneficial interest.¹⁴⁹ The trustee's entitlement to remuneration is not in the nature of a contract and a charging provision in the trust instrument, even if executed by the settlor, does not entitle the trustee to sue the settlor for satisfaction of its fees.¹⁵⁰ In circumstances where the trust is declared to be invalid after its commencement and the trustee has drawn remuneration from the fund, the trustee is not to be required to repay that remuneration if the Court otherwise regards it as being reasonable notwithstanding that in finding the trust to be invalid the effect of a charging provision would fall away.¹⁵¹ However, the right of a trustee to remuneration is not regarded as a beneficial

¹⁴⁶ (1841) 4 Beav 115; *In re A & B Trusts* [2007 JLR 444].

¹⁴⁷ Trusts (Jersey) Law 1984, Art 26(1).

¹⁴⁸ ibid, Art 26(2), applicable only for services provided after 2 November 2012. A professional trustee is defined as a trustee registered by the Jersey Financial Services Commission to carry on trust company business within the meaning of Art 2(3) and Art 9 of the Financial Services (Jersey) Law 1998.

¹⁴⁹ *Landau v Anburn Trustees Ltd* (n 145); *Re Duke of Norfolk's Settlement Trusts* [1982] Ch 61 at 77, CA, per Fox LJ.

¹⁵⁰ *Re Duke of Norfolk's Settlement Trusts* (n 149) at 76–77. Careful thought should be given to the need for a collateral agreement alongside the trust instrument that entitles the trustee to recover fees from some source other than the trust fund where the trust assets are illiquid, such as real estate or a debt which cannot easily be realised without placing the trustee in a position where it may have to prefer its own interest in the recovery of fees at the expense of upsetting the way the trust assets have been structured.

¹⁵¹ *In The Matter of the Strathmullen Trust* [2014 (1) JLR 309].

interest in the fund for all purposes. For the purpose of the Court's jurisdiction to vary the terms of a trust, under Article 47 of the Trusts (Jersey) Law 1984 a remuneration provision is treated as being of an administrative rather than beneficial character.¹⁵²

The trustee's right to remuneration is also of a different quality from the trustee's entitlement to be reimbursed or indemnified from the trust assets in respect of the trustee's reasonable costs and expenses conferred by the general law and confirmed in Article 26 of the Trusts (Jersey) Law.¹⁵³ A charging clause entitles the trustee to deduct its reasonable charges in priority to making distributions out to beneficiaries. But, unlike the trustee's indemnity, and subject to contrary provision in the instrument itself, it is not in the nature of an equitable charge over or proprietary interest in the trust fund that persists after the trustee has parted with the trust property.¹⁵⁴

Upon retirement, a trustee whose fees are disputed, is entitled, as with costs in respect of which it is entitled to an indemnity but which have not yet fallen due, to reasonable security to ensure that it receives any fees ultimately found to be due but is not entitled to greater protection by way of reasonable security than is necessary.¹⁵⁵

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D. Effect of a Breach of Trust on the Trustee's Right to Remuneration

A trustee is not deprived of his right to remuneration under a charging clause merely because he has committed a breach of his duties as trustee.¹⁵⁶ The authors are doubtful whether a trustee can charge remuneration in respect of a transaction which involves a dishonest breach of trust or in respect of a transaction that is unauthorised by the trust fund.¹⁵⁷ A trustee would not be entitled to an indemnity in respect of such a transaction either at any rate unless the transaction has benefited the trust fund.

E. Challenging a Trustee's Charges

The beneficiaries are entitled, at their own risk as to costs, to subject the trustee's charges to scrutiny by way of an assessment before the Royal Court.¹⁵⁸ An assessment is not a formal taxation of the trustee's fees and the scales applicable on a taxation are not relevant. The Greffier is likely to be concentrating on two aspects, namely, whether a particular matter is one upon which it was reasonable to spend time; and secondly, whether the degree of time spent on a particular matter was reasonable. The test is not whether the Greffier thinks

¹⁵² *Re Duke of Norfolk's Settlement Trusts* (n 149), cited with approval in *In re Greville Bathe Fund* [2013 (2) JLR 402].

¹⁵³ As to the nature and extent of the trustee's entitlement to its indemnity, see Ch 11.

¹⁵⁴ *Representation of the Z Trusts* [2015] JRC 031.

¹⁵⁵ *Re the Carafe Trust* [2005] JLR 159].

¹⁵⁶ *Hulbert v Avens* [2003] EWHC 76 (Ch), [2003] WTLR 387 at [57]–[63], although this is subject to the forfeiture principle discussed below at para 8-94.

¹⁵⁷ Unless it can be demonstrated that the transaction has benefited the trust.

¹⁵⁸ *Landau v Anburn Trustees Ltd* (n 145); the task is usually delegated from the Inferior Number to the Judicial Greffier.

the fees were incurred at the right level; it is whether they were reasonably incurred. Put another way, they may only be disallowed if they were unreasonably incurred. The Court expects a trustee to have regard to the value of the funds and to keep its remuneration at a level which is proportionate to that amount. A trustee is not entitled to its time costs incurred defending itself in a hostile dispute with the beneficiaries; the position is consistent with that applicable to legal fees in this context. Any doubts that the Greffier might have as to whether the costs were reasonably incurred or of a reasonable amount should be resolved in favour of the trustee.

- 8-59** The trustee will be liable to account for any charges on the fund insofar they are unreasonable or excessive. The Royal Court, but not the Judicial Greffier, has jurisdiction under both Article 51 of the Trusts (Jersey) Law 1984 and under its inherent jurisdiction to order the production of documents by the trustee to enable the beneficiaries to decide whether to challenge trustees' fees.¹⁵⁹ A Jersey trustee, in accordance with the Codes of Practice for Trust Company Business, issued by the Jersey Financial Services Commission, is required to be open and transparent in its fee structure. A trustee is expected to render regular and prompt invoices for its fees.¹⁶⁰ Unless the trustee provides the beneficiaries with a full breakdown of its fees the beneficiaries are not obliged to do so unless and until an itemisation is provided.¹⁶¹

F. Remuneration Authorised by Order of the Court

- 8-60** The Court has both a statutory and an inherent jurisdiction to authorise, increase or vary the remuneration of a trustee. However the Court's jurisdiction to authorise remuneration is, of less practical importance than formerly following the enactment of Article 26(1A) of the Trusts (Jersey) Law 1984.¹⁶²
- 8-61** The Court has an inherent jurisdiction, to be exercised sparingly and in exceptional cases,¹⁶³ to authorise increase or vary the payment of remuneration to a trustee.¹⁶⁴ This jurisdiction may be exercised not only to award remuneration upon or after the appointment of a trustee where there is no provision in the trust instrument. The Court has an inherent power to secure the good administration of trusts.¹⁶⁵ The Court will not exercise its jurisdiction unless it is satisfied, having regard to all the circumstances of the case, including the nature of the trust, the experience and skill of a particular trustee and the amounts which he seeks to charge, that it would be in the interests of the good administration of the trust, and therefore of the beneficiaries, to award or increase the trustee's remuneration.¹⁶⁶ The Court has

¹⁵⁹ *EE v Royal Bank of Canada Trust Co (Jersey) Ltd* [2014 (1) JLR N [27]].

¹⁶⁰ *I n re Carafe Trust* (n 155).

¹⁶¹ *Caversham Trustees Ltd v Patel* [2007 JLR N [30]]; *Wells v Wells* [1962] 1 WLR 397, on appeal, [1962] 1 WLR 874.

¹⁶² Effective from 2 November 2012. The jurisdiction under Art 26(1)(c) remains of practical importance in circumstances where the trustee requesting remuneration is a trustee de son tort (*In re BB* [2011 JLR 672]) and where the trustee is not a professional trustee.

¹⁶³ *Landau v Anburn Trustees Ltd* (n 145).

¹⁶⁴ *Re Duke of Norfolk's Settlement Trusts* (n 149).

¹⁶⁵ *ibid*, at 76–77.

¹⁶⁶ *ibid*, at 77, affirmed in *Landau v Anburn Trustees Ltd* (n 145); and *In re Greville Bathe Fund* (n 152).

power to vary the terms of a trust to include a charging clause in a trust instrument, which, as it does not involve a variation of beneficial interests, does not require the consent of adult beneficiaries or approval under Article 47(3) of the Trusts (Jersey) Law 1984 on behalf of other beneficiaries.¹⁶⁷

In the absence of provision in the trust instrument, the Court is likely to be easily persuaded of the desirability to authorise remuneration, if the application is supported or not opposed by the beneficiaries represented in the proceedings.¹⁶⁸ The Court is more rather than less likely to hold that in electing to use a professional Jersey trustee, the settlor and the beneficiaries can be deemed to have expected to pay the charges of a professional trust company and, subject to consideration of the amount, the identity of the trustee was irrelevant.¹⁶⁹ The Court has been persuaded to do so even where the application is opposed by the beneficiaries and the trustee is an unlicensed trust company which inadvertently failed to transfer the trusteeship to another trust company which acted as though the trusteeship had been transferred.¹⁷⁰

8-62

G. Allowance for Skill and Labour of Trustee who is Liable to Account for Profits

If a trustee (or other fiduciary) becomes liable to account for profits made by reason of its position as trustee, then the Court, in granting the appropriate remedy against the trustee (or other fiduciary), has a discretion to allow the trustee remuneration by way of an allowance for the trustee's skill or labour in obtaining the profit which will be offset against the profits for which he is liable to account.¹⁷¹

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H. The Duration of the Trustee's Entitlement to Remuneration

A trustee's right to remuneration under a charging clause continues until the trust assets have been distributed by the trustee to the beneficiaries or at least until the expiry of a reasonable time for the trustee to effect the distribution.¹⁷² If the trustee retires or is removed from office, it is doubtful, given the absence of any mechanism under Jersey law to effect an automatic vesting of assets, whether the trustee has any right to remuneration thereafter. The trustee's unreasonable refusal to retire pending settlement of a dispute as to fees may also have a prejudicial effect on his right to remuneration.¹⁷³

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¹⁶⁷ *Re Duke of Norfolk's Settlement Trusts* (n 149) at 77–78; *In re Greville Bathe Fund* (n 152).

¹⁶⁸ *Re Kane Trusts* [2004] JRC 041.

¹⁶⁹ *Landau v Anburn Trustees Ltd* (n 145); *In re Greville Bathe Fund* (n 152).

¹⁷⁰ *Landau v Anburn Trustees Ltd* (n 145).

¹⁷¹ As to the allowance, see Ch 13.

¹⁷² Taking account of outstanding or future liabilities for which retention by the trustee is reasonably required by the trustee to protect his rights of indemnity.

¹⁷³ *Re the Carafe Trust* (n 155), in which the Court capped the trustee's costs so as to remove any profit element in respect of those fees charged after the date on which the Court deemed the trustee should have retired.

VII. Remedies

- 8-65** Breach of the no-profit or no-conflicts rules carries a range of potential remedies which include the rescission of a transaction vitiated by the conflict, actions for an account of profits made in breach of the trustee's duty, the imposition of a proprietary constructive trust on the proceeds of the transaction, and the payment of compensation for loss caused by the breach of the trustee's fiduciary duty. Some of these remedies treat the trustee's duties as being in the nature of a disability and some treat breach of the trustee's duties as wrongdoing. While this distinction is not universally endorsed,¹⁷⁴ it is nonetheless illustrative of the different ways in which fiduciary duties operate.
- 8-66** The remedies of rescission, accounts of profits and proprietary constructive trusts operate on the basis that the fiduciary was under a disability, in the sense that the trustee ought not to have entered into the transaction or taken the unauthorised profit except for the benefit of the beneficiaries. That justifies the beneficiaries applying to reverse the relevant transaction, by rescinding it. Alternatively, the beneficiaries can seek to strip the trustee of any profit which it made from the impugned transaction by way of an account of that profit or by way of proceedings for a declaration that the profit or its traceable proceeds is impressed with a constructive trust. A trustee who has taken an unauthorised profit is obliged to account for that profit that was obtained in breach of its duty of utmost good faith without the Court needing to determine whether the principal might have been prepared to give consent, had it been sought. If the trustee did not seek, or failed to obtain, fully informed consent from the beneficiaries that it should profit on its own account, it should not have proceeded with the transaction other than for the benefit of the beneficiaries and the trustee cannot seek to defend itself by relying on its own failure to obtain such consent as a justification for reducing its liability to account for profit. The principles of causation are not otherwise relevant to the assessment of a fiduciary's liability to account for profits.
- 8-67** Where compensatory remedy is sought, the claim for breach of fiduciary duty has more of the characteristics that the fiduciary has committed wrongdoing by acting with a conflict in preferring its interest to its duties to the beneficiaries and that wrong has caused loss to the trust fund. In contrast with those remedies discussed in the preceding paragraph, the plaintiff beneficiaries' position is relevant, in that a beneficiary cannot recover from the trustee loss which would have been suffered in any event. The loss must be shown to have been caused by the breach of fiduciary duty. Thus, it becomes important to assess how the plaintiff beneficiaries would have acted but for the trustee's breach of its fiduciary duty, in a way that is unimportant where the disability-based remedies are sought.
- 8-68** The beneficiaries are entitled to elect the most advantageous remedy to them but must elect between remedies that are inconsistent with one another, although they may claim remedies that are inconsistent with one another if they plead them in the alternative.¹⁷⁵ For example, an account of the profits made by a defendant trustee in breach of his fiduciary

¹⁷⁴ *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048 at [108]; 'an unnecessary complication ... whether viewed as duties or disabilities, all such incidents are aspects of the fiduciary's primary obligation of loyalty'. See also *AB Jnr v MB* (n 137) at 465, per Smellie CJ.

¹⁷⁵ *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514 at 521.

obligations and equitable compensation in the nature of damages for the loss suffered by reason of the same breach. The former remedy is measured by the wrongdoer's gain, the latter by the injured party's loss.¹⁷⁶

A. An Account of Profits

A trustee, as with any other fiduciary, is not, without authorisation, permitted to make or retain,¹⁷⁷ and is bound to account for any profit that it receives in breach of fiduciary duty.¹⁷⁸ The beneficiaries' entitlement to an account of profits which have been made in breach of fiduciary duty, while in principle at the discretion of the Court, is in practice ordered virtually as of right. A company, or member of a company, is entitled to bring proceedings ordering an account of profits from a director that has entered into a transaction with the company and failed to disclose his interest.¹⁷⁹ The trustee's liability to account extends to the actual net profit whether in the nature of income or capital. The profits for which the fiduciary must account must bear some reasonable relationship to the breach of fiduciary duty.¹⁸⁰ The proper analysis is that the trustee's obligation is to account for profits which have been *made in breach of fiduciary duty*, not to account for profits in some abstract sense.¹⁸¹ One of the first questions in any proper analysis is to ascertain precisely what is it that has been acquired in consequence of the trustee's breach of fiduciary duty.

In simple cases, such as where the trustee has sold or purchased trust assets the account of profits will take into account all moneys which the trustee has received in the transaction sought to be impugned, set against all expenses reasonably incurred in respect of the transaction which the trustee has incurred. Where the trustee has taken a secret profit in the transaction, the beneficiaries may surcharge the incoming side of the account with the profit that the trustee has obtained but not accounted for.¹⁸²

In more complex cases the governing principle is that the fiduciary must account for all of the profit which he made in breach of fiduciary duty, but this accounting must not operate so as to unjustly enrich the plaintiff beneficiaries. While the fiduciary's liability to account is not based on the principle of unjust enrichment, the Court must be vigilant to ensure that the remedy of an account does not become a vehicle for the unjust enrichment of the plaintiff.¹⁸³

Thus, which is not so common in respect of trustees, but would conceivably be so in cases of other fiduciaries, where the profit is derived from a business, rather than a specific asset, given the risks inherent in business activities and the amount of time, effort and skill

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¹⁷⁶ *ibid*, at 520.

¹⁷⁷ Trusts (Jersey) Law 1984, Art 21(4).

¹⁷⁸ *Regal (Hastings) Ltd v Gulliver* (n 32) at 144, referred to in *Towers v Premier Waste Management Limited* [2011] EWCA Civ 923, cited with approval in *Dick Stock v Pantrust International SA & Ors* (n 71).

¹⁷⁹ Companies (Jersey) Law 1991, Art 76(1).

¹⁸⁰ *West v Lazard Bros & Co (Jersey) Ltd* [1993 JLR 165]; *Midland Bank Trust Co (Jersey) Ltd v Federated Pension Servs* [1994 JLR 276]; *Ultraframe (UK) Ltd v Fielding* (n 131) at [1588].

¹⁸¹ *Murad v Al-Saraj* [2005] EWCA Civ 959 at [85], [112] and [115]–[116].

¹⁸² As to how the mechanism of an account works, see Ch 7, para 7-3.

¹⁸³ *Murad v Al-Saraj* (n 181) at [64].

required to make a business successful, there is a basis to argue that the principal who has the benefit of the fiduciary's duty, will not necessarily be awarded an account of the entire profits of the business.¹⁸⁴

- 8-73** A fiduciary who has acted in breach of fiduciary duty, and against whom an account of profits is ordered, may nevertheless be awarded an allowance for skill and effort employed in obtaining the profit which he has to disgorge,¹⁸⁵ where it would be inequitable for the beneficiaries to step in and take the profit without paying for the skill and labour which has produced it.¹⁸⁶ Again this is a principle that applies to fiduciaries generally, not only trustees, and practically will not usually be encountered in the context of professional trustees who are generally unwilling or too commercially inexperienced to engage directly in the underlying economic undertaking of which they are a trustee. This power is to be exercised sparingly. While the Court will be reluctant to confer a windfall on the beneficiaries by depriving the trustee of its right to charge for its services, the obvious concern is not to encourage fiduciaries to act in breach of fiduciary duty on the expectation they will be rewarded for their efforts with an allowance.¹⁸⁷ The Court is most likely to deprive a trustee of their allowance where the trustee has acted surreptitiously, dishonestly or in bad faith.¹⁸⁸ However, there are examples in the English case law where notwithstanding deceitful or surreptitious conduct a fiduciary has been permitted their allowance.¹⁸⁹
- 8-74** The fiduciary has the burden persuading the Court that its entire profits are appropriate in the circumstances. It is not a relevant consideration for the trustee to argue that the beneficiaries would have consented to the profit, had they been informed and consented. While such considerations can be relevant to the question whether *the trust* has suffered a loss as a result of the breach of fiduciary duty, they are not relevant in determining what profit has been made by *the trustee* in breach of fiduciary duty.¹⁹⁰ It is the actual profit the trustee has obtained for which it must account, rather than any profit in excess of some hypothetical level to which the beneficiaries might potentially have agreed had they been asked.
- 8-75** A trustee may not avoid the obligation to account for a profit made in breach of fiduciary duty by arranging for the profit to be earned by or accrue to a third party, such as a separate corporate entity.¹⁹¹ The Court will not permit the interposition of a corporate entity to protect a profit obtained in breach of fiduciary duty from being stripped away where the company's separate legal personality has been used to conceal the fact that the fiduciary has made the profit,¹⁹² such as where the company is the alter ego of the

¹⁸⁴ *Re Jarvis (Deceased)* [1958] 1 WLR 815 at 821.

¹⁸⁵ *Boardman v Phipps* (n 29) at 104, 112.

¹⁸⁶ *Phipps v Boardman* [1964] 1 WLR 993 at 1018.

¹⁸⁷ *Guinness Plc v Saunders* [1990] 2 AC 663 at 701.

¹⁸⁸ *Phipps v Boardman* [1965] Ch 992 at 1021.

¹⁸⁹ *O'Sullivan v Management Agency & Music Ltd* [1985] QB 428 at 468; *Murad v Al-Saraj* (n 181) at [88].

¹⁹⁰ *Murad v Al-Saraj* (n 181) at [67], [136].

¹⁹¹ Trusts (Jersey) Law 1984, Art 21(4)(b)(ii); *Lindsley v Woodfull* [2004] EWCA Civ 165 at [27]–[28]; *Quarter Master UK Ltd v Pyke* [2004] EWHC 1815 (Ch) at [75]; *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 at [100]–[103]; *Cook v Deeks* [1916] AC 554.

¹⁹² *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd* [2007] EWHC 915 (Ch) at [104] (obiter). See also the discussion of *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177 at [23] in *Prest v Petrodel Resources Ltd* [2013] UKSC 34 at [32]–[33].

fiduciary.¹⁹³ According to the UK Supreme Court, if no other remedy is available, it may be possible to pierce the corporate veil, if the company's personality has been used to evade the fiduciary's liability.¹⁹⁴ However, no piercing may take place on the basis merely that the fiduciary has a substantial interest in a company.¹⁹⁵ The Royal Court has a discretionary jurisdiction to award compound interest in respect of any award to account for profit, gain or advantage derived from a breach of trust or fiduciary duty.¹⁹⁶

B. Proprietary Remedies

Whether a bribe or secret commission received by a fiduciary in breach of its fiduciary duty can be subject to a proprietary claim (as well as a personal obligation to account) in favour of the beneficiary has been the subject of considerable controversy in recent years.¹⁹⁷ While there was no doubt that a fiduciary must account for any secret commission or profit obtained by virtue of his position, there was a line of English authority that beneficiaries could not claim any proprietary interest in monies constituting or representing a bribe.¹⁹⁸ The issue becomes of practical importance, often in cases of fraud, where the defaulting fiduciary becomes insolvent prior to the fiduciary's default being remedied. While a proprietary claim in favour of the beneficiaries or principal will usually survive an insolvency event, the fiduciary's personal accountability will not. Neither does a personal claim for an account of profits rank in priority to other claims by the fiduciary's unsecured creditors.

First in Jersey¹⁹⁹ and subsequently the UK Supreme Court²⁰⁰ have now settled this controversy: where a fiduciary, including but not limited to trustees, eg agents or company directors, receive a bribe or secret commission without authority, the fiduciary is to be treated as having acquired the benefit on behalf of his principal, so that it is beneficially owned by the principal. In such cases, the principal has a proprietary remedy in addition to his personal remedy against the agent, and the principal can elect between the two remedies.²⁰¹ The approach in *Reid* which is the approach which currently prevails in Jersey effectively permits the plaintiff to elect either for a right in the nature of a lien on the profit to secure the fiduciary's personal obligation to account, or a proprietary constructive trust over the secret commission itself. A constructive trust of this sort arises automatically out of the fiduciary's obligation to transfer the secret commission in specie. It follows that the beneficiaries are

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¹⁹³ *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734 at 744; *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd* (n 192) at [104] (obiter). See also the discussion of *Gencor* in *Prest v Petrodel Resources Ltd* (n 192) at [31]–[33].

¹⁹⁴ *Prest v Petrodel Resources Ltd* (n 192).

¹⁹⁵ *Ultraframe (UK) Ltd v Fielding* (n 131) at [1576]. However, the company will itself be liable to any remedies available against a knowing recipient.

¹⁹⁶ *United Capital Corp Ltd v Bender* [2006] JLR N [7]; *Fed Republic of Brazil v Durant Intl Corp* [2013 (1) JLR 103].

¹⁹⁷ See Ch 13.

¹⁹⁸ *Lister & Co v Stubbs* (1890) 45 ChD 1; *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, [2012] Ch 453.

¹⁹⁹ *In re Rex Trust* (n 7).

²⁰⁰ *FHR European Ventures LLP v Cedar Capital Partners LLC* (n 6).

²⁰¹ ibid, at [7]. As to the need for election, cf *AG for Hong Kong v Reid* (n 7) at 336, approved and followed in *In re Rex Trust* (n 7). See also J Sheedy, 'Who Owns A Bribe?: UK Supreme Court Follows Where Jersey Leads' (2014) 18(3) *Jersey & Guernsey Law Review*

entitled to trace the bribe or secret commission in order to identify its current form and location before claiming a constructive trust over it or any asset substituted for it.²⁰²

- 8-78** While any profit may be subject to a proprietary interest in favour of the beneficiaries, the fiduciary is nonetheless entitled to claim an allowance for expenses incurred in obtaining the property.²⁰³ A fiduciary may also claim an allowance in respect of any effort or skill employed in generating the profit. The Court will be mindful of the potential adverse consequences of encouraging fiduciaries to place their own interests ahead of those of their beneficiaries with the expectation of being rewarded by way of an allowance for doing so. The Royal Court has expressed itself as being reluctant to bestow a windfall on the beneficiaries by way of the ‘free’ administration of trust assets by stripping trustees of their right to charge for the services they provide.²⁰⁴ In *Carafe*, the trustee was stripped of any profit element of their professional fees, which may be adequate to discourage trustees from actively taking steps to breach their duties in the expectation of reward.
- 8-79** The beneficiaries may issue proceedings seeking declaratory relief as to the ownership of the asset representing the profit that is caught by the no-profit rule combined with suitable orders concerning the vesting of the property. Where the proceeds of the profit have been dissipated so as to be untraceable, the trustee remains personally liable to account to the beneficiaries for the value of the profit obtained in the same way as the trustee would be liable for any actionable loss sustained by the trust fund.²⁰⁵ The trustee is also obliged to account for any income or profits derived from the profit that is subject to the constructive trust that arises by virtue of the rule. A trustee who expends its own money in the upkeep of any property that represents a profit is entitled to reimbursement for those costs and expenses from the fund by way of its indemnity by reason of the principle that the trustee is not obliged to expend its own money in the maintenance of the trust assets.²⁰⁶ The Court is reluctant to permit the beneficiaries to obtain a windfall in what would in effect, were the trustee’s right of indemnity to be barred, amount to the free administration of trust property. It will be observed that the operation of the rule is not a one-way street for the beneficiaries. The property that has been acquired by the trustee in breach of the rule may be burdensomely expensive and to treat it as an accretion to the trust fund may not be in the interests of the beneficiaries as a whole. Beneficiaries cannot be compelled to accept the property as an accretion to the fund.²⁰⁷ For this reason, the rule is described as ‘a sword for the beneficiaries which may be sheathed if desired, not a shield for the trustee.²⁰⁸

²⁰² *FHR European Ventures LLP v Cedar Capital Partners LLC* (n 6) at [1]; *Ultraframe (UK) Ltd v Fielding* (n 131) at [1519]. As to tracing into clean or mixed substitutions, see para 13–49.

²⁰³ *Phipps v Boardman* (n 186) at 1018.

²⁰⁴ *In the Matter of the Carafe Trust* (n 155), an entitlement to remuneration is fundamental to the interests of Jersey’s professional trustee industry.

²⁰⁵ As to personal actions against trustees, see Ch 7.

²⁰⁶ Trusts (Jersey) Law 1984, Art 26(2); *Williams v Stevens* (1866) LR 1 PC 352, *Viscount v Wadman* (1972) JJ 2085. As to the trustee’s indemnity, see Ch 11.

²⁰⁷ *Thompson’s Trustee in Bankruptcy v Heaton and Others* (n 75).

²⁰⁸ Tucker, Le Poidevin, Brightwell, *Lewin on Trusts*, 19th edn (London, Sweet & Maxwell, 2014) at 20-030; see *Boultung and Another v Association of Cinematograph, Television and Allied Technicians* (n 67), per Lord Denning MR. at 637

C. Compensation for Loss²⁰⁹

The beneficiaries may alternatively seek to claim equitable compensation in the nature of damages for any loss caused to the trust fund by a breach of fiduciary duty.²¹⁰ In support of a remedy for loss, the House of Lords has held that the fact that rescission was impossible did not preclude the possibility of a pecuniary award,²¹¹ and recognised that equitable compensation could be awarded if the breach of fiduciary duty had caused loss.²¹² It might be argued²¹³ that equitable compensation in the nature of damages is not a remedy for breach of fiduciary duty by a trustee on the basis that the primary remedy of a beneficiary is an order for an account to be taken and if a trustee has committed a breach of fiduciary duty, by way of the surcharging or falsification of the entries in the account, the trustee is liable to make the position whole, as if no breach of fiduciary duty has occurred.²¹⁴ While an account is the usual remedy against a trustee, not all fiduciaries are necessarily stewards of property from which an account can be taken. Where there is no fund, compensatory relief must be available as a necessity to ensure that any loss caused by a breach of fiduciary duty is not without a remedy.

However, compensation is only available in respect of loss which is shown to have been caused by a breach of fiduciary duty,²¹⁵ which requires the Court to determine what would have happened but for the breach of fiduciary duty. It will amount to breach of the principle against double recovery to pursue a claim for compensation for loss and an account of profits.²¹⁶ Consideration may be given to how the beneficiaries or principal would have acted if the fiduciary had not acted in breach of fiduciary duty.²¹⁷ The fiduciary will have a defence to a claim for compensation where the beneficiaries or principal would have acted in the same way even if the trustee or fiduciary had disclosed all the material facts.²¹⁸ In *Gwembe Valley Development Co Ltd v Koshy*,²¹⁹ the defendant director was found to have acted dishonestly in not disclosing his interest in a transaction and was nonetheless held not liable to pay equitable compensation on the basis that his breach had not been proven to have caused loss to his company.

The burden of proving that the breach of fiduciary duty caused the loss for which compensation is claimed rests with the beneficiaries.²²⁰ The beneficiaries must establish that but for the breach of duty the loss would not have occurred. The Court may be persuaded to

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²⁰⁹ See Ch 7 for claims for an account and compensation for loss caused by a breach of trust.

²¹⁰ *West v Lazard Bros & Co (Jersey) Ltd* (n 180).

²¹¹ *Bentinck v Fenn* (1887) 12 AppCas 652 at 665; *Re Olympia* [1898] 2 Ch 153 at 178–79; *Gluckstein v Barnes* [1900] AC 240 at 249 and 252–54.

²¹² *Bentinck v Fenn* (n 211) at 661, 667 and 669.

²¹³ Lord Millett, 'Proprietary Restitution' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Sydney, Lawbook Co, 2005) 309–10.

²¹⁴ For an explanation as to how an account of the trustee's conduct of its administration works, see Ch 7.

²¹⁵ *Bentinck v Fenn* (n 211) at 661–62 and 669; *Gwembe Valley Development Co Ltd v Koshy* (n 140) at [147].

The approach is analogous to the position where there has been a breach of trust: *Target Holdings Ltd v Redfersns* [1996] AC 421 at 432, 434.

²¹⁶ *Stevens v Premium Real Estate Ltd* [2009] NZSC 15 at 90.

²¹⁷ *Murad v Al-Saraj* (n 181) at [110], [120].

²¹⁸ *Gwembe Valley Development Co Ltd v Koshy* (n 140) at [147] and [159].

²¹⁹ [2003] EWCA Civ 1478, [2004] 1 BCLC 131 at [135], [159].

²²⁰ *Swindle v Harrison* (n 139) at 718, 726 and 733.

draw inferences (but will not speculate) as to what would have happened had the trustee performed its duty properly. In the absence of evidence to justify such inferences the beneficiary of the trust is entitled to be placed in the position it was in before the breach occurred, unless the fiduciary (on whom the onus will lie in proving this) is able to show what the beneficiary would have done if there had been no breach of fiduciary duty and that in doing that, no loss would have occurred.

- 8-83** Compensation cannot be recovered for breach of the trustee's fiduciary duty where the loss suffered is merely reflective of loss caused to a company of which the plaintiff is a shareholder, even if separate duties are owed to the company and the plaintiff respectively.²²¹ Careful analysis is required in cases involving fiduciary duties at both the trustee and corporate level as to precisely who the loss that has been occasioned by the breach of fiduciary duty belongs to.
- 8-84** The principles by which the quantum of an award for compensation for breach of fiduciary duty are determined are not necessarily the same as those which apply to the quantification of damages in tort or for breach of contract. The fiduciary is unable to assert a defence of contributory fault or negligence against the plaintiff beneficiaries in order to reduce the award where his or her breach of fiduciary duty involved conscious disloyalty.²²² It has yet to be determined whether a defence of contributory fault is unavailable in *all* cases involving breach of fiduciary duty or only those involving conscious disloyalty.²²³ Given the underlying policy imperative for the trustee's fiduciary duties is to ensure a trustee is not tempted to prefer any other interest to that of the beneficiaries it is inappropriate for a trustee to seek to defend themselves by arguing contributory fault on the part of the beneficiaries where the fiduciary has succumbed to temptation and thereby caused loss to the fund. The principal's conduct will still be relevant where it is a factor determining the loss for which he can recover.
- 8-85** As with cases where the remedy sought is for an account of profits, the Court may award interest (both simple or compound) on an award for loss caused to the fund. In determining what interest rate will be applicable the Court will investigate the counterfactual position of what would have been done had the breach not occurred including analysis of the appropriate rate of return in respect of funds or assets that have gone missing.²²⁴

D. Rescission of the Transaction

- 8-86** The beneficiaries may commence proceedings to rescind a transaction entered into by the trustee in breach of the trustee's fiduciary duty not to enter a transaction in which the trustee is personally interested.²²⁵ Where the fiduciary enters a transaction that is subject to

²²¹ *Shaker v Al-Bedrawi* [2002] EWCA Civ 1452 at [81]; *Gardner v Parker* [2004] EWCA Civ 781 at [39] and [46].

²²² *Nationwide Building Society v Balmer Radmore* [1999] Lloyd's Rep PN 241 at 281.

²²³ *De Beer v Kanaar & Co (No 2)* [2002] EWHC 688 (Ch) at [92] (where the point is asserted, in the context of a trust claim, without discussion).

²²⁴ *Durant Intl Corp v Brazil* (1) JLR 273.

²²⁵ *Dick Stock v Pantrust International SA & Ors* (n 51).

a conflict without the approval of the Court, the informed consent of beneficiaries or the terms of the trust instrument, the transaction is voidable and not void.²²⁶ A trustee asserting that the beneficiaries' consent was obtained, and the transaction should be upheld, bears the burden of proving that it made full disclosure of all material facts to the beneficiaries and that the consent was informed and freely given.

The beneficiaries may also apply to rescind a transaction entered into by the trustee with a third party to the trust where the trustee has received a profit in the nature of a secret commission or a bribe from the third party in the transaction provided that the third party was aware that the recipient of the profit was a trustee.²²⁷ This rule applies to all fiduciaries and is not confined to trustees. It is also established that the beneficiaries may elect to assert a proprietary remedy over the secret profit,²²⁸ but the beneficiaries must elect between claiming the profit and rescission of the transaction giving rise to it. It is not a defence that the payor of the secret commission to the trustee believed the fiduciary had given disclosure to the beneficiaries if it did not.²²⁹

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The beneficiaries are entitled to seek rescission if they neither knew of, nor consented to, the payment made to the trustee in breach of its fiduciary duty.²³⁰ Where it comes to the beneficiaries' attention that the trustee had been paid a commission by the other party to the transaction of which the trustee has given insufficient disclosure to enable the beneficiaries to give their fully informed consent, the Court has a discretion as to whether to rescind the transaction. The Royal Court has refused to order rescission in such a situation where it considered that the agreement, notwithstanding the conflict, was fair and reasonable.²³¹

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It is not a bar to rescission of the transaction if the transaction that is vitiated by the conflict has been executed or where the property subject to it has changed in value.²³² Rescission will usually be refused where the beneficiaries have affirmed the transaction with full knowledge of the trustee's interest in it.²³³

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Rescission is only possible where *restitutio in integrum* is possible.²³⁴ Both sides of the transaction must be undone and the parties restored to their original positions. A trustee who

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²²⁶ *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549, 585, 589–90 and 594; *Tito v Waddell (No 2)* (n 43) at 225, 241; *Guinness Plc v Saunders* (n 187) at 697; *Ingram v Inland Revenue Commissioners* (n 58) (CA), affirmed on appeal: [2000] 1 AC 293; M Conaglen, *Fiduciary Loyalty. Protecting the Due Performance of Non-Fiduciary Duties* (Oxford, Hart, 2010) Ch 4. However, the transaction may be void for other reasons, eg transactions entered into prior to 2 November 2012 (the enactment of the Trusts (Amendment No 5) (Jersey) Law 2012, inserting Art 31(3) in the Trusts (Jersey) Law 1984), that infringe the rule requiring there to be two parties to a contract entered into by the trustee.

²²⁷ *Ross River Limited v Cambridge City Football Club Limited* (n 82), cited but distinguished in *Dick Stock v Pantrust International SA & Ors* (n 51).

²²⁸ *In re Rex Trust* (n 7); *FHR European Ventures LLP v Cedar Capital Partners LLC* (n 6).

²²⁹ *Grant v Gold Exploration and Development Syndicate Ltd* [1900] 1 QB 233 at 248–49; *Taylor v Walker* [1958] 1 Lloyd's Rep 490 at 513; *Logicrose Ltd v Southend United Football Club Ltd* [1988] 1 WLR 1256 at 1262; *Ross River Ltd v Cambridge City Football Club Ltd* (n 82) at [205].

²³⁰ *Ross River Ltd v Cambridge City Football Club Ltd* (n 82) at [203].

²³¹ *Dick Stock v Pantrust International SA & Ors* (n 71); however, relief was refused on the basis of the provisions in the Companies (Jersey) Law 1991 and not the principles applicable to trustees.

²³² *Armstrong v Jackson* [1917] 2 KB 822 at 828–29.

²³³ *Holder v Holder* (n 48); *Re Cape Breton Co* (1885) 29 ChD 795 at 805 and 812.

²³⁴ *In The Matter Of R* [2011] JRC117, approving *Abram Steamship Co v Westville Shipping Co* [1923] AC 773 at 781, per Lord Atkinson; *Transvaal Lands Co v New Belgium (Transvaal) Land & Development Co* [1914] 2 Ch 488 at 505; *Armstrong v Jackson* (n 232) at 828; *Hely-Hutchinson v Brayhead Ltd* (n 226) at 586.

buys trust property from itself is entitled to be paid back the purchase price and interest if the beneficiaries apply to set aside the sale. Equally, a trustee that lends money at interest from one trust of which it is the trustee to itself as trustee of another trust is, in principle, entitled to repayment of the principal plus interest, subject to the Court's inherent power to reduce any contractual provision for interest it regards as excessive.²³⁵ And a trustee who spends money improving property concerned has a lien on the property for the costs of improvement.²³⁶ Likewise, the trustee is personally liable to account for profits which it has received while in possession of the property.²³⁷ The beneficiaries are, however, not required to return to a third party any bribe or secret commission which the third party paid to the trustee, even if the beneficiaries have asserted proprietary rights in respect of such a profit in the hands of the trustee.

- 8-91** The requirement for *restitutio in integrum* means that rescission will generally be barred where it is not possible for the transaction to be undone such as where the property that is the subject of the transaction has passed into the hands of a third party and cannot be recovered. However, where rescission is impossible the Court may be willing to order rescission on terms which require a monetary payment that places the parties, as nearly as money is able, in the position they would have occupied had the transaction been fully rescinded.²³⁸

i. Rescission of Transactions Entered into by Directors of a Jersey Company

- 8-92** A director of a Jersey company who has, directly or indirectly, an interest in a transaction entered into or proposed to be entered into by the company or by a subsidiary of the company which conflicts or may conflict with the interests of the company and of which the director is aware, is required to disclose to the company the nature and extent of the director's interest.²³⁹ Such disclosure is required to be placed in the minutes of the directors' meeting at the first meeting of the directors at which the transaction is considered after the director concerned becomes aware of the circumstances giving rise to his or her duty to make it.
- 8-93** Where a director of a Jersey company fails to comply with the requirements to give disclosure in accordance with Article 75, a member of the company, or the company itself may issue proceedings to rescind the transaction entered into by the company.²⁴⁰ However, the Court shall not set aside a transaction unless it is satisfied both that the interests of third parties who have acted in good faith thereunder would not thereby be unfairly prejudiced; and that the transaction was not reasonable and fair in the interests of the company at the

²³⁵ *Doorstop Limited v Gillman and Lepervier Holdings Limited* [2012 (2) JLR 297], citing Le Geyt, *Priviléges, Loix et Coutumes de L'Île de Jersey* (1953) vol 4, title 1, art 4, at 68; art 8, at 69.

²³⁶ See Ch 13, para 13-68.

²³⁷ See para 8-69 above.

²³⁸ RC Nolan, 'Conflicts of Interest, Unjust Enrichment, and Wrongdoing' in WR Cornish, RC Nolan, J O'Sullivan and GJ Virgo (eds), *Restitution: Past, Present and Future* (Oxford, Hart Publishing, 1998) 87 at paras 114–15.

²³⁹ Companies (Jersey) Law 1991, Art 75.

²⁴⁰ ibid, Art 76; the jurisdiction to grant rescission is also required to be in conjunction with a direction that the directors account to the company for any profit or gain.

time it was entered into.²⁴¹ A transaction is not voidable, and a director is not accountable for any profit made under a contract with the company in which the director has an interest where, notwithstanding a failure to comply with Article 75, the transaction is confirmed by special resolution; and the nature and extent of the director's interest in the transaction were disclosed in reasonable detail in the notice calling a meeting of the directors at which the resolution is passed.²⁴² The Royal Court has recently considered whether Article 75 could be used by an incoming court-appointed trustee shareholder of a Jersey company to rescind a registered charge over Jersey immovable property held by the company granted by the company at the direction of the former directors of the company to the former corporate trustee. In *Dick Stock v Pantrust International SA*, the Court was in little doubt that the former directors of the company, who were also directors of the former corporate trustee (one of whom was also the beneficial owner of the former corporate trustee), were in a position of conflict when, as directors of the company, they considered whether or not to accept the lending facility offered by the former corporate trustee and to grant it a second charge over the company's property.²⁴³ The Court held that the burden of satisfying the Court that the conditions in Article 76(3) have been met falls on the party seeking to have the transaction set aside.²⁴⁴ The authors have some reservations as to whether this can be correct given that Article 76(3) is only engaged where the director has failed to do its duty to give disclosure of the transaction so that the interests of the company are potentially at risk and that it seems unjust to reverse the burden of proof to impose on the company from whom information has been improperly withheld whether third parties are involved and that the transaction (details of which it will not have been given) was not reasonable and fair at the time it was entered into.

E. Forfeiture

It is well established that there are circumstances where a fiduciary, and in practice the rule is encountered more with agents than with trustees, who acts in breach of fiduciary duty may forfeit their entitlement to remuneration.²⁴⁵ Remuneration obtained by the fiduciary from a third party without the principal's consent can be stripped from the fiduciary, using an account of profits, as it is in the nature of a bribe or secret commission taken in breach of fiduciary duty.²⁴⁶ The commission or remuneration is forfeited because it has not been earned by the fiduciary in good faith.²⁴⁷ The underlying policy rationale for the rule was set out by Jacob LJ in *Imageview Management Ltd v Jack* as being.²⁴⁸

8-94

²⁴¹ *ibid*, Art 76(3); *Dick Stock v Pantrust International SA & Ors* (n 71).

²⁴² *ibid*, Art 76(2).

²⁴³ *Dick Stock v Pantrust International SA & Ors* (n 71) at 19.

²⁴⁴ *ibid*, at 23.

²⁴⁵ *Snell's Equity*, 33rd edn (London, Sweet and Maxwell, 2014) at 7-062; *Andrews v Ramsay & Co* [1903] 2 KB 635 at 638, per Lord Alverstone CJ; *Keppel v Wheeler* [1927] 1 KB 577 at 592, per Atkin LJ; *Imageview Management Ltd v Jack* [2009] EWCA Civ 63 at 44 and 50; *Bank v Ireland v Jaffery* [2012] EWHC 1377 (Ch); *Avrahami v Biran* [2013] EWHC 1776 (Ch).

²⁴⁶ *In re Rex Trust* (n 7); *FHR European Ventures LLP v Cedar Capital Partners LLC* (n 6).

²⁴⁷ *Stevens v Premium Real Estate Ltd* (n 216) at 90.

²⁴⁸ *Imageview Management Ltd v Jack* (n 245) at 50.

we are here concerned not merely with damages such as those for a tort or breach of contract but with what the remedy should be when the agent has betrayed the trust reposed in him—notions of equity and conscience are brought into play. Necessarily such a betrayal may not come to light. If all the agent has to pay if and when he is found out are damages the temptation to betray the trust reposed in him is all the greater. So the trust rule is there as a real deterrent to betrayal.²⁴⁹

- 8-95** Where the principal is aware that the fiduciary is acting for another party in the same transaction, the principal cannot normally require the fiduciary to disgorge any fees which he or she receives from that other party as there will be no betrayal and their consent will generally be implied.²⁵⁰ If a fiduciary acts dishonestly he will forfeit his right to remuneration from the principal (as distinct from sums paid to the fiduciary by a third party).²⁵¹ He will also forfeit his right to fees if he takes a secret commission from a third party which is directly related to performance of the duties in respect of which he is being paid,²⁵² even if the principal has benefited from the fiduciary's performance of those duties.²⁵³ However, a fiduciary's fees may not be forfeit if the betrayal of trust has not been in respect of the entire subject matter of the fiduciary relationship and where forfeiture would be disproportionate and inequitable.²⁵⁴

F. Removal

- 8-96** A trustee, protector or other fiduciary or special power holder²⁵⁵ that purports to act or exercise powers in circumstances where there is an actual or potential conflict between its own interest and the beneficiaries' interest or between its duties owed to more than one beneficiary or class of beneficiaries, may be prevented from continuing to act by an order of the Court removing them from office.²⁵⁶

²⁴⁹ *Rhodes v Macalister* (1923) 29 Com Cas 19, 28: 'the more the principle is enforced, the better for the honesty of commercial transactions'.

²⁵⁰ *Re Haslam & Hier-Evans* [1902] 1 Ch 765 at 769; *Wade v Poppleton & Appleby* [2003] EWHC 3159 (Ch) at [149].

²⁵¹ *Kelly v Cooper* [1993] AC 205 at 216.

²⁵² *Imageview Management Ltd v Jack* (n 245) at [44] and [46]; *Avrahami v Biran* [2013] EWHC 1776 (Ch) at [339].

²⁵³ *Rhodes v Macalister* (n 249) at 27; *Imageview Management Ltd v Jack* (n 245) at [47]–[50].

²⁵⁴ *Bank of Ireland v Jaffery* (n 245) at [371]–[373].

²⁵⁵ *In re VR Family Trust* (n 68).

²⁵⁶ *Dick Stock v Pantrust International SA & Ors* [2015] JRC 208, [2015] JRC 223. As to principles governing the circumstances in which the Royal Court will exercise its jurisdiction to remove a trustee, protector or other power holder, see Ch 10.

9

Remedies against Wrongful Recipients of Trust Property

I. Introduction

A person who directly or indirectly, for his own benefit, receives trust property transferred in breach of trust, in circumstances where the interests of the trust's beneficiaries in the property have not been destroyed by the recipient being a without notice purchaser for value, without actual notice, without justification is, *prima facie* enriched by his receipt. In Jersey law, such receipt has the potential to give rise to a number of possible remedies against the recipient. Proprietary claims, to recover the assets from the hands of the recipient, are considered elsewhere.¹ Jersey law, like English law, may be said to have gradually moved in the direction of a general restitutionary remedy based on the principles of unjust enrichment² (whereby the recipient is personally liable to pay compensation in respect of his unjust receipt (subject to a change of position defence)). The parameters of unjust enrichment in Jersey remain inexact and the jurisdiction to award compensation remains in the early stages of development. Jersey also recognises an array of other personal causes of action that may be deployed against wrongful recipients of trust property.³ It is with these causes of action (as well as an action for unjust enrichment, that this chapter is concerned.

9-1

II. Recovering Trust Funds Paid Away by Mistake

Jersey law recognises there is a cause of action for money had and received against a wrongly paid or overpaid beneficiary (or third party) if the payment was made by mistake.⁴ Locus to bring such an action is vested in the trustee rather than the beneficiaries and there is persuasive English authority that beneficiaries cannot bring an action directly (although

9-2

¹ See Ch. 13.

² *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548; HL, *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, HL. It should be noted that Jersey's rules on unjust enrichment, unlike England's, do not require any proof of fault or culpability; see *Federal Republic of Brazil v Durant International Corporation* [2012] (2) JLR 356].

³ *Bank of Credit & Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437; *Charter plc v City Index Ltd* [2007] EWCA Civ 1382.

⁴ Service of Process Rules 1994, r 7(q); *UCC v Bender & Ors* [2006] JLR 242].

they may prevail upon the trustee to bring an action or themselves bring a derivative claim by standing in the trustee's shoes).⁵ If the overpayment is as the result of the trustee's negligence, the recipient is not able to plead that negligence as a defence to an action for money had and received, though change of position on the part of the payee is a defence.⁶ There is House of Lords authority that is likely to be persuasive in the absence of any well-developed local authority that money is recoverable under either a mistake of fact or a mistake of law.⁷ This opens the door to an action for recovery of overpaid or wrongly paid money to a beneficiary by reason of a mistaken construction of the trust instrument, or on the mistaken basis that the trust in their favour was valid, though it was in law void for some reason. An error of law may (although there is no authority to that effect) extend to recovery of money paid on the mistaken basis that the trustee had a valid power to make the payment though in law it did not. There is no Jersey authority to the effect that that the only mistake capable of founding an action for money had and received is one which led the person making payment to suppose that he had a legal liability to pay.⁸ If a payment is made on the foundation of a mistaken belief in the validity of the power then in principle there is no reason why recovery should be denied. Recovery will not usually be permitted if the trustee is aware that there is a doubt as to its entitlement to make the payment, but nonetheless decides to make it anyway, thereby assuming the risk that its construction of the trust instrument or view of the law may turn out to be wrong.⁹ An action for money had and received is, on a traditional analysis, limited to cases of payment of money and is not available where there is a distribution of assets in specie.¹⁰ However as Jersey does not recognise a distinction between actions at law and actions in equity, and has a unified theory of proprietary tracing, it may be possible to recover assets from indirect recipients if the recipient is not a bona fides purchaser for value without notice.¹¹ If a recipient has sufficient knowledge or notice before disposing of or dealing with the trust property so as to make him liable as a knowing recipient, the trustee may make him accountable.¹² However, the trustee will have limited recourse against an innocent volunteer recipient of trust property if the recipient has parted with the trust property before acquiring the knowledge or notice requisite to make him personally liable.

III. Actions of Knowing Receipt

- 9-3** Secondary liability, by way of the interposition of a species of constructive trusteeship, against a third party for breaches of trust, is, according to the well-known judgment of

⁵ *Re Robinson* [1911] 1 Ch 502 at 507–08 and 513.

⁶ *Lipkin Gorman v Karpnale Ltd* (n 2); *Dextra Bank & Trust Company Ltd v Bank of Jamaica* [2001] UKPC 50 at [34]–[38].

⁷ *Kleinwort Benson Ltd v Lincoln City Council* (n 2).

⁸ *Aiken v Short* (1856) 1 H & N 210 at 215; *Re Bodega Co Ltd* [1904] 1 Ch 276 at 286.

⁹ Goff and Jones, *The Law of Restitution*, 7th edn (London, Sweet and Maxwell, 2009) §§ 9–84, 9–85.

¹⁰ *ibid*, Chs 7 and 8, and § 19–011 (not in 8th edn).

¹¹ Cf *Durant International Corporation v Federal Republic of Brazil* [2013] (1) JLR 273; see Ch 13. *Agip (Africa) Ltd v Jackson* [1990] Ch 265 at 285–86; [1991] Ch 547 at 563–66, CA; *Foskett v McKeown* [2001] 1 AC 102 at 128–29.

¹² *Montrose Investments Ltd v Orion Nominees Ltd* [2004] EWCA (Civ) 1032.

Lord Selborne in *Barnes v Addy*,¹³ distinguishable between cases of assistance and cases of receipt. A third party who assists in a breach of trust may be made personally liable as a dishonest assistant whether or not he has received trust property and whether or not he is acting for his own benefit if the test for dishonesty can be made out.¹⁴ The remedy for claims in dishonest assistance is considered in Chapter 12.

Where dishonesty cannot be established the third party may have a concurrent personal liability as a knowing recipient if at least the first four requirements below are made out. If the requirements below are established against a defendant, he is deemed to be liable as a constructive trustee of the property and the property still in his hands is liable to be recovered against him by way of a proprietary claim, discussed elsewhere. A proprietary claim will be good against even an insolvent defendant as the property in their hands is ring-fenced from the defendant's personal property, the plaintiff having priority to it as against the insolvent defendant's other creditors. Concurrent with any proprietary claim that may be available, a defendant found liable in knowing receipt is also personally accountable as if a constructive trustee of the property received. Such personal accountability subsists even if the defendant has since parted with the property received. Where the first four requirements made out below are satisfied and the recipient still retains the property, then the proprietary remedy will usually eclipse the concurrent personal claim. However, if the defendant recipient has not retained (either in whole or in part) the received funds, the personal claim comes to the fore and may be used to satisfy any shortfall in recovery under the proprietary remedy. The personal claim affords the plaintiff no priority as against the defendant recipient's other creditors in the event of the defendant becoming insolvent.

9-4

A. Locus

Generally, those with standing to pursue a breach of trust claim will have standing to pursue a claim for knowing receipt.¹⁵ A trustee who itself made a transfer of trust property in breach of trust has locus to bring a knowing receipt claim as against the third party recipient, notwithstanding that as between himself and the beneficiary there may be a breach of trust claim.

9-5

B. Requirements for Liability

The requirements that must be satisfied to found liability in an action for knowing receipt¹⁶ are:

1. there is property that is subject to a trust;
2. the trust property is transferred;

9-6

¹³ 1874 9 Ch App 244 at 251–52.

¹⁴ *Barlow Clowes Ltd v Eurotrust Ltd* [2005] UKPC 37, considered in Jersey in *Nolan v Minerva Trust Co Ltd* [2014 (2) JLR 117], [2014] JRC078A.

¹⁵ As to locus for breach of trust claims, see Ch 7.

¹⁶ *Federal Republic of Brazil v Durant International Corporation* (n 2), affirming *Bagus Invs Ltd v Kastening* [2010 JLR 355] which approved the threefold test; *Bank of Credit & Comm Intl (Overseas) Ltd v Akindele* (n 3).

3. the transfer is in breach of trust;
4. the property (or its traceable proceeds) is received by the defendant;
5. the receipt is for the defendant's own benefit;
6. the defendant's receipt is with the knowledge that the property is trust property and has been transferred in breach of trust;
7. with such knowledge, the defendant retains or deals with the property inconsistently with the trust; and
8. the defendant is not a bona fides purchaser of the property for value with actual notice.

9-7 If a claim in knowing receipt is made out, the defendant's liability is to make good to the trust whose property has been transferred in breach of trust the money, or the value of the property, which has been received by the defendant, with interest. The liability to pay interest will run from the date of the receipt, and the Court has an inherent jurisdiction to award compound interest.¹⁷

i. Property that Is Subject to a Trust

9-8 It is a prerequisite, in order to make out a claim for knowing receipt, that the property that has been knowingly received was subject to a trust or other fiduciary relationship. Property subject to an express trust obviously satisfies this requirement but what the law regards as a trust for the purposes of knowing receipt has been interpreted widely.¹⁸ Property comprised within a deceased's estate has been held in England to be subject to a trust for these purposes.¹⁹

a. Companies and Fiduciary Agents and Directors

9-9 The property of a company that is subject to or held or controlled by the fiduciary duties of the company's directors or others on the company's behalf is to be treated as trust property for these purposes.²⁰ A bribe or secret commission paid to a fiduciary agent of a company, such as a director, is imbued with a constructive trust in favour of the company and is property beneficially owned by it²¹ and, in the authors' view, is therefore capable of being the subject of a claim in knowing receipt by the company. In cases involving companies, it is the company (or its liquidator) and not the shareholders (absent a derivative claim) that have locus to bring an action for knowing receipt in respect of a breach of fiduciary duty by a director concerning the company's property.

¹⁷ *Brazil (Fed Rep) v Durant Intl Corp* [2013] (1) JLR 103.

¹⁸ *Competitive Insurance Co v Davies Investments Ltd* [1975] 3 All ER 254; *Belmont Finance Co Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 405; *Baden v Societe General pour Favoriser le Developpement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509.

¹⁹ *Nelson v Larholt* [1948] 1 KB 339. However, the analogy is imperfect given that in Jersey succession law, the immovable estate of the *de cūs* devolves directly and automatically upon the heirs under the Wills & Succession (Jersey) Law 1993, Art 4, and does not fall to be administered by the deceased's personal representatives ('*le mort saisit le vif*'). The analogy is likely to be sustainable in relation to the movable estate. See *La Cloche v La Cloche* [1870] UKPC 14 and *In the Matter of the Estate of T.J. Moralee* [2012] (1) JLR 180].

²⁰ *Selangor United Rubber Estate Ltd v Cradock (No 3)* [1968] 1 WLR 1555 at 1574–77; *Belmont Finance Co Ltd v Williams Furniture Ltd (No 2)* (n 18) at 405.

²¹ *FHR European Ventures LLP & Ors v Cedar Capital Partners LLC* [2014] UKSC 45; *Lloyds Trust Company (Channel Islands) Limited v Fragoso* [2013] JRC211, affirming *FHR European Ventures LLP & Ors v Ramsey Neil Mankarious & Ors* [2013] EWCA Civ 17.

b. Property Subject to a Resulting or Constructive Trust

There are two kinds of constructive trust imposed by operation of law.²² The first (a 'type one' constructive trust) is a trust imposed on property in circumstance where there was a fiduciary relationship preceding the breach, such as in the case of an express trustee or a director of a company. The second (a 'type two' constructive trust) is a trust imposed where there is no preceding fiduciary relationship and the trust is constituted for the first time by the wrongful conduct of the defendant in asserting his interests to such as to render it unconscionable for the defendant to retain the benefit of what he had received leading to the imposition of an equitable obligation him.²³ As is well understood, such a person is not in fact a trustee at all, even though he may be liable to account as if he were. In such a case, the expressions 'constructive trust' and 'constructive trustee' are said to be 'nothing more than a formula for equitable relief'.²⁴ Save in the case of a Halley trust,²⁵ a constructive trust (of either type) will not arise out of a contract which has been procured by a fraudulent misrepresentation unless and until the contract has been rescinded.²⁶ The Royal Court has acknowledged that property subject to a Quistclose trust²⁷ is capable of founding an action for dishonest assistance and we can see no basis why similar reasoning could not be applied in a case of knowing receipt.²⁸ Where the transfer of property is made by a trustee under a transaction that is voidable on the basis of fraud (by the recipient) or mistake on the part of the trustee and the trustee elects to rescind the transaction (but not otherwise) then the property transferred is held on constructive trust for the trustee. It is the authors' view that property may be the subject of a knowing receipt claim if it is wrongfully transferred subject to either a type one or a type two constructive trust. What matters is that property has already become subject to a trust imposed by law before it is wrongly transferred to a third party rather than to the rightful beneficial owner. It seems obvious to the author that property that is also subject to a resulting trust would satisfy this first requirement. A resulting trust arising from the failure or determination of an express trust in favour of the settlor is obviously still trust property. Likewise where property is purchased in the name of another person and then transferred to a third party without the purchaser's authority.

9-10

ii. A Transfer of Trust Property

There must be a transfer or misapplication of either (usually) the legal title²⁹ or the beneficial title (by way of an equitable assignment) to property subject to the trust or fiduciary relationship. Consideration should be given to the capacity of the transferor of trust

9-11

²² *Paragon Finance plc v D.B. Thakerar & Co* [1999] 1 All ER 400; *Bagus Investments Limited v Kastening* (n 16).

²³ eg in cases of theft, see *Re Esteem Settlement* [2002 JLR 53], approving *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669. See *Federal Republic of Brazil v Durant International Corporation And Kildare Finance Limited* (n 2).

²⁴ *Selangor United Rubber Estates Ltd v Cradock* (No 3) (n 2) at 1583–84, per Ungoed-Thomas J.

²⁵ *Halley v The Law Society* [2003] EWCA Civ 97, a species of 'type two' constructive trusteeship based upon a fraud.

²⁶ *Nolan v Minerva Trust Co Ltd* (n 14) at 151.

²⁷ *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567.

²⁸ *Nolan v Minerva Trust Co Ltd* (n 14).

²⁹ If the beneficial title passes to the recipient absent a breach of trust there is no basis to impose a liability in equity upon the recipient by way of a claim in knowing receipt.

property to affect a transfer to a third party. Under Jersey law an express trustee has, subject to the terms of the trust, all the powers of disposition of an absolute owner in relation to property comprised within the trust.³⁰ A transfer of the legal title will be effective, even where the transfer is in breach of trust, although, by reason of the breach, the beneficial title remains subject to the trust.³¹ Transfers of money that are made under a void transaction will suffice.³² Most transactions purported to be executed by a Jersey corporation are not void as being in excess of corporate capacity.³³ A purported transfer of trust property by a person who has neither legal nor beneficial title to the property will not suffice to fix the recipient as a constructive trustee of the property. The recipient may have physical possession of the property but the action to recover the property is not one of knowing receipt but an action for goods or money had and received.³⁴

iii. The Transfer is in Breach of Trust

- 9-12** There must be a transfer of trust property in breach of trust although the breach does not have to be fraudulent or dishonest.³⁵ The transfer itself must be the breach of trust; it is insufficient that there has been a breach of trust preceding the transfer. A transfer of trust property in breach of trust of whatever character is usually ineffective to destroy the beneficial interest in the trust property unless the transferee is a bona fides purchaser for value without notice.³⁶ The result is that while legal title may be transferred the rights of the beneficiaries subsist in the property as against the new title holder.
- 9-13** It is impermissible as a matter of Jersey law for Jersey immovable property to be held directly in trust.³⁷ Consequently, there is no directly analogous provision in the Trusts (Jersey) Law 1984 with section 2(1) of the Law of Property Act 1925.³⁸ The closest equivalent provision is Article 55 of the Trusts (Jersey) Law 1984, which provides that where property subject to a trust is transferred to a bona fides purchaser for value without actual notice of the breach of trust, the property transferred is wiped clean of the trust to which it was formally subject (which now takes effect in the purchase money). Where the beneficial interests are overreached in this way, it is not possible to bring a knowing receipt claim in relation to the property transferred in breach of trust. However where there is no overreaching the recipient remains exposed to a knowing receipt claim if the knowledge requirement is satisfied.

³⁰ Trusts (Jersey) Law 1984, Art 24(1).

³¹ *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246 at 303, per Browne-Wilkinson LJ.

³² *Belmont Finance Co Ltd v Williams Furniture Ltd (No 2)* (n 18).

³³ Companies (Jersey) Law 1991, Art 18. However, a transaction may still be in breach of directors' duties.

³⁴ *Trustee of the Property of FC Jones & Sons (A Firm) v Jones* [1997] Ch 159.

³⁵ *Right Reverent Hollis v Rolfe* [2008] EWHC 1747 (Ch) at [174]; *Belmont Finance Co Ltd v Williams Furniture Ltd (No 2)* (n 18); *Polly Peck International plc v Nadir (No 2)* 4 All ER 769 at 777; and *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 at 700.

³⁶ Trusts (Jersey) Law 1984, Art 55.

³⁷ ibid, Art 11(2)(a)(iii) (although there is no objection to immovable property being owned by a corporation the shares of which are held directly by the trustee).

³⁸ A conveyance to a purchaser of a legal estate in land shall overreach any equitable interest or power affecting that estate, whether or not he has notice thereof.

A breach of directors' duties will suffice to found an action of knowing receipt.³⁹ It does not seem relevant to this requirement, whether the company is a Jersey company or whether the breach that is alleged is governed by a foreign law.

9-14

Where the constructive trust existing over the property is of 'type two', as discussed above, to describe the transfer of property as being in 'breach of trust' sits awkwardly with the way the constructive trust arises; as the existence of the constructive trust and the transfer may occur simultaneously or so closely together in time as to be indistinguishable. The reality is that the constructive trust arises when the constructive trustee fails in their duty to restore the property to its true owner.

9-15

iv. The Property (or its Traceable Proceeds) is Received by the Defendant

In determining whether trust property has been received, it is permissible to use the principles applicable when seeking to assert a proprietary remedy by way of tracing.⁴⁰ Jersey law does not recognise the separate rules applicable in English law to following at law and tracing in equity, which, in Jersey, are subsumed into a single flexible doctrine of tracing.⁴¹ It follows that it is possible to establish receipt for the purposes of a knowing receipt claim even where the defendant has received the property indirectly (provided the knowledge requirement is made out and the receipt is not from a bona fides purchaser without notice). It would even seem possible to establish receipt by way of so-called 'backwards' or 'reverse' tracing thereby circumventing difficulties with tracing the receipt of trust moneys through overdrawn bank accounts and the lowest intermediate balance rule.⁴²

9-16

Provided the requirements of knowledge is satisfied against each of them (and there is no interposition of a bona fides purchaser for value without notice), a claim for knowing receipt can be brought against each and every participant in a chain of recipients leading from the original transferee of trust property to the last recipient into whose hands the funds are traceable (though not as to achieve any double or multiple recovery).

9-17

a. Receipt by Agents and Nominees and Ministerial Receipt

9-18

Trust property received by an agent on behalf of the defendant amounts to receipt by the defendant if there is no evidence that the agent has accounted to the defendant for their receipt or dealt with the property at the defendant's instructions. A company's shareholder(s) is not the company and so money received by a company is not, in the absence of a successful application to pierce the corporate veil, to be regarded as receipt by the company's shareholder.⁴³ The law on piercing the corporate veil has been restated in England in *Petrodel Resources Ltd v Prest*.⁴⁴ In *Prest*, the older cases on piercing the corporate veil were reviewed and re-analysed to be cases where the company's receipt was as an agent for the principal defendant who had used the company to conceal their true identity

³⁹ *Lipkin Gorman v Karpnale Ltd* (n 2) at 565.

⁴⁰ *Durant International Corporation v Federal Republic Of Brazil* (n 11); *Boscowen v Bajwa* [1996] 1 WLR 328 at 334; *Belmont Finance Co Ltd v Williams Furniture Ltd* (No 2) (n 18).

⁴¹ See Ch 13 and *Durant International Corporation v Federal Republic of Brazil* (n 11).

⁴² *The Federal Republic of Brazil and another v Durant International Corporation and Anor* [2015] UKPC 35.

⁴³ *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 171 at 738; *Trustor AB v Smallbone* (No 2) [2001] 1 WLR 1177.

⁴⁴ [2013] UKSC 34.

as recipient and not to be cases that involved disregarding the distinct personality of the company. Where a company (or several companies) is interposed so as to conceal the identity of the real actors, the Court will not be deterred from identifying those actors, where it is relevant, without disregarding the corporate structure put in place. Where however the interposition of a company or companies is designed to defeat a right or enforcement of that right against a person who is in control of the company that exists independently of the company, then the court may disregard the corporate structure. This evasion principle will usually have limited relevance to cases of knowing assistance because there will usually be no pre-existing right against the defendant other than the receipt and that right will only arise if the company's receipt is treated as the defendant's receipt.

- 9-19** The principles applicable in a case of concealment however are potentially more relevant in that it may give the court greater scope to regard what is ostensibly a receipt by a company for its own benefit as actually being a receipt by the company as the defendant's agent. Where the money is subsequently distributed by the company or sold on with notice to the shareholder(s) then the requirement for receipt will clearly be satisfied as the distribution will be the traceable proceeds of the company's receipt.

v. The Receipt Is for the Defendant's own Benefit

- 9-20** A recipient must receive the property in his own right and for his own benefit.⁴⁵ Where property is received by the agent of a third party, in breach of trust, the agent is not liable for knowingly receiving property in this ministerial capacity because he does not receive the property for his own benefit.⁴⁶ If the agent transmits the property to his principal he may be liable as a dishonest assistant if he does so knowing the property that he has received was in breach of trust and knowing that in transmitting the property to his principal, the principal would treat it as his own. The authors are of the view that the same principle applies to nominees. What is the liability of a bank that has received and dealt with the proceeds of misapplied trust monies? Is the bank to be treated as having received the funds for its own benefit or on the basis they have received it in a ministerial capacity? There is thought to be a relevant distinction between the situation where money is deposited with the bank by the account holder and the situation where the money is deposited with the bank by a third party.⁴⁷ Where the deposit is by the account holder, the bank receives the funds beneficially. Money deposited with a bank by an account holder becomes the bank's money as an accretion to the debt owed by the bank to the account holder.⁴⁸ If the account is overdrawn the deposit is treated as a repayment of the debt owed by the account holder to the bank.⁴⁹ Where cash is deposited with the bank by a person other than the account holder, the bank is thought to take the accretion to the account in a ministerial capacity as agent for the account holder and not for its own benefit, so as to preclude a claim in knowing receipt against it. This distinction is thought to rest on two principles: first, that a bank which receives a deposit from someone other than the account holder does so on

⁴⁵ *Barnes v Addy* (1874) 9 Ch App 244 at 254–55; *Agip (Africa) Ltd v Jackson* (n 11) at 291–92; *El Ajou v Dollar Land Holdings plc* (n 35) 700.

⁴⁶ *Agip (Africa) Ltd v Jackson* (n 11) at 291–92.

⁴⁷ Underhill and Hayton, *Law of Trusts and Trustees*, 18th edn (London, LexisNexis, 2010) at 98.13.

⁴⁸ *Royal Bank of Scotland v Skinner* [1931] SLT 382.

⁴⁹ Cf *Polly Peck International plc v Nadir (No 2)* [1993] BCLC 187.

its customer's behalf. The bank does not receive the sum deposited beneficially because it takes title to the funds. To take the sum deposited beneficially requires also that the bank does not have to account for an equivalent sum to the principal who is himself liable to the plaintiff when the defendant takes receipt. The second is how the treatment of the receipt of third party funds into an account is booked by a bank. Regardless of the state of the account between the bank and the account holder (whether in credit or overdrawn), the bank first receives the deposit in a ministerial capacity as agent for the account holder. In a separate transaction, the bank either borrows the money from its customer (crediting the sum in its own books as a debt owed to the customer) or, if the account is overdrawn, the bank applies the amount borrowed in reduction of the account holder's debt to the bank.⁵⁰ The bank is not enriched because upon receiving the deposit into the account from a third party the bank becomes indebted to its customer for the corresponding amount.⁵¹ Against this line of authority are a number of decisions and dicta, which include Millett J's further statement in *Agip* that 'if the collecting bank uses the money to reduce or discharge the company's overdraft ... it receives the money for its own benefit'.⁵²

vi. The Defendant's Receipt Is with the Knowledge that the Property Is Trust Property and Has Been Transferred in Breach of Trust

The Royal Court has adopted the test of unconscionability as the relevant threshold in relation to knowledge for the purposes of knowing receipt;⁵³ however, the test of unconscionability has been recognised to be something of an elephant test.⁵⁴ In the absence of extensive local authority, English cases and those from other jurisdictions that share the Privy Council as their final court of appeal, are likely to be regarded as persuasive in Jersey. However, even having recourse to these authorities reveals that the requirement of knowledge and precisely what must be proven against a defendant has, been one of the most controversial aspects of knowing receipt.

9-21

A classification of knowledge that has remained influential (despite its abandonment by the higher courts in England) is that found in *Baden v Societe General pour Favoriser le Developpement du Commerce et de l'Industrie en France SA*⁵⁵ in which Peter Gibson J, delineated five types of knowledge:

9-22

1. actual knowledge;⁵⁶
2. wilfully shutting one's eyes to the obvious (so-called Nelsonian blindness);⁵⁷

⁵⁰ *Agip (Africa) Ltd v Jackson* (n 11).

⁵¹ *Compagnie Commerciale Andre SA v Artibell Shipping Co Ltd* (No 2) 2001 SC 653 at 661–62; *Continental Caoutchouc and Gutta Percha Co v Kleinworth Sons & Co* (1904) 90 LT 474 at 476; and *British American Elevator Co v Bank of British North America* [1919] AC 658 (PC).

⁵² *Agip (Africa) Ltd v Jackson* (n 11) at 292. See also *Coleman v Bucks and Oxon Union Bank* [1897] 2 Ch 243; *Citadel General Assurance Co v Lloyds Bank Canada* [1997] 3 SCR 805; *Evans v European Bank Ltd* [2004] NSWCA 82; (2004) 61 NSWLR 75 at [167]; *B.M.P. Global Distribution Inc v Bank of Nova Scotia* [2009] SCC 15; [2009] 1 SCR 504 at [77].

⁵³ *Bagus Investments Limited v Kastening* (n 16); *Bankd of Credit & Comm Intl (Overseas) Ltd v Akindele* (n 3).

⁵⁴ Precisely why it was rejected as a test for assistance in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 at 392.

⁵⁵ (1983) [1993] 1 WLR 509.

⁵⁶ ie conscious awareness of the existence of a breach of trust.

⁵⁷ *The Sea Star* [2001] UKHL 1 at 112: 'an imputation of blind-eye knowledge requires an amalgam of suspicion that certain facts may exist and a decision to refrain from taking any step to confirm their existence'.

3. wilfully and recklessly failing to make such enquiries as would a reasonable and honest man;
4. knowledge of circumstance which would indicate the acts to an honest and reasonable man; and
5. knowledge of circumstances which would put an honest and reasonable man on inquiry.

- 9-23** The Baden categories should not be regarded as comprehensive; neither is the delineation between the different categories particularly clear.⁵⁸ Baden categories 2 and 3 are usually regarded as being very closely aligned with category 1, actual knowledge, and a defendant who wilfully shuts his eyes or recklessly fails to make reasonable enquiries is not entitled to rely on a want of actual knowledge.⁵⁹ Categories 4 and 5 involve the application of an objective test to establish knowledge.
- 9-24** The Baden classifications of knowledge ceased to have relevance to actions for dishonest assistance following the decision of the Privy Council in *Royal Brunei Airlines v Tan*.⁶⁰ The English Court of Appeal has expressed grave doubts about their utility in relation to claims for knowing receipt,⁶¹ holding that while proof of dishonesty (in the Brunei sense) would be sufficient to satisfy the requirement for knowledge, it was not necessary, the key threshold being whether the defendant's 'state of knowledge [is] ... such as to make it unconscionable for him to retain the benefit of the receipt'. However, in the absence of a definitive statement as to what degree of knowledge makes it unconscionable for a defendant to retain receipt of trust property, in the authors' view the Baden categories continue to have utility even if that is only to provide some structure by which it is possible to distinguish between different kinds of knowledge.
- 9-25** With that health warning, what is such a defendant required to know and which of the Baden categories of knowledge, if satisfied, would fix a defendant to a knowing receipt claim with liability? A plaintiff must prove that the defendant knew of the breach of trust or fiduciary duty which underlies and gives rise to the claim.⁶² A defendant need not be subjectively aware or know that as a matter of law there has been a breach of trust or fiduciary duty in the transfer of trust property to him but it must be proven that he has sufficient knowledge of the factual circumstances which make the transfer a breach of trust.⁶³ There are some authorities that refer to a want of probity by the defendant being sufficient to found liability.⁶⁴ 'Want of probity' refers to such knowledge that sufficiently affects the

⁵⁸ *Polly Peck International plc v Nadir (No 2)* [1992] 4 All ER 769 at 777; *Agip (Africa) Ltd v Jackson* [1991] Ch 547 at 567, CA, per Fox LJ *Royal Brunei Airlines Sdn Bhd v Tan* (n 54); *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* (n 3) at 454–55.

⁵⁹ *Belmont Finance Co Ltd v Williams Furniture Ltd (No 2)* (n 18); *Eagle Trust plc v SBC Securities Ltd* [1992] 4 All ER 700.

⁶⁰ Followed in Jersey in *Nolan v Minerva Trust Co Ltd* (n 14).

⁶¹ *Bank of Credit & Commerce International (Overseas) Ltd v Akindele* (n 3); *Bagus Investments Limited v Kastening* (n 16); *Aurthur v AG of Turks & Caicos Islands* [2012] UKPC 30 at [33]–[36].

⁶² *Bagus Investments Limited v Kastening* (n 16) at 53.

⁶³ *Re Montagu's Settlement Trusts* [1987] Ch 264, cited with approval at first instances in *Lipkin Gorman v Karpnale Ltd* [1987] 1 WLR 987 at 1005; *Barclays Bank plc v Quinecare Ltd* [1992] 4 All ER 488 at 509; *Eagle Trust plc v SBC Securities Ltd* (n 59) 759.

⁶⁴ *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276 at 298 and 301; and *Re Montagu's Settlement Trusts* (n 63).

defendant's conscience to justify the imposition of personal accountability upon him and it is not necessary to prove that the defendant was knowingly dishonest.⁶⁵

Knowledge within Baden categories 1–3 will affect the defendant's conscience sufficiently. Knowledge within Baden categories 4 and 5 is capable (but not in all cases) of being sufficient to fix the defendant with liability.⁶⁶ It will be possible to rely upon Baden categories 4 and 5 only if in the particular context the inquiries in question ought reasonably to have been made.⁶⁷ Baden categories 4 and 5 will suffice only if, on the facts actually known to the defendant, a reasonable person with the attributes of the defendant would either have appreciated that the transfer was probably in breach of trust or would have made inquiries or sought advice which would have revealed the probability of the breach of trust.⁶⁸ If the facts already known to the defendant show that the transaction was probably improper without further inquiries, the defendant will have constructive knowledge of that impropriety without further inquiry. The defendant must make inquiries if there is a serious possibility of a third party having a proprietary right or, put in another way, if the facts known to the defendant would give a reasonable person in the position of the defendant serious cause to question the propriety of the transaction. The mere possibility that such a proprietary interest or impropriety exists is not enough to warrant inquiries. There must be something which the defendant actually knows (or would actually know if he had a reasonable appreciation of the meaning of the information in his hands) which calls for inquiry.⁶⁹ While proof of guilt of commercially unacceptable conduct is not required for a claim in knowing receipt, it will no doubt be relevant for the Court to have regard to the objective norms of commercial conduct in coming to a view as to what a reasonable person would have appreciated or inquired about.⁷⁰

Where the defendant knows of circumstances that may be consistent with receipt of the misapplication of trust funds but may also be consistent with propriety, the court is likely to be mindful that a party to a commercial transaction should not be fixed with notice simply by virtue of the fact that he is, loosely, put on inquiry.⁷¹ If even without inquiry or explanation the transaction appears to be a proper one, then there is no justification for requiring a defendant to make inquiries. But if there are features of the transaction such that if left unexplained they are indicative of wrongdoing, then an explanation must be sought before it can be assumed that there is none.⁷²

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⁶⁵ *Bank of Credit & Commerce International (Overseas) Ltd v Akindele* (n 3).

⁶⁶ *Re Montagu's Settlement Trusts* (n 63); *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch) at [132] and [246].

⁶⁷ *El Ajou v Dollar Land Holdings plc* (n 35) at 739.

⁶⁸ *Armstrong DLW GmbH v Winnington Networks Ltd* (n 66) at 132 and 246 and *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, [2012] Ch 453 at 109, per Neuberger MR but note that the correct formulation is knowledge of a proprietary right not a proprietary claim; see *Crédit Agricole Corporation and Investment Bank v Papadimitriou* [2015] UKPC 13, per Lord Clarke.

⁶⁹ The mere possibility that such interests exist cannot be enough to warrant inquiries. There must be something which the defendant actually knows (or would actually know if he had a reasonable appreciation of the meaning of the information in his hands) which calls for inquiry.

⁷⁰ Cf dishonest assistance cases; *Nolan v Minerva Trust Co Ltd* (n 14).

⁷¹ *Criterion Properties plc v Stratford UK Properties LLC* [2002] EWHC 496 (Ch) at 173, not doubted on appeal [2002] EWCA Civ 1783 and affirmed [2004] UKHL 28.

⁷² *Crédit Agricole Corporation and Investment Bank v Papadimitriou* (n 68).

C. Knowledge and Notice

- 9-28** Is knowledge in the context of knowing receipt to be equated with the concept of notice so that notice of property being subject to a trust and of a transfer of property in breach of trust, whether actual or constructive, will suffice to fix a defendant with knowledge? In the authors' view, notice is not the correct criterion for knowing receipt claims unless the knowledge on which the notice is based is such as to make the defendant's retention of the receipt unconscionable. The only reference to the doctrine of notice in the Trusts (Jersey) Law 1984 is in Article 55 which provides that a person dealing with a trustee will only be prevented from raising a defence as a bona fides purchaser from the trustee if it has actual notice (a conscious awareness of a breach of trust or fiduciary duty). In the authors' view, there is no material difference between actual notice and Baden category 1 actual knowledge. Any lesser degree of notice, such as constructive notice, ie that a third party dealing with a trustee ought to be aware of a breach of trust or would have discovered one by making reasonable inquiries, or imputed notice, ie where a third party dealing with a trustee through an agent is deemed to know everything of which his agent has actual or constructive notice, will still afford the third party with a defence. Whether a person claims to be a bona fides purchaser of assets without notice of a prior interest in them, or disputes a claim to make him accountable as a constructive trustee on the footing of knowing receipt, the question of what constitutes notice or knowledge is, in reality, the same:⁷³ where a defendant has actual knowledge of facts such that a reasonable person should either have appreciated that a proprietary right probably existed or should have made enquiries or sought advice which would have revealed the probable existence of such a right. Lord Neuberger in *Sinclair v Versailles*⁷⁴ put it another way—the bank will have constructive notice where it should either have appreciated that a proprietary claim probably existed or have made inquiries or sought advice, which would have revealed the probable existence of such a claim.

i. *Imputing Knowledge from an Agent to a Principal*

- 9-29** An agent's knowledge can only be imputed to the agent's principal if the principal has a duty of investigation in relation to the fact or matter that comes into the agent's knowledge and the principal has engaged the agent either to discharge the principal's duty to investigate or if the agent has authority to receive communications from which the agent derives the relevant knowledge.⁷⁵

ii. *The Knowledge of Companies*

- 9-30** A company may be treated as having knowledge of a fact or matter by one of two ways; either the imputation of that knowledge on the basis of the law of agency as outlined above or alternatively on the basis of knowledge of an individual or group of individuals who are

⁷³ *ibid*, per Lord Sumption.

⁷⁴ [2011] EWCA Civ 347 at 109.

⁷⁵ *Re Montagu's Settlement Trusts* (n 63); *El Ajou v Dollar Land Holdings plc* (n 35); see also generally *Bowstead & Reynolds on Agency*, 20th edn (London, Sweet and Maxwell, 2014) Ch 8, para 8-207 *et seq.*

the directing mind and will of the company in relation to the transaction in question.⁷⁶ A director who arranges for his company to enter into a transaction may be the directing mind and will be for the company in relation to the transaction even if he is not the directing mind and will for all purposes.⁷⁷ A director can be the company's directing mind and will be even if he acts in accordance with the directions of some stranger to the company.⁷⁸ A company will continue to be effected by the knowledge of a person who is the company's directing mind and will for the purposes of any subsequent stages of the same transaction.⁷⁹ The unanimous decision of all the shareholders of a solvent company is to be regarded as decision of company and the knowledge of a sole shareholder is to be regarded as the company's knowledge.⁸⁰ Some doubt has been expressed as to what the position is where two or more persons could properly be described as a company's directing mind and will in relation to a transaction where the knowledge that each of them holds individually, would, if added together, constitute knowledge for the purposes of knowing receipt but which individually does not constitute the requisite knowledge.⁸¹ It has been held in Jersey that any knowledge that those intimately associated with the ultimate ownership and control of the defendant company had of the tainted nature of funds flowing into the companies could be attributed to those companies.⁸²

The unlawful or fraudulent conduct of an agent or a person who is the directing mind and will of a company may affect the attribution to a company of their knowledge concerning a particular transaction. The extent to which the attribution principles outlined above apply depends upon the particular context in which the issue of attribution arises.⁸³

9-31

Where a claim is brought against a company by a third party who has been defrauded by agents acting for the company, it is not possible for the company to avoid the application of the attribution rules. Were the company able to do so it would not be possible to establish liability in any case because the company can only interact with the world through its agents. While the company could be described as the 'victim' of its agents who (by reason of the attribution of their knowledge to it) have by their wrongdoing fixed the company with a liability to the defrauded third party, the interests of the defrauded third party take priority notwithstanding that the company may be described as a secondary victim of its agents.⁸⁴

9-32

Where a company has been the victim of wrongdoing by its directors, or of which its directors had notice, then the wrongdoing, or knowledge, of the directors cannot be attributed

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⁷⁶ *Meridian Global Funds Management Asia Ltd* [1995] 2 AC 500 (PC), approved in *Nolan v Minerva Trust Co Ltd* (n 14), also affirming the principles in *Selangor Utd Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR. 1555 at 1577–1578 and 1613–14, per Ungoed-Thomas and in *Royal Brunei v Tan* (n 54) at 393, per Lord Nicholls.

⁷⁷ *El Ajou v Dollar Land Holdings plc* (n 35).

⁷⁸ See the principles cited with approval in *Nolan v Minerva Trust Co Ltd* (n 14) at 242–54.

⁷⁹ *El Ajou v Dollar Land Holdings plc* (n 35).

⁸⁰ *Brazil (Fed Rep) v Durant Intl Corp* (n 2), affirming *Multinational Gas & Petrochemical Co v Multinational Gas & Petrochemical Servs Ltd* [1983] Ch 258; *In re Duomatic Limited* [1969] 2 Ch 365

⁸¹ L. Tucker, N Le Poidevin and J Brightwell, *Lewin on Trusts*, 19th edn (London, Sweet & Maxwell, 2015) at para 42-066.

⁸² *Brazil (Fed Rep) v Durant Intl Corp* (n 2) at [45]–[50], although the defendants' approach to the case was minimalist and the Court's conclusions do not appear from the report to have resulted from extensive argument; see paras [12]–[20].

⁸³ *Bilta (UK) Limited v Nazir* [2013] EWCA Civ 968; *Stone & Rolls v Moore Stephens* [2009] 1 AC 1391. See also *Madoff Securities International Ltd v Raven* [2013] EWHC 3147 (Comm) at [315].

⁸⁴ *Bilta (UK) Limited v Nazir* (n 83) at [34].

to the company so as to allow them to raise a defence to a claim brought against them by the company or its liquidator in the name of the company and/or on behalf of its creditors, for the loss suffered by the company as a result of the wrongdoing. That is so even where the directors were the only directors and shareholders of the company, and even though the wrongdoing or knowledge of the directors may be attributed to the company in many other types of proceedings.⁸⁵

- 9-34** Where the claim is brought by the company against its directors or agents the issue is whether the attribution rules should apply so as to attribute the unlawful or fraudulent conduct of the company's directors or agent or the person(s) who is the company's directing mind and will in relation to the transaction, to the company so as to afford the defendant to the company's action an opportunity to raise the defence of *ex turpi causa non oritur actio*.⁸⁶ The UK Supreme Court has been instructive in describing how the attribution rules apply in those circumstances. Where the company is the victim of the wrongdoing that has been undertaken by its agent or the person(s) who is the company's directing mind and will in relation to the transaction, there will generally be no attribution to the company. This is known as the '*Hampshire Land* principle'.⁸⁷ This principle also prevents the defence of *ex turpi causa non oritur action* being raised against the company. There is an exception to the *Hampshire Land* principle, which remains of uncertain ambit, in the case of a 'one man company' where the fraudster or fraudsters whose conduct or knowledge is sought to be attributed to the company is or are the 'sole actor' in the sense that the company is owned and controlled by the fraudsters and there is no separate constituency of directors or shareholders who are innocent of his/their fraud.⁸⁸ In such a case the company cannot seriously be described as a victim thereby allowing attribution and the *ex turpi causa* defence.⁸⁹ But even in the case of such a 'sole actor', the *Hampshire Land* principle remains applicable so as to prevent the attribution of knowledge to the company and the raising of an *ex turpi causa* defence where the claim is brought by the company against its delinquent agents or those associated with their wrongdoing.⁹⁰
- 9-35** Where the company's claim is against its directors or agents who are guilty of unlawful or fraudulent conduct for breach of their duties to the company or the company's claim is against third parties, liable by reason of being accessories to that breach of fiduciary duty, there will be no attribution to the company.⁹¹ It is thought that even where the *Hampshire Land* principle is excluded, the principle that the company may claim against the directors or against third party accessories is not prevented from applying on the basis that the

⁸⁵ *Jetivia SA & Anor v Biltia (UK) Ltd & Ors* [2015] UKSC 23 at [65]–[78] and [82]–[97], per Lord Sumption and at [182]–[209], per Lords Toulson and Hodge.

⁸⁶ *Holman v Johnson* (1775) 1 Cowl 341, per Lord Mansfield at 343, *Biltia (UK) Limited v Nazir* (n 83).

⁸⁷ *Jetivia SA & Anor v Biltia (UK) Ltd & Ors* (n 85); *Biltia (UK) Limited v Nazir* (n 83) affirming *Re Hampshire Land Co (No 2)* [1896] 2 Ch 743; *Belmont Finance v Williams Furniture* [1979] Ch 250, *Stone & Rolls Ltd v Moore Stephens* (n 83) at [137]–[156].

⁸⁸ *Stone & Rolls Ltd v Moore Stephens* (n 83).

⁸⁹ *ibid*; and *Madoff Securities International Ltd v Raven* (n 83) at [314] and [319].

⁹⁰ *Biltia (UK) Limited v Nazir* (n 83) at [75] and [78]–[82].

⁹¹ It does not make a difference (1) that the guilty directors or agents are engaged in a fraud against the third party using a corporate entity which, by reason of that fraud, the directors leave exposed to a claim from the third party or (2) that the company is wholly owned/controlled by the fraudsters; see *Biltia (UK) Limited v Nazir* (n 83); *Madoff Securities International Ltd v Raven* (n 83).

company is merely a vehicle for fraud where the company has become insolvent because in those circumstances the duties of the miscreant directors include a duty to consider or act in the interests of creditors.⁹² Where the company is a vehicle for fraud, the company will almost inevitably immediately become insolvent as soon as it is utilised for this purpose ensuring that the company may still claim against its directors because the duty of the directors to consider and act in the interests of creditors arises from the outset. However, attribution may still be allowed (and hence the possibility of raising an *ex turpi causa* defence) where the company remains solvent as no creditors are prejudiced and the defendant is also a participant in the wrongdoing or is sought to be made secondarily liable in respect of the company's agents breach of fiduciary duty. In those circumstances there are no relevant duties owed to anyone other than those engaged in fraud and hence no sound basis upon which the *ex turpi causa* defence should be excluded.⁹³ The company is properly not to be regarded as the victim, but as the perpetrator of the fraud.⁹⁴ This is the exception to the *Hampshire Land* principle identified in the *Stone v Rolls* and *Madoff* decisions and affirmed by the UK Supreme Court in *Bilta*. In this scenario, it will not be possible to establish that the company is a secondary victim in having been exposed to a third party claim.⁹⁵

The application of these principles to an action for knowing receipt will usually result in the knowing recipient of company assets transferred in breach of fiduciary duties being unable to raise an *ex turpi causa* defence because the plaintiff company will usually be the victim in having its assets paid away in breach of fiduciary duty. Further the principle that prevents a guilty fiduciary from raising that defence against the company will also prevent those fixed with secondary liability through a guilty fiduciary from raising it either.⁹⁶ However, where a solvent company which is a vehicle for fraud seeks to recover from a third party knowing recipient for the benefit of the fraudsters who need to rely upon their own wrongdoing against the plaintiff company to establish requirement 3 above, then the *ex turpi causa* defence remains available to the knowing recipient.

9-36

iii. Proof of Knowledge

Knowledge may be proven affirmatively or by inference from the circumstances. The burden of proof of knowledge falls to the plaintiff on the balance of probabilities. Inference of knowledge from the surrounding factual matrix is of particular importance in cases where the knowing recipient elects not to call evidence.⁹⁷ The court may also be concerned with inferences in cases where it is necessary to reach a conclusion on the plaintiff's prospects of success on establishing the defendant's knowledge prior to trial such as in a strike out,

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⁹² Bankruptcy (Désastre) (Jersey) Law 1990, Arts 44 and 45 (wrongful and fraudulent trading respectively). See also *In The Matter of the Z Trusts* [2015] JRC 196C for the principles applicable to trustees of insolvent trusts, said to be analogous to the company law position.

⁹³ Consistent with the majority in *Stone & Rolls Ltd v Moore Stephens* (n 83) and with the dissenting position of Lord Scott which was approved in *Bilta (UK) Limited v Nazir* (n 83).

⁹⁴ *Moulin Global Eyecare Trading Ltd v Commrs of Inland Revenue* [2014] HKCFAR 218.

⁹⁵ *Madoff Securities International Ltd v Raven* (n 83) at 314 and 319.

⁹⁶ A similar principle is recognised to apply to a dishonest assistance claim; see *Bilta (UK) Limited v Nazir* (n 83) at 30, affirming *Royal Brunei Airlines Sdn Bhd v Tan* (n 54).

⁹⁷ As in *Brazil (Fed Rep) v Durant Intl Corp* (n 2), affirming *Wisniewski v Central Manchester Health Auth* [1998] PIQR P324 at 340 from which the principles set out in 9.36 are taken.

summary judgment or Mareva injunction. The following principles have been cited with approval in relation to permissible inferences:

1. In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
2. If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
3. There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the Court is entitled to draw the desired inference; in other words, there must be a case to answer on that issue.
4. If the reason for the witness' silence satisfies the Court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.
5. It will not be necessary for a plaintiff to invoke the principles propounded in *Wisniewski* where the case is not dependent solely or even largely on silence but is built on substantial documentary evidence.

- 9-38** A plea of privilege against self-incrimination is required to be taken in person by the witness in the face of the Court at the point when he was asked to answer specific questions to which he objected.⁹⁸ Proof of the defendant's knowledge should not be confused with proof of the defendant's means of knowledge where he may have genuinely forgotten or overlooked documents in his possession.⁹⁹ If on a balance of probabilities the plaintiff is able to prove the knowing recipient had actual knowledge, or had Baden Category 4 or 5 knowledge, the Court may infer actual knowledge even if the defendant might have been able to show a credible explanation had he elected to call evidence.¹⁰⁰
- 9-39** In circumstances where it is proven that a defendant has actual knowledge of facts such that a reasonable person should either have appreciated that a proprietary right probably existed or should have made enquiries or sought advice which would have revealed the probable existence of such a right it is for the defendant to show that it lacked constructive notice of the impropriety of the relevant arrangements.¹⁰¹

iv. Pleading Knowledge

- 9-40** An allegation of knowledge, especially if such knowledge is alleged to sufficiently affect his conscience to justify the imposition of a constructive trust upon him,¹⁰² must be fully particularised in the Order of Justice.¹⁰³ If the claim is pleaded using the alternative

⁹⁸ *Trant v AG* [2007] JLR 231].

⁹⁹ *Bristol & West Building Society v Mothew* [1998] Ch 1 at 15E-G.

¹⁰⁰ *Agip (Africa) Ltd v Jackson* (n 11); *Eagle Trust plc v SBC Securities Ltd* (n 59).

¹⁰¹ *Crédit Agricole Corporation and Investment Bank v Papadimitriou* (n 68); *In re Nisbet and Potts' Contract* [1906] 1 Ch 386, 404, per Collins MR.

¹⁰² *Re Montagu's Settlement Trusts* (n 63).

¹⁰³ *Bagus Investments Limited v Kastening* (n 16) at 49–56; *Belmont Finance Co Ltd v Williams Furniture Ltd* (No 2) (n 18); *Lipkin Gorman v Karpnale Ltd* (n 2).

formulation of ‘knew or ought to have known’ facts or matters then the allegation on each alternative must be supported by particulars differentiating between what the defendant knew and ought to have known.¹⁰⁴ In the authors’ view, a pleading that only includes an allegation of what the defendant ought to have known is vulnerable to being struck out on the current formulation of the law as adopted in Jersey. The Order of Justice should state what the defendant actually knew and set out the facts upon which the plaintiff relies that show, in view of that knowledge, the defendant’s retention of the receipt was unconscionable.

v. With such Knowledge, the Defendant Retains or Deals with the Property Inconsistently with the Trust

As in English law, the Jersey threshold by which liability is established is that first established in English law in *Bank of Credit and Commerce International (Overseas) Ltd v Akindale* namely that ‘the recipient’s state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt’¹⁰⁵

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vi. The Defendant Is Not a Bona Fides Purchaser of the Property for Value without Notice

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Equity’s darling has an absolute defence to a claim for knowing receipt, just as such a recipient of trust property would be able to defeat a proprietary or tracing claim. It is to be noted that in Jersey law what is required is actual notice rather than some lesser kind of constructive notice although the issue is likely to be self-referential in that a defendant against whom the requisite knowledge can be established is likely to have actual notice so as to preclude the defence applying.¹⁰⁶

IV. Trustees de son Tort

A trustee de son tort is a person who, by mistake or otherwise, assumes to act as a trustee without being properly appointed to office.¹⁰⁷ They are a de facto trustee.¹⁰⁸ A trustee de son tort is accountable to the beneficiaries of the trust as if he were an express trustee for any trust property received by them¹⁰⁹ and falls within the definition of a trustee for the purposes Article 2 of the Trusts (Jersey) Law 1984.¹¹⁰ Most of the Jersey reported

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¹⁰⁴ *Lipkin Gorman v Karpnale Ltd* (n 2).

¹⁰⁵ [2001] Ch 437 at 455, affirmed in *Bagus Investments Limited v Kastening* (n 16) at [49]–[56]; *Brazil (Fed Rep) v Durant Intl Corp* (n 2).

¹⁰⁶ See Ch 13 as to the application of the defence to proprietary claims.

¹⁰⁷ *In re BB A & D* [2011] JLR 672; *In the Matter of the Z Trust* [2016] JRC 048.

¹⁰⁸ Substituting dog Latin for bastard French as per Lord Millett in *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, at [135]–[141].

¹⁰⁹ *Cunningham v Cunningham* [2009] JLR 227; *Jasmine Trustees Ltd v Wells & Hind* [2008] Ch 194, per Mann J at [42].

¹¹⁰ *In re BB A & D* (n 107), including the jurisdiction to ratify the acts of a trustee de son tort and the supervisory jurisdiction of the Court to authorise a trustee de son tort’s reasonable remuneration for their services; see *Landau v Anburn Trustees Ltd* [2007] JLR 250].

cases concerning trustees de son tort arise from the defective appointment of an express trustee¹¹¹ although the principles are equally applicable to a situation where an outsider to the trust intermeddles in the affairs of the trust without the authority of the de jure trustee.¹¹² It follows that an agent or delegate acting with the authority of a duly appointed trustee is not committing any ‘wrong’ by acting within the scope of his delegation and is not ‘intermeddling’ in the trust so as to constitute him a trustee de son tort.¹¹³ If an agent of a trustee de son tort proceeds to administer the trust without reference to the trustee, as though he himself were a trustee rather than as an agent, then the agent will go outside their authority and will themselves become a trustee de son tort. If a trustee wrongfully abandons the administration of the trust to an agent, who in consequence becomes a trustee de son tort and there is a resulting loss to the fund, the trustee and the agent will be jointly and severally liable. A trustee de son tort is a ‘type one’ constructive trustee,¹¹⁴ the overarching principle being that a person who assumes office ought not to be in a better or worse position than if he actually were what he purports to be.¹¹⁵

- 9-44** A person must consciously know that they are taking the office as trustee to be a trustee de son tort. It is not a requirement for a person to be fixed with liability as a trustee de son tort that they have done anything wrong.¹¹⁶ Many of the Jersey cases concern instances where a trustee de son tort assumes to act as trustee with the best of motives and may be unaware (without negligence on their part) that they have not been duly appointed to execute the office of trustee.¹¹⁷

A. Liability of a Trustee de son Tort

- 9-45** When the Court considers whether the trustee de son tort has acted in accordance with its duties, it is not open to the trustee de son tort to use their defective appointment as a defence.¹¹⁸ The liability of a trustee de son tort is limited to the property which it has received.¹¹⁹ Receipt has been held to mean the acquisition of title to or the right to obtain title to the assets and is not to be elided with lesser forms of control over the assets.¹²⁰ The lack of a Jersey equivalent to section 40 of the Trustee Act 1925 (whereby certain trust properly automatically vests in a new trustee) sidesteps the apparent uncertainty in English law¹²¹ concerning the liability of a trustee de son tort who administers and controls trust property that, because of the defective appointment, does not automatically vest in them as trustee.

¹¹¹ See *In re BB A & D* (n 107) and *In the Matter of the Z Trust* (n 107).

¹¹² *Cunningham v Cunningham* (n 109).

¹¹³ *ibid*, at [31].

¹¹⁴ *Paragon Finance plc v D.B. Thakerar & Co* (n 22) 408–09.

¹¹⁵ *Mara v Browne* [1896] 1 Ch at 209, approved in *Cunningham v Cunningham* (n 107); *Soar v Ashwell* [1983] QB 390; *Phipps v Boardman* [1965] Ch 992 at 1018, CA, per Denning MR; *Taylor v Davies* [1920] AC 636.

¹¹⁶ *Baden v Societe General pour Favoriser le Developpement du Commerce et de l'Industrie en France SA* (n 18) at 102.

¹¹⁷ *In re BB A & D* (n 107) and *In the Matter of the Z Trust* (n 107).

¹¹⁸ *Mara v Browne* (n 115) at 209; *Dubai Aluminium Co Ltd v Salaam* (n 108) at [135]–[141].

¹¹⁹ *Cunningham v Cunningham* (n 109).

¹²⁰ *Re Barney* [1892] 2 Ch 265.

¹²¹ Tucker, Le Poidevin, Brightwell, *Lewin on Trusts* (n 81) 42–103.

B. Validity of Acts Done by a Trustee de son Tort

Where a trust is administered by a trustee de son tort, particularly if a long time has passed since their defective appointment as trustee and the realisation that the appointment was or may have been defective, questions are likely to arise as to whether the acts of the trustee de son tort have been valid and what the consequences of that may be for the fund and the trustee.¹²² Even if the liability attaching to the trustee de son tort or the apparently retired trustee as a result of the purported exercise of powers is expunged by application of, for example, Article 45 of the Trusts (Jersey) Law, the validity of the exercise may nonetheless be impugned.

The consequences of an ineffectual appointment can potentially be very serious for the trust and the trustees (whether de facto or de jure). The exercise of a power or discretion by a trustee de son tort may come under attack because retiring trustees were not effectively discharged from office having regard to the defective character of the appointment but nonetheless did not participate in the exercise of the power or discretion (and so remain liable for the administration of the trust from which in their minds they have resigned responsibility). The exercise may be attacked on the alternative basis that the power or discretion purportedly exercised by the trustee de son tort was not available to him because it had not been properly appointed. There is very little authority, either in England or in Jersey, as to the validity of the exercise of powers by a trustee de son tort. Had the validity of acts done by a trustee de son tort not been in doubt, it is difficult to understand why the Royal Court in *In re BB, A & D*¹²³ thought it might be necessary to ‘unscramble’ what had been done by trustees de son tort. In English law it is regarded as doubtful whether the definition of trustee in the Trustee Act 1925 (which encompasses a constructive trustee) is wide enough to enable a trustee de son tort to validly exercise powers conferred upon a trustee by that legislation.¹²⁴ Likewise in *In re BB A & D* it was held that Article 2 of the Trusts (Jersey) Law 1984 was wide enough to encompass a trustee de son tort.¹²⁵ It was not the subject of argument whether that enabled a trustee de son tort to exercise the powers in Articles 24 and 25 of the Law although it was accepted that the power of the trustee de son tort to exercise powers in the trust deed of appointment of new trustees (consistent with *Jasmine*) was in doubt. In the absence of specific provision in the trust instrument that includes within it the definition of a constructive trustee as a ‘trustee’, it is the authors’ view that the exercise of any dispositive or administrative power by a trustee de son tort is invalid.¹²⁶

C. Confirmation and Ratification of Acts of a Trustee de son Tort

The Royal Court has held itself to have an inherent jurisdiction to ratify the acts of a trustee de son tort who has acted in good faith, unaware that it has not been duly appointed.¹²⁷ Such

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¹²² Described in *In re BB A & D* (n 107) as ‘the havoc that would be caused by any attempt to unscramble what was purportedly done by the trustee de son tort, and would have been properly done had there been no defect in his appointment’.

¹²³ *ibid.*

¹²⁴ *Jasmine Trustees Ltd v Wells & Hind* (n 109) at 55.

¹²⁵ However, this appears to have been with an eye to the agreed course of all parties to the case that the acts of the trustee de son tort were to be ratified and confirmed pursuant to Art 51.

¹²⁶ *Jasmine Trustees Ltd v Wells & Hind* (n 109) at 55.

¹²⁷ *In re BB A & D* (n 107).

9-48

a conclusion was apparently necessary to save the havoc that would no doubt be wrought in attempting to unscramble the purported exercises of powers by a trustee de son tort. However, that is not a wholly satisfactory answer to the issues.¹²⁸ Not only was the exercise of the Court's inherent jurisdiction wholly unsupported by authority, all the parties were in agreement that they too wished to avoid the aforementioned havoc and for the Court, so the point was not fully argued. The Court was also of the view that because a trustee de son tort fell within the definition of a trustee for the purposes of Article 51 it would be possible for the Court to give directions to the trustees (once properly appointed) to approve the exercise of any confirmatory powers in the trust instrument or to direct them not to investigate, unravel or seek to litigate the past actions of a trustee de son tort. The principles applicable to confirmation and ratification of the acts of a trustee de son tort have recently been aired in *In the Matter of the Z Trust*,¹²⁹ which concerned the consequences for the exercise of the powers of trustees whose appointment had been set aside under Jersey's statutory equivalent of the rule in *Re Hastings Bass*. The trustees' appointments were set aside and the Court took the opportunity to clarify the scope of its apparent jurisdiction identified in *In re BB A & D* to ratify or confirm actions taken by a trustee de son tort. The Court identified three forms of ratification which it said may have the same practical result but are conceptually distinct:

1. Confirmation by perfection of an imperfect act or transaction; confirmation by a principal of a contract entered into by an agent without authority; confirmation by a company of acts done by directors which are voidable by reason of an undisclosed interest; and confirmation by a donor of a gift made as a result of undue influence. In these cases a transaction which is capable of being set aside or otherwise impugned itself becomes fully valid and enforceable.
2. Confirmation by replacement of a tainted or doubtful act or transaction by an effective one with a similar effect. Where a power is conferred on the trustees of a settlement to appoint or apply capital or income of a trust fund for the benefit of any one or more of a class of beneficiaries, and following a purported appointment by trustees, whose appointment is in doubt, of part of the trust fund to a beneficiary absolutely, the validly appointed trustees exercise their powers so as to appoint the same part of the trust fund to the beneficiary absolutely and to resolve to apply all income of that part since the date of the purported appointment to the beneficiary. In this type of case, the state of affairs which was intended to have been brought about by the tainted or doubtful act or transaction is instead brought about by a second act or transaction which is fully effective.
3. 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 and the trusts are accordingly administered on the same footing as if those acts or omissions had been done or omitted by or with the

¹²⁸ F Tregear QC 'Putting it Right: Remedyng Problems Arising from Defective Trustee Appointment' (2013) 19(1) *Trust & Trustees*; D Hagen and B Lincoln, 'What's Past is Prologue, or is it? Re the Representation of BB and its Consequences' (2013) 19(5) *Trusts and Trustees* 469–74.

¹²⁹ *In the Matter of the Z Trust* (n 107).

authority of duly constituted trustees. An example is where trustees de son tort who have control over the trust assets, and mistakenly believe that they are the duly constituted trustees, operate a discretionary income trust so as to make distributions of trust income among a class of beneficiaries in a manner which would have been entirely proper had the trustees been duly appointed and those distributions are subsequently left undisturbed on the same footing as though they had been validly made.

The Court has drawn a distinction between the validation of purported exercises of administrative and dispositive powers. The purported exercise of the latter by a trustee de son tort, if validated, may have the effect of the Court changing the terms of the trusts on which the property is held. The Royal Court has no general jurisdiction, other than Article 47 or in the context of a compromise between adult beneficiaries, to validate the invalid exercise of dispositive of powers by trustees.¹³⁰ Outside of these exceptions, the only established case where a court may intervene to validate a defective exercise of the power is where the donee of the power intends to exercise a power in favour of an object of the power but the exercise of the power fails to comply with some formal requirement of the exercise of the power.¹³¹ That is not to say nothing can be done to confirm the invalid exercise of dispositive powers. The second form of confirmation will usually be available and the third form may also be available. The kind of case which causes difficulty is where the power which was originally sought to be exercised has lapsed by the time that the defective appointment of trustees is discovered, or can no longer be exercised in the manner originally intended, and no distributions have been made to give effect to the invalid exercise of power. That was the position in the *Jasmine* case,¹³² and perhaps in such a case the only way of resolving matters is a variation of trust in accordance with Article 47(1) of the Trusts Law, or (as happened in the *Jasmine* case) a claim against the professional advisors involved. By contrast, where a trustee de son tort, acting in good faith in the belief that they are the duly constituted trustees, purports to exercise administrative powers, or perform other administrative functions conferred on the duly constituted trustees, whether by law or by the terms of the trust concerned, then, even if the exercise of the powers is invalid, the Court has jurisdiction to validate those acts on the basis that the Court may intervene in the administration of a trust so as to secure its competent administration. It is to be noted that while Article 51 makes no reference to ratification of past exercise of the trustee's administrative powers, the inherent jurisdiction, as supplemented by Article 51, is not merely a supervisory jurisdiction. It is also a jurisdiction, where necessary or appropriate, to intervene in the administration of the trust.¹³³ The appropriate method by which the Court intervenes, and the appropriate form of order, will depend on the circumstances of the case. In many cases the intervention or order will take the form of a direction to the trustees, but that is not the only kind of intervention possible. The guiding principle is that the form of intervention or order is such as best serves the welfare of the beneficiaries and the competent administration of the trust in the circumstances of the case.

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¹³⁰ *Re IMK Family Trusts* [2008] JLR 250] at 65, affirming *Chapman v Chapman* [1954] AC 429.

¹³¹ *Shinorvic Trust* [2012] (1) JLR 324. See also *Re Gleeds Retirement Benefits Scheme* [2015] Ch 212 at [70]–[82].

¹³² *Jasmine Trustees Ltd v Wells & Hind* (n 109).

¹³³ Described in *Re WW and XX* [2011] JRC 231 at [13] as a 'wide and vibrant jurisdiction'; see also *Re New* [1901] 2 Ch 534, per Romer LJ.

D. Relief from Liability

- 9-50** A trustee de son tort falls within the scope of Article 45 of the Trusts (Jersey) Law 1984, which will be of assistance where it acts on a defective appointment, reasonably and honestly believing to have been validly appointed.¹³⁴ A trustee de son tort who acts in accordance with its duties is entitled to an indemnity for all costs and liabilities reasonably incurred.¹³⁵ It has yet to be decided in Jersey law whether a trustee exemption or exoneration clause contained in a trust instrument is capable of being construed so as to cover a trustee de son tort.

V. Unjust Enrichment

- 9-51** Jersey law does recognise that where property in respect of which a beneficiary had an equitable proprietary interest was received by an innocent volunteer, the beneficiary had a personal claim in restitution against the recipient, where the beneficiary is unjustly deprived of his property without consent, even where he had not been guilty of any 'fault' in receiving the property.¹³⁶ The state of mind required for a claim in knowing receipt was not required to found an action in unjust enrichment in Jersey. If the recipient of the property is themselves guilty of a fault,¹³⁷ the recipient is a constructive trustee for the beneficiary, and the beneficiary's remedy in respect of the property is proprietary.¹³⁸ In a claim based upon unjust enrichment, however, the beneficiary could only succeed to the extent that the recipient remained unjustly enriched with the underlying principle being that in no circumstances should the innocent recipient be left worse off than if he had never received the funds in the first place. A 'change of position' defence was therefore available to the recipient.¹³⁹ For a claim based upon receipt, whether one based on mistake, knowing receipt or unjust enrichment, the proper law of the objection is governed by the place where the enrichment occurs.¹⁴⁰
- 9-52** The breadth of the circumstances in which a claim in unjust enrichment will arise in Jersey law is not yet fully developed. However, the Court has expressed the view that the fact that unjust enrichment may not have been contemplated in relation to particular disputes before does not mean that the Court is unable to declare new limits on a cause of action

¹³⁴ *In re BB A & D* (n 107) approved in *In the Matter of the Z Trust* (n 107).

¹³⁵ *In re BB A & D* (n 107), approving *Travis v Illingworth* (1865) 62 ER 652.

¹³⁶ *Re Esteem Settlement* (n 23).

¹³⁷ The English authorities appear to be unclear as to precisely what fault means in these circumstances; see *In Re Montagu's Settlement Trusts* (n 63) and *Belmont Finance Corp v Williams Furniture Ltd (No 2)* (n 18), which are of no concern in Jersey. The requirement for fault has also been subject to criticism as giving rise to the potential for injustice; P Birks, 'Misdirected Funds: Restitution from the Recipient' (1989) 3 *Lloyds Maritime & Commercial Law Quarterly* 296 at 341; Lord Nicholls, 'Knowing Receipt: The Need for a New Landmark' in E Cornish (ed), *Essays in Honour of Gareth Jones* (Oxford, Hart, 1998) at 231.

¹³⁸ As to the circumstances in which it is possible to bring a proprietary remedy in Jersey, see Ch 13.

¹³⁹ *Re Esteem Settlement* (n 23).

¹⁴⁰ *In The Matter of the S Trust* [2011 JLR 375]; *Federal Republic of Brazil v Durant International Corporation* [2010 JLR 421]; Dicey, Morris & Collins, *The Conflict of Laws*, 15th edn (London, Sweet and Maxwell, 2012) r 257–258 provides, para 36-008.

for unjust enrichment.¹⁴¹ In Jersey, owing to the impossibility of a concurrent equitable interest in Jersey immovable property alongside the legal interest, unjust enrichment has been used to fill the place occupied in English law by the common intention constructive trust in cohabitation disputes.¹⁴² However, whether in the context of a domestic arrangement or in the context of combatting international fraud the Royal Court has cited the availability of a claim in unjust enrichment as one of the bases to reject, for the time being at least, the proposition that Jersey law admits of the possibility of a remedial constructive trust that affords a plaintiff a proprietary remedy to the particular assets,¹⁴³ in the way that unjust enrichment and unconscionability have been used as touchstones for such relief in Canada, Australia and New Zealand and the Isle of Man.¹⁴⁴

¹⁴¹ *Flynn v Reid* 2012 (1) JLR 370 at [100].

¹⁴² *ibid.*

¹⁴³ *Re Esteem Settlement* [2003] JLR 188] at [146]–[151].

¹⁴⁴ *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 at 48; *Muschinski v Dodds* (1985) 160 CLR 583; *Giunelli v Giunelli* (1999) 73 ALJR 547; *Commonwealth Reserves v Chodar* (2001) 3 ITELR 549; *Cusack v Scroop Ltd* [1997–98] 1 OFLR 68; see D Hayton, ‘Shams, Piercing Veils, Remedial Constructive Trusts and Tracing’ (2004) 8 *Jersey and Guernsey Law Review* 6.

10

The Retirement, Removal or Replacement of the Trustee by the Royal Court

I. Introduction

Save under some express provision in the trust instrument, the beneficiaries of a Jersey law trust cannot, even if of full age and capacity and even if taken together they are absolutely beneficially entitled, compel a trustee to retire, without terminating the trust.¹ The Trusts (Jersey) Law 1984 has no equivalent to the English section 19 of the Trusts of Land and Appointment of Trustees Act 1996 which provides an out-of-court mechanism by which the beneficiaries may, in certain circumstances, force the trustee to retire without bringing the trust to an end.² It follows that if there is no provision in the trust instrument conferring power on the beneficiaries or some other person³ to compel the retirement of the trustee, and the trustee does not wish to resign voluntarily,⁴ the trustee cannot be removed, save by order of the Royal Court under its inherent jurisdiction.⁵

10-1

II. Removal of Trustee under an Express Power in the Trust Instrument

The trust instrument itself may contain an express power conferred on some person to remove the trustee. It is clear that in Jersey law, without any provision to the contrary in the trust instrument,⁶ an express power to remove and appoint trustees is a fiduciary power

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¹ *Saunders v Vautier* (1841) Cr Ph 240.

² Depending on where the beneficiaries are resident for tax purposes, termination may prove extremely expensive in terms of accrued or unrealised capital gains on the trust assets.

³ See list of permissible reserve powers in the Trusts (Jersey) Law 1984, Art 9A(2).

⁴ Trusts (Jersey) Law 1984, Art 19.

⁵ Given expression in the Trusts (Jersey) Law 1984, Art 51(2)(a)(ii).

⁶ See *Re VR Family Trust v Van Rooyen* [2009] JRC 109 in which the trust instrument declared that no power vested in the protector was to be exercised in a fiduciary capacity, although the powers were held to be limited and had to be exercised in good faith, in the best interests of the beneficiaries and for the purpose for which they were given.

and can only be exercised for the benefit of the beneficiaries and not for the benefit of the person on whom the power is conferred.⁷ The power to remove a trustee is one of the powers capable of reservation by the settlor or grant to a third party, such as a protector, under Article 9A of the Trusts (Jersey) Law 1984.

- 10-3** The significance of the distinction between a limited and a fiduciary power (although the latter is a sub-class of the former) is that the donee of a fiduciary power owes a duty to the objects of the power to consider from time to time whether and how to exercise it and the objects have various remedies open to them if the donee does not or cannot do so. A necessary corollary of a power being fiduciary is that it cannot, subject to the trust instrument, be released by the donee. Whether such a donee of a power can be compelled to consider whether or not to exercise a power of removal remains unclear. In the authors' view it is arguable that subject to the context in which the question arises, the person in whom such a power is vested should consider from time to time whether the trustee continues to discharge its office adequately or ought to be removed. Where a third party has the power to remove a trustee, that person is not, in our view, constrained by the same considerations that the court would have if an application for removal came before it under Article 51(2) (a)(ii).⁸ In *Re Skeats Settlement*,⁹ it was held to be sufficient that the donee of the power of removal had concluded, on the basis of relevant considerations that the trustee was no longer the best that could be found for the beneficiaries as a whole. Whether there is friction between the trustee and one or more beneficiaries may arguably be a relevant consideration, particularly where the trust is discretionary and the settlor's wishes as to how the discretion should be exercised have an important role.¹⁰ Where the trustee is unsure as to whether a power to remove him has been exercised properly, he should seek the Court's direction under Article 51 before he risks surrendering his control of the trust fund to a newly appointed trustee.¹¹
- 10-4** As an alternative to a power to remove a trustee, it is possible to expressly provide in the trust instrument for the automatic removal of a trustee on the occurrence of specific circumstances. Aside from determining precisely when the designated factual circumstances have come about,¹² there may be a practical issue as to how trust property, vested in one trustee becomes automatically vested in another.¹³ It is a common practice for trust assets to be held in the name of nominees, so that where the nominees hold the trust assets for the trustees for the time being, the replacement of one trustee for another has no effect on the legal title. An issue may arise if nominees have executed a declaration of trust that they

⁷ *In the Matter of the Bird Charitable Trust and the Bird Purpose Trust* [2008] JLR 1], affirmed in *In the Matter of HHH Employee Trust* [2012] JRC 127B; *Re VR Family Trust v Van Rooyen* (n 6), affirming *Re Skeats' Settlement* (1889) 42 ChD 522 at 526; *In The Matter Of The Z Trusts* [2015] JRC 196C; *In the Matter of the P and R Trusts* [2015] JRC 196.

⁸ Although the grounds upon which the Court may order a trustee's removal would clearly also be of relevance to the donee of the power as well.

⁹ *Re Skeats Settlement* (n 7) at 526 (in connection with the appointment rather than removal of trustees)

¹⁰ *Charman v Charman (No 2)* [2007] EWCA Civ 503 at [55e].

¹¹ See Ch 3 for the procedure and principles for seeking directions.

¹² Ambiguity may be resolved by an application for directions, as to which see Ch 4.

¹³ Trusts (Jersey) Law 1984 has no equivalent to s 40 of the Trustee Act 1925 so as to provide for automatic vesting of assets on a change of trustee.

hold particular trust assets for named trustees. Where that named trustee is removed, the outgoing trustee, the new and continuing trustees must ensure as part of the transitional arrangements, that the nominees execute a declaration of trust that they hold on trust for the new and continuing trustees. Automatic cessation of trusteeship carries with it the possibility that the trustee will be in the midst of an exercise of its powers when the specific event occurs.

A. *Ex officio* Trustees

While rare among professionally administered Jersey trusts, a trust instrument may provide for the trustee(s) to be a person or class of persons who are holder(s) of one or more particular offices, that is to say an *ex officio* trustee. There is no doubt that in such cases an individual's trusteeship ceases when he or she ceases to hold the office to which the trusteeship attaches. Where the office is unincorporated the trusteeship cannot attach to the office itself, only its incumbent.¹⁴ Where the office is a corporation sole, any newly appointed individual to the vacant corporation can assume office as trustee without further appointment. If a settlor specifies a successor trustee by name in the trust instrument as the holder of a particular office for the time being, it does not appear obvious to the authors why such trusteeship should not transfer automatically. That said, there is English authority that suggests such provision is nothing more than an indication of the settlor's wishes as to the identity of future trustees and is therefore not effective to pass the office of trusteeship automatically.¹⁵ It appears that whether or not the trusteeship passes automatically it is the right of the office holder to decline trusteeship.¹⁶

10-5

B. Removal of an Insolvent or Incapable Trustee

The Court may exercise powers of resignation conferred on a trustee who has become mentally incapable under the Mental Health (Jersey) Law 1969.¹⁷ For the vast majority of Jersey trusts the trustee is a professional trust company and so mental incapacity is not an issue although the jurisdiction may be used to retire an incapacitated director of a trust company where no other mechanism in the company's articles of association exists. A trustee, including a corporate trustee, may not act as trustee during such time as his affairs remain *en désastre*.¹⁸ If there is no other trustee capable of taking office at the time, the Court must be invited by someone with locus, to make an appropriate order transferring the trusteeship to a new trustee in order to protect the interests of the beneficiaries.¹⁹ The

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¹⁴ *Bankes v Salsbury Diocesan Council of Education* [1960] Ch 631.

¹⁵ *ibid*; and more recently *St Mary and St Michael Parish Advisory Co Ltd v Westminster Roman Catholic Diocese Trustee* [2006] EWHC 762 (Ch).

¹⁶ Trusts (Jersey) Law 1984, Art 18, although there may be extraneous contractual provisions that tie the acceptance of an office to an acceptance of trusteeship.

¹⁷ Mental Health (Jersey) Law 1969, Arts 43(17) and 43(18).

¹⁸ Bankruptcy (Jersey) Law 1990, Art 24.

¹⁹ This proposition has never been tested as a new trustee is often appointed well in advance of a *désastre*. A professional trustee, regulated by the JFSC, is obliged to keep the JFSC apprised of any circumstances, material

vast majority of proceedings seeking the removal of the trustee are not made under this jurisdiction but under Article 51 of the Trusts (Jersey) Law 1984.

III. Removal of Trustee—Removal by the Court under its Inherent Jurisdiction

- 10-7** Article 51(2)(a)(ii) of the Trusts (Jersey) Law 1984 gives expression to the Royal Court's inherent jurisdiction to remove a trustee, with or without the appointment of a replacement and without the trustee's cooperation.²⁰ The power to remove a trustee cannot be exercised by the Judicial Greffier or a judge sitting alone but only by the Inferior Number.²¹ The Royal Court's inherent jurisdiction to remove a trustee is not confined to trusts that have Jersey law as their proper law.²² The Court has a similar supervisory jurisdiction to remove a protector on similar grounds to those applicable when seeking to remove a trustee.²³ The Court's power to remove a trustee is a discretionary one and in reality is exercised relatively seldom because a professional trustee, as the vast majority of Jersey's trustees are, will usually prefer to resign and avoid the risk of an adverse cost, than choose to defend an application for its removal.²⁴ A professional trustee often has more to lose in terms of reputational damage than it has to gain in remaining as trustee facing hostile and litigious beneficiaries.²⁵ A trustee who unreasonably refuses to resign and has to be removed by court order puts its indemnity for its costs of the proceedings at serious risk.²⁶ A trustee that makes an appropriately timed offer to resign can go a considerable way to defuse a dispute with beneficiaries, especially where a new, neutral trustee can be appointed as a replacement. Such a solution also has the benefit of avoiding the not insignificant legal costs of proceedings.²⁷ Nevertheless, there are a variety of examples where a trustee has sought to hang on to office rather than resign, for good²⁸ and more questionable reasons.²⁹

effect on the registered person or its profitability that may affect the trustee's ability to continue to discharge its functions as trustee under its licence, including any insolvency procedure.

²⁰ *Re Harrison's Settlement Trusts* [1965] 1 WLR 1492 at 1497.

²¹ *Butler v Axco Trustees Ltd* [1997] JLR N-16] (on an application for summary judgment before the Greffier). See also the definition of 'Court' in the Trusts (Jersey) Law 1984, Art 1(1).

²² Trusts (Jersey) Law 1984, Art 50; see *Dick v Pantrust International SA & Ors* [2015] JRC208 and [2015] JRC223 (a *prima facie* a Panamanian law trust).

²³ *In re A Trust* [2012] (2) JLR 253] (irretrievable breakdown in relationship between protector and beneficiaries, to detriment of trust); *In re Freiburg Trust* 2004 JLR N[13], following *Baudains v Du Heaume* (1886) 211 Ex 379; and *Re VR Family Trust v Van Rooyen* (n 6).

²⁴ *Dick v Pantrust International SA & Ors* [2016] JRC069; *In re VR Family Trust* [2009] JLR 202]; *In the matter of the E, L, O and R Trusts* [2008] JLR 360]. Proceedings to remove the trustee, while under the supervisory jurisdiction of the Court are hostile proceedings to which the usual rule applies that costs follow the event; *Alsop Wilkinson v Neary* [1996] 1 WLR 1220 at 1223.

²⁵ In *Dick* (n 22), the trustee had committed to writing in correspondence with the beneficiaries that it did not intend to resign to retain its 'practical security' over the trust assets held in consequence of the trusteeship.

²⁶ *In re VR Family Trust* (n 24); *In the matter of the E, L, O and R Trusts* (n 24); *Dick v Pantrust International SA & Ors* (n 24).

²⁷ A trustee, not being a sole trustee, may resign his or her office by notice in writing delivered to his or her co-trustees under the Trusts (Jersey) Law 1984, Art 19(1); *Dick v Pantrust International SA & Ors* (n 24).

²⁸ *In the Matter of the A Trust* 2012 JRC 066; *Brudenell-Bruce v Moore & Cotton* [2014] EWHC 3679 (Ch).

²⁹ See n 25.

A. Locus to Seek Removal

Those with locus to apply to remove a trustee are those listed in Article 51(3) of the Trusts (Jersey) Law 1984, that is to say the Attorney General,³⁰ the other trustees, an enforcer of a non-charitable purpose trust, a beneficiary or, with leave of the court, any other person. While the locus of those able to make an application to have the trustee removed is confined to Article 51(3) of the Trusts (Jersey) Law, the Court's jurisdiction to remove a trustee is strictly a corollary of its role in ensuring that trusts are properly administered and executed.³¹ It follows that the Court may at any time order a trustee to be removed and the Court's power is not confined to the scope of the relief sought in proceedings brought before it.³²

B. Grounds on which a Trustee May be Removed

The Royal Court will not remove a trustee simply on the beneficiaries' say so and it is axiomatic to say it will not do so lightly.³³ Removal is a serious step and the Court must be satisfied there are proper grounds for removal. The following is a non-exhaustive list of factual circumstances in which the Court can and has removed the trustee on the beneficiaries' application:

1. where the trustee has removed itself from the jurisdiction of the Royal Court and refuses to answer correspondence from the beneficiaries or otherwise becomes untraceable;³⁴
2. where the trustee has ceased to function;³⁵
3. where friction between the trustee and his co-trustees or between the trustee and the beneficiaries makes the trust unmanageable in the sense that the relationship has entirely broken down;³⁶
4. where the trustee shares contrary views to the objects of a purpose trust or charity;³⁷
5. where the trustee has entered *désastre*, bankruptcy or otherwise makes a compromise with its creditors;³⁸
6. where the trustee shows want of honesty or reasonable fidelity;³⁹

³⁰ The Attorney General is a necessary (and in many cases the only) party able to make an application to remove a charitable trustee from office. There are, however, no reported cases in which the AG has done so.

³¹ *Letterstedt v Broers* (1884) 9 App Cas 371.

³² *Re Wrightson* [1908] 1 Ch 789; in *In Dick* (n 25) the merits of the trustee's removal were readily apparent in the hearing of the trustee's challenge to the jurisdiction and the Court proceeded to remove the trustee on a summary basis shortly thereafter; see [2015] JRC 223.

³³ In *In the Matter of the Representation of C, D, E & F and In the Matter of the A & B Trusts* [2012] JRC169A, a suggestion that the jurisdiction to remove either a trustee or a protector was only to be exercised in exceptional cases was rejected as putting the threshold too high.

³⁴ *Representation of the Jeep Trust* [2010] JLR N 25; *Howard v Rhodes* (1837) 1 Keen 581; *Re Roberts* (1978) 265 Ex 281.

³⁵ *Representation of the Jeep Trust* (n 34).

³⁶ *Eiro v Lombardo* [2005] JRC 172; *Parujan v Atlantic Western Trustees Limited* 2003 JLR N [11].

³⁷ *Trilogy Management v YT and Ors* [2014] JRC 214.

³⁸ *Re Barker's Trusts* (1875) 1 Ch D 43; *Re Adams' Trust* (1879) 12 Ch D 634, where a trustee was allowed to remain having gone bankrupt through no moral fault of his own and having since recovered from his pecuniary difficulties.

³⁹ *In The Matter of the Jeep Trust* (n 34).

7. where the trustee unreasonably fails to recognise a conflict of interest;⁴⁰
8. where the trustee has embarked on litigation calculated to promote the trustee's interest to the prejudice of the beneficiaries;⁴¹
9. where the trustee has otherwise misconducted himself⁴² such as self-dealing with the trust property, by competing with the trust or by refusing to act in the interests of the trust;⁴³
10. where the trustee has an obstructive attitude and general unwillingness to attend promptly to the beneficiaries' interest or the preparation of trust accounts;⁴⁴
11. where the trustee does or attempts to thwart the order of the court or regulatory authority;⁴⁵
12. where the trustee has been guilty of a prolonged dereliction of duty in failing to provided adequate information and to make distributions, as required by the terms of the trust;⁴⁶
13. where the trustees are deadlocked so as to prejudice the administration of the trust the court may remove (and replace) any number of trustees necessary to break the deadlock;⁴⁷
14. where the trustee has committed a serious criminal offence, or an offence of dishonesty;⁴⁸ and
15. where the trustee has had its licence to conduct trust company business revoked and has failed to transfer trustee as ordered by its regulator.⁴⁹

10-10 As will be appreciated, these are not discrete categories in which a trustee may find himself the respondent to an application for his own removal but are different factual examples in which the principles discussed below have come to the fore.

C. Principles Guiding the Court in the Exercise of its Inherent Jurisdiction

10-11 The overriding principle that underpins the Court's jurisdiction to order the removal of the trustee is the welfare of the beneficiaries.⁵⁰ The preservation of the beneficiaries' best

⁴⁰ *Dick Stock v Pantrust International SA & Ors* [2015] JRC 223, following [2015] JRC 208 (jurisdiction challenge but factual history colourful); *In The Matter Of the E, L, O and R Trusts* n 26), approving *Hunter v Hunter* [1938] NZLR 520; *In The Matter Of The Estate Of C* [2012] JRC 050 at [87(vi)].

⁴¹ *Thomas and Agnes Carvel Foundation v Carvel* [2007] EWHC 1314 (Ch); see also *Yashvina Parujan v Atlantic Western Trustees Limited* [2003] JRC 045 in which the trustee was also found to have committed a breach of trust in using the trust fund to pay its own legal fees in hostile litigation with the beneficiaries; *Dick Stock v Pantrust International SA & Ors* (n 40), following [2015] JRC 208 (trustee alleged the trust to be a sham).

⁴² *West v Lazard Bros* [1987-88 JLR 414].

⁴³ *In The Matter Of The Jeep Trust* (n 34); *Dick Stock v Pantrust International SA & Ors* (n 40).

⁴⁴ *Re Whitehouse* [1982] Qd R 196 at 207.

⁴⁵ *Dick Stock v Pantrust International SA & Ors* (n 40).

⁴⁶ *Representation of the Jeep Trust* (n 34).

⁴⁷ *Trilogy Management v YT and Ors* (n 37) where the administration of the trust had become dysfunctional and the board of the trustee had become paralysed by the requirement for unanimity among its directors in circumstances where one director in particular had adopted an intransigent and unreasonable view as to how the trust should be administered.

⁴⁸ *Turner v Maule* (1850) 15 Jur 761; *Re the Freiburg Trust* [2004] JRC 056 in relation to a protector, rather than a trustee.

⁴⁹ *Dick Stock v Pantrust International SA & Ors* (n 40).

⁵⁰ *Letterstedt v Broers* (n 31).

interests depends upon the good faith and integrity of the trustee. The beneficiaries will therefore be afforded all practical assistance by the Court to secure that interest against any misconduct by the trustee, which includes an order for the trustee's removal.⁵¹ The beneficiaries' best interests are of course different from the wishes of a single beneficiary or a faction of beneficiaries at any one particular time. Apart from the welfare of the beneficiaries the jurisdiction can also be exercised with a view to the security of the trust property, the efficient and satisfactory execution of the trust and a faithful and sound exercise of the powers conferred on the trustee⁵²—although each of these may properly regarded as different facets of the same core principle, namely the Court's supervision of the welfare of the beneficiaries. The leading case as to the principles to be applied on an application to remove a trustee is not a Jersey case⁵³ but a Privy Council decision from South Africa, *Letterstedt v Broers*,⁵⁴ in which Lord Blackburn said as follows:

In exercising so delicate a jurisdiction as that of removing trustees their Lordships do not venture to lay down any general rule beyond the very broad principle ... that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety.... It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of trustees. But where the hostility is grounded on the mode in which the trust has been administered... it is certainly not to be disregarded.... [I]f it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts even if for no other reason than that human infirmity would prevent those beneficially interested or those who act for them from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the Court might think it proper to remove him.⁵⁵

Subject to the general guiding principle that the act or omission on the part of the trustee must be such as to endanger the trust property or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity, the test in its simplest terms is: whether the continuance of the trustee or protector, would be detrimental to the execution of the trusts.⁵⁶

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i. Removal on Grounds of a Breach of Trust

An actual or alleged breach of trust is likely to be a source of a loss of confidence in the trustee or a source of friction and even hostility between the trustee and beneficiaries and may create a conflict of interest in the trustee continuing in office. However, the Court may remove a trustee owing to the breakdown in the relationship between the trustee and

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⁵¹ Any cause of action the beneficiaries may have against a trustee for breach of trust is not extinguished by the removal or retirement of the trustee; see *Trusts (Jersey) Law 1984*, Art 34(3).

⁵² *Re Wrightson* (n 32) at 803.

⁵³ Although the dictum has been endorsed and applied in Jersey many times; see *West v Lazard Bros* (n 42); *Eiro v Equinox Trustees and Ors* [2006] JRC 119; *Representation of the Jeep Trust* (n 34).

⁵⁴ *Letterstedt v Broers* (n 31).

⁵⁵ *ibid*, at 386–87.

⁵⁶ *In the Matter of the Representation of C, D, E & F and In the Matter of the A & B Trusts* (n 33); *Dick Stock v Pantrust International SA & Ors* (n 40).

the beneficiaries even without proof of a breach of trust.⁵⁷ It may be helpful to regard the circumstances in which the Court will remove a trustee as points along a sliding scale. At one extreme, where there is proof of positive misconduct or dishonesty by the trustee, serious incompetence⁵⁸ or hopeless conflict,⁵⁹ the Court will remove the trustee without hesitation.⁶⁰ If a breach of trust is to be relied upon as sufficient grounds for removal, much will depend on the gravity and nature of the alleged breach. Where it can be proven the trustee has culpability in any breach of trust, the Court is more likely to consider removing them from office.⁶¹ However, proof of deliberate default of duty by the trustee is not, it seems, always required in order to engage the jurisdiction.⁶² Not every mistake, omission or breach of duty by the trustee will merit the trustee's removal.⁶³ Applications for removal have been refused on the basis that the grounds for removal were insufficient where dissent has arisen between the trustee and the beneficiary because a beneficiary puts forward an unsubstantiated claim that property of the trustee should be subject to the trust⁶⁴ or the trustee has defaulted in his duty on the grounds of misunderstanding as to the powers conferred by the trust but without wilful default⁶⁵ or a trustee who was guilty of a one-off failure to produce a set of accounts when it was not clear such failure would reoccur in the future.⁶⁶ The Court may remove a trustee pre-emptively in anticipation of a breach of trust if it perceives the trustee is likely to commit a breach without waiting for the breach to occur.⁶⁷ The act or omission must be such as to (1) endanger the trust property or (2) demonstrate a want of honesty or fidelity or (3) demonstrate a want of capacity to execute the trustee's duties as they should be executed, or a combination of one or more of these.⁶⁸

ii. Friction and Hostility between the Trustee and Beneficiaries

- 10-14** Friction or hostility between trustees and beneficiaries, or between a trustee and his co-trustees, is not of itself a reason for the Court to order removal.⁶⁹ Were it to be otherwise every disagreement between the trustee, who is obliged to exercise an independent

⁵⁷ *Heyman v Dobson* [2007] EWHC 3503 at [22]; *Dick Stock v Pantrust International SA & Ors* (n 40).

⁵⁸ *Thomas and Agnes Carvel Foundation v Pamela Carvel* (n 41).

⁵⁹ *In The Matter Of the E, L, O and R Trusts* (n 24).

⁶⁰ *In The Matter Of The Jeep Trust* (n 34); *Eiro v Equinox Trustees and Ors* (n 53).

⁶¹ *Kain v Hutton* [2007] NZCA 199 at 267: 'merely showing breach of trust would not necessarily be sufficient to justify removal of the trustees. The would depend on the gravity and nature of the breaches and the particular circumstances of the trust and trustees, including the level of culpability of the trustees ... To allow trustees to be removed for relatively inconsequential mistakes would be usurp the settlor's wishes in entrusting the assets to the trustees.'

⁶² *Jones & Ors v Firkin-Flood and Anor* [2008] EWHC 2417, ATR 284, in which it was said that proof of collective unfitness amounting to a *total abdication of the trustee's duties* in the absence of dishonesty or deliberate breach of duty would suffice; cf *Rafferty v Philip* [2011] EWHC 709 (Ch) at [70]–[72].

⁶³ *Re Wrightson* (n 32); *Kershaw v Micklethwaite* [2010] EWHC 506 (Ch); *Letterstedt v Broers* (n 31) at 385–86.

⁶⁴ *Forster v Davies* (1861) 4 De GF & J 133.

⁶⁵ *Re Wrightson* (n 32); see also an example of leniency in giving a trustee a second chance in *Rafferty v Philip* (n 62).

⁶⁶ *Conway v Stokes* 1952 4 DLR 124.

⁶⁷ *Miller v Cameron* 1936 54 CLR 572 at 575: 'even though he [the trustee] has been guilty of no misconduct, if a trustee is in a position so impecunious [by the transfer of all his assets to avoid claims from his creditors] that he would be subject to a particularly strong temptation to misapply the trust funds, the Court may properly remove him from office'.

⁶⁸ *In The Matter of the E, L, O And R Trusts* (n 24); *In Re 18th August Trust* 2006 JLR N [23]; *Letterstedt v Broers* (n 31) at 385–86.

⁶⁹ *Forster v Davies* (n 64).

judgement as part of his fiduciary duty, and the beneficiaries would end in endless applications to court. The Court has stated many times that the settlor's intention should be respected and that it is the trustee's and not the Court's role to administer the trust according to its terms.⁷⁰ The Court is prepared to tolerate a degree of friction in the trust's administration as part and parcel of the trustee/beneficiary relationship. However, where the degree of friction tips into hostility, such as to impact on the way in which the trust is administered, where it is caused wholly or partially by overcharges against the trust,⁷¹ or where it is likely to obstruct or hinder the due performance of the trustee's duties,⁷² the Court may come to the conclusion that it is necessary, for the welfare of the beneficiaries, that a trustee should be removed.⁷³ Hostility arising from and manifesting itself in the administration of the trust will be the touchstone upon which the Court will exercise its power to remove the trustee. The key questions when advising a trustee are likely to include (1) How seriously does the hostility affect the running of the trust? (2) Who is responsible for the friction? (3) Is there a justification for the friction? Which beneficiaries are for and against the trustee's removal? (4) Are there any particular reasons to refuse removal (or to refuse removal just yet) and (5) Are the costs of appointing a new trustee disproportionate?⁷⁴ The Court is in a better position to investigate hostility founded in the trust's administration than it is able to investigate hostility founded, for example, in some other source, such as the breakdown of family relationships, which are extraneous to the trust. Hostility grounded in the administration of the trust is also something for which the trustee can clearly be held responsible and thereby provide justification for the trustee's removal.

An irretrievable breakdown in the relationship between the trustee and some of the beneficiaries was held not to be in the best interests of the beneficiaries as a whole and, at least in part, this justified the trustee's removal in *Parujan v Atlantic Western Trustees Limited*.⁷⁵ Further aggravating factors in that case included the trustee's conduct in charging excessive fees, and that the trustee was also found to have committed a breach of trust in using the trust fund to pay its own legal fees in hostile litigation with the beneficiaries.⁷⁶ In a discretionary trust where no beneficiary has a vested interest in the trust property (and in trusts where there is no beneficiary because the trust is for a charitable or non-charitable purpose) the essential issue for the Court to consider is, having regard to the interests of all potential beneficiaries as a class, whether the due and proper administration of the trust is put in jeopardy by the trustee remaining in office.⁷⁷ Where there is friction between the trustee and a single discretionary object (or group of objects within a wider class) it is necessary for the Court to determine whether or not the trustee is able to give a proper consideration to the beneficial object's claim in deciding whether or not to remove them.⁷⁸ In *Trilogy*

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⁷⁰ *Kain v Hutton* (n 61).

⁷¹ *Letterstedt v Broers* (n 31).

⁷² *Dick Stock v Pantrust International SA & Ors* (n 40).

⁷³ *Trilogy Management v YT and Ors* (n 37); *In the Matter of the Representation of C, D, E & F and In the Matter of the A & B Trusts* (n 33) at [10].

⁷⁴ *Brudenell-Bruce v Moore & Cotton* (n 28).

⁷⁵ *Parujan v Atlantic Western Trustees Limited* (n 41).

⁷⁶ Contrary to guidance in cases such as *In re Carafe Trust* [2005] JLR 159].

⁷⁷ *Fay v Moramba Services Pty Ltd* [2009] NSWSC 1428 at [24].

⁷⁸ *Alkin v Raymond* [2010] WTLR 1117 at 1125.

Management Limited v YT Charitable Foundation (International) Limited & Ors,⁷⁹ the Royal Court ordered the removal of the trustee of a charitable trust owing to a deadlock in the way the trust was structured which permitted a single individual to entrench herself and exercise an effective veto over any proposal which went against her own views. This was held to have a detrimental impact on the charitable trust's sound administration and unless remedied would have led to an improper failure adequately to distribute profits and gains to eight charitable sub-trusts, for charitable purposes. A breakdown in relations between the trustee and the trustees of the sub-trusts was held to be a relevant factor in ordering the removal of the trustee if it obstructs the carrying into effect of the charitable objects of the trust.⁸⁰ The Court commented that while the single-minded pursuit of what a trustee believes to be the correct course of action is often regarded as a praiseworthy quality and not a defect, in the Court's judgment a single director's defence of what she believed were her father's (ie the settlor) wishes when first establishing the structure had crossed the line from reasonable firmness to unreasonable obstinacy. Ultimately that unreasonable obstinacy led to the trustee's removal.

iii. Loss of Trust and Confidence

- 10-16** Inherent to the relationship between the beneficiaries and their trustee is the relationship of trust and confidence. Where the beneficiaries lose trust and confidence in the trustee, the Court may exercise its discretion to remove the trustee. Clearly, where there is hostility based on a substantial mismanagement of the trust fund there is likely to be a diminution in the level of trust and confidence in which the beneficiaries hold the trustee. However, the Court will be mindful (1) that it should not accede to an application to remove the trustee on the beneficiaries' say so and (2) that an alleged loss of trust and confidence can be manufactured precisely to provide grounds upon which to seek the trustee's removal. The Court will look to whether the loss of trust and confidence is genuine, justified and warranted. Where the loss of trust and confidence is genuine, justified and warranted, that alone may in some cases be sufficient to justify removal.⁸¹ Some thought must be given as to in what capacity the beneficiary is allegedly dissatisfied with the trustee given that the Court's jurisdiction exists to protect the welfare of the beneficiaries. In *Isaac v Isaac (No 2)*⁸² while the applicants were discretionary beneficiaries it was not in their capacity as beneficiaries that they were dissatisfied with the trustee. Their dissatisfaction arose from their belief that they were not obtaining the advantages which they believed they would have got by personally owning the substantial shareholding held by the trustee. Where the trustees are otherwise of high standing and integrity but have nonetheless been held liable at first instance for a substantial but innocent breach of trust, and have lost the confidence of their beneficiaries, the Court may decline to remove them from the trusteeship until an appeal against the finding of breach of trust and other related proceedings have been determined, particularly when

⁷⁹ [2014] JRC 214.

⁸⁰ *Kershaw v Micklethwaite* (n 63); *Trilogy Management Limited v YT Charitable Foundation (International) Limited & Ors* (n 37).

⁸¹ eg *Re Pauling's Settlement Trusts (No 2)* [1962] 1 WLR 86 and [1964] 1 Ch 303; *Dick Stock v Pantrust International SA & Ors* (n 40), where the trustee alleged the trust to be a sham arrangement.

⁸² [2005] EWHC 435 (Ch) at [68].

a premature removal might prejudice the protection of the trustees against possible future liabilities and the trustees give undertakings concerning the administration of the trust and the proceedings of which they have the conduct.⁸³

Where a trustee proposes to exercise a power that will have a momentous impact on the future of the trust, in the belief that it accords with the settlor's intention, but the proposal provokes a demand from the beneficiaries for the trustee to resign on grounds of loss of confidence, in order to forestall the exercise of the power, what is the appropriate thing for the trustee to do? Should the trustee resign as requested or refuse to resign and force an application for its own removal. If it does the latter does the trustee put itself at personal risk as to costs? *In the Matter of the A Trust*⁸⁴ provides at least partial guidance on the appropriate response from the trustee in such a situation. The case concerned a situation in which beneficiaries alleged a loss of confidence in a trustee and demanded that they resign in order to defeat a process by which the trustee proposed to exercise a power to expand the beneficial class in accordance with what the trustee believed to be the settlor's intentions for the future of the trust. In those circumstances the trustee was held to be right in applying to court for directions on the grounds that the efficient and satisfactory execution of the trust required the issue as to whether the trustee should exercise the power to expand the class to be clarified now and that blessing the decision would avoid difficulties for any future trustee. Applications for removal have been refused in the converse situation, where the trustee has refused, for honest motives, to exercise a power vested in him at the request of a beneficiary.⁸⁵

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iv. Conflicts of Interest

A situation in which a trustee's personal interest and his duties conflict may justify the trustee's removal on the basis that unless the trustee seeks the Court's direction as to what it should do, it will either be disabled from dealing with the trust property or put itself in breach of trust.⁸⁶ In *Dick Stock v Pantrust International SA & Ors*,⁸⁷ the trustee claimed to be owed large sums of money from the settlor and beneficiaries for sums it has allegedly lent to them on behalf of third parties to the trust over the years and had commenced proceedings in Colorado against the beneficiaries on the basis of loan documents that appeared to show itself as acting not qua trustee but qua creditor. The trustee had expressed itself as unwilling to voluntarily retire as trustee, using the office of trustee to ensure its practical continuing security over the trust assets in respect of the borrowing it claimed to be owed by the beneficiaries. This was a clear case of a conflict of interest between the trustee's stated desire to seek recoupment on its loans and its obligations qua trustee to the beneficiaries.⁸⁸ The trustee may also find himself in a hopeless position of conflict where the trustee cannot discharge its duties equally as between the interests of two groups of beneficiaries of two trusts which share the same trustee. Such a situation arose in *In The Matter Of the E, L, O and R*

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⁸³ *Re Pauling's Settlement Trusts (No 2)* (n 81).

⁸⁴ [2012] JRC 066.

⁸⁵ *Lee v Young* (1843) 2 Y & C Ch 532.

⁸⁶ *Passingham v Sherborn* (1846) 9 Beav 424; *Dick Stock v Pantrust International SA & Ors* (n 40).

⁸⁷ [2015] JRC 208, [2015] JRC 223.

⁸⁸ [2015] JRC 208 at [75], [2015] JRC 223 at [9(iv)].

*Trusts*⁸⁹ out of the conduct of the affairs of a company, which was the sole asset of various trusts held for the benefit of two groups of beneficiaries. In such a situation the appropriate course for a trustee is to resign before it becomes necessary to remove it from office. It is not necessarily the case that a trustee must resign on the grounds of conflict where beneficiaries of the same trust take different views as to the administration of the trust. The nature of the conflict necessitating the trustee's removal in *E, L, O and R Trusts*⁹⁰ was a direct conflict of interest between the beneficiaries (as well as clearly differing views) which had escalated to the point of issuing proceedings for unfair prejudice under section 459 of the Companies Act 1985 in relation to a company in which the trustee held the controlling shareholding.

v. Other Factors for the Court's Consideration as Part of the Court's Discretion

- 10-19** While the welfare of the beneficiaries is the Court's primary concern, the Court will also have regard to all the circumstances, which it will place in the balance against the harm to the beneficiary's interests in leaving the trustee in office. Those factors include the fact that the trustee may have been specifically chosen and appointed by the settlor; the trustee's interest in maintaining its professional reputation; and the principle that the trustee should be free from unwarranted interference from the Court. While a settlor's selection of individuals to be his executors (and trustees) may be an important factor for the Court to consider in deciding whether to remove them, ultimately it can never be determinative.⁹¹ Another factor may be that a trustee, who puts himself into a position where he becomes so impecunious that he would be subject to a particularly strong temptation to misapply the trust fund, may result in the Court ordering his removal from office in order to protect the trust from that temptation.⁹² A trustee that is declared *en désastre* will usually be removed from office,⁹³ irrespective, it seems, of Article 54 of the Trust Law which is to the effect that the trustee's creditors shall have no right or claim against the trust property except to the extent that the trustee himself or herself has a claim against the trust or has a beneficial interest in the trust and to that extent the trustee's insolvency in and of itself presents no risk that the trust fund will be raided by the insolvent trustee's creditors.

D. Procedure for Removal and the Form of Proceedings

- 10-20** It is unusual for the removal of a trustee to be sought in isolation from any other form of relief. As has been already mentioned, the Court has an inherent power to remove a trustee from office regardless as to whether removal is pleaded in the prayer for relief.⁹⁴ It follows that the form of pleading in which the relief is sought is largely irrelevant and the

⁸⁹ *In The Matter Of the E, L, O And R Trusts* [2008] JRC150.

⁹⁰ *ibid.*

⁹¹ *Trilogy Management Limited v YT Charitable Foundation (International) Limited & Ors* (n 37).

⁹² *Miller v Cameron* (n 67).

⁹³ *Bainbridge v Blair* (No 1) (1839) 1 Beav 459; cf *Re Adams' Trust* (n 38). Such cases are extremely rare. A JFSC-regulated trust company business in financial difficulty will usually transfer trusteeship well in advance of a declaration of *désastre* so as to make the invocation of the Court's jurisdiction to remove them otiose.

⁹⁴ Indeed, where proceedings are commenced by way of Representation, it may be unclear at the commencement of proceedings, what the form of relief should be.

choice between commencing proceedings by way of Order of Justice or a Representation will be guided by whether the removal of the trustee is accompanied by a claim for breach of trust or other allegation of misconduct on the part of the trustee or whether its removal is sought in isolation as the primary head of relief. Rather than the form of the proceedings, it will be far more significant whether the basis for removal is adequately particularised. A Representation, which is not bound by the strict rules of pleading, affords a plaintiff beneficiary more latitude in setting out the contextual basis upon which removal is sought. Where removal is sought in hostile proceedings alleging breach of trust or other duty, the facts necessary to make out both the breach of trust and how the said breach engages the principles discussed above must be clearly pleaded to avoid the claim being struck out.⁹⁵ Careful thought should be given to the basis upon which removal is pleaded. If an allegation amounting to a discrete cause of action is later abandoned (even if the claim settles) it may still amount to discontinuance with a cost penalty against the discontinuing party.⁹⁶ Removal may also be sought as a remedy in proceedings commenced by way of Representation either singularly or as an alternative to some other form of relief.⁹⁷ Matters giving rise to a basis for removal may not be apparent at the outset of proceedings and may only reveal themselves as the proceedings unfold. There is likely to be very little justification for the hearing of an application to remove a trustee in the context of hostile proceedings being heard in private and even where the names of other parties are excised and anonymised, the trustee's identity is unlikely to be. The desire to avoid criticism in open court is a factor that will weigh heavily with a professional trustee in deciding whether to jump before being pushed. However, where the proceedings in which removal is sought are commenced by Representation and involve the invocation of the Court's administrative jurisdiction, the proceedings may be subject to an order for privacy for that reason.

i. Replacement by the Court

The jurisdiction under Article 51(2)(a)(ii) of the Trusts (Jersey) Law 1984 encompasses a power to remove a trustee with or without a replacement. By law, a Jersey trust must have a minimum of at least one trustee. The Court will not make an order removing a trustee without a replacement unless an adequate quorum of trustees will remain after the order for removal takes effect.⁹⁸ It follows that an applicant will usually have to line up an alternative trustee in advance.⁹⁹ In some circumstances the proposed new trustee may require the Court's approval before it is formally appointed and may require or be ordered to seek the Court's directions as to how it should proceed once appointed.¹⁰⁰ Jersey has no equivalent

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⁹⁵ *In re Esteem Settlement* [2000] JLR N41a] at [33], approved in *Macfirbhisigh v C.I. Trustees and Executors Limited* [2014] (1) JLR 244].

⁹⁶ See *Isaac v Isaac (No 2)* [2005] EWHC 435 (Ch), albeit under CPR, pt 38 and not RCR 2004, r 6/31 although similar principles would apply.

⁹⁷ *Trilogy Management v YT and Ors* [2012] JRC 093, summarised in the costs judgment at [2013] JRC 142, where the alternately pleaded relief included a declaration as the appropriate level of dividend to be declared by an investment company and/or the collapse of the charitable structure; *Dick Stock v Pantrust International SA & Ors* (n 40).

⁹⁸ Trusts (Jersey) Law 1984, Art 16(1) provides that subject to the terms of the trust that can provide for a greater minimum number, there must be at least 1 trustee.

⁹⁹ *In re R Settlement* [1987–88] JLR N–22c].

¹⁰⁰ See *Trilogy Management v YT and Ors* (n 37).

of the office of receiver and so the English practice of appointing a receiver of the trust property in the rare cases where the need to remove the trustee is so urgent that no replacement has yet been found¹⁰¹ is not available. A trust will not be permitted to fail for want of a trustee.¹⁰² Instead of a receiver the Court would most likely order the Viscount be appointed to hold the trust property while a new trustee is found.¹⁰³ The duration of the Viscount's tenure as custodian of the trust property is likely to be very short. As an officer of the Court, the Viscount will require to be put in funds before it will take any step in relation to the trust property and will not take any such step without either a full indemnity from the beneficiaries or by seeking the Court's direction. A trustee who is removed and replaced will have to negotiate the terms of its release of any security for its liabilities before it can be compelled to transfer any of the trust's assets to replacement trustees.¹⁰⁴

E. Court-ordered Removal of Power Holders other than the Trustee: Protectors and Enforcers

- 10-22** Thus far we have considered the Court's inherent jurisdiction to remove and/or replace a trustee. It may well be the case that the continuation of the trustee in office is not the problem and the beneficiaries' interests under the trust are put in peril by some other power holder within the trust structure. Protectors or 'guardians' with reserved powers over the trustees and trust property are more prevalent in offshore trusts than they are in the major onshore jurisdictions. Where there is a protector with extensive reserve powers, can it be removed if, in the exercise (or refusal to exercise) its powers, the beneficiaries' interests are put at risk. It has been held that the Court's inherent jurisdiction extends to the removal of a protector.¹⁰⁵ This power is said to flow from the fiduciary nature of a protector's office,¹⁰⁶ although in the authors' view the better analysis is that the Court's power to remove a protector turns not on the innate fiduciary nature of the protector's office but on the nature of the duties that arise from the powers which the protector holds. The guiding principles for the exercise of the jurisdiction to remove a protector are said to be akin to those applicable to the removal of a trustee.¹⁰⁷ Those with locus to remove a protector are the same as those with locus to remove a trustee: the Attorney General, the trustees, an enforcer of a non-charitable purpose trust, a beneficiary or, with leave of the Court, any other person.
- 10-23** Further, Jersey's trust law also provides for the legitimacy of private purpose trusts¹⁰⁸ that might otherwise fall foul of the traditional orthodoxy requiring there to be a beneficiary

¹⁰¹ eg *Clarke v Heathfield (No 2)* [1985] ICR 606.

¹⁰² Trusts (Jersey) Law 1984, Art 16(1).

¹⁰³ The circumstance in which this mechanism may be required is mercifully rare and remains more a theoretical possibility than a real one owing to the relatively greater prevalence of JFSC-regulated professional trustees as opposed to lay individuals among Jersey's trustees. In the authors' experience it has never happened.

¹⁰⁴ As to which see below.

¹⁰⁵ *Re the Freiburg Trust* (n 48) and *Re VR Family Trust v Van Rooyen* (n 6); see also Art 51(2)(a)(iv). There is as yet no Jersey case law on the removal of an enforcer.

¹⁰⁶ *Re the Freiburg Trust* (n 48) at [6].

¹⁰⁷ *In the Matter of the Representation of C, D, E & F and In the Matter of the A & B Trusts* (n 33).

¹⁰⁸ Trusts (Jersey) Law 1984, Arts 12 and 13.

in whose favour the Court may decree performance.¹⁰⁹ The absence of beneficiaries is compensated for by the office of 'enforcer', whose duty is it to enforce the trust in relation to its purposes.¹¹⁰ An enforcer is a distinct office from that of trustee, although the two offices are subject to the same no-profit and no-conflict rules.¹¹¹ There is currently no Jersey case law on the principles to be applied for the removal of an enforcer of a private purpose trust. The principles upon which the jurisdiction to remove an enforcer is likely to turn, as in the case of protectors, are not simply on the nature of their office but on the nature of the duties that arise from the powers which the enforcer holds in relation to the trust and the trust property. While it may be tempting to elide the two, the roles of an enforcer and a protector are fundamentally different which would suggest the analogy that has been made between trustees and protectors as to the basis upon which the latter can be removed by the Court does not easily extend to an enforcer. We are in the main concerned with the removal of an enforcer to a private purpose trust. To the extent that the Attorney General can be regarded as an enforcer of trusts for charitable purposes, it is the authors' suggestion that he cannot be removed from this role,¹¹² although an enforcer of a charitable trust may be subject to removal.

The grounds upon which an application to remove an enforcer are likely to be based are (1) for breach of the no-profit/no-conflict rules in Article 21(4) of the Trusts Law; (2) where the enforcer is unfit, incapable, unwilling or refuses to act; and (3) where the enforcer purports to assume a role that is inappropriate to his office so as to encroach on the role and powers to the trustees. Each of these grounds is essentially a different failure by the enforcer to comply with its duty to enforce the terms of the private purpose trust which by that fact must put the sound administration of the trust (and the objects) at risk. The Jersey statute, unlike the Guernsey equivalent, is ambiguous as to the nature of the enforcer's duty to enforce a purpose trust. In the authors' view, the Guernsey statute makes express what must obviously be impliedly a power of a fiduciary rather than limited nature on the basis that the enforcer must, as a matter of practical reality, if their office is to mean anything, review and consider whether to enforce the trust from time to time.¹¹³ The analogy between the position of a beneficiary and an enforcer in relation to the enforcement of the trust may

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¹⁰⁹ *Morice v Bishop of Durham* (1804) 9 Ves 399; note that Jersey is not alone among the offshore financial centres in permitting purpose trusts, which exist also in the Bahamas, Bermuda, the British Virgin Islands, the Cayman Islands, the Isle of Man and Guernsey.

¹¹⁰ Trusts (Jersey) Law 1984, Art 13(1). As to the nature of this duty, the Trusts (Guernsey) Law 2007, s 12(2), which expressly provides that the duty is fiduciary, may provide a guide. In the case of charitable trusts without beneficiaries (such as the trustees of sub-trusts) the role of an enforcer of the trust's charitable purposes is fulfilled by the AG.

¹¹¹ Trusts (Jersey) Law 1984, Art 13(3); *Re VR Family Trust v Van Rooyen* (n 6) (protector subject to non-conflict rule).

¹¹² While no authority is provided for this proposition it seems to us obvious that a trust for charitable purposes cannot oust the supervisory jurisdiction of the AG to protect the public interest. However, it may be possible to exercise a power in the trust instrument to change the proper law of the trust, the exclusive jurisdiction to which disputes concerning it are to be subject and replace the Jersey trustees so as to remove the structure from Jersey altogether. Such a power would have to be exercised with extreme caution so as to ensure there was no vitiating factor that would render its exercise void under the doctrine of fraud on a power. But note *Crociani & Ors v Crociani & Ors* [2014] UKPC 40, affirming the Jersey Court of Appeal [2014] JCA 089 to the effect that exceptional circumstances may justify the Court overriding a so-called exclusive jurisdiction clause.

¹¹³ See Trusts (Guernsey) Law 2007, s 12(2); no equivalent provision exists in Jersey's Trusts Law.

appear convenient but is not wholly apposite. If an enforcer is to be equated with a beneficiary in relation to the enforcement of the trust, there is clearly no difficulty with the principle that a beneficiary, who holds certain powers, must exercise them as a fiduciary.¹¹⁴ While an enforcer effectively stands in as a beneficiary in relation to the enforcement of a trust that is, by its nature without beneficiaries, the analogy with a beneficiary is a limited one. The office of enforcer could not sensibly be regarded as giving the enforcer any ascertained or contingent beneficial interest in the trust assets from which her right to enforce the trust emerges. Neither can it be said that a beneficiary who fails to enforce a trust of which they are a beneficiary can or should be removed as a beneficiary, whereas a failure to enforce the trust would be the main basis on which an enforcer is most likely to be removed.

- 10-25** While an enforcer is under a duty (whether or not fiduciary) to enforce a purpose trust, a serious practical difficulty arises as to whom that duty is owed. Locus to remove an enforcer is restricted to the Attorney General (whose role is restricted only to charitable trusts), the trustee or, with leave of the Court, by any other person.¹¹⁵ By definition a beneficiary of a purpose trust cannot seek the enforcer's removal. This clearly represents a defect in Jersey's non-charitable purpose trust regime because it principally relies on the trustee to take action against an enforcer who is failing in his task to hold the trustee to its duties. It may be argued that where the trustee is put on notice that the enforcer is in breach of the no-conflict rule or is unwilling, refusing, unfit or incapable of acting, by virtue of its own fiduciary obligations, the trustee are under a duty to apply to the Royal Court for the removal of the enforcer and the appointment of a new one.¹¹⁶ However, the point must be made as to whether this is in practice or principle a credible mechanism.¹¹⁷
- 10-26** In *Re VR Family Trust-v-Van Rooyen*,¹¹⁸ the trust instrument declared that no power was vested in the protector in a fiduciary capacity. The powers were held to be limited and had to be exercised in the best interests of the beneficiaries and for the purpose for which they were given even if the protector was not under a duty to consider from time to time whether to exercise them.
- 10-27** What if the trustee wishes to retire but the protector (or settlor to whom the power to appoint a new trustee is reserved) will not exercise the power to remove and replace them? What we are concerned with here is not the loss of the trustee's right to retire from office but the effective veto a protector or settlor may have over the appointment of a new trustee. In those circumstances it is open to the trustee to apply to court for an order to remove themselves from office. The protector's deliberate failure or refusal to exercise a power to replace the trustee without a legitimate reason by reference to the beneficiaries' interests

¹¹⁴ *In the Matter of the Z Trust* [1997] CILR 248 (Cayman); *Re Skeats' Settlement* (n 7); *Re Papadimitriou* [2001–03] MLR 287 (IOM).

¹¹⁵ Guernsey's law provides that a settlor may make the application to remove the enforcer; the settlor may with leave bring the application in Jersey but has no locus to do so as of right.

¹¹⁶ See Trusts (Jersey) Law 1984, Art 21(7) and (8). See also Trusts (Guernsey) Law 2007, s 12(9).

¹¹⁷ Being those listed in Art 51(3). See P Matthews, 'Shooting Star: the New Special Trusts Regime from the Cayman Islands (1997) 11(3) *Trust Law International* 67–71: 'One cannot seriously imagine the case of a trustee bringing an action against an enforcer for failing in his duty to bring an action against the same trustee for breach of trust'.

¹¹⁸ [2009] JRC 109.

may amount to a breach of the fiduciary duty attaching to that power.¹¹⁹ Obstinacy on the part of the protector in relation to the exercise of its powers may provide grounds for the removal of the protector. A settlor with reserve powers to veto an incoming trustee cannot be removed, but the nature of the power reserved to the settlor is still of a limited character and the Court may exercise the powers for them. Article 17(3) of the Trusts (Jersey) Law 1984 provides that a trustee with power to appoint a new trustee who fails to exercise that power may be removed from office by the Court. A protector with the same power would by virtue of the fact that a power to appoint a trustee is (at the very least) a limited power¹²⁰ also be liable to be removed under the Court's inherent jurisdiction.

*In the Matter of the Representation of C, D, E & F and In the Matter of the A & B Trusts*¹²¹ concerned the irretrievable breakdown in relations between the beneficiaries and protector to the extent that the overwhelming majority of the other adult beneficiaries wanted the protector removed. The root of the breakdown in relations was the protector's misconceived view of himself as the 'living guardian and enforcer' of the settlors' wishes.¹²² The powers vested in the protector were: (1) to withhold its consent to the exercise of the trustee's dispositive powers; (2) to add and exclude beneficiaries; and (3) to appoint and dismiss trustees. The Court held that it could be no part of the function of a protector with limited powers of the kind conferred on the protector to ensure that a settlor's wishes were carried out any more than it was open to the settlor himself to insist on them being carried out. A trustee's duty as regards a letter of wishes was no more than to have due regard to such matters without any obligation to follow them. And a protector's duty could, correspondingly, be no higher than to do his best to see that trustees have due regard to the settlor's wishes. The protector was removed, notwithstanding a finding that that the settlor's motivation for the way he exercised his role as protector was bona fides, his behaviour being driven by conviction that it was his duty to ensure that the trusts were administered according to his perception of what the settlor would have wanted and that it was all the more important for him to remain steadfast to that role at a time when the original trustee had resigned.

In *In the Matter of the Freiburg Trust*¹²³ the written consent of the protector was required for the exercise by the trustee of certain of its powers including the power to make appointments of capital and income to any of the beneficiaries. While the trustee had power to appoint a protector, it could only do so if the office was vacated. However the office of protector could only be deemed vacated if the protector was found by the trustees to be of unsound mind or subject to bankruptcy or insolvency proceedings. The trustees issued proceedings before the Royal Court to remove the protector citing examples of misappropriation of funds from the trust fund and a conviction and sentence to a term of imprisonment for fraud. In those circumstances, the Court did not hesitate to remove the protector, notwithstanding any provision to that effect in the trust instrument or the 1984 Law, holding:

It would be quite unconscionable and unthinkable that this Court should have no jurisdiction to remove a Protector who was thwarting the execution of a trust or who was otherwise unfit to

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¹¹⁹ *In re Bird Charitable Trust* [2008 JLR 1]; *Re VR Family Trust v Van Rooyen* (n 6).

¹²⁰ See *Re VR Family Trust v Van Rooyen* (n 6).

¹²¹ [2012] JRC 169A.

¹²² See *Trilogy Management v YT and Ors* (n 37) for a similar problem concerning a director of the trustee.

¹²³ [2004] JRC 056.

exercise the functions entrusted to him by the Trust Instrument. Is this a proper case to exercise the inherent jurisdiction that we have asserted? [The protector]... is the antithesis of a Protector. Far from protecting the Trust, he [the protector] has actually defrauded it and misappropriated part of the Trust fund.

- 10-30** Having removed the protector, the Court did not seek to replace him but directed that the trustee could henceforth execute the terms of the trust without requiring the consent of any other person in relation to the exercise of its powers. The Freiburg trust was drafted in terms that the requirement for the protector's prescribed consent was only be operative while there remained a protector capable of exercising the consent and that in the absence of a protector it was the protector's effective power to veto that fell into abeyance rather than the trustee's. Where the terms of a trust are drafted so as to always require the consent of a protector and the protector is removed, we are doubtful whether the Royal Court has power to unilaterally take a blue pencil to the requirement for a protector at all.

F. Costs of Applications to Remove a Trustee

- 10-31** Proceedings to remove a trustee are hostile proceedings to which the usual rule is that costs follow the event. A trustee who defends proceedings which are brought to secure his removal and in which his defence fails, may not only be deprived of his costs, but may be ordered to pay the plaintiff's costs.¹²⁴ Where the trustee is ordered to pay costs, the question will be whether they should be on the standard or indemnity basis.¹²⁵ The threshold at which the Court may order indemnity costs is whether the behaviour of the paying party has been unreasonable.¹²⁶ The question of costs then turns on the Court's view as to whether the trustee's refusal to resign when requested was reasonable.
- 10-32** It will not be reasonable for a trustee to refuse to resign in the face of a plain and obvious conflict of interest.¹²⁷ Such a plain and obvious conflict of interest arose *In The Matter of the E, L, O and R Trusts* between the interests of two groups of beneficiaries of two trusts which shared the same trustee. The dispute arose out of the conduct of the affairs of the company, which was the sole asset of all the various trusts. It was held that the conflict was so obvious that there was no justification for the trustee seeking the directions of the Court. The trustee issued a Representation for directions as to what it should do; however, the trustee subsequently withdrew the proceedings after one of the beneficiaries refused to provide funds to the trustee to meet the costs of the Representation. The beneficiaries then issued a second Representation seeking the removal of the trustee on grounds of the conflict. Shortly before the matter was due to be heard by the Royal Court the trustee agreed to retire. The Court was asked to assess the reasonableness of the trustee's conduct in not resigning earlier. The representors in the second Representation submitted that the trustee has acted unreasonably in not retiring earlier and that accordingly its remuneration and legal costs incurred

¹²⁴ *Alsop Wilkinson v Neary* (n 24) at 1223, per Lightman J (a beneficiary dispute); *In the matter of the E, L, O and R Trusts* (n 24); see also *In re VR Family Trust* (n 24).

¹²⁵ As to the difference between standard and indemnity costs in Jersey, see Ch 1.

¹²⁶ *Federal Republic of Brazil & Anor v Durant International Corporation & Anor* [2013 JLR 103].

¹²⁷ *Hunter v Hunter* (n 40), approved in *In The Matter Of The E, L, O And R Trusts* (n 89); *Dick v Pantrust International SA & Ors* (n 40).

in connection with the two Representations should not be payable out of the trust funds. The fact that there was no criticism of the trustee's administration of the trust up until the point at which a plain and obvious conflict of interest arose was irrelevant to the Court's determination as to the trustee's conduct and its impact on the question of costs.

It was held that the trustee's costs of the first Representation were unreasonably incurred and accordingly the trustee was not entitled to be indemnified for them, nor was it entitled to charge remuneration for time spent in connection with those proceedings. The trustee was also ordered to pay the costs of the other parties incurred in those proceedings from its personal assets, albeit on the standard rather than indemnity basis. However, the other parties were awarded their costs against the trustee personally on the indemnity basis on the second Representation. That second Representation was necessitated by the trustee's sudden decision to withdraw the first Representation because it was not receiving its fees and costs. The Court held that if the trustee believed that there was a genuine issue as to whether it should retire which required the Court's attention, it was incumbent upon the trustee to see the matter through to conclusion. There were ample trust assets from which it could ultimately have received remuneration if the Court had taken the view that the trustee had acted reasonably in bringing the first Representation (which on the facts it did not). Its decision to withdraw the proceedings was held thoroughly unreasonable and resulted in extra costs being incurred by the other parties in bringing the second Representation. The second Representation arose only as a result of the trustee's continued refusal to retire. Accordingly, the same principles applied and the trustee was ordered to bear its own legal costs incurred in connection with those proceedings personally and was not permitted to charge fees for time spent in relation to those proceedings.

In a short postscript to the judgment the Royal Court was keen to stress that its judgment was not to be taken as a general proposition that a trustee who is requested to retire should do so immediately. A trustee who seeks directions will not be denied its costs before agreeing to retire. The decision as to costs in *In the Matter of the E, L, O & R Trusts* is particular to the plain and obvious conflict which made it (again) plain and obvious that it was thoroughly unreasonable of the trustee not to recognise that it was in an impossible position and had no option but to retire. The Court acknowledged that in many cases the trustee's position will be far less clear-cut. In many cases, even where the Court's decision is that the trustee should be removed, the Court will not necessarily conclude that the trustee has acted in such a way that it should be deprived of its costs or remuneration. A trustee which is acting in good faith in what it perceives to be the best interests of the trust and the beneficiaries as a whole will not be deprived of its costs unless it has behaved unreasonably. That affords both trustees and the Court a margin of appreciation as to differences within the trust as to whether the trustee should continue in office or not.

A beneficiary who unsuccessfully seeks the removal of a trustee will normally be ordered to pay the costs of the application.¹²⁸ It follows that the beneficiaries' and trustees' cost risk in proceedings to remove the trustee are asymmetric. While a beneficiary will usually have to pay the costs of the application if it loses; a trustee will only be ordered to pay the costs of the application if it is held to have been unreasonable in refusing to resign. It may

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¹²⁸ *Isaac v Isaac* (n 96) at [96]–[97].

be that the trustee will be removed owing to the breakdown in the relationship even if the allegations of wrongdoing fail. Even if the trustee is removed there remains the possibility that its refusal to resign when requested was not unreasonable or where there is doubt as to that question, the trustee may still be entitled to its indemnity for the costs of the application.

- 10-36** For a beneficiary to seek its costs from the trust fund requires the beneficiary to bring the application within the categories identified in *Buckton*¹²⁹ so that the application to remove the trustee is treated as being necessary for the administration of the trust and the costs of all parties are necessarily incurred for the benefit of the trust estate, regarded as a whole. In such cases the costs of all parties are directed to be taxed as between solicitor and client and paid out of the trust estate, thereby providing an equivalent of the indemnity basis enjoyed by trustees to beneficiaries as well.¹³⁰ Where the beneficiary succeeds in removing the trustee they are usually entitled to their costs however, as it is not uncommon in litigation that the question of costs can be the tail that wags the dog. In order to secure the best chance of protecting their position on costs in the event that the application to remove fails, in the absence of a clear breach of trust, applications may be brought as Representations so as to engage the administrative jurisdiction of the court.
- 10-37** An order for the removal of trustees by the Court is usually sought under Article 51(2)(a)(ii) of the Trusts (Jersey) Law 1984.¹³¹ In a case where a claim for removal of trustees forms part of the relief sought in a breach of trust claim, the position as to costs will be governed by the general principles applicable to breach of trust actions.¹³² The plaintiff is not obliged to succeed on every charge of misconduct raised against the trustee; a trustee who fails to resign and has to be removed will normally be ordered to pay the costs of the beneficiary, usually on the indemnity basis, as well as bear his own costs.¹³³ However, a beneficiary who persists in seeking the removal of a trustee on grounds of misconduct, but secures the removal on other grounds, may be ordered to bear his own costs.¹³⁴ A trustee who refuses to retire and has to be removed by the court owing to an obvious conflict of interest may be refused his costs.¹³⁵ If a trustee is removed on the ground of conflict of interest, the court might normally be expected to make an order for costs against the trustee, though might allow the trustee his costs in special circumstances, for example where the conflict is expressly authorised by the terms of the trust, but the court nonetheless considers that the trustee should be removed.¹³⁶ A trustee removed on grounds other than misconduct is at less risk of being ordered to pay the applicant's costs, and will obtain an order for costs from the trust fund if he acted reasonably in defending the claim for removal.¹³⁷

¹²⁹ *Buckton v Buckton* [1907] Ch D 406, approved in *Trilogy Management Limited v YT Charitable Foundation (International) Limited & Ors* [2012] JCA204. See Ch 3 as to the cost of administrative proceedings.

¹³⁰ *Trilogy Management Limited v YT Charitable Foundation (International) Limited & Ors* (n 129).

¹³¹ *Dick v Pantrust International & Ors* (n 40).

¹³² *Alsop Wilkinson v Neary* (n 24) at 1224B and G.

¹³³ *Letterstedt v Broers* (n 31); *In the matter of the E, L, O and R Trusts* (n 26); and *In the matter of the VR Family Trusts* (n 24); *Dick v Pantrust International SA & Ors* (n 24).

¹³⁴ *Letterstedt v Broers* (n 31) at 390.

¹³⁵ *In The Matter Of The E, L, O And R Trusts* (n 24).

¹³⁶ *Dick v Pantrust International SA & Ors* (n 40) (for background), 2015 JRC 223 (removal hearing); *In re Carafe Trust* (n 76).

¹³⁷ *Kain v Hutton* (n 61) (affirmed [2007] NZCA 199 at [299]).

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A trustee may be tempted to continue in office and vigorously defend what it perceives as a not well-founded claim from beneficiaries for its removal out of concern that if it fails to refute the allegations, it will be taken as acknowledging them. The reputational risk to a trustee in being perceived to be at fault, so as to be worthy of removal, is an acute one in a jurisdiction like Jersey where the vast majority of trustees are professional. The trustee would be well advised to consider making an offer of settlement containing positive proposals for the appointment of a new independent trustee of good standing in his place, with whom the beneficiaries might enjoy a better relationship, without in any way conceding the allegations of misconduct, and thereby protecting his position as to costs so far as possible. Beneficiaries who unsuccessfully seek the removal of trustees will normally be ordered to pay the costs.¹³⁸

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If a trustee is purportedly removed from office under an express power in the trust instrument on some specified ground, and the trustee challenges the exercise of that power of removal, costs will normally follow the event. Unless the matter can be resolved by agreement with the beneficiaries, all being of full age and capacity, a trustee purportedly removed by what the trustee reasonably considers to be an improper exercise of such a power¹³⁹ can apply to the court for directions as to whether he ought to act on the purported removal and cause or allow the trust assets to vest in the new trustee purportedly appointed in his place without being at personal risk as to costs. In those circumstances, the trustee's affidavit should set out the material facts and the result of his consultation with adult beneficiaries, and explain the nature of and reason for his concern as to the exercise of the power.

IV. The Transition between Outgoing and Incoming Trustees

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A court order removing a trustee and appointing a replacement (as is usually the case) does not in and of itself resolve all issues concerning the rights and liabilities of the outgoing and incoming trustee. There is the outstanding issue of the vesting of the trust property in the new trustee.¹⁴⁰ There is also the question of what provision should be made as to the outgoing trustee's outstanding liabilities as trustee as these cannot usually be the subject of an assignment to the incoming trustee.¹⁴¹ The circumstances in which the Court is likely to be required to exercise its jurisdiction to remove a trustee means that it is only in rare cases that an order for retirement and appointment can take effect immediately. The usual practice is for the Court to grant an order directing the trustee to retire, once a suitable replacement has been found and once appropriate transitional arrangements have been made.¹⁴²

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The position of an outgoing (ie removed) trustee is governed by Article 34 of the Trusts (Jersey) Law 1984. Article 34(1) and (2) provide that outgoing trustees shall duly surrender

¹³⁸ *Fane v Fane* (1879) 13 ChD 228.

¹³⁹ A power to remove removal is usually a fiduciary power and can only be validly exercised for the benefit of the beneficiaries as a whole; *In re VR Family Trust* (n 24).

¹⁴⁰ Jersey's trust law, unlike English law, does not provide for the automatic vesting of trust assets on a transfer of trusteeship; see Trustee Act 1925, s 40.

¹⁴¹ These issues will also be faced by any trustee wishing to retire, desiring perhaps to extricate itself from a difficult relationship or where there is a concern that the trust assets are tainted as the proceeds of unlawful conduct.

¹⁴² eg *Trilogy Management Limited v YT Charitable Foundation (International) Limited & Ors* (n 37).

trust property subject to being first provided with reasonable security for liabilities, whether existing, future, contingent or otherwise if the outgoing trustees require it.¹⁴³ The trustees are under a duty proactively to pursue the transfer of the assets, subject only to their right to be provided with reasonable security for their fees and any liabilities, by (1) instructing Jersey lawyers to draft the formal documents by which the assets would be appointed to the new trust and any indemnities that should be given; (2) marshalling and preparing the assets so that they were ready to be transferred; (3) ascertaining the identity of the entities to whom the assets were to be transferred; (4) where necessary, obtaining advice on the steps required to effect the transfer, the tax implications (if any) and the cost to be incurred in the actual conveyance or transfer of the assets in the jurisdictions in which they were located; (5) setting out a timetable for the transfer of the assets; (6) providing information to the new trustee to enable it properly to accept the assets; (7) carrying out due diligence on the new trustee; and (8) answering the new trustee's reasonable questions concerning the assets.¹⁴⁴ It follows that if, and only if, reasonable security is provided, is the trustee obliged to part with trust property even if subject to a court order to resign.¹⁴⁵ Whether security was 'reasonable' depends on the circumstances of an individual case. There is no general principle that a trustee should always accept an escrow arrangement in a dispute over fees (eg such an arrangement would not ordinarily apply in fee disputes between beneficiaries and trustees who were to remain in office).¹⁴⁶ The trustee has a right to seek security by way of an indemnity and the extension of that security to their officers and employees is not to be considered unreasonable or unusual. However, an indemnity could not in general, reasonably be insisted on to extend to officers and employees of the trustee's associates or to companies in which the trust assets had been invested.¹⁴⁷ Article 34(3) provides that an outgoing trustee that duly surrenders the trust property in the manner contemplated by Article 34(1) shall be released from liability to any beneficiary, trustee or person interested under the trust aside from liabilities that outgoing trustees incur as a result of their own breach of trust or claims to recover trust assets in the possession of the outgoing trustees. As to what amounts to 'reasonable security', readers should be aware that until recently Jersey law has no equivalent to the English floating charge and it was not possible for a new trustee to charge the trust fund in favour of the outgoing trustee. Part 3 of the Security Interests (Jersey) Law 2012 it is now possible to achieve a floating charge like security interest over all present and future intangible movable property held by the grantor of the security from time to time.

- 10-42** What usually follows an order for removal is a transitional period in which the outgoing and incoming trustees engage in a negotiated de-coupling of the personage of the outgoing trustee from his office. Such negotiations will take into account the outgoing trustees' and successor trustees' respective obligations and legitimate interests, but paramount must

¹⁴³ See Ch 11 for fuller discussion of the trustee's indemnity.

¹⁴⁴ *In re Essel Trust* [2008 JLR N [18]], these steps are to be dealt with concurrently and not consecutively.

¹⁴⁵ *In re Ogier Trustee (Jersey) Ltd* [2006 JLR N [35]], however, a trustee who holds out on the terms of the indemnity and effectively paralyses the trust and the transfer to new trustees may be subject to criticism (and may commit a breach of trust) unless it seeks the Court's direction in a timely fashion; see *In re Essel Trust* (n 144).

¹⁴⁶ *In re Essel Trust* (n 144).

¹⁴⁷ *ibid.*

be the interests of the beneficiaries. The efficient management of such negotiations can be particularly challenging in circumstances where the:

1. outgoing trustees' liabilities are subject to contingencies;
2. parties disagree regarding the probability that the contingencies will materialise;
3. quantum of the outgoing trustees' liabilities (if they do arise) is uncertain;
4. relationship between the settlor, protector or beneficiaries and the outgoing trustees has completely broken down;
5. outgoing trustees consider that they may be exposed to liabilities in the near future but have limited understanding of the basis, amount or probability of their exposure;
6. trust fund is illiquid;¹⁴⁸ or
7. outgoing or successor trustees are experiencing difficulty accessing liquid assets in the trust fund owing to the influence of the settlor or other third parties, or for other reasons.

It is impossible to contemplate every scenario that may arise when outgoing trustees' security is being negotiated, the circumstances of each trust being unique, but the following principles should guide the transition process. The outgoing trustees should actively prepare for the trust assets and administration to be transferred to the successor trustees, notwithstanding that the outcome regarding the outgoing trustees' indemnity for its liabilities may still be pending.¹⁴⁹ Both outgoing and successor trustees should take into account the interests of the beneficiaries, notwithstanding that the outgoing and successor trustees may have legitimate personal interests that they wish to protect.¹⁵⁰ The outgoing trustees should, in most cases, avoid retention of the entire trust fund as security for their outstanding costs, particularly where the value of the trust fund considerably exceeds their outstanding costs.¹⁵¹ Jersey law is said to recognise an equitable proprietary right in the nature of or analogous to a non-possessory lien in favour of a retiring trustee.¹⁵² The outgoing trustees should make reasonable enquiries as to the nature and amount of their contingent and future liabilities with respect to the trust and promptly communicate the outcome of those enquiries to the successor trustees.¹⁵³ It is insufficient for the outgoing trustees to simply refer the successor trustees to the settlor or the protector or other persons so the successor trustees can, in effect, initiate their own fact-finding exercise regarding the outgoing trustees' liabilities. It is the outgoing trustees who need to actively inform the successor trustees directly of the nature and basis of the outgoing trustees' liabilities. If the outgoing trustees' maximum exposure is unknown, outgoing trustees can retain enough of the trust fund to

10-43

¹⁴⁸ The JFSC's Codes of Practice for Trust Company Business, Sch 2 defines illiquid assets as for example, land and buildings, intangibles (goodwill, intellectual property etc) amounts receivable from shareholders and/or directors and/or related parties (unless in the ordinary course of business and outstanding balances are settled every 60 days), debtors which are more than 90 days overdue; and margins taken against bank guarantees.

¹⁴⁹ *Ogier Trustee (Jersey) Ltd v CI Law Trustees* (n 145); *Re Caversham Trustees Ltd* [2008] JRC 065.

¹⁵⁰ *Re Caversham Trustees Ltd* (n 149).

¹⁵¹ *Re Carafe Trust* (n 76) at [37]; *In re Essel Trust* (n 144).

¹⁵² Although in the authors' view the references to the existence of a trustee's lien are sparse, obiter and at best oblique and may not be safe to rely upon for a retiring trustee to fully protect its position (see *In re Esteem Settlement* [2000] JLR 119] at 136–41, and [2002] JLR 53] at 89 and 90) and *Investec Trust (Guernsey) Limited et al v Glenalla Properties Limited et al* 41/2014).

¹⁵³ *Wester v Borland* [2007] EWHC 2484 (Ch).

cover the worst-case scenario, ‘calculated on reasonable and not fanciful assumptions’.¹⁵⁴ The outgoing trustees may, in certain circumstances, retain the entire trust fund for their liabilities where the maximum amount of those liabilities cannot be ascertained.¹⁵⁵ However, the circumstances where this is appropriate: (1) are likely to be exceptional; (2) may only exist for a limited period following the outgoing trustees’ retirement or removal; and (3) would require the outgoing trustees to reasonably demonstrate why doing so is reasonable and proportionate in the circumstances.

- 10-44** In a recent series of decisions of the Royal Court in the *Dick* litigation, it became apparent shortly after the trustee was removed from office by the Court that the now former trustee, had, before its removal, executed and secured for itself charges over certain of the trust assets in favour of itself as security for borrowing it alleged had been incurred by it in the course of its administration. The effect of those charges was to effectively impound the effective refinancing and administration of already illiquid trust assets while the security interests persisted. What followed were a series of hearings by which the court-appointed incumbent trustee and beneficiaries sought orders lifting the security interest on the basis that they were vitiated by a conflict of interest.¹⁵⁶

A. Provision of Trust Records to the Successor Trustees

- 10-45** An outgoing trustee is under a positive duty to fully and actively cooperate on a transfer of trusteeship by promptly providing the new trustee with all trust documents and correspondence and answering reasonable questions.¹⁵⁷ Successor trustees will be unable to effectively administer the trust and fulfil their duties without at least having access to the trust and supplementary instruments; the beneficiaries’ identity and contact details; and the current details of the trust’s assets and liabilities. The Royal Court has a discretion, under its inherent jurisdiction to supervise and, if necessary, intervene in the administration of trusts, to direct that specific documents or information not be disclosed by the outgoing trustee.¹⁵⁸ However, legal advice paid for by trustee out of the trust fund not is not to be considered ‘trust property’ under Article 1(1) of the Trusts (Jersey) Law 1984 and an outgoing trustee is not required to hand it over to new trustee under Article 34(1).¹⁵⁹
- 10-46** In certain cases, the outgoing trustees may consider that their retention of shares in a private company or an investment portfolio, which is effectively controlled by the settlor (apparently determined to frustrate the outgoing trustees’ attempts to access trust assets), does not constitute reasonable security for the outgoing trustees’ liabilities. Outgoing trustees are not required to readily accept a charge over shares or other assets that are subject to considerable direct or indirect influence by the settlor. This is particularly so where the settlor’s conduct suggests that they may seek to frustrate the outgoing trustees’ legitimate

¹⁵⁴ *Concord Trust v The Law Debenture Trust Corporation plc* [2004] EWCA Civ 1001.

¹⁵⁵ *X v A* [2000] 1 All ER 490.

¹⁵⁶ *Dick v Pantrust International SA & Ors* [2016] JRC021; *Dick v Pantrust International SA & Ors* [2016] JRC053.

¹⁵⁷ *In re Bird Charitable Trust* [2012 (1) JLR 62].

¹⁵⁸ *ibid.*

¹⁵⁹ *ibid.*

access to, or enforcement of, the security.¹⁶⁰ In these circumstances, the outgoing trustees may consider it reasonable that they retain (notionally) the entire trust assets (including the trust records) until they reach an agreement with the successor trustees regarding the outgoing trustees' security. That approach would rarely by itself, if at all, be considered proactive or reasonable because it effectively prevents the incoming from being able to effectively administer the trust. As a matter of priority, outgoing trustees should proactively and efficiently:

1. ascertain the nature and extent of their outstanding costs and the estimated costs of the transfer process and provide this information to the successor trustees;
2. take reasonable steps to determine the nature and extent of their liabilities;
3. inform the successor trustees of the nature of their concerns in as much detail as reasonably possible given the information available, even if the outgoing trustees do not yet clearly understand the nature of their liabilities; and
4. propose to the successor trustees a procedure and timetable pursuant to which the issue of the outgoing trustees' security may be resolved, taking into account the information regarding the outgoing trustees' liabilities available, the nature of the trust fund, the impact of costs and delays on the successor trustees' ability to properly administer the trust, the interests of the beneficiaries and any other relevant factors.

Where the trust fund is illiquid or inaccessible to the outgoing trustees, the successor trustees and any other parties that exert practical control over all or part of the trust fund should (and can be ordered to) facilitate the provision to the outgoing trustees of a reasonable sum from the trust fund or some other source to secure the outgoing trustees' costs of making key trust records available.

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It may be unreasonable for successor trustees, by accepting their appointments as trustees, to place themselves in a position where neither they nor the outgoing trustees have any access to the liquid trust assets or other means to fund the transfer of administration. Successor trustees, before accepting their appointment and as part of their due diligence, would place themselves in a better position to manage the negotiation process if they have made reasonable enquiries to ascertain:

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1. the nature and value of the trust assets, including the liquidity of the trust fund;
2. the nature and extent of the settlor's or beneficiaries' direct or indirect control over trust assets;
3. the outgoing trustees' current position in relation to security for their liabilities; and
4. the likelihood of any difficulties that either party may experience accessing trust assets to fund the cost of work performed by either party in connection with the transfer process, or provision of security to the outgoing trustees.

¹⁶⁰ See *Caversham Trustees Ltd v Patel and Ors* [2007] JRC 070, where the outgoing trustees were granted security for their outstanding fees in the form of a charge over shares in a company that was controlled by the settlor. Notwithstanding that, the settlor's Jersey lawyers were provided with the share certificate of an underlying company of the trust to hold as security on behalf of the outgoing trustees, the outgoing trustees remained as directors of the underlying company, court orders of the Jersey Court compelled the settlor to honour the security arrangement, and the settlor fraudulently sold the property held by the underlying company and retained the proceeds.

- 10-49** Where the outgoing trustees do not have effective control over the trust fund,¹⁶¹ the incoming trustee should make a payment into the outgoing trustees' client account or an escrow account to secure the outgoing trustees' reasonable costs of providing the trust documents that the incoming trustees may require. This is the appropriate approach notwithstanding any potential claim the incoming trustees consider they may have against the outgoing trustees that would require the outgoing trustees to compensate the trust fund. The outgoing trustees may, rightly or wrongly, consider that the incoming trustees' claims for compensation on behalf of the trust fund do not have any merit. In any event, it will usually be practical for the determination of such claims to be deferred until the transfer of administration has been completed. The successor trustees' provision of security to the outgoing trustees does not ordinarily constitute a waiver of claims they have against the outgoing trustees regarding their administration of the trust.¹⁶²

B. Contingent Liabilities and the Probability that They Will Materialise

- 10-50** The trustee is, by law, entitled to be indemnified from the trust fund for all liabilities reasonably incurred.¹⁶³ Frequently, contingent liabilities that are unlikely to materialise may be appropriately secured simply by the indemnities suggested in templates such as the STEP Guide.¹⁶⁴ It is the author's view that given the circumstances of every trust are unique, an instrument of indemnity should be a bespoke document, tailored to the precise requirements of the trust for which it is to be used. There are occasions where the templates in works such as the STEP Guide may be unsuitable and/or indemnities may be of limited utility given the nature of the trust and the trust assets.¹⁶⁵ An outgoing trustee should provide a detailed explanation to the incoming trustees if they consider this to be the case. Where there is ongoing disagreement about the probability of liabilities materialising, the parties should explore whether security made up of a combination of cash, charges over intangible movable trust assets and indemnities is appropriate; and consider putting in place a timetable pursuant to which the outgoing trustees may release one or more assets retained as security at certain agreed stages, taking into account the nature of the claims and limitation periods¹⁶⁶ on which the parties acknowledge it is less probable that the liabilities will arise; whether a preliminary independent opinion from appropriate counsel on the issue would assist resolution; or whether an independent expert determination is required.

¹⁶¹ Notwithstanding that this in itself may amount to a breach of duty in failing to properly secure the trust assets.

¹⁶² Trusts (Jersey) Law, Art 34(3).

¹⁶³ As to the nature and scope of the trustee's indemnity, see Ch 11.

¹⁶⁴ R Williams, A Saker and T Graham, *A Practical Guide to the Transfer of Trusteeships*, 2nd edn (Society of Trust and Estate Practitioners, 2011).

¹⁶⁵ eg *Oakhurst Property Developments and Others v Blackstar (Isle of Man Ltd and Church Street Trustees Ltd)* [2012] EWHC 1131 (Ch), where the trust assets comprised an unsecured loan receivable and a small sum in cash and where the scheme in which the trust was involved rendered it possible that the value of the chose in action in relation to the loan receivable could be significantly reduced in value without the successor trustee making a distribution of all or part of that chose in action.

¹⁶⁶ For limitation periods applicable to trust litigation, see Ch 16. Jersey regards procedural matters (including prescription) as governed by the *lex fori*; see *Pell Frischmann Engineering Limited v Bow Valley Iran Limited & Ors* 2007 JLR N [38], applying *Gordon v Gore* (1890) 214 Ex 95; *Pemberton v Westaway* (1892) 215 Ex 499 and *Cooper*

Where the incoming trustees consider that the provision to the outgoing trustees of certain trust assets or types of security would have a material adverse impact on the administration of the trust, they should seek to offer a constructive alternative proposal to the outgoing trustees. There may be instances where the value of the trust assets is such that the incoming trustees are unable to provide security, including an indemnity, of any real value to the outgoing trustees. In such circumstances, the outgoing trustee will have to look elsewhere for such provision.¹⁶⁷ In the recent English case of *Oakhurst v Blackstar*,¹⁶⁸ the settlor (Oakhurst) had established four employer-funded retirement benefit trust schemes (the schemes). The schemes were established primarily to provide benefits for directors of Oakhurst. Blackstar was the trustee of each of the schemes and Oakhurst purported to remove Blackstar as trustee and appoint a successor trustee (Church Street Trustees Ltd—‘Church Street’) in Blackstar’s place for each scheme. Oakhurst brought proceedings seeking declarations to confirm that Blackstar had been removed as trustee of each scheme and that Church Street had been appointed trustee in Blackstar’s place, and to clarify ‘what was required to be provided to Oakhurst by way of reasonable security and indemnities’ in the circumstances. The circumstances were unusual because the trusts’ or schemes’ funds, in each case, essentially consisted of choses in action to recover unsecured loans owed by directors or employees of Oakhurst to the trustees of respective schemes; and because the schemes were of a nature where it was possible that arrangements would be implemented after Blackstar’s removal, which would significantly reduce the value of the choses in action and, accordingly, the value of the indemnities provided by Church Street to Blackstar. The Court determined that Blackstar was unlikely to be exposed to any liabilities but, despite that, no ‘reasonable professional advisor could reach the conclusion that the risk of potential liability was absolutely nil’.¹⁶⁹ The outgoing trustee should not be left to bear whatever degree of risk there might be of a potential liability where it runs the further risk of there being no worthwhile indemnity in relation to it. While the outgoing trustee, or the parties together, could consider placing further restrictions upon successor trustees in relation to the manner in which the incoming trustees dealt with the schemes’ funds (to preserve the value of the indemnities) to do so might be objected to as an excessive fetter to the discretion of the incoming trustees and, accordingly, it was reasonable to consider alternatives. The persons who stood to benefit from the schemes were the settlor Oakhurst and its directors and employees. Oakhurst’s financial position was such that it could meet its obligations to the outgoing trustee Blackstar if it provided the indemnities contemplated by the trust instruments; ‘as between the outgoing trustee and Oakhurst ... Oakhurst and not the outgoing trustee should bear any risk which might be involved’, and accordingly Oakhurst was

^v *Cooper (née Resch)* [1985–86 JLR N–6]. Jersey has no equivalent of the Foreign Limitation Periods Act 1984, which introduced the rule into English law that foreign periods of prescription or limitation were now to be treated as substantive matters, governed by *lex causae*, irrespective of whether the same period would be regarded by the law of the jurisdiction it emanates from as procedural.

¹⁶⁷ eg *In re Carafe Trust* (n 76) where beneficiaries offered to provide security for the trustee’s fees by paying them into an escrow account.

¹⁶⁸ *Oakhurst Property Developments and Others v Blackstar (Isle of Man Ltd and Church Street Trustees Ltd)* (n 165).

¹⁶⁹ *ibid*, at [70].

required to provide a personal covenant of indemnity to Blackstar, substantially in the form contemplated by the terms of each scheme; with the indemnities provided by Oakhurst carefully setting out the circumstances in which Blackstar could claim against any remaining trust assets and the circumstances in which it could claim under the indemnity to manage Oakhurst's concern that its provision of the indemnities could give rise to a tax charge.

- 10-52** *Oakhurst v Blackstar* required the Court to fashion a solution in a commercial context. It remains to be seen, although it seems unlikely that a court would require settlors of family discretionary trusts to provide indemnities to outgoing trustees where the settlor has little or no ongoing involvement with the trust. The provision of an indemnity or other form of security from settlors, or perhaps even beneficiaries in certain cases, to the outgoing trustees can be explored by the outgoing and incoming trustees as part of the negotiation process in relation to the outgoing trustees' security. However, the circumstances in which courts may require settlors or beneficiaries to provide outgoing trustees with indemnities and other security on retirement or removal are likely to be limited. It is open to trustees to include a requirement in their terms and conditions (to which the settlor is usually a party) for the settlor to provide a specific indemnity (and other forms of security if reasonably required) to an outgoing trustee immediately before their removal.¹⁷⁰
- 10-53** It is another matter whether the indemnity is ultimately of any value when circumstances for enforcement of the indemnity may ultimately arise, taking into consideration the financial circumstances and location of the settlor at the time of enforcement, and the possibility that a court may strictly construe whether the indemnity is enforceable in the circumstances that exist when the trust service provider seeks to enforce the indemnity.

C. Retention of the Entire Trust Fund as Reasonable Security

- 10-54** Where the value of the trust fund significantly exceeds the level of the outgoing trustee's liabilities and the outgoing trustees have control of the trust assets or access to liquid assets within the structure, the outgoing trustees should transfer sufficient trust assets to the incoming trustees to enable them to settle expenses and make distributions without recourse to the outgoing trustees. As further information clarifying the nature of their liabilities becomes available the outgoing trustees should consider the extent to which they can transfer trust assets into the control of the incoming trustees without depriving themselves of the means to satisfy liabilities from those assets as they fall due. The outgoing trustees should not retain trust assets that they reasonably consider, on a conservative basis and with the information they have available from time to time, are not required to secure their liabilities. Without expert advice, it is likely that a trustee will adopt a more conservative approach to what assets they should retain than if they receive professional advice that assists them to understand the nature of their liabilities. This is understandable and reasonable, albeit the outgoing trustees should be mindful of potentially adverse cost consequences they may suffer as a result of their failure to promptly mobilise to ascertain

¹⁷⁰ This may of course only be a partial solution where (1) the trusteeship has changed hands between the date of the original settlement and the time the indemnity comes to be enforced and no provision has been made for successor trustees to claim against the settlor through the original trustee and (2) the whereabouts, means of and prospects of enforceability against the settlor at the time the indemnity comes to be enforced are uncertain.

their exposure when it became reasonably clear that successor trustees were likely to be appointed to replace them. However, the outgoing trustees' transfer of at least part of the trust assets in the manner outlined above to some extent demonstrates their recognition of the legitimate needs of the incoming trustees and may help to facilitate more collaborative negotiations and reduce their exposure to adverse costs orders. An approach whereby an outgoing trustee retains sufficient trust assets to meet prospective liabilities and drip-feeds assets to the incoming trustee as and when it considers it safe to do so is not inconsistent with the language in Article 34(2) of the Trusts (Jersey) Law which does not provide that outgoing trustees may ignore the impact of their retention of trust assets on the administration of the trust and the interests of the beneficiaries as a whole by, for example, retaining a sum that is clearly disproportionate to their exposure for any period of time.¹⁷¹

D. Independent Advice

An outgoing trustee concerned as to its exposure for outgoing liabilities may have insufficient information to ascertain the nature of their liabilities and may accordingly obtain advice on those issues. Advice may be required in more than one jurisdiction.¹⁷² Incoming trustees may be reluctant to entertain the outgoing trustees' request for time and funds with which to procure advice regarding the outgoing trustees' liabilities where, for example, the outgoing trustees have known for some time that they were soon to cease acting as trustees yet did not procure such advice in a timely fashion; the incoming trustees believe that the outgoing trustees are not exposed to any liabilities other than costs the outgoing trustees may charge or incur in connection with the transfer of administration; or the incoming trustees are under pressure from the beneficiaries to quickly secure the trust assets and make a clean break with the outgoing trustees so that the successor trustees can focus on the day-to-day administration of the trust. In these circumstances, the outgoing trustees should consider:

1. instructing an advisor to provide impartial preliminary advice;
2. informing the advisor that the advice will be provided to the successor trustees who may later wish to jointly instruct the advisor to provide a more substantive report, if considered appropriate; and
3. providing the successor trustees with the outgoing trustees' instructions to the independent advisor and the advisor's fee estimate, advice and invoice.

Frequently, presuming the preliminary advice arranged in the above manner is obtained at modest or reasonable cost and does not reveal the outgoing trustees' concerns to be fanciful, the incoming trustees will have difficulty arguing that the costs of such advice should not be met from the trust fund, notwithstanding that the advice may have determined, on a preliminary basis, that the outgoing trustees clearly have no exposure or minimal exposure, or that their exposure is unlikely to materialise. Persuasive independent preliminary advice that indicates that there is a realistic possibility that the outgoing trustees are exposed to

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¹⁷¹ *Caversham Trustees Ltd v Patel and Ors* (n 160).

¹⁷² See n 159.

material liabilities should influence the incoming trustees to consider jointly instructing or otherwise providing the outgoing trustees with security for the costs that they are likely to incur when obtaining a more substantive report from the advisor. The outgoing trustees should be as transparent as possible with the incoming trustees about their intention to seek independent advice, the costs of the advice, their instructions and the advice itself, regardless of the successor trustees' apparent attitude towards the outgoing trustees obtaining the advice.

E. Suggested Procedure for Securing Reasonable Security

- 10-57** In many cases, the following procedure should balance the legitimate interests of the outgoing trustees, successor trustees and beneficiaries. The procedure is proposed on the basis that it would be implemented in conjunction with guidance that courts have provided, with emphasis on the obligations of outgoing trustees, when transferring trusteeship, and focused on facilitating a cost-effective and efficient resolution. Once the outgoing trustees should reasonably expect that their retirement or removal is inevitable, they should consider the liabilities to which they may be exposed and, particularly if they do not understand the nature of their exposure, procure impartial preliminary advice about their concerns. The incoming trustees should, before their appointment, make enquiries to ensure that on their appointment, assuming the outgoing trustees do not seek to retain the entire trust fund as security, they will have access to liquid trust assets to fund the outgoing trustees' costs to transfer trusteeship and manage the process to determine the outgoing trustees' security for their costs and liabilities. The outgoing trustees should, as soon as practicable (in many instances this will be immediately after the successor trustees' appointment), provide the successor trustees with (1) details of their concerns about their liabilities and a copy of any advice they have obtained about the nature of the liabilities; (2) copies of the outgoing trustees' outstanding invoices, complete with narrative breakdowns and relevant fee schedules; and (3) an itemised preliminary estimate of the outgoing trustees' costs of completing the transfer of administration, including resolution of the outgoing trustees' security.
- 10-58** The successor trustees should facilitate the provision of security to the outgoing trustees, in the form of liquid assets sufficient to comfortably discharge the outgoing trustees' costs in connection with (1) providing the trust records required by the successor trustees; (2) transferring administration of the trust and its assets to the successor trustees; and (3) obtaining advice in connection with their liabilities (assuming this has not already been done).
- 10-59** If the trust fund is illiquid, the incoming trustees should provide the outgoing trustees with cash as security (from their own funds at first instance, if necessary) sufficient to comfortably discharge the outgoing trustees' estimation of their costs in connection with providing the trust records requested by the successor trustees. The outgoing trustees should promptly provide the incoming trustees with the trust records they require, on receipt of security to meet their costs of providing those documents. If the trust fund includes sufficient liquid assets that the outgoing trustees' reasonable claims for security are not compromised, the outgoing trustees should, as soon as possible after the above steps, facilitate provision to the incoming trustees of liquid assets sufficient to (1) meet the successor

trustees' costs and expenses in connection with the day-to-day administration of the trust for at least a six-month period (the period in which the issue of the nature and extent of the outgoing trustees' security should comfortably be resolved); and (2) make distributions and payments, such as annual distributions, of which the beneficiaries had a reasonable expectation, as long as the provision of assets would not, on a conservative basis, materially prejudice the outgoing trustees' security.

Concurrently, the outgoing trustees should consider, on a conservative basis, whether they can transfer to the incoming trustees, assets that are greater in value than that set out above without, on a conservative basis, compromising their reasonable requirements for security. If the outgoing trustees consider that they require substantive professional advice and the incoming trustees do not wish to jointly instruct an independent expert to determine the nature of the outgoing trustees' liabilities, the outgoing trustees should (1) prepare instructions to an advisor on the basis that the advisor is impartially advising both the outgoing and successor trustees, and provide a copy of these instructions to the successor trustees; (2) procure an itemised estimate from the advisor and provide this to the successor trustees before the advisor proceeds; (3) consider obtaining preliminary advice first if the costs of substantive advice are significant; and (4) provide the successor trustees with full copies of the advice, regardless of whether the successor trustees agree that the advice is necessary or that the advisor's costs are a reasonable trust expense.

On receipt of the advice, the outgoing trustees should consider the nature of their liabilities, the assets contained in the trust fund and the efficient administration of the trust and (so far as the composition of the trust fund makes it possible) transfer to the incoming trustees further trust assets that the outgoing trustees consider, on a conservative basis, they do not reasonably require to secure their liabilities, and make a proposal to the incoming trustees detailing: (1) the nature of the security the outgoing trustees require, with reference to particular trust assets (for example, whether cash, portfolio accounts or charges over particular trust assets); (2) the rationale for their requirement for those particular trust assets to be provided as their security; and (3) a timetable of when they propose the assets provided as security shall be released to the successor trustees, paying particular regard to limitation periods and other contingencies that may, if overcome, remove or reduce the outgoing trustees' exposure. At this point, in most cases, the incoming trustees will have a considerable proportion of the trust assets under their control and both incoming and outgoing trustees should have a relatively clear understanding of the outgoing trustees' liabilities to enable a sensible resolution of the matter whether by way of mediation or other binding independent determination or, if necessary, a court application.

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11

The Trustee's Protection from Personal Liability: The Trustee's Indemnity

I. Introduction

This chapter is concerned with the trustee's right of indemnity in respect of liabilities, costs (including the costs of litigation) and expenses incurred by the trustee in the execution of a trust. Subject to the terms of the trust, it is well established that a trustee has a right of reimbursement out of the trust fund in respect of liabilities, costs and expenses if properly incurred. The trustee's indemnity also entitles third party creditors of the trustee (and in some circumstances, the beneficiaries) to avail themselves of the trustee's right of indemnity by way of subrogation. This chapter considers the basis upon which a trustee incurs liabilities to third parties on behalf of the trust that may be reimbursed from the fund: liabilities in contract or tort; the costs of litigation in which the trustee is engaged; and fiscal liabilities.

11-1

A feature of the nature of a Jersey trustee's liability to third parties, which is not known in English trust law, is that it is limited to the extent of the trust property in the trustee's hands. This limitation has important ramifications, the boundaries of which have only recently begun to be explored by the courts, for its interaction with the trustee's right of indemnity. This limitation gives rise to the possibility, which has hitherto been heresy to English trust lawyers, of an insolvent trust, where the trust assets are insufficient to meet liabilities, costs and expenses irrespective of the solvency or otherwise of the trustee. The limited nature of the trustee's liability to third parties also has important implications for the rights of beneficiaries, particularly given that Jersey trust law appears to adopt a different approach from that adopted in England as to the ability of a trustee and subrogated third parties to avail themselves of the trustee's indemnity where the trustee has committed a breach of trust or is otherwise in default of its duties.

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II. General Principles

Under Jersey law, a trustee is entitled to be indemnified out of the trust for all expenses and liabilities reasonably incurred by the trustee in connection with the performance of its

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duties and in the exercise of its powers as trustee of the trust.¹ It has yet to be determined whether the scope of the indemnity is materially affected by the omission of 'properly' from the formulation used in Article 26.² As the Jersey Court of Appeal has observed, it is possible for a trustee to act unreasonably without acting improperly and the omission of 'properly' from the Jersey legislation may have the effect of being less generous to a Jersey trustee than the equivalent formulation prevailing in English law.³ It is difficult to imagine a liability being improperly incurred that would nonetheless have been incurred reasonably.

- 11-4** A former trustee maintains its right of indemnity even after it ceases to hold office, independently of any contractual indemnity the former trustee may have secured from its successor upon its retirement.⁴ Notwithstanding recent confirmation from courts in both Jersey and Guernsey⁵ that the trustee has an entitlement to an indemnity independent of the statutory provision in Article 26, an express contractual indemnity remains the usual mechanism by which an outgoing trustee's entitlement to reasonable security for liabilities reasonably incurred, whether existing, future, contingent or otherwise before surrendering trust property, is satisfied.⁶ A trustee's indemnity gives it a proprietary equitable interest in the trust fund that takes priority over the claims of the beneficiaries in the fund.⁷
- 11-5** The reason why a trustee is entitled to an indemnity arises from the nature of the Jersey trust and the basis upon which it is administered. It is trite law that a trust is not a legal person but a legal relationship. The person of the trustee (whether legal or natural) is the outward-facing legal personality of a Jersey trust. In the administration of the trust, the trustee acts as principal and is not an agent for the beneficiaries. That is the position even if the trustee exercises its powers following consultation with the settlor or beneficiaries, in a manner approved of or in accordance with the wishes of the beneficiaries or settlor, or if the powers are reserved to or exercised concurrently with a person other than the trustee. An agent acts on behalf of a principal. The trustee is not an agent for the beneficiaries or the settlor.⁸ As a general proposition of agency law, where the agent acts within the scope of its authority, the agent will not incur any personal liability. The liability is the principal's and not the agent's. By contrast, a trustee acts as principal in connection with the administration of the trust and is personally liable, *qua* trustee,⁹ as the counterparty to any legal relationship in which the trustee engages in the course of its administration of the trust with a

¹ Trusts (Jersey) Law 1984, Art 26(2); *Williams v Stevens* (1866) LR 1 PC 352; *Viscount v Wadman* (1972) JJ 2085.

² *Alhamrani v Alhamrani* [2007] JCA 164.

³ *Re Grimthorpe* [1958] Ch 615 at 623, per Dankwerts J. See also Trustee Act 2000, s 30(1), replacing the Trustee Act 1925, s 30(2).

⁴ *In re Z Trusts* [2015 (1) JLR N[13]], also reported as [2015] JRC031; *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* 2014 GLR 371.

⁵ *ibid.*

⁶ Trusts (Jersey) Law 1984, Arts 34(2) and (2A).

⁷ *Investec Trust (Guernsey) Limited v Glenalla Properties Limited and Ors* (n 4); *In the Matter of the Z Trusts* (n 4).

⁸ Unless the trust is a sham, in which case it may not be a trust at all or such trust that does exist is a bare trust for the settlor.

⁹ Whether the trustee could be described as 'personally liable' was explored extensively by the Guernsey Court of Appeal in *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* (n 4). The Court concluded that a trustee was not personally liable; however, the only way the decision can be properly understood and reconciled with orthodox principles of trust law is to regard 'not personally liable' as meaning 'not the personal liability of the trustee on its own account'.

third party to the trust. That is so whether or not the trustee is acting in accordance with its powers and duties. The trustee's right of indemnity serves to protect the trustee by permitting it to reimburse itself from the trust fund in respect of the liabilities it has personally incurred, qua trustee, in the administration of the trust, with the important rider that the liability must have been reasonably incurred. Where the trustee engages with a third party on behalf of the trust, there are two distinct relationships. The first is between the trustee and the third party with whom it deals or to whom it incurs liabilities. This relationship gives rise to a personal liability for the person of the trustee, qua trustee. Generally speaking the third party dealing with a trustee is not concerned as to the terms of any the trust. However the extent to which the third party may have recourse to the assets of the trust (through, or by being subrogated to, the trustee's right of indemnity) is dependent upon whether the third party knows that they are dealing with the trustee qua trustee and not with the person of the trustee in any other capacity (including its personal capacity).¹⁰ The second relationship that arises is between the trustee and the beneficiaries as affected by the first relationship.¹¹ There is no legal relationship between the third party dealing with the trustee and the beneficiaries or the trust property, and there will therefore be no direct recourse by the third party against the beneficiaries personally or to the trust assets other than through the trustee (or by way of subrogation to the trustee's right of indemnity). Normally an unsecured third party creditor of the trustee will claim its remedy against the trustee and the trustee will claim by way of its indemnity, against the trust property.¹²

A. Indemnity of Particular Trustees

i. Constructive Trustees

A person who has not been properly appointed as a trustee, if they have acted in good faith and believed themselves to have been properly appointed, is entitled to an indemnity, as would be a properly appointed trustee, and for the costs of proceedings to ratify their appointment and purported actions while a trustee *de son tort*.¹³ There is old English authority for the proposition that where a person in a fiduciary position obtains or uses trust property in breach of the no-profit rule the beneficiary seeking to recover such property must give credit to the constructive trustee for the costs and expenses incurred effecting improvements which augment its value.¹⁴

11-6

ii. Trustees of Void or Voidable Trusts

A properly appointed trustee of a voidable settlement is entitled to the usual indemnity up to the point of its avoidance on the basis that until the trust is avoided it is a valid trust,

11-7

¹⁰ *Trusts (Jersey) Law 1984*, Art 32.

¹¹ *ATC (Cayman) Limited v Rothschild Trust Company Limited* (2011–12) 14 ITELR 523 at [42].

¹² The third party may have direct resource to the trust assets by way of a direct security interest.

¹³ *In The Matter of the Representation of BB, A and C* [2011 JLR 672], approving *Travis v Illingworth* (1865) 62 ER 652.

¹⁴ *Rowley v Ginnever* [1897] 2 Ch 503.

notwithstanding that an order rescinding the trust for mistake has effect as though the trust never existed.¹⁵ On the other hand, a trustee of a trust that is void *ab initio* is not usually entitled to the costs of administering the trust.¹⁶ The discretion the Royal Court retains¹⁷ to authorise the remuneration of a trustee under its general supervisory jurisdiction and under Article 26(1)(c) of the Trusts (Jersey) Law 1984 appears to apply only in respect of valid trusts that meet the definition of a trust under Article 2 of the Trusts (Jersey) Law 1984. A trustee who considers that the trust they purport to administer may be void should apply for directions by issuing a Representation at the earliest opportunity. Depending upon the reason why the trust is void, for example a failure to satisfy the certainty of objects requirement,¹⁸ it may be possible to argue that the property is still subject to a trust (a bare resulting trust) albeit not a trust under the instrument so as to fall within the scope of Article 2. The Court may deprive a trustee of the profit element of its fees, capping recovery at the costs of administration only so as not to confer a windfall benefit upon the beneficiaries in the form of free administration.¹⁹

B. Beneficiaries' Indemnity

- 11-8** Where a beneficiary advances money at the request of the trustee to enable the trustee to discharge a liability that would otherwise be met by the trustee raising money against the trust fund, the beneficiary is entitled to stand in the shoes of the trustee and has a lien on the fund for the quantum of the sum advanced.²⁰

C. The Indemnity of Third Parties Involved in the Administration of the Trust

- 11-9** Where the trust instrument confers fiduciary powers or functions on a third party, such as a protector or an enforcer, that third party has an implied right of indemnity in respect of the costs reasonably incurred by him in the discharge of those functions.²¹ A fiduciary's implied right of indemnity is to be equated to a trustee's right to full reimbursement and is not therefore to be subject to taxation under rule 12/3 of the RCR 2004.²² The right of a protector's indemnity is not directly against the fund but via the trustee, which is in turn entitled to reimbursement from the fund by way of its own indemnity.

¹⁵ *In re Strathmullen Trust* [2014 (1) JLR 309].

¹⁶ *Re Holden* (1887) 20 QBD 43; *Smith v Dresser* (1866) LR 1 Eq 651.

¹⁷ *Landau v Anburn Trustees Ltd* [2007 JLR 250].

¹⁸ Trusts (Jersey) Law 1984, Art 11; *In re Exeter Settlement* [2010 JLR 169].

¹⁹ *In The Matter Of The Carafe Trust* [2005 JLR 159].

²⁰ *Todd v Moorehouse* (1874) LR 19 Eq 69; *Re Layton's Policy* [1873] WN 49.

²¹ *In The Matter of The HHH Employee Trust* [2013 (1) JLR 135], affirmed sub nom in *Re JP Morgan 1998 Employee Trust* [2013 JLR 239] at [23].

²² *In The Matter of The HHH Employee Trust* (n 21); see also *In the matter of the K Trust* 31/2015 (Guernsey RC).

D. The Limited Liability of Jersey Trustees

Under English trust law, a trustee is personally liable to the full extent of its personal assets for all liabilities, costs and expenses incurred by it on behalf of the trust of which it is trustee, whether or not properly or reasonably incurred. The value of the indemnity to the trustee is illusory where the trust assets are insufficient to meet the liabilities claimed against the trustee by a third party. On orthodox English trust law principles, the trustee remains personally liable to the full extent of the trustee's own assets to meet any shortfall to a third party that it cannot satisfy by way of its indemnity from the trust fund.

That is not the position in Jersey law. Jersey, like neighbouring Guernsey,²³ has enacted legislation that has the effect of limiting or capping the liability of a trustee of a trust governed by Jersey law to a third party to the value of the trust assets, in circumstances where the third party knows that the trustee is acting *qua* trustee.²⁴ The relevant provision is in the following terms:

32 Trustee's liability to third parties

(1) Where a trustee is a party to any transaction or matter affecting the trust—

- (a) if the other party knows that the trustee is acting as trustee, any claim by the other party shall be against the trustee as trustee and shall extend only to the trust property;
- (b) if the other party does not know that the trustee is acting as trustee, any claim by the other party may be made against the trustee personally (though, without prejudice to his or her personal liability, the trustee shall have a right of recourse to the trust property by way of indemnity).

(2) Paragraph (1) shall not affect any liability the trustee may have for breach of trust.

The meaning and application of Article 32 has only recently come to be analysed by the Guernsey courts, which have provided the leading authorities, subsequently affirmed by the Royal Court in Jersey.²⁵

i. *The Meaning and Effect of Article 32(1)(a) of the Trusts (Jersey) Law 1984*

There are no authorities in which the Court has resolved a doubt as to whether a third party knows it is dealing with a trustee. The Guernsey Court of Appeal has given limited guidance on what it means for a third party to 'know' it is dealing with a trustee. The state of knowledge of the third party is a matter of fact to be determined in each case. It appears that nothing more is required, such as knowledge that the trustee is empowered to enter into the transaction, and there is no obligation for the third party to take steps to ascertain the capacity of the trustee to deal with them. The relevant time to consider the third party's knowledge is the time that the contract is entered into. The trustee is liable on any contract it enters into as trustee and assumes obligations under the contract in its own name as principal, but the contracting trustee is not required to satisfy any claim by a third party

²³ Trusts (Guernsey) Law 2007 (Guernsey), s 42; see also Trustee Ordinance 1961 (as amended by Trustee (Amendment) Act 2003) (BVI).

²⁴ Trusts (Jersey) Law 1984, Art 32, read in light of Art 6 and Art 1(1).

²⁵ *Investec Trust (Guernsey) Limited & Anor v Glenalla Properties Limited & Ors* (28/2014) 27 June 2014 (CA); *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* (n 4), affirmed *In The Matter of the Z Trusts* (n 4).

with whom it contracts by recourse to the trustee's personal assets. A trustee that enters into a contract while trustee and then ceases to hold office (in circumstances where the contract is not novated between the third party and the successor trustee) has the right to recover from the successor trustee by way of its indemnity such trust property as is necessary to satisfy a claim to a third party. Upon satisfying such liability to the extent of the trust property, a trustee contracting with a third party has no further liability to the third party. The liability of a trustee contracting with a third party extends only as far as the trust assets that exist either in his hands or in the hands of a successor trustee, from time to time. The contracting trustee enjoys a right to be indemnified by his successor trustee up to the limit of the trust assets held by the successor trustee. This right is to be characterised as being an equitable right in the form of, or, analogous to a non-possessory lien.²⁶ A trustee contracting with a third party is entitled to satisfy the liability out of the trust property irrespective of whether or not there is any allegation of breach of trust, whether justified or otherwise, against the contracting trustee.²⁷ The counterparty to a contract with a trustee does not have a direct right of recourse to the trust assets. The creditor's claim is against the trustee with whom they contract, who will have access to the trust assets either by way of its indemnity against the assets in its hands or by way of its indemnity as against a successor trustee. The third party creditor may be entitled to be subrogated to the contracting trustee's right of indemnity against a successor trustee.

- 11-14** The critical time at which the obligation on the trustee to expend the trust assets in satisfaction of the third party's claim arises is—somewhat imprecisely—the time when the claim falls to be satisfied. That must be taken to mean the date of enforcement and not the date when the liability was assumed or incurred.

ii. The Meaning and Effect of Article 32(1)(b) of the Trusts (Jersey) Law 1984

- 11-15** The meaning and effect of Article 32(1)(b) were not in dispute between the parties in *Glenalla* and the Guernsey Court of Appeal's observations on this are strictly obiter. The Guernsey Court's view was that Article 32(1)(b) applies when the third party does not know it is contracting with a trustee. In these circumstances the position reverts to that under English law where the trustee is personally liable under the contract to the full extent of its assets. Such personal liability is, however, stated to be subject to the trustee's right of recourse to the trust property by way of its indemnity. As with Article 32(1)(a), the trustee's right of indemnity endures irrespective of whether or not there is any allegation of breach of trust, whether justified or otherwise.

iii. The Relationship between Article 32(1) and 32(2) of the Trusts (Jersey) Law 1984

- 11-16** Article 32(1) and 32(2) are to be read and applied disjunctively. A beneficiary with a claim alleging a breach of trust is not in the same position as a third party creditor to the trustee and is not limited in its claim against the trustee to the value of the trust assets. Article 32(2)

²⁶ The existence and nature of the trustee's lien was confirmed in *In The Matter of the Z Trusts* (n 4).

²⁷ It may yet be significant that the trustee's right to be indemnified irrespective of the position vis-à-vis the account with the beneficiaries seems to apply only to an alleged rather than proven breach of trust claim.

preserves any rights that beneficiaries may have in a case of a breach of trust, but it does so separately from the mechanism for the satisfaction of third party claims which exists under Article 32(1)(a) and (b). Where Article 32(1)(a) and 32(2) are both engaged, a third party's claim against the trustee can be satisfied from the trust fund up to the value of the trust assets irrespective of whether the trustee is liable to the beneficiary for breach of trust. Where Article 32(1)(b) and (2) are both engaged and the trustee has incurred liability to the third party in breach of his duties as trustee, or is otherwise alleged to be in breach of trust, the trustee is still entitled to have his indemnity satisfied in order to meet the third party's claim. In other words, a third party that contracts with a trustee not knowing it to be a trustee is entitled to satisfaction of its claim via the trustee's indemnity so long as there are trust assets, irrespective of whether the trustee, in contracting with the third party, has done so in breach of trust. Even where the trustee's liability extends to its personal assets under Article 32(1)(b) of the Trusts (Jersey) Law 1984, so long as there are sufficient trust assets to satisfy the claim, a creditor may not be prevented from having his claim satisfied by the trustee (including by subrogation to the contracting trustee's right of indemnity) even though the contracting trustee may have acted in breach of trust in assuming the obligation or otherwise. This is a significant departure from the prevailing position under English law where the rule is that a trustee who is in default of their duties to the fund is not permitted to have recourse to its indemnity.²⁸ The rule in *Re Johnson*²⁹ prejudices a third party dealing with the trustee to the extent that the trustee is unable to have recourse to the trust's assets; however, under English law, the trustee remains personally liable to the full extent of its personal assets. It therefore has the effect of putting the trustee on risk to ensure they do not forget their duties to the beneficiaries (or do so at their own risk) when dealing with a third party. The effect of Article 32 is to prevent a third party dealing with the trustee of Jersey trust from having recourse to the trustee's personal assets, with recourse limited only to the trust's assets via the trustee's indemnity. Were the rule in *Re Johnson* to apply alongside Article 32, the third party would be unable to have recourse to the trust assets through the trustee's indemnity and the trustee would have no personal liability to satisfy the third party from its own assets. The conclusion of the Guernsey Court of Appeal in *Glenalla*³⁰ is the logical consequence of the policy decision to protect the interests of third parties dealing with a Jersey trustee. However it also has the consequence (perhaps unintended) of protecting the trustee from what would otherwise be the ordinary consequence of being in default of duty. The risk of a Jersey trustee contracting with a third party is borne not by the trustee but by the beneficiaries. It has to be considered whether this result is justifiable as a matter of principle or whether it is just a tolerable compromise balancing the interests of third parties and beneficiaries. Where the trustee has breached its duties the beneficiaries will have to be content with a separate breach of trust claim against the trustee to recover the amount paid out to the third party creditor. However, the beneficiaries may find (particularly if the trustee is a Private Trust Company (PTC))³¹ that the trustee has insufficient assets to restore the trust fund.

²⁸ *In Re Johnson* [1880] 15 Ch D 370.

²⁹ *ibid.*

³⁰ *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* (n 4).

³¹ Defined in the Financial Services (Trust Company Business (Exemptions)) (Jersey) Order 2000, Sch 1, pt 1, para 4 as a company whose purpose is (1) solely to provide trust company business services in respect of a specific

III. Common Liabilities of Trustees

A. Contracts

- 11-17** A Jersey trustee entering into a contract will be personally liable under the contract like any other party to a contract. Subject to any contractual limitation on the trustee's liability and the effect of Article 32 of the Trusts (Jersey) Law 1984 where the counterparty knows the trustee is acting as trustee, the trustee's liability will be unlimited. Notwithstanding the statutory provision for limited liability a Jersey trustee, if well advised, will usually seek to limit its liability under the contract to a specific amount or to the extent of the trust fund. Whether a Jersey trustee's liability is limited under a contract is a matter of construction of the agreement to be determined by reference to all the circumstances. Where the contract is governed by Jersey law, whether or not with a Jersey counterparty, the contract is likely to be construed consistently with Article 32 of the Trusts (Jersey) Law 1984, with the result that the trustee's liability will, if Article 32(1)(a) is engaged, be limited.³² Where the contract is governed by a law other than the law of Jersey the position becomes more complicated. If the contract comes to be enforced in a court outside Jersey, the question as to whether the trustee's liability is limited depends upon how the nature and extent of the trustee's liability is determined under the prevailing basic principles of the conflict of laws.³³
- 11-18** It appears that a Jersey trust is to be considered as analogous to a company, whereby the limited liability of the members of the company to a third party with whom the company transacts is governed by the law of the jurisdiction of incorporation rather than the law governing the transaction.³⁴ If the law of one jurisdiction makes provision regarding the potential liability of a legal person holding a particular status then that, if it is of a substantive nature, should be recognised by the courts of the forum of the dispute (assuming the forum of the dispute recognises a trust at all).³⁵ Under the law of Jersey, Article 32 is a substantive and not a procedural limitation on the trustee's liability.³⁶ The alternative proposition, which did not find favour with the Guernsey Court of Appeal in *Glenalla* is that it is the law

trust or trusts; (2) that does not solicit from or provide trust company business services to the public; and (3) the administration of which is carried out by a registered person (who will often serve as a director) registered to carry out trust company business. While a PTC does not have any exemptions from the obligations of trustees under Jersey law, the PTC itself is not directly bound by the Codes of Practice for Trust Company Business issued under the Financial Services (Jersey) Law 1998, Art 19, including the requirement for the PTC (which is not itself a registered person) to maintain professional indemnity insurance. Very often a PTC will effectively be a shell company.

³² *Investec Trust (Guernsey) Limited & Anor v Glenalla Properties Limited & Ors* (28/2014) (n 25). For the circumstances in which a term will be implied into a Jersey contract, see *Sibley v Berry* [1992 JLR N 4] and *Grove v Baker* [2005 JLR 348], affirming *Liverpool City Council v Irwin* [1977] AC 239, per Lord Wilberforce, but see *Jersey Civil Service Association v Establishment Committee of the States of Jersey*, unreported 19 October 1994 (RC).

³³ *Investec Trust (Guernsey) Limited & Anor v Glenalla Properties Limited & Ors* (28/2014) (n 25) at [67].

³⁴ *Investec Trust (Guernsey) Limited & Anor v Glenalla Properties Limited & Ors* (28/2014) (n 25), affirming *Risdon Iron & Locomotive Works v Furness* [1906] 1 KB 49.

³⁵ *Risdon Iron & Locomotive Works v Furness* (n 34); *Grupo Torras SA v Al-Sabah (No 1)* [1996] 1 Lloyds Rep 7, per Stuart Smith; *Excalibur Ventures LLC v Texas Keystone Inc* [2013] EWHC 2767 (Comm), per Christopher Clarke LJ at [1143]. Dicey, Morris and Collins, *The Conflict of Laws*, 15th edn (London, Sweet and Maxwell, 2012) at 7.020

³⁶ *Investec Trust (Guernsey) Limited & Anor v Glenalla Properties Limited & Ors* (n 25).

governing the transaction in which the trustee is engaged that governs the limitation on the liability of the trustee to that transaction. Where the proper law of the transaction is not Jersey law, therefore, the trustee's liability would not be limited by Article 32.

Whether a third party knows they are dealing with a trustee is a matter of fact in each case. It is thought not to be sufficient that a trustee is able to limit its liability under Article 32 merely by describing itself as a trustee (particularly given that an understanding of Article 32 cannot be assumed to exist on the part of a third party dealing with a trustee from outside the Channel Islands). However, a statement that the trustee is a trustee³⁷ and is entering into the contract qua trustee is an important part of the surrounding factual matrix that can be taken into account by a court in construing the contract.³⁸ A trustee that expressly contracts 'as trustee but not otherwise' or 'as trustee only' may be sufficient as it is likely to put a third party on notice to inquire as to what that means, which will give the trustee (as it will be in its interests to do) an opportunity to explain the position.

11-19

B. Tortious Liabilities

A trustee may, like any other legal person, be liable in tort to a third party in respect of acts or omissions by itself or its agents for which it is vicariously liable in connection with the administration of the trust property. As between the trustee and the third party, there is no reason why the trustee's liability should have anything to do with whether the trustee was acting in accordance with its powers or duties qua trustee, which is an issue internal to the trust. There is, as yet, no authority on the application of Article 32 of the Trusts (Jersey) Law 1984 to a situation where the trustee is liable in tort to a third party. It is likely that in the majority of cases the liability of a trustee in tort will be governed by Article 32(1)(b) rather than Article 32(1)(a). There is no necessary reason why a third party would even know the identity of a trustee when the cause of action is constituted, let alone that the trustee is acting as a trustee. The trustee will be entitled to its indemnity from the trust fund to satisfy a tortious liability to a third party if the trustee acted reasonably, with due diligence in accordance with its powers as trustee.³⁹ There is Australian authority that a trustee is entitled to its indemnity from the trust fund for liabilities incurred by it in the course of trade authorised by the terms of the trust even if the trustee is personally at fault, provided the fault does not amount to fraud or a crime.⁴⁰ For the same position to be taken in Jersey would require the Court to reconcile the English authority providing for indemnity only in the case of liabilities incurred reasonably, with due diligence as described above. It would also likely require further exploration of whether, as the Court of Appeal identified in *Alhamrani v Alhamrani*,⁴¹ there is a material difference in the scope of the

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³⁷ *Lumsden v Buchanan* (1865) 4 Macq 950; *Burt, Boulton & Hayward v Bull* [1985] 1 QB 276 at 285; *Helvetic Investment Corp Pty Ltd v Knight* (1984) 9 AClr 773, NSW CA; *Marston Thompson & Evershed plc v Benn* [1997] WTLR 315.

³⁸ *Muir v City of Glasgow Bank* (1879) 4 App Cass 337.

³⁹ *Re Raybould* [1900] 1 Ch 199; *Benett v Wyndham* (1857) 4 De GF & J 259.

⁴⁰ *Gastios Holdings Pty Ltd v Nick Kritharas Holdings PTD Ltd* [2002] NSWCA 29 at [47].

⁴¹ [2007] JCA 164.

trustee's indemnity between English and Jersey law in the omission of the word 'properly' from Article 26(2) of the Trusts (Jersey) Law 1984.

C. Fiscal Liabilities

11-21 There is no doubt that a Jersey resident trustee is entitled to be indemnified out of the trust property in respect of tax imposed upon a trustee by Jersey law. Where a Jersey resident trustee is liable for a foreign tax liability, is payment of that tax by the trustee from within the scope of the indemnity? The Royal Court has historically set its face against the direct or indirect enforcement of foreign tax liabilities in Jersey under the principles in *Government of Indian v Taylor*.⁴² Generally, a Jersey trustee is not (whether or not in the absence of a specific power in the trust instrument) entitled or bound to pay foreign fiscal impositions or to remit trust assets to a foreign jurisdiction for the purposes of satisfying a foreign fiscal liability.⁴³ The issue so far as the indemnity goes is whether the *Government of India* principle means that if the trustee does pay a foreign revenue claim that is a liability reasonably incurred by the trustee in the execution of the trust so as to fall within the scope of the indemnity. An express power to pay unenforceable foreign revenue claims is still in the nature of a fiduciary power and so must be exercised for the purpose of giving proper effect to the terms of the trust and the protection of the beneficiaries.⁴⁴ The author is doubtful whether such a power adds very much to the analysis of the trustee's position under the general law, although the Court will have due regard to the presence of such a power in a trust instrument if the trustee seeks directions.⁴⁵ A trustee should apply for directions and an order for indemnification under Article 51 of the Trusts (Jersey) Law 1984 when faced with a dilemma as to whether or not to pay a foreign revenue claim, whether or not it is authorised to do so under the terms of the trust instrument. In considering an application by the trustee to approve the payment of a foreign revenue claim, the Court is likely to have close regard to the following:

1. whether the revenue claim is enforceable against the trustee in the foreign country, or failure to pay the revenue claim would entail the trustee breaching the law of a foreign country in which the trustee is resident;
2. whether trust assets are situated in the jurisdiction where the foreign revenue claim arises so as to be vulnerable to enforcement by local revenue authorities if the tax were to go unpaid (as well as interest and penalties); and⁴⁶
3. whether it is part of the terms of the trust that a beneficiary should receive trust property free of any tax that would arise in the jurisdiction where the beneficiary is resident, and so were the trustee not to pay the tax the terms of the trust could not properly be given effect to.⁴⁷

⁴² [1955] AC 491; *Abdel Rahman v Chase Bank (C.I.) Trust Co Ltd* 1984 JJ 127.

⁴³ *In re Marc Bolan Charitable Trust* 1981 JJ 117; *In re X's Settlements* 1994 JLR N-6.

⁴⁴ *In re X's Settlements* (n 43).

⁴⁵ *ibid.*

⁴⁶ *In re Marc Bolan Charitable Trust* (n 43).

⁴⁷ *In re X's Settlements* (n 43).

D. Costs Incurred by an Incoming Trustee

The costs incurred by an incoming trustee in its ‘take on’ of trusteeship, undertaking the necessary due diligence in compliance with its regulatory obligations and in familiarising itself with the state of the trust and the costs associated with the appointment (whether by the Court by the exercise of a power of appointment by the incumbent trustee), are payable by way of an indemnity out of the trust fund.⁴⁸

11-22

E. Litigation Costs

In the context of litigation between the trustee and a third party to the trust, the incidence of costs in the proceedings is a separate issue from whether the trustee is permitted to reimburse itself for those costs from the trust fund. The first issue is external to the trust and is governed by the normal rules of civil procedure while the latter issue is wholly internal to the trust and falls within the ambit of the Court’s supervisory jurisdiction in respect of the internal workings of the trust. The trustee’s entitlement to obtain an order, known as a Beddoe order, for its own costs and any adverse cost risk incurred in the course of legal proceedings of any kind, is dealt with in Chapter 3. However, the trustee’s entitlement to seek an indemnity from the trust assets does have the potential to impact on the trustee’s liability for costs in hostile proceedings in which the trustee is engaged. First, where the litigation is between the trustee and an ‘insider’ to the trust relationship, other than where the trustee is sued for breach of trust. Secondly, where the third party with whom the trustee is in dispute knows the trustee is acting as a trustee so as to cap the trustee’s liability in costs to the third party to the value of the trust assets.

11-23

i. Costs of Trust Proceedings

The treatment of litigation costs incurred in the course of trust proceedings⁴⁹ is dealt with elsewhere.⁵⁰

11-24

ii. Costs of Proceedings against the Trust or the Trust Property

A second category of legal proceeding in which the trustee’s right of indemnity becomes engaged is where a third party, by way of hostile proceedings issued against the trustee, lays claim to the whole or part of the trust fund. There are a number of circumstances in which a third party may lay claim to a proprietary interest in the trust assets (rather than a mere personal claim against the trustee, which is considered below). The claim may be made by the settlor or by others through the settlor, seeking to set aside the disposition of property into trust on the grounds of an operative mistake,⁵¹ or on the

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⁴⁸ *Harvey v Oliver* (1887) 57 LT 239.

⁴⁹ As to the different classifications of trust proceedings, see *Alsop Wilkinson v Neary* [1996] 1 WLR 1220, approved and adopted in Jersey; see *Trilogy Management Ltd v YT Charitable Foundation (Intl) Ltd* [2013] (2) JLR 265].

⁵⁰ See Ch 3.

⁵¹ See Ch 4. Trusts (Jersey) Law 1984, Art 47A–H; *In The Matter of the S Trust* [2011] JLR 375].

grounds that the disposition is a transaction in fraud of the settlor's creditors.⁵² An alternative basis upon which a third party may assert a proprietary entitlement to the trust assets is where the assets are already subject to a prior equitable interest that has not been extinguished because the property has been stolen or misappropriated by a fiduciary.⁵³

- 11-26** If such a claim is successful it has the effect of upending the basis upon which the trustee holds the trust property. The nature of the claim against the trust assets is to place the trustee's interests and the third party's interests in direct conflict in respect of the trustee's indemnity. Were the trustee to seek to have recourse to the trust assets by way of its indemnity for the legal costs of defending the trust assets from a proprietary claim, the trustee would, in effect, be using the third party's money to defeat the third party's vindication of its proprietary rights. The prejudice that arises to the third party is similar to that arising in circumstances where the trustee is able to plead its limited liability to the third party as a defence to the main action and there are insufficient trust assets to satisfy both the main action and the costs of the proceedings, where there has to be an abatement of the claim.⁵⁴ The risk to the trustee in defending hostile proceedings by which a third party lays claim to the trust assets is that, if successful, the substratum of the trust has been totally undermined and there will be no trust assets to which the trustee's indemnity may attach in satisfaction of the trustee's costs.
- 11-27** The key applicable principle in this situation is that the trustee cannot usually hope to maintain its right to an indemnity against a plaintiff that is successful in pursuing a proprietary claim. The best the trustee can hope for is either a direction not to defend the claim or to persuade the Court to exercise its discretion as to costs under Article 53 of the Trusts (Jersey) Law 1984 in the trustee's favour. If the trustee acts reasonably, which in the absence of an express direction to the contrary means neutrally, the established presumption is that the trustee will be allowed its costs from the fund by way of its indemnity. This position is justifiable on the basis that while the beneficial interest in the trust assets shifts from the named beneficiaries in favour of the plaintiff asserting its beneficial interest in their place, the assets are still held on trust for someone. The position is therefore analogous to the established presumption in *Buckton* category 1 cases⁵⁵ where the dispute is one of construction as to the terms upon which the trustee holds the assets.
- 11-28** While it may suit the trustee's personal interests to remain neutral, until the claim is determined in favour of the third party the trustee still owes the named beneficiaries a duty to protect and preserve the trust fund which the trustee cannot discharge if it, of its own volition, assumes a neutral position. Indeed the trustee's neutrality may result in the third party winning where it might otherwise have lost its claim had the trustee defended the claim. Caught on the horns of this kind of dilemma the trustee has very few alternatives other than to make a Beddoe application.

⁵² Note that any attack upon the original disposition of assets into trust is protected by the firewall and is subject to Art 9 of the Trusts (Jersey) Law 1984.

⁵³ See Ch 6 as to the basis upon which a proprietary constructive trust may arise.

⁵⁴ No such issue arises where Art 32(1)(a) of the Trusts (Jersey) Law 1984 is not engaged. As to which see para 11-40 below.

⁵⁵ See Ch 3.

The trustee's neutrality may be a sustainable position where there is a beneficiary or group of beneficiaries willing and able to defend the trust fund at their own cost risk instead of the trustee.⁵⁶ In this kind of dispute the real dispute is between those with a competing interest in the beneficial entitlement to the fund, making the proceedings analogous with a *Buckton* category 3 claim,⁵⁷ where the established position is that a trustee is normally entitled to its costs of proceedings by way of its indemnity while the real combatants battle it out, usually on the basis that costs follow the event. This assumes there is an adult beneficiary willing to defend, which cannot be guaranteed. The beneficiaries may not be willing to subject themselves to the ordeal and cost risk of litigating on behalf of the trust fund and the third party may, not unreasonably, seek to exploit the trustee's reluctance to wholeheartedly defend the third party's claim. Where assets are held on private purpose trusts there may not even be beneficiaries at all capable of defending the main action.⁵⁸

The trustee should explore the possibilities of funding the defence of the third party's claim from another source (whether outside the trust or from trust assets that are unaffected by the third party's claim). It is likely to be prudent for the trustee to seek the blessing of the Court to an arrangement with a third party litigation funder (who will invariably require a return for the promise of funding) where the return is likely to be met, whether in whole or in part, from the trust fund in the event that the trustee succeeds in seeing off the third party's claim. What is clear is that the trustee should not be tempted to allow the third party's claim to go by default unless there is no real prospect of defending it.⁵⁹

No Beddoe application will be necessary unless there is dissent among the beneficial class as to what the trustee should do in response to the third party's claim (assuming there are some trust assets available to fund a defence),⁶⁰ or where there are minor, unborn or unascertained beneficiaries whose interests are not otherwise represented but which will be affected either way if the trustee defends using trust assets or the fund is declared to belong to the third party.

A trustee who finds itself faced with a third party proprietary claim to the trust assets, and where there is no ready source of external funding to defend the proceedings and/or no beneficiary willing to put themselves forward to defend the claim at their own expense, is, to put it mildly, in a dilemma and can usually expect a sympathetic ear from the Royal Court in making a Beddoe application. In such an application, the Court is likely to have regard to the principles governing prospective costs orders (if it does not absolve the trustee of its responsibility to defend the claim). If the Court does direct the trustee to defend, the Court will need to be persuaded as to the strength of the defence (which will have to have a high prospect of success) but also as to why it is not an injustice upon the third party for the Court to grant permission for the trustee to defend the case at the third party's expense.

⁵⁶ As to derivative claims by beneficiaries, see Ch 13.

⁵⁷ See Ch 3.

⁵⁸ The position of an enforcer in such circumstances is unclear; it would presumably be in the same position as the trustee in having no personal incentive to intervene and too much exposure if it chose to do so.

⁵⁹ It would be a brave trustee that took this sort of momentous decision without seeking the Court's direction: see the line of cases following *Public Trustee v Cooper* [2001] WTLR 901, approved in Jersey in *In re S Settlement* [2001] JLR N [37]].

⁶⁰ ie a Beddoe application is the only prudent course for the trustee unless the beneficiaries are unanimous in their view as to what the trustee should do (assuming the defence can be funded).

It should not be forgotten that in a Beddoe hearing the Court has a wide discretion as to what directions it gives and the choice is not a binary one between directing the trustee to defend or to do nothing.⁶¹

iii. Costs of Third Party Proceedings

- 11-33** The third category of dispute where the trustee's right of indemnity from the fund arises is where the trustee becomes involved in proceedings with an outsider to the trust in respect of rights or liabilities assumed by the trustee during the course of the trustee's administration of the trust.⁶²
- 11-34** It is the trustee, and not the beneficiaries, who represents the trust in proceedings with third parties.⁶³ In such proceedings, the trustee acts as the principal with conduct of the administration of the trust and has a duty to protect and preserve the trust fund in the interests of the beneficiaries.⁶⁴ Where, for example, the trustee becomes engaged in a legal dispute with a counterparty with which it entered into a contract during the course of the trust's administration, only the trustee will have privity of contract with the third party to appear as plaintiff or defendant. The trustee will normally be the title holder to the trust property and as such will be responsible for vindicating rights or answering for liabilities by virtue of being the title holder. In tortious claims, it is likely to be the trustee to whom or by whom duties are owed.
- 11-35** A trustee engaged in a third party legal dispute sits, Janus-like, upon a threshold. Outwardly, as between the trustee and the third party with whom it is engaged in a dispute, the issue is what order for costs, if any, should be made by the Court in disposing of the legal dispute. The trustee has no special status as a litigant and is subject to the normal presumption that costs follow the event. However, at the same time, the trustee faces inwardly, towards its beneficiaries. As between the trustee and its beneficiaries, the issue is whether the costs incurred by the trustee in the course of the third party proceedings (whether the trustee's own costs or any adverse costs it is ordered to pay to the third party) fall to be satisfied from the trust assets, pursuant to the trustee's indemnity for costs reasonably incurred, or whether they fall to the trustee to satisfy personally from its own assets.

a. Position as between the Trustee and Third Party

- 11-36** The incidence of costs as between the trustee and the third party in a dispute litigated outside Jersey is governed by the law of the forum of the dispute. Where the litigation is conducted in Jersey, the incidence of costs will be governed by Jersey's procedural and substantive rules.⁶⁵ The third party proceedings will usually be commenced either by way of Order of Justice or summons in the Royal Court or Petty Debts Court, for disputes falling within the latter's jurisdictional limits.⁶⁶

⁶¹ See Ch 3.

⁶² *Alsop Wilkinson v Neary* (n 49).

⁶³ Unless the beneficiaries have brought and obtained relief to bring a derivative claim on behalf of the trustee, as to which see Ch 13. When granting leave for a derivative action, the Court can also normally be expected to grant prospective costs relief; see *In re X Trust* [2012 (2) JLR 260].

⁶⁴ RCR 2004, r 4/5.

⁶⁵ Trusts (Jersey) Law 1984, Art 53; and RCR, pt 12.

⁶⁶ Petty Debts Court (Miscellaneous Provisions) (Jersey) Law 2000, Art 1.

11-37

In normal hostile proceedings the Court has a discretion as to whether costs are payable and their amount. Where the Court resolves to make an award of costs, the general rule is that costs follow the event and that the unsuccessful party is ordered to pay the costs of the successful party either on the standard or indemnity basis.⁶⁷ Where therefore a trustee sues or is sued by a third party to the trust and loses, the *prima facie* rule is that the trustee is normally ordered to meet the third party's costs. Where the trustee is acting properly and reasonably in either bringing or defending the claim (other than in circumstances where losing the claim would exhaust the fund) then the trustee is usually entitled to recoup the costs of the litigation from the trust fund as an expense reasonably incurred in the administration of the trust and thereby transferring the risk in the litigation from the trustee personally to the beneficiaries. Just as the trustee has no special or privileged status as a trustee against the third party, a third party, if successful, will get its costs as if the trustee were any other party in hostile proceedings.

b. Position as between the Trustee and the Beneficiaries

11-38

The key issue as between the trustee and the beneficiaries where the trustee engages in hostile proceedings on behalf of the trust is whether the trustee is acting reasonably in engaging in the litigation in the first place so as to preserve its indemnity under Article 26. The trustee's right of indemnity as regards the costs of litigation operates as follows. If the trustee is sued by a third party and successfully defends the action, the third party is normally ordered to pay the trustee's costs. Whether an award is made on the standard or indemnity basis, there is usually a shortfall between the amount the third party is ordered to pay and the amount the trustee has actually spent. Even an award of indemnity costs is not a full indemnity (so as to make the trustee 100 per cent whole). Where the indemnity is preserved, the trustee is in principle permitted to make up the shortfall from the trust fund. Where the trustee is subject to an adverse costs order in favour of the third party, the trustee is entitled by way of its indemnity to be reimbursed those costs out of the trust fund, as well as the whole of the costs which the trustee has itself incurred in the conduct of the proceedings. The mere fact that the trustee has engaged in litigation in which it has incurred costs and been unsuccessful is not of itself a basis to preclude the trustee from getting reimbursement of its costs pursuant to its indemnity.⁶⁸ Objectively the trustee may still have acted reasonably. However, in the absence of the protection afforded by a Beddoe order in advance of commencing hostile proceedings, it is likely only to be in exceptional circumstances that the trustee will be able to establish that it is still within the scope of Article 26. Obtaining Beddoe relief has become very close to being a prerequisite to establishing that the trustee's participation in hostile proceedings was reasonable for the purposes of Article 26. Where the trustee proceeds without Beddoe relief, the trustee runs a significant risk that it will be denied its indemnity and will be required to meet the costs of hostile proceedings from its own resources and/or face the prospect of a dispute with the beneficiaries if the trustee attempts to recoup the costs of hostile proceedings without the Court's blessing.

⁶⁷ As to which see Ch 1.

⁶⁸ *Bonham v Blake Lapthorn Linell* [2006] EWHC 2513 (Ch), [2007] WTLR 189, cited in *Garnham v PC and Ors* [2012] JRC 078.

c. Article 32 and Litigation Costs

- 11-39** Is an award of costs incurred in litigation subject to the statutory limitation upon the trustee's personal liability in Article 32(1) of the Trusts (Jersey) Law 1984?⁶⁹ If the third party knows the trustee is a trustee, the answer appears to be in the affirmative. Litigation in which a trustee becomes engaged is a 'matter' for the purposes of Article 32(1).⁷⁰ An adverse costs order made against a trustee in the course of litigation is not made against the trustee in its personal capacity but qua trustee and therefore, whether or not the trust assets are insufficient to meet any award, the trustee is not liable to satisfy an adverse costs order from its own assets. Trustees may be involved in a variety of different types of litigation.⁷¹ The Article 32 limitation will only be engaged in litigation in which the trustee would be entitled to an indemnity for its costs from the trust fund.⁷² As the Guernsey Court of Appeal observes, this conclusion ensures consistency between the rights of a third party engaged in litigation against the trustee and any other counterparty to any other kind of transaction or matter with a trustee. However, this conclusion has serious implications for a trustee's attitude to risk when engaging in litigation against third parties on behalf of the trust. Other than the possibility of a claim by the beneficiaries against the trustee for breach of trust in having burdened (or perhaps even exhausted) the trust fund by incurring an adverse costs award, the fact that the trustee is not personally at risk as to costs means there may be no incentive for the trustee to obtain Beddoe relief.

IV. Mechanism for Satisfaction of the Trustee's Right of Indemnity

- 11-40** While it had been the subject of doubt,⁷³ the Royal Court has now confirmed that in support of its right of indemnity a trustee has an equitable lien over the trust fund in the nature of a proprietary interest in respect of all liabilities, costs and expenses reasonably incurred by the trustee in the discharge of its office.⁷⁴ The trustee's lien comprises a number of rights: reimbursement from the trust property, retention of the trust assets and realisation of the trust assets and exoneration in respect of liabilities. The trustee's lien takes priority to the claims of the beneficiaries to the trust property.⁷⁵ A former trustee is entitled to ensure that successor trustees do not take steps that will destroy, diminish or jeopardise that right.⁷⁶

⁶⁹ *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* (15/2016).

⁷⁰ *ibid*, at [90]–[93].

⁷¹ See the categorisation of 'trust disputes', 'beneficiary disputes' and 'third party disputes' referred to in *Alsop Wilkinson v Neary* (n 49) at 1223–24, per Lightman J.

⁷² Using the *Neary* classifications, a trustee is not entitled to defend itself from criticism at the cost of the trust fund in a 'beneficiary dispute' and a trustee may be deprived of its costs from the trust fund in certain categories of 'trust dispute'.

⁷³ *In re Esteem Settlement* [2000 JLR 119] at 136–41, and [2002 JLR 53] at paras [89] and [90].

⁷⁴ *Investec Trust (Guernsey) Limited v Glenalla Properties Limited and Ors* (n 4), affirmed in *In the Matter of the Z Trusts* (n 4).

⁷⁵ *In the Matter of the Z Trusts* (n 4); *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* (41/2014); *Jennings v Mather* [1901] 1 KB 108, at 113–14.

⁷⁶ *In the Matter of the Z Trusts* (n 4); *Lemery Holdings Pty Ltd v Reliance Fin Servs Pty Ltd* [2008] NSWSC 1344, referred to).

A trustee is entitled to meet a liability reasonably incurred from its own resources, and then reach into the fund for assets of commensurate value to make itself whole. More commonly, the trustee will not meet the liability directly but will satisfy it directly from the fund. A trustee may retain (by way of escrow) sufficient trust assets from the fund to the extent required to meet liabilities reasonably incurred. The reasonableness of a trustee's right of retention will depend upon the circumstances.⁷⁷ The practical impact of retaining trust assets on the smooth administration of the trust (the assets not being available for the benefit of beneficiaries) usually means the trustee's retention of assets is only considered reasonable in cases involving present liabilities of the trustee (such as fees),⁷⁸ liabilities that are very likely or certain to fall due in the foreseeable future on the basis of a reasonable not fanciful assumption,⁷⁹ or in cases where there is a foreseeable risk that the trust assets will not be available to meet the liability when it falls due. It is inappropriate for the trustee to seek to retain the whole or any substantial portion of the trust fund in satisfaction of disputed fees.⁸⁰ Where the trustee does seek to exercise its right to retain trust assets, the trustee should be prepared to satisfy the Court that it has made proper inquiries as to what contingent or future liabilities there are and the extent of the trustee's potential liability.⁸¹ A trustee is entitled to realise trust assets to generate cash to meet its costs and expenses even if a sale is against the wishes of the beneficiaries or the asset is required or lived in by the beneficiary.⁸² The Court is unlikely to subordinate the trustee's entitlement to its indemnity (even if that means a realisation of the trust's assets) to the rights of the beneficiaries. Where the realisation involves the principal trust asset, the trustee is clearly conflicted in how it exercises its power of sale and where there is resistance from the beneficiaries, the trustee would be well advised to make an application for directions in respect of a momentous decision.⁸³

The trustee's lien extends over the whole of the trust fund, whether income or capital, and a liability, whether chargeable to either capital or income, may be satisfied from any part of it.⁸⁴ Where there are distinct trust funds within the same trust, a trustee is generally entitled to indemnify itself from funds held in one fund for liabilities incurred in respect of the other.⁸⁵ A trustee is not generally entitled to interest on sums it expends satisfying liabilities on behalf of the trust from its own resources and then recovers from the fund by way of its indemnity.⁸⁶

⁷⁷ *In re Essel Trust* 2008 JLR N [18].

⁷⁸ *In re Carafe Trust* (n 19).

⁷⁹ *Concord Trust v The Law Debenture Trust Corporation plc* [2005] UKHL 27.

⁸⁰ *In re Carafe Trust* (n 19); *In re Essel Trust* (n 77).

⁸¹ *Wester v Borland* [2007] EWHC 2484 (Ch).

⁸² *Re Pumfrey* (1882) 22 Ch D 255 at 262, cited with approval in *ATC (Cayman) Ltd v Rothschild Trust Cayman Ltd* (n 11) at [47].

⁸³ *In re Y Trust* [2011 JLR 464], applying *Public Trustee v Cooper* (n 59).

⁸⁴ *Harsoon v Beliliros* [1900] UKPC 66 at 123–24 (Hong Kong).

⁸⁵ ibid, at [124], affirming *Fraser v Murdoch* (1881) 6 App Cas 855 HL.

⁸⁶ *Foster v Spencer* [1996] 3 All ER 672.

A. Rights of Third Party Creditors of the Trustee to the Trust Fund

- 11-43** The unsecured creditors of the trustee (whether personal creditors or trust creditors) do not have direct recourse to and may not seek to levy execution against the trust assets in respect of liabilities incurred to them by the trustee.⁸⁷ However, a creditor of the trustee may be subrogated to the trustee's right of indemnity to enforce its entitlement against the trust assets in the same way as the trustee itself would be entitled. The third party creditor stands in the shoes of the trustee and its rights cannot exceed the trustee's own entitlement to have recourse to the trust assets. The Guernsey Court of Appeal's decision in *Glenalla* to the effect that Jersey law does not admit of the rule in *Re Johnson*⁸⁸ means that the third party creditor may still be subrogated to the trustee's right of indemnity even where the trustee is alleged to be in breach of trust.⁸⁹

i. Where a Third Party Claim May Exhaust the Trust Fund

- 11-44** Particular thought needs to be given to the incidence of costs in circumstances where the trustee is faced with a claim which, if successful, will exhaust the entire trust fund or where recourse to the indemnity leaves the trust insolvent on the cash-flow basis.⁹⁰ There is a distinction between a proprietary claim (already considered) and a personal claim by a third party against the trustee. Where there is an insufficiency in the trust assets, the benefit that would normally accrue to the trustee in obtaining Beddoe relief may be illusory if the means by which the trustee is able to pay its legal costs or an adverse costs order is exhausted by the quantum of the main claim.

a. Third Party Claims against the Trustee where the Trustee's Liability is Limited

- 11-45** Where a trustee is faced with a personal claim by a third party and the third party knew it was dealing with the trustee qua trustee, the third party's recourse against the trustee in satisfaction of its personal claim is limited to the value of the trust assets. This means the trust assets net of any deductions for the trustee's reasonable expenses, including any legal costs (both the trustee's own costs and any adverse costs it may be ordered to pay the third party) reasonably incurred by the trustee in defending any claim.⁹¹ In order for the trustee to ensure that no dispute arises as between itself and the third party as to whether the trustee's legal costs are reasonably incurred, the trustee is usually well advised to obtain Beddoe relief to put the matter beyond doubt. The liability of the trustee to meet its own lawyer's fees is not usually in issue, as the lawyers will know they are dealing with a trustee and so the trustee's liability under the retainer will be within the scope of Article 32(1)(a).

⁸⁷ *Investec Trust (Guernsey) Limited v Glenalla Properties Limited and Ors* (n 4); *Jennings v Mather* (n 75),

⁸⁸ (1880) 15 Ch D 548.

⁸⁹ *Investec Trust (Guernsey) Limited v Glenalla Properties Limited and Ors* (n 4).

⁹⁰ As to insolvent trusts, see para 11-65 below.

⁹¹ *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* (n 69). As to the circumstances in which the trustee's liability to third parties will be limited, see para 11-36 above.

b. Third Party Claims against the Trustee where the Trustee Does not Have the Benefit of Limited Liability

In contrast to the position where Article 32(1)(a) is engaged, when a trustee is faced with a personal claim by a third party and the third party did not know it was dealing with the trustee qua trustee, the third party's recourse against the trustee in satisfaction of its personal claim (including any adverse costs) is unlimited⁹² even though, as between the trustee and the beneficiaries, the trustee may be entitled to its indemnity for its legal costs from the trust fund if they are reasonably incurred. In circumstances where the trust assets may be exhausted by a combination of the trustee's own legal costs, the sum sought in satisfaction of the main claim or the adverse costs ordered to be paid by the trustee to the third party, a Beddoe application will usually provide the trustee with the protection it requires. A trustee will not be expected to litigate on behalf of the trust at its own expense, where the trust fund is insufficient to be able to bear the trustee's costs of doing so and there is no other lawful funding mechanism available to protect the trustee from the risk of having to expend its own funds in defence of the trust. The trustee's duty in this regard is therefore commensurate with the trustee's right of indemnity. The only exception to this principle is where the insufficiency in the trust fund arises from the trustee's own mismanagement or breach of duty.

11-46

V. Insolvency and the Trustee's Indemnity

In recent years the courts of both Jersey and neighbouring Guernsey have begun to explore the boundary between principles of trust law and principles of insolvency law. When considering the interaction between insolvency law and trust law it is important to distinguish between, on the one hand, the insolvency of the legal persons that constitute the trust: the trustee, the settlor, the beneficiaries, perhaps a corporation that is owned by the trustee; and on the other hand (if such a thing can be said to exist at all) the insolvency of the trust as a *thing* distinct from the trustee.

11-47

A. The Insolvency of the Trustee

It is beyond the scope of this text to provide a detailed statement of Jersey's insolvency law.⁹³ While a trust may not become insolvent,⁹⁴ the legal person of the trustee, whether natural or legal can. The effect of Article 32(1)(a) of the Trusts (Jersey) Law 1984 is to make it legally impossible to make the trustee, qua trustee, insolvent. There are two principal regimes applicable to an insolvent corporate trustee in Jersey: *désastre* and winding up. A *désastre* is conducted in accordance with the Bankruptcy (Désastre) (Jersey) Law 1990.

11-48

⁹² Trusts (Jersey) Law 1984, Art 32(1)(b); see para 11-15 above.

⁹³ For such a statement, see A Dessain, M Wilkins and E Shorrock, *Jersey Insolvency and Asset Tracking*, 5th edn (London, Key Haven, 2016).

⁹⁴ Where a trustee is unable to meet the debts incurred on behalf of the trust as they fall due; see below.

The winding up of a corporate trustee (which does not necessary require the trustee to be insolvent) is conducted in accordance with the Companies (Jersey) Law 1991. A creditor's only remedy against a corporate trustee is to place the trustee *en désastre*. A creditors' winding up is something of a misnomer as the procedure to appoint a liquidator can only be commenced by a resolution of the members of the corporate trustee and not by the trustee's creditors. The Jersey Financial Services Commission (JFSC) can seek that a corporate trustee be declared *en désastre*. The purpose of both the *désastre* and creditors' winding up procedure is to effect a *pari passu* distribution of the trustee's assets amongst its creditors according to their status.

B. The Test for Insolvency

- 11-49** The test for the personal insolvency of a corporate trustee, both in the case of a *désastre* and to commence the process of a creditor's winding up, is the cash-flow test: that the trustee is unable to pay its debts as they fall due.⁹⁵ However even where a corporate trustee is insolvent, whether to make declaration that the corporate trustee is *en désastre* remains within the discretion of the Royal Court.

C. Effect of a Declaration of *désastre*

- 11-50** Upon the making of a declaration that the personal property of the trustee is *en désastre*, the property of the corporate trustee, whether movable or immovable, present, future, vested or contingent and whether located in or outside of Jersey and the powers of the directors, vests in the Viscount.

D. Winding up a Corporate Trustee

- 11-51** A creditors' winding up commences upon the passing of the special resolution by the company's members in general meeting. The subsequently convened meeting of the company's creditors will approve the appointment of a liquidator. Unlike in a *désastre*, in a winding up, the property of the trustee remains vested in the corporate trustee. The liquidator stands in the shoes of the directors and acts as agent of the corporate trustee.

E. Effect of the Insolvency of the Trustee on Trusteeship and the Trust Fund

- 11-52** Upon the declaration that the trustee is *en désastre* or the commencement of a creditors' winding up, there is a general moratorium of claims against the trustee while the process is concluded, ending in the dissolution of the corporate trustee.⁹⁶ Subject to the particular

⁹⁵ Bankruptcy (Désastre) (Jersey) Law 1990, Art 1(1); and Companies (Jersey) Law 1991, Art 1(1).

⁹⁶ Bankruptcy (Désastre) (Jersey) Law 1990, Art 38; and Companies (Jersey) Law 1991, Art 159(4).

terms of a trust, which may provide for automatic renunciation of office upon the insolvency of the trustee,⁹⁷ or the suspension of the trustee's powers other than the power to appoint its successor and then retire, the insolvency of the trustee does not operate to terminate the trusteeship automatically.⁹⁸ However, in practice, a professional trustee can normally be expected to retire and transfer trusteeship well in advance of it becoming insolvent on the cash-flow basis. Such are the internal financial control systems required of registered persons providing services as professional trustees by the JFSC that the prospect of the trustee's insolvency will usually trigger the intervention of the JFSC and its insistence that the trustee immediately arrange for the transfer of trusteeship and assets to a new service provider.

Other provisions of Jersey's insolvency regime positively incentivise the directors of a corporate trustee to transfer trusteeship at the earliest opportunity where insolvency may be a possibility. A regulated person offering services as a professional trustee is trading for the purposes of Article 177 of the Companies (Jersey) Law 1991 and Article 44 of the Bankruptcy (Désastre) (Jersey) Law 1990. Under these provisions, the directors of a corporate trustee may be held personally liable, without any limitation, for all or any of the debts or other personal liabilities of the trustee if at a time before the declaration of *désastre* or the date of commencement of a winding up of the trustee the director knew there was no reasonable prospect that the company would avoid, or was reckless as to whether the company would avoid, such a winding up or the making of such a declaration of *désastre*, and continued to allow the corporate trustee to trade.

It is an offence for any person to carry on trust company business (which includes acting as a professional trustee) without a licence from the JFSC.⁹⁹ The JFSC may revoke a licence to conduct trust company business if the Commission is not satisfied that the applicant is a fit and proper person to be registered, having regard to its financial standing.¹⁰⁰ The personal insolvency of the trustee is likely to make it practically impossible for the trustee to continue to act as trustee.

Where the trustee (whether corporate or individual) becomes insolvent or declared *en désastre*, only the trustee's own personal assets will fall into the bankruptcy.¹⁰¹ Those assets held by the trustee qua trustee will not.¹⁰² It follows that property held by a debtor trustee on trust will not vest in the Viscount but will remain vested in the trustee.

Article 54(2) of the Trusts (Jersey) Law 1984 provides that trust assets will not be deemed to form part of the estate of a trustee unless the trustee is a beneficiary of the trust. That must be taken as requiring the beneficial interest of the trustee to be a vested interest as a beneficiary who is an object of a discretionary power of appointment under a discretionary trust cannot be said, in advance of the exercise of that power of appointment to it, to have any interest in the property of the trust that is capable of forming part of the beneficiary's personal estate.¹⁰³

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⁹⁷ Subject to the Trusts (Jersey) Law 1984, Art 19, which provides that there must always be at least 1 trustee.

⁹⁸ Bankruptcy (Désastre) (Jersey) Law 1990, Art 24(4) requires the trustee to retire immediately.

⁹⁹ Financial Services (Jersey) Law 1998, Art 7.

¹⁰⁰ *ibid*, Art 9(4)(e).

¹⁰¹ *Barclays Bank Limited v Quistclose Investments Limited* [1970] AC 567.

¹⁰² Bankruptcy (Désastre) (Jersey) Law 1990, Art 8(2).

¹⁰³ *Ex parte Viscount Wimborne* [1983] JJ 17].

- 11-57** If the trustee does not fall within Article 54(2) then the interest the trustee has in the trust property is limited to that which is necessary for the proper performance of the trust.¹⁰⁴ That is a reference to the trustee's right of indemnity against the fund.¹⁰⁵ A trustee's creditors have no right or claim against the trust property except to the extent that the trustee has a claim against the trust (by way of subrogation to the trustee's indemnity) or has a vested beneficial interest in some portion of the trust property. Even in those circumstances, the trustee's creditors' claim will be limited to the extent of the indemnity or the trustee's interest in the trust fund.
- 11-58** If the assets of the trust fund are insufficient to satisfy the liability that is sought to be enforced against the trustee so as to exhaust the assets which can be subject to the trustee's indemnity, or the indemnity cannot be relied upon,¹⁰⁶ then as a matter of orthodox trust law principles the trustee remains personally liable to the third party to the full extent of its personal assets. Unlike in English law, a trustee of a Jersey trust has protection of limited liability (limited to the extent of the trust fund) if the third party with whom the trustee incurs the liability knows it is dealing with a trustee. If the requirements of Article 32 are satisfied, the third party will have no recourse to the personal assets of the trustee in the event of a shortfall in the trust fund or if the trustee's right of indemnity is somehow compromised.
- 11-59** The combined effect of these provisions is that it is legally impossible for a Jersey trustee, qua trustee, to be made insolvent. None of the trust property forms part of the trustee's own bankrupt estate and the effect of Article 32 of the Trusts (Jersey) Law 1984, at least where a third party knows that it is dealing with a trustee, is that the trustee's liability to the third party cannot extend beyond the value of the trust fund.

F. Costs and Expenses of the Trustee's Insolvency

- 11-60** If the trustee is declared *en désastre* the Viscount's fees, costs and expenses properly incurred are paid as a first charge on the liquidated value of the trustee's own assets. The payment of the costs, charges and expenses of winding up, including the remuneration of the liquidator, are payable out of the company's assets in priority to all other claims.¹⁰⁷ Neither the Viscount nor a liquidator in a creditors' winding up is entitled to have recourse to the trust fund by way of the trustee's indemnity for the costs of the *désastre* or winding up unless the trustee has expended its own resources meeting a liability to a third party on behalf of the trust and has not reimbursed itself from the fund prior to the declaration or the commencement of the winding up.

¹⁰⁴ Trusts (Jersey) Law 1984, Art 54(1).

¹⁰⁵ See above.

¹⁰⁶ *In Re Johnson* (n 28).

¹⁰⁷ Companies (Jersey) Law 1991, Art 165.

G. The Effect of the Trustee's Insolvency on the Trust Property and the Administration of the Trusts

Upon the making of a declaration that the personal property of the trustee is *en désastre*, all property (whether located in Jersey or elsewhere) and powers of the debtor trustee vest in the Viscount.¹⁰⁸ Property held by the debtor trustee that is subject to a trust does not vest in the Viscount and, to the extent that it has not already been transferred, remains vested in the trustee.¹⁰⁹ As for trust assets that are converted into property of a different character or mixed with other property, the beneficiaries will ordinarily be entitled to trace it into them and assert proprietary remedies, which are not dependent upon the trustee's insolvency. A third party proprietary interest in property held by the trustee renders the property unavailable to an insolvent trustee's personal creditors. It follows that in the absence of circumstances that may cause the Viscount to question whether a trust exists or not,¹¹⁰ the trust property is not touched by the debtor trustee's personal insolvency. In a creditors' winding up both the personal property of the trustee and any property that it still holds on trust and has not yet transferred to a new trustee remain vested in the trustee and not the liquidator.

11-61

In practice, the existence of an express trust vested in the trustee, if it has not already been transferred to a new trustee well in advance of the declaration, is unlikely to cause significant difficulty. The position is likely to be more complicated, and may require the Viscount or liquidator to obtain the direction or determination of the Court, where property vested in a debtor is subject to a trust that has arisen informally or by operation of law. Whether under a specific direction from the Court or under its own volition, it can be expected that the Viscount (or the liquidator in a winding up) will arrange for the transfer of the trusteeship and the vesting of trust assets in a new trustee as soon as is practicable after the existence of the trust is brought to his attention.

11-62

The powers of the Viscount expressly include the power to conduct the business of the debtor (which could conceivably include acting as a trustee) but only in so far as this is necessary or expedient in the interests of creditors.¹¹¹ In a creditors' winding up, all the powers of the directors of the debtor company become exercisable by the liquidator.¹¹² Given that the trust property does not form part of the trustee's *désastre* or liquidation and so may not be made available to the trustee's personal creditors, it is unlikely the Viscount has power to continue to administer a trust of which the debtor is the trustee. Practically, the Viscount's function is to conduct the *désastre* and he will have little appetite to assume the duties or functions of a trustee.

11-63

The trustee's indemnity is not a mechanism to pay for the costs and expenses of the Viscount or the liquidator of the trustee. While the costs of the Viscount or liquidator

11-64

¹⁰⁸ Bankruptcy (Désastre) (Jersey) Law 1990, Art 8(2).

¹⁰⁹ Bankruptcy (Désastre) (Jersey) Law 1990, Art 8(3), consistent with the Trusts (Jersey) Law 1984, Art 54, 'trust' is to be interpreted widely and includes property held subject to an express trust and also property subject to a constructive trust.

¹¹⁰ So as to raise a doubt as to whether the property falls to be administered *en désastre* or not.

¹¹¹ Bankruptcy (Désastre) (Jersey) Law 1990, Art 26(h).

¹¹² Companies (Jersey) Law 1991, Art 149, save as otherwise provided by the creditors' liquidation committee or the creditors (see Companies (Jersey) Law 1991, Art 163(2)).

administering the trust would be properly chargeable to the trust fund, the costs of a *désastre* or liquidation are not costs properly incurred in the administration of the trust and therefore are not recoverable under Article 26 of the Trusts (Jersey) Law 1984.¹¹³

VI. Insolvent Trusts

- 11-65** A trust is a legal relationship comprised of rights and obligations. A trust is not a juridical person and therefore cannot be made insolvent or declared *en désastre*.¹¹⁴ However, the effect of Article 32 of the Trusts (Jersey) Law 1984 allows for the possibility of what is in effect and can be described as, at least as a convenient shorthand, an insolvent trust, independent of the personal solvency of the trustee. Where the trustee perceives there to be a probability that the trust is insolvent, that will bring about realignment of how the trust is administered and for whom. The interests of the beneficiaries in the fund are displaced and replaced by the interests of creditors. Thereafter the powers and duties of the trustee (and any third party such as a protector)¹¹⁵ are to be exercised with the consent of and in the interests of all the creditors as a class (or in accordance with the directions of the Court) to the exclusion of the interests of the beneficiaries.¹¹⁶

A. Test for Insolvency of a Trust

- 11-66** The relevant test for the insolvency of a Jersey trust is the cash-flow rather than the balance sheet test of insolvency: the inability of the trustee to meet its debts as they fall due from the trust property.¹¹⁷ The solvency of a trust is, it appears, judged according to the prevailing test in Jersey insolvency law applicable to individuals or companies in the ongoing conduct of their business, and not with the estate of a deceased person, where the balance sheet test for insolvency is often invoked.¹¹⁸
- 11-67** The cash-flow test of insolvency is not without its conceptual and practical difficulties. A trust is neither a legal nor a natural person and while a Jersey trust may exist for a non-charitable purpose,¹¹⁹ it cannot accurately be said that a trust conducts business in the

¹¹³ The Court retains an inherent power to authorise the remuneration of a trustee qua liquidator of an insolvent trust, as to which see 11-71 below. The creditors of an insolvent trust may also authorise the remuneration of a trustee acting as liquidator.

¹¹⁴ Bankruptcy (Désastre) (Jersey) Law 1990, Art 1 defines debtor as a person. For different reasons, a trust cannot be subject to a *dégrégement* by virtue of the statutory prohibition on Jersey land being held on trust by trustee; see Trusts (Jersey) Law 1984, Art 11(2)(a)(iii). If a trustee is to hold Jersey immovable property it may only do so indirectly, through a corporation.

¹¹⁵ See n 121.

¹¹⁶ *Representation of the Z Trusts* [2015] JRC 196C; *Hague v Nam Tai Electronics (No 2)* [2008] UKPC 13.

¹¹⁷ *Representation of the Z Trusts* (n 116) at [29]; *Representation of the Z Trusts* [2015] JRC 214 at [3]. Consistent with the test for insolvency for individuals and corporations under Art 1(1) of both the Bankruptcy (Desastre) (Jersey) Law 1990 and Companies (Jersey) Law 1991.

¹¹⁸ *Del Amo v Viberts, Collas Crill and Ors* [2012 (1) JLR 180] at [32]; Bankruptcy (Desastre) (Jersey) Law 1990, Art 1(1).

¹¹⁹ Trusts (Jersey) Law 1984, Arts 11(2)(a)(iv) and 12.

same way that an individual or corporation might. Where a trust owns all the shares in a trading company, it is the company rather than the trust that conducts the business. Indeed a trustee with the benefit of an anti-*Bartlett* clause may have no active involvement in the management or business of an underlying company at all. The obvious practical difficulty for a trustee of a cash-flow insolvent trust is that a cash-flow difficulty may only be a temporary problem, giving rise to the practical difficulty of the trustee's duties and powers oscillating unpredictably back and forth between the interests of beneficiaries and creditors. The precise threshold at which a trustee is supposed to realise that its trust is insolvent is inexact,¹²⁰ particularly when considering the serious implications that insolvency might have itself on those of its employees appointed to the boards of companies whose shares are held by the trust.¹²¹

The cash-flow test for the insolvency of a trust also has significant implications for the asset composition of a Jersey trust structure. A trust that contains many millions of pounds of illiquid assets, such as land, and which on any sensible interpretation could not properly be regarded as being at risk of insolvency, could find itself at risk of liquidation for an unpaid electricity bill well within the upper limit for debts within the jurisdiction of the Petty Debts Court.¹²²

11-68

B. Winding up an Insolvent Trust

There is as yet no formalised statutory regime to wind up an insolvent trust in Jersey. Given the re-orientation of the focus of the trustee's powers¹²³ and duties from beneficiaries to creditors that occurs as soon as the trust becomes insolvent, and in the absence of a default statutory insolvency regime that may be followed, it is imperative that the trustee issue a Representation for directions under Article 51(2)(a)(i)–(ii) as soon as it perceives there to be a risk that the trust is no longer solvent. The Court has drawn inspiration from the principles applicable to executors dealing with the insolvent estate of a deceased person.¹²⁴ The regime that was approved by the Royal Court in *Re Hickman* was itself based on the regime applicable to a *désastre* under Bankruptcy (Désastre) Rules 2006 notwithstanding that under Jersey's insolvency law it is not possible to have an insolvent estate made the subject of a *désastre*; the deceased's estate must be administered pursuant to the common

11-69

¹²⁰ *Representation of the Z Trusts* (n 116) at [32].

¹²¹ Companies (Jersey) Law 1991, Art 177 and Bankruptcy (Desastre) (Jersey) Law 1990, Art 44 (wrongful trading).

¹²² Currently fixed at £10,000 by Petty Debts Court (Miscellaneous Provisions) (Jersey) Law 2000, Art 1.

¹²³ The object of any fiduciary power reserved to or exercisable by a third party to a trust, such as a protector, is also re-orientated upon trust's insolvency, so as to only be capable of being validly exercised if the exercise is in the interests of the body of creditors; *In Representation of the Z Trusts* (n 116) and *In re Jasmine Trustees Limited* [2015] JRC 196. An invalid exercise is liable to be set aside as a fraud on the power. The decision in *Z Trusts* (n 116) also confirms that powers must be exercised in the interests of the trust to which the powers relate and cannot be exercised for the benefit of another trust in a related structure, even though it may be convenient to do so for the purposes of alleviating the cash-flow difficulties of the structure as a whole.

¹²⁴ *In re Hickman* [2009] JRC 040.

law and to the Probate (Jersey) Law 1998.¹²⁵ The template adopted for the directions which might be sought in relation to an insolvent trust is:

1. A notice published requiring creditors to file their claims within a specified date.
2. Failure to file a claim by that date will lead to forfeiture of a creditor's right to participate in the distribution from the trust.
3. Creditors will be able to inspect claims and file oppositions.
4. The trustee will examine the claims and any oppositions and either admit or reject the same.
5. A creditor dissatisfied with the decision of the executor to either reject a claim or opposition to a claim can apply to have the decision reviewed by the Court.
6. Following determination of the claims the trustee will serve the draft accounts on the creditors and apply to court for the accounts to be approved and the realised assets distributed.

- 11-70** The *Re Hickman* directions envisage an insolvent liquidation of the remaining assets of the trust fund. However, the Royal Court has stated that the insolvency regime adopted in *Re Hickman* will not be appropriate in all cases.¹²⁶ The Court is alive to the need to maintain flexibility in whatever insolvency regime will be the interests of creditors as a body. While the directions, or something very like them, that were given in *Re Hickman* may be appropriate in a case where the trustee faces numerous claims from third party creditors all pressing for their claims to be paid and the trust assets realised, by contrast in a case such as in the *Z Trusts* litigation,¹²⁷ where the creditors are in both number and value connected, and they oppose the imposition of an insolvency regime that would risk the destruction of value in the assets were they to be realised, the Court can and will take a different approach. The *Z Trusts* decisions demonstrate that it is far from clear whether the answer in every case (to what may be a temporary cash-flow problem for the trust) is liquidation or whether there is some other course the Court should consider and give directions accordingly. A further question arises as to whether the incumbent trustee should remain in office to administer the trust through whatever course is deemed appropriate in the interest of the trust's creditors. If the trust is to be liquidated, should the incumbent trustee remain in office or resign in favour of a professional liquidator, who might have greater experience of the insolvency process? Whoever administers the trust from the moment of its insolvency, how are they to be paid?

C. The Office Holder

- 11-71** It has been observed that the position of an executor of an insolvent estate and a trustee of an insolvent trust are not directly analogous.¹²⁸ In the context of an insolvent estate,

¹²⁵ Bankruptcy (Désastre)(Jersey) Law 1990, Art 4(2) provides that no application can be made to have an insolvent estate made the subject of a 'désastre' which must be administered pursuant to the common law and to the Probate (Jersey) Law 1998. It is not possible to make a trust the subject of a *désastre*.

¹²⁶ *Representation of the Z Trusts* [2015] JRC 214.

¹²⁷ *ibid.*

¹²⁸ *ibid.*

the debts incurred to third parties will have been by the deceased. In the context of a trust, unless a new office holder is appointed to conduct the insolvency process, the debts will have been incurred by the trustee. On orthodox English trust law principles, there is an inherent conflict in a trustee undertaking the process of examining, admitting or rejecting claims against itself. However, the effect of Article 32(1)(a) of the Trusts (Jersey) Law 1984 means that the potential for conflict that exists between the trustee's personal capacity and its capacity qua trustee in settling claims does not exist. Once the trust enters insolvency, the trustee becomes, in essence, a cipher through whom the claims of the creditors are made. That will not apply to the trustee's own claim for professional fees and expenses, but that is a conflict inherent of a professional trustee which (whether or not the trust is insolvent) is manageable under the supervisory jurisdiction of the Court.

Upon insolvency the trustee must administer the trust for the benefit of creditors as a whole, and the interests of beneficiaries are displaced.¹²⁹ Where the trustee remains in office, it will do so to fulfil the function of a liquidator. The liquidation of the fund is not usually within the scope of the remuneration provision in a trust instrument.¹³⁰ The trustee must obtain creditor agreement or Court approval for the charging of ongoing fees.¹³¹ Failure to do so may mean that fees incurred beyond the point of insolvency might rank equal to, or perhaps even behind, the claims of other creditors.¹³²

11-72

D. The Effect of the Trustee's Insolvency on the Trustee's Indemnity

The trustee's indemnity and lien are in the nature of an equitable proprietary interest over the trust assets.¹³³ In most cases the creditor's right of subrogation never arises because the trustee is able to satisfy the liability from the trust's assets by way of its own indemnity. A creditor is most likely to rely upon its right to be subrogated to the trustee's indemnity in a case where the trustee or the trust becomes insolvent. Where the trustee as an entity is declared *en désastre*, the trustee's right of indemnity vests in the Viscount. Where the trustee is put into liquidation, the lien remains vested in the corporate trustee. It is legally impossible to bankrupt the trustee qua trustee if the trustee can invoke the Article 32(1)(a) limitation on the trustee's liability which extends only to the trust assets. Regardless of whether the limitation on the trustee's liability under Article 32(1)(a) is engaged, in the event that the trustee becomes insolvent a creditor of the trustee is entitled to be subrogated to the trustee's right of indemnity that becomes vested in the Viscount, but may only recover up to extent of the trust assets. Where the limitation on the trustee's liability to third parties is not engaged (Article 32(1)(b)) it remains possible to bankrupt the trustee as a trustee (there being no distinction from the insolvency of the trustee as an entity). A trustee is likely to have a multiplicity of creditors. The trustee will have personal creditors

11-73

¹²⁹ *Investec Trust (Guernsey) Limited v Glenalla Properties Limited and Ors* (n 4); *In the Matter of the Z Trusts* (n 4).

¹³⁰ A trustee's statutory entitlement to reasonable remuneration in Art 26 is predicated on the services being provided being that of a trustee and not a liquidator.

¹³¹ Trusts (Jersey) Law 1984, Art 51(2)(a)(ii): 'the court may, if it thinks fit—make an order concerning [...] the remuneration of a trustee'.

¹³² *Representation of the Z Trusts* (n 116); *In the Matter of the Z Trusts* [(n 4)].

¹³³ *Representation of the Z Trusts* [2015] JRC 214.

and creditors in its capacity as trustee. It is necessary to delineate clearly which creditors fall into which category. A personal creditor of the trustee cannot be subrogated to the trustee's right of indemnity, although personal creditors of the trustee are entitled to the proceeds of the trustee indemnity in the event of the trustee's insolvency if they represent the reimbursement of payments made out of the trustee's own funds on the basis that had the trustee remained solvent it would have been free to do with any reimbursement to itself as it pleased. The proper parties to a third party's claim to be subrogated to the trustee's right of indemnity are the person in whom the trust property is vested (which may not necessarily be the trustee) and the trustee. rule 4/5 RCR 2004 provides that it is not necessary to join the beneficiaries of a trust to proceedings where the trustee has been joined.¹³⁴ It remains unclear whether a creditor has a right of subrogation against the trustee's right of indemnity in the case of a trust being void or voidable where the Court has a discretion whether or not to allow the trustee an indemnity.

E. Priority as between the Trust's Unsecured Creditors

- 11-74** The issue of priority as between creditors subrogated to the trustee's right of indemnity in the event of an insolvency only comes to the fore where there are insufficient trust assets to meet all claims. Because the solvency of a trust is to be judged on the trustee's ability to satisfy debts as they fall due, there may in fact be sufficient trust assets available to meet all claims given sufficient time. The personal creditors of the trustee in its capacity as trustee have no right of subrogation to the trustee's indemnity from the trust fund but as a class the unsecured creditors of the trustee (qua trustee) have, as the trustee has, priority over the interests of the beneficiaries in the assets of the fund. Consistent with the position of unsecured creditors under the Bankruptcy (Désastre) (Jersey) Law 1990 which rank *pari passu* and not in order of time (ie the liability arising first being the first met from the fund),¹³⁵ the claims of unsecured creditors of the trustee (qua trustee) also rank *pari passu*. This avoids the requirement to undertake what could be a cumbersome and expensive enquiry to determine the temporal order of debts. This approach appears to be consistent with cases in Singapore,¹³⁶ Australia¹³⁷ and New Zealand.¹³⁸ Unlike under English law, in Jersey law the trust creditors, so far as they have not been satisfied out of the right of indemnity, are not entitled to have recourse to the personal assets of the trustee or to share with the trustee's personal creditors in event that the trustee becomes insolvent.¹³⁹

¹³⁴ The authors of *Lewin* 19th edn (London, Sweet and Maxwell, 2014) 21-053 fn 206 indicate they do not consider the English procedural equivalent of RCR 2004, r 4/2, namely CPR pt 19 r 19.7A, would apply but give no explanation as to why. Given the decision in *Glenalla*, that a third party creditor has no right of recourse against the trust assets independently of the trustee's right of indemnity, it seems that the trustee will always need to be joined to the proceedings.

¹³⁵ Art 32; the same approach applies under the Companies (Jersey) Law 1991, Art 186.

¹³⁶ *EC Investment Holdings Pte Ltd v Ridout Residence Pte Ltd* [2013] SGHC 139 although in this case the competing creditors there were in agreement that they should rank *pari passu* rather than in order of time.

¹³⁷ *Re Suco Gold Pty Ltd* (1983) 33 SASR 99, SA, SC.

¹³⁸ *Finnigan v Yuan Fu Capital Markets Ltd* (in liquidation) [2013] NZHC 2899.

¹³⁹ *Investec Trust (Guernsey) Limited v Glenalla Properties Limited and Ors* (n 4); *Re Suco Gold Pty Ltd* (n 137).

F. The Claims of Third Party Creditors against Beneficiaries

A trustee may distribute all or so large a portion of the trust assets to the beneficiaries as to leave insufficient assets remaining in the fund to satisfy the incumbent or former trustee's right of indemnity to meet liabilities to third parties as they fall due. The issue is whether it is possible for creditors of the trust to 'reach through' to satisfy themselves from trust assets distributed to the beneficiaries.

It is frequently the practice for an incumbent trustee to obtain indemnities from beneficiaries when exercising a power to appoint a substantial proportion of the trust fund to a beneficiary to enable the trustee to recoup liabilities incurred in the execution of the trust. It is often the practice where chain indemnities are negotiated between successor and retiring trustees that they provide for the successor trustee to obtain like for like indemnities from beneficiaries for distributions above a *de minimis* proportion of the fund. That practice would appear consistent with the former trustee's entitlement to ensure that its right of indemnity is not destroyed or jeopardised by a distribution to beneficiaries by a successor trustee.¹⁴⁰ Such a distribution may be liable to be upset as a transaction at undervalue or a preference by the Viscount or the trustee's liquidator if the trustee becomes insolvent and the trustee has expended its own funds that it has not yet reimbursed from the trust fund.¹⁴¹ If the trust subsequently becomes insolvent (or is made insolvent by the distribution) it appears that the distribution is not liable to be upset as a transaction at undervalue or a preference on the basis that those jurisdictions are creatures of their respective statutes which do not apply to the insolvency of a trust.¹⁴² The use of the power of appointment making the distribution may be liable to challenge as an improper exercise of the trustee's discretion if its exercise is known to (or would probably result in) the insolvency of the trust.¹⁴³ Funds derived from an order upsetting the distribution would be restored to the fund in favour of the trust creditors in the same way as if it had not taken place.

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¹⁴⁰ *In the Matter of the Z Trusts* (n 4), referring to *Lemery Holdings Pty Ltd v Reliance Fin Servs Pty Ltd* (n 76).

¹⁴¹ Companies (Jersey) Law 1991, Art 176–176B and the Bankruptcy (Désastre) (Jersey) Law 1990, Art 17.

¹⁴² Locus to challenge a transaction at undervalue or as a preference is vested in the liquidator and Viscount respectively.

¹⁴³ *In The Matter of the Representation of Jasmine Trustees Limited* (n 123).

12

Remedies against Accessories to a Breach of Trust and Miscellaneous Claims against Third Parties other than in Respect of Breach of Trust

I. Introduction

Where a trustee has breached their duties as trustee, giving rise to an actionable breach of trust claim, it may be possible for a trustee in default and facing the prospect of hostile proceedings to seek to shift or share the burden of liability elsewhere so as to offer up an additional or alternative defendant. Where there is more than one trustee, the ‘innocent’ co-trustee will not be liable jointly and severally with the trustee in default, thereby precluding a contribution claim, unless the co-trustee became aware or ought to have become aware of a breach of trust and the co-trustee actively conceals such breach or such intention or fails within a reasonable time to take proper steps to protect or restore the trust property or prevent such breach.¹ Another way for the trustee to shift the burden of liability is to seek an order under Article 46 of the Trusts (Jersey) Law 1984 impounding the beneficial interest of a beneficiary who has instigated, requested or consented to the breach of trust. This chapter also considers the right of beneficiaries prejudiced by a breach of trust to impound the beneficial interests of other beneficiaries implicated in the breach. The remaining sections of this chapter are concerned with the liability of accessories to breaches of trust otherwise than on the basis of receipt of trust property, a topic which is considered discretely in Chapter 9; the remedy available against accessories who dishonestly assist in a breach of trust, claims against directors of a corporate trustee (so-called ‘dog-leg’ claims); and miscellaneous tortious claims.

12-1

¹ Trusts (Jersey) Law 1984, Art 30(5)(a)–(b).

II. Impounding a Beneficial Interest in Order to Indemnify the Trustee

12-2 Article 46 of the Trusts (Jersey) Law 1984 provides:

(1) Where a trustee commits a breach of trust at the instigation or at the request or with the consent of a beneficiary, the court may by order impound all or part of the interest of the beneficiary² by way of indemnity to the trustee or any person claiming through the trustee.³

(2) Paragraph (1) applies whether or not such beneficiary is a minor or an interdict.

12-3 This provision is in similar terms to section 62 of the Trustee Act 1925. In the absence of a wealth of Jersey authority, recourse may be had to the more developed jurisdiction under the equivalent English provisions. For the provision to apply the beneficiary whose interest is sought to be impounded must instigate, or request, or consent⁴ to some act or omission which is itself a breach of trust and not merely one which becomes a breach of trust by reason of want of care on the part of the trustees.⁵ The right conferred by an order under Article 46 of the Trusts (Jersey) Law does not entitle the trustee to insist on remaining a trustee until he has exercised this right which may be exercised by a former trustee.⁶

12-4 Article 46 is an infrequently litigated provision of the Trusts (Jersey) Law 1984, there being only two judgments on its invocation, the leading authority concerning an attempt to invoke the provision which failed on the facts.⁷ In *Sociedad Financiera Sofimeca*, the Court speculated whether it had jurisdiction to impound a beneficiary's interest under a trust independent of the 1984 legislation as a substitute to, or to buttress, its inherent jurisdiction to grant an injunction restraining the trust assets. On the facts no order was necessary as the injunction and cross-undertaking in damages were sufficient to preserve the trust assets. Article 46 does not seem to confer a jurisdiction on the Court to impound the beneficiary's interest where a breach of trust is yet to be or about to be committed. In *West v Lazard*, the Royal Court declined to be drawn on whether Article 46 of the Trusts (Jersey) Law 1984 could only operate against a beneficiary who has a fixed interest under a trust. There appears to be no authority as to whether the equivalent provision in the English legislation, section 62 of the Trustee Act 1925, is capable of applying to a beneficial interest that is not a fixed interest. The obvious difficulty in a trustee impounding the interest of an object of a discretionary overriding power of appointment is that such an interest is entirely valueless and has no substance unless and until the power of appointment comes to be exercised.⁸

² The interest must be in the actual estate of which the trustee seeking to impound is a trustee: *Ricketts v Ricketts* (1891) 64 LT 263 at 265.

³ However, the trustee may not use an impounding order in respect of a loss sustained by himself as having afterwards succeeded to a beneficial interest: *Evans v Benyon* (1887) 37 ChD 329.

⁴ Consent, it seems, need not necessarily be in writing; cf Trustee Act 1925, s 62.

⁵ *Re Somerset* [1894] 1 Ch 265, CA.

⁶ *Re Pauling's Settlement Trusts (No 2)* [1963] 2 Ch 584.

⁷ *West v Lazard Bros & Co (Jersey) Ltd* [1993] JLR 165]; see also *Sociedad Financiera Sofimeca & Anor v Kleinwort Benson (Jersey) Trustees Ltd & Or* [1992] JRC 125.

⁸ *AG v Tantular* [2014] (2) JLR 25].

If it were possible to impound a discretionary beneficiary's interest, a trustee that subsequently sought to exercise a power of appointment in favour of that discretionary object would clearly be in a position where his personal interests and fiduciary duties conflict as he would be exercising the power in his own favour. Where an order under Article 46 of the Trusts (Jersey) Law 1984 is sought by a former trustee against a discretionary beneficiary, that may give rise to practical difficulties for the incumbent trustee, in whom the power of appointment may be vested. Exercising that power to appoint trust assets to a discretionary object, knowing that such assets are impounded by the former trustee to satisfy its liabilities to the trust fund, would require such a degree of coordination in the exercise of the power between the former trustee and incumbent trustee as to leave the whole exercise open to challenge as an improper exercise of a power.

While Article 46 provides the trustee with a mechanism to satisfy its own liability to the trust fund from the impounded interest, it does not have the effect of exculpating the trustee from liability to reconstitute the trust fund.⁹ The right to impound has been considered as analogous to a right of subrogation; the trustee has to make good the breach of trust, but is entitled to look to the beneficiary who consented to it or who instigated or requested it to make good to him.¹⁰ The trustee would therefore remain liable for any shortfall if the impounded interest was insufficient to meet the loss to the fund or the Court declines to make the order sought.

The application of Article 46 of the Trusts (Jersey) Law 1984 should be considered where a trust dispute between trustees and beneficiaries is compromised in whole or in part by the payment of a sum from the fund that, if that sum were met from the fund in any other circumstances, would amount to a breach of trust. The consent of the beneficiaries to the payment of the sum from the fund as part of the compromise of the dispute is likely to afford the trustee the opportunity to rely upon Article 46 of the Trusts (Jersey) Law 1984 if those same beneficiaries later attempt to pursue the trustee for diminution of the fund caused by the payment.

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12-6

A. Extent of the Beneficiaries' Knowledge that they Are Instigating, Requesting or Consenting to a Breach of Trust

If the beneficiary has instigated, requested or consented to the trustee making or divesting itself of a particular investment, it is not necessary that the beneficiary should know that the investment (or sale) is in law a breach of trust, but they must know the facts which constitute the breach of trust.¹¹ The Royal Court has stated that it is not possible to impound a beneficiary's interest to indemnify a trustee guilty of fraudulent breach of trust unless the beneficiary specifically authorised the fraudulent acts.¹² While somewhat imperfect, it is the authors' view that a workable test is whether facts were known to the beneficiary which would be sufficient to bring home to the mind of a person of ordinary intelligence

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⁹ *Brudenell-Bruce v Moore* [2014] EWHC 3679 (Ch) at [250].

¹⁰ *Re Pauling's Settlement Trusts (No 2)* [1963] 2 Ch 576 at 597.

¹¹ *Re Somerset* (n 5).

¹² *West v Lazard Bros & Co (Jersey) Ltd* (n 7).

the fact that the trustee was being invited to depart from his duty. Thus in the English decision of *Re Somerset*,¹³ a case in which the trustees committed a breach of trust by, with the consent of the life tenant, investing trust money by way of a mortgage on property which was (unknown to the life tenant) of insufficient value. While the tenant for life knew of the property in which the trustees were investing, he was not informed of the valuations made and was not, so far as it appeared, acquainted with the rental value, and so the case did not fall within the then English equivalent of Article 46.

B. Exercise of the Court's Discretion

- 12-8** In the English case of *Bolton v Curre*¹⁴ it was held that the power given to the court by section 45 of the Trustee Act 1893, the then English statutory equivalent of Article 46 of the Trusts (Jersey) Law 1984, was intended to enlarge the power of the court as to indemnifying trustees, and to give greater relief to trustees, and did not operate to curtail the previously existing rights and remedies of trustees in equity.¹⁵ As such, if the court would in a particular case enforce the equity of the trustee and impound the interest of a beneficiary in the hands of an assignee, the court was bound to do the same in a similar case following the enactment of the legislation.¹⁶ That said, the Court's power under the general law and under Article 46 is in the nature of a judicial discretion. The right of a trustee to have the interest of a beneficiary impounded will prevail against an innocent assignee for value of the beneficiaries' interest claiming under an assignment made after the commission of the breach of trust¹⁷ or against a trustee in bankruptcy.¹⁸ Article 46 does not define the extent of the liability of a concurring beneficiary but rather describes the cases in which the Court may, if it thinks fit, impound all or any part of the interest of the beneficiary by way of indemnity to the trustee.¹⁹

C. Impounding a Trust Interest in Order to Indemnify the Beneficiaries

- 12-9** Despite a dearth of case law it is the authors' view that an aligned but separate jurisdiction to that available to trustees under Article 46, which exists as a matter of general law in England, also exists as a matter of general law in Jersey, to ensure that if a beneficiary who has a life or other partial interest joins in a breach of trust, then all the benefit which

¹³ *Re Somerset* (n 5) at 274.

¹⁴ [1895] 1 Ch 544.

¹⁵ Alluded to in *Sociedad Financiera Sofimeca & Anor v Kleinwort Benson (Jersey) Trustees Ltd & Or* (n 7).

¹⁶ *Bolton v Curre* [1895] 1 Ch 544 at 549, per Romer J; *Fletcher v Collis* [1905] 2 Ch 34, CA; and see *Re Pain* [1919] 1 Ch 38.

¹⁷ *Bolton v Curre* (n 16) at 548–49.

¹⁸ *Fletcher v Collis* (n 16). Jersey's equivalent of a trustee in bankruptcy is the Viscount, in whom title and possession of the property of the debtor vests automatically upon a declaration of *désastre*. See the Bankruptcy (Desastre) (Jersey) Law 1990, Arts 8 and 14.

¹⁹ *Chillingworth v Chambers* [1896] 1 Ch 685 at 707, CA, per Kay LJ, and see the judgment in the same case of Lindley LJ at 700.

would have accrued to the beneficiary, either directly or derivatively,²⁰ whether from that trust fund or any other property comprised in the same settlement,²¹ may be impounded by the other beneficiaries or other persons having a similar equity, as against the concurring beneficiary. In England, such impounding is effective against the concurring beneficiary's trustee in bankruptcy,²² judgment creditors,²³ or general creditors²⁴ and (except so far as the defence of purchase for value may be applicable) against all who claim under him²⁵ until the amount impounded (with accumulations of its income)²⁶ has compensated the trust fund for the breach for which the beneficiary was responsible.

In English law, it has been observed²⁷ that the principle that underpins this jurisdiction does not extend so far as to entitle beneficiaries of part of the balance of money in a bank account held on trust to stop the payment to the account holder of other money in the bank account held free from trust in circumstances where the account holder had failed to pay money into that account on trust for the beneficiaries and had instead paid the money into an overdrawn account so as to prevent it being traced as trust property and consequently could not therefore give rise to a right to impound.²⁸ The lack of a trust fund with subsisting beneficial interests capable of being impounded proved fatal to the claim in the English decision of *Re BA Peters plc*. Following *Brazil v Durant*,²⁹ a like case might be determined differently under Jersey law were a sufficient link between the original property and its traceable proceeds through an overdrawn account to be capable of being proven.

The principle applies when the beneficiary is indebted to or is otherwise in default to the trust, for instance, under an enforceable promise to pay a sum of money³⁰ or the premiums on an insurance policy.³¹ The principle applies only against property held under the same trusts: thus if, after administration, a specific legacy and the residuary estate are held on entirely distinct trusts, a beneficiary's interest in the former cannot be impounded to make good his default in respect of the latter.³²

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²⁰ *Jacobs v Rylance* (1874) LR 17 Eq 341; *Doering v Doering* (1889) 42 ChD. 203; *Re Dacre* [1916] 1 Ch 344, CA; cf *Re Towndrow* [1911] 1 Ch 662.

²¹ *Woodyatt v Gresley* (1836) 8 Sim 180; *Lincoln v Wright* (1841) 4 Beav 427 at 432, per Lord Langdale; *Fuller v Knight* (1843) 6 Beav 205; *M'Gachen v Dew* (1851) 15 Beav 84; *Vaughton v Noble* (1864) 30 Beav 34.

²² *Ex parte Turpin* (1832) 1 D & C 120; *Jacobs v Rylance* (n 20); see *Smith v Smith* (1835) 1 Y & C 338; *Burridge v Row* (1842) 1 Y & C Ch. 183 and 583 (affd (1844) 13 LJ Ch 173); the Jersey equivalent would be the Viscount, although the proposition above is not supported by the Bankruptcy (Désastre) (Jersey) Law 1990.

²³ *Kilworth v Mountcashell* (1864) 15 IrChRep 565.

²⁴ *Williams v Allen* (No 2) (1863) 32 Beav 650.

²⁵ *Priddy v Rose* (1817) 3 Mer 86; *Woodyatt v Gresley* (n 21); *Cole v Muddle* (1852) 10 Hare 186; *Doering v Doering* (n 20); and see *Morris v Lovie* (1822) 1 Y & C Ch 380; *Re Hervey* (1890) 61 LT 429. The right prevails against assignees even where the breach of trust takes place after the assignment where the assignor is a trustee and a beneficiary: *Re Pain* (n 16) at 46 and 47. See n 386.

²⁶ *Ex parte King* (1835) 2 Mont & Ayr 410.

²⁷ L Tucker, N Le Poidevin and J Brightwell, *Lewin on Trusts*, 19th edn (London, Sweet & Maxwell, 2014) para 40-008.

²⁸ *Re BA Peters plc* [2008] EWCA Civ 1604. But note the Judicial Committee of the Privy Council's dismissal of an appeal from Jersey that tracing through an overdrawn bank account was legally impossible in *The Federal Republic of Brazil v Durant International Corporation and Anor* [2015] UKPC 35 at [40].

²⁹ [2012] (2) JLR 356).

³⁰ *Re Weston* [1900] 2 Ch 164.

³¹ *Re Jewell's Settlement* [1919] 2 Ch 161.

³² *Re Towndrow* (n 20).

D. Where a Co-trustee Is also a Beneficiary Whose Interest Is Sought to Be Impounded

- 12-12** If a trustee that has been guilty of a breach of trust also has a beneficial interest under the trust instrument, (which will be rare where the trust is professionally administered) it will not be allowed to receive any part of the trust fund in which it is equitably interested until it has made good the breach of trust.³³ The principle is that to the extent that it is in default³⁴ it is regarded as having already received its share.³⁵ It seems that the whole of the trustee's beneficial interest, whether acquired before or after the breach of trust was committed, will, as between itself and its co-trustee who is *in pari delicto*, be applied in making good the loss to the fund. This certainly seems to be so where such a trustee/beneficiary has, as between itself and his co-trustee, derived an exclusive benefit from the breach of trust.³⁶ In English law, the rule applies not only to beneficial interests given to the trustee directly by the trust instrument, but also to interests acquired derivatively, eg by purchase from another beneficiary or inherited from them.³⁷ The beneficial interest which the trustee claims under the instrument is treated as being subject to an implied condition of the proper performance of its duty as trustee.³⁸ The trustee's assignee of such an interest is therefore in no better position than it would be, even where the default was committed by the trustee after assigning its beneficial interest.³⁹ But there can be no impounding of the trustee's beneficial interest if the assignor does not become a trustee until after the assignment,⁴⁰ and if the trustee holds two distinct funds on distinct trusts, and has a beneficial interest in the first but not in the second, the Court has no power to impound its beneficial interest in the first to make good his default in the second.⁴¹

³³ *Re Dacre* (n 20). Cf impounding orders under the Trusts (Jersey) Law 1984, Art 46 and the Trustee Act 1925, s 62.

³⁴ For adjustments to be made in respect of costs, see *Selangor United Rubber Estates Ltd v Cradock* (No 4) [1969] 1 WLR 1773.

³⁵ *Re Dacre* (n 20). The principle is also applied as between shareholder directors and companies in liquidation: see *Selangor United Rubber Estates Ltd v Cradock* (No 4) (n 34), discussing *Re VGM Holdings Ltd* [1942] Ch 235.

³⁶ *Chillingworth v Chambers* (n 19). The decision in this case seems to involve the principle that the trustee who is party to a breach of trust cannot, as between himself and his co-trustee, take anything out of the trust fund until he has repaired his breach of trust. This principle, however, is not in terms enunciated. In his judgment (at 707) Kay LJ, after an examination of all the authorities, said: 'On the whole, I think the weight of authority is in favour of holding that a trustee, who, being also a cestui que trust, has received, as between himself and his co-trustee, an exclusive benefit by the breach of trust, must indemnify his co-trustee to the extent of the benefit which he has received. I think that the plaintiff must be treated as having received such an exclusive benefit'. Lindley LJ (at 700) thought that the principle applied even where the beneficiary derived no benefit, however this principle may be complicated by the fact that subject to Art 30(5)(a)–(b) of the Trusts (Jersey) Law 1984 Jersey trustees are not jointly liable for a breach of trust.

³⁷ *Jacobs v Rylance* (n 20); *Doering v Doering* (n 20); *Re Dacre* (n 20).

³⁸ *Morris v Livie* (n 25); *Re Pain* (n 16) at 47.

³⁹ *Doering v Doering* (n 20).

⁴⁰ *Irby v Irby* (No 3) (1858) 25 Beav 632; *Re Pain* (n 16) at 47.

⁴¹ *Re Towndrow* (n 20).

III. Dishonest Assistance

In circumstances where a trustee, or other fiduciary in an analogous position to a trustee, such as a company director,⁴² acts in breach of their duties, the primary claim is as against the defaulting trustee or fiduciary. However, a person who is a third party to the trust or fiduciary relationship who dishonestly assists in the breach of the primary obligation of the trustee or fiduciary will become personally liable to compensate the beneficiaries to the same extent as the trustee in whose breach of duty he assists. A dishonest assistant, like a knowing recipient of trust assets misapplied in breach of trust, is a species of constructive trustee, although that description has been criticised as inapposite as a dishonest assistant owes no duties to the beneficiaries in the same way that the primary wrongdoing trustee does, and the only liability of a dishonest assistant is a personal one.⁴³ The basic requirements that must be established in order to found a claim for dishonest assistance are as follows:⁴⁴

1. There is a trust.
2. There is a breach of trust by the trustee of that trust.
3. The defendant induces or assists that breach of trust.
4. The defendant does so dishonestly.

Where each of these requirements is satisfied, the defendant is personally liable to account to the plaintiff in respect of the breach of trust as though he were a trustee.⁴⁵ The remedy available against a dishonest assistant is a personal remedy. Although a constructive trust is imposed on the defendant,⁴⁶ the constructive trust is not to be confused with an institutional trust of a proprietary nature imposed on any property which is or has been in the hands of the defendant. A dishonest assistance claim, being purely personal, will therefore not survive the defendant's insolvency in which a successful plaintiff will have to prove for their loss among the defendant's other unsecured creditors. Indeed there need be no property in the hands of the defendant for a claim in dishonest assistance to succeed. Rather, the term 'constructive trust' must be understood in the sense of imposition of a personal liability to account on the basis applicable to a trustee. The term 'constructive trust', as in English law, is used simply to describe the equitable obligation to account which is imposed on the defendant to the action.⁴⁷ The defendant is liable not because he is a trustee of any property, but because he is a dishonest accessory to a breach of trust committed by someone else.⁴⁸ The constructive trust imposed upon a dishonest assistant comes within the second kind

⁴² *CMC Holdings Limited v RBC Trust Company (International) Limited, Regent Trust Company & Anor* [2015] JRC 149].

⁴³ *Bagus Invs Ltd v Kastening* [2010] JLR 355]; *Nolan v Minerva Trust Co Ltd* [2014 (2) JLR 117].

⁴⁴ It will be noted that these basic requirements are the same as those in English law.

⁴⁵ *Nolan & Ors v Minerva Trust Company Limited and Ors* [2014] JRC 078A.

⁴⁶ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 705F, HL, per Lord Browne-Wilkinson.

⁴⁷ *Twinsectra Ltd v Yardley* [1999] Lloyd's Rep Bank. 438 at 467, CA (reversed on other grounds [2002] UKHL 12), approving *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555 at 1582.

⁴⁸ *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 at 382D–E, PC, per Lord Nicholls.

of constructive trust in the classification used in this work.⁴⁹ Though a dishonest assistant may be personally liable to account for profits made from his dishonest assistance, it does not follow that such profits made by the defendant become subject to a constructive trust in the proprietary sense, and the remedy of dishonest assistance cannot be used as a route to a proprietary remedy in respect of the profits.⁵⁰

- 12-15** What follows is a distillation of the general requirements set out above, special cases involving banks, the registration of share transfers, the appropriate measure of liability, the position of agents holding trust money, vicarious liability and defences.⁵¹

A. Basis of Liability

i. Locus

- 12-16** Generally, those with standing to pursue a breach of trust claim will have standing to pursue a claim for dishonest assistance.⁵² A trustee who itself is guilty of making a transfer of trust property in breach of trust and who wishes to recover either the property or equitable compensation of commensurate value before the beneficiaries wish to bring an action either against the third party (or more likely the trustee for breach of trust) has locus to bring a dishonest assistance claim as against the third party assistant, notwithstanding that as between himself and the beneficiary there may be a breach of trust claim.

ii. Requirement (1)—a Trust

- 12-17** The requirement that there be a trust is not concerned with the description of the relationship between the plaintiff and the defendant in the claim for dishonest assistance but rather with the trust which must be shown to exist if the defendant is to be made liable for assisting a breach of trust by the trustee in relation to it. There is no need for a trust in the formal sense of property vested in one person held in trust for another person, although a formal trust will certainly qualify. It will suffice if there is a fiduciary relationship in relation to property, even if that relationship is not described as a ‘trust’. Putting it at its most abstract, if a person (T) is placed in possession of, or exercises command or control over, the property of another person (B) while the property remains B’s property, and T can deal with B’s property only for the benefit of B or for purposes authorised by B, T is a trustee of the property for the purposes of constructive trusteeship.⁵³ The property in T’s hands is treated as subject to a trust. The most common example of this type of trust for these purposes is the fiduciary relationship between the directors of a company and the company itself in relation to the company’s property, the director being the ‘trustee’ of the company’s corporate assets, even though the property is likely to be owned by the company outright, being

⁴⁹ See Ch 6; *Williams v Central Bank of Nigeria* [2014] UKSC 10.

⁵⁰ *Sinclair Investement Holdings SA v Versailles Trade Finance Ltd* [2007] EWHC 915 (Ch) at [109]–[135].

⁵¹ Besides the general defence of limitation which is dealt with in Ch 16.

⁵² As to locus for breach of trust claims, see personal remedies, Ch 7.

⁵³ *Baden v Société Général pour Favoriser le Développement du Commerce et de l’Industrie en France SA* (1983) [1993] 1 WLR 509 at 573E-F.

the ‘trust property’. Other agents and employees having property under their command or control may also be treated as trustees, and the property as trust property.⁵⁴ The analogy between a trust in the formal sense and the kind of fiduciary relationship capable of giving rise to a constructive trusteeship is close. There is both a quasi-trustee and quasi-trust property. But the analogy is less easily maintained where one is concerned with a fiduciary relationship which does not relate to property in the hands of the fiduciary. Will any kind of fiduciary relationship suffice, or must it be a relationship relating to property controlled by the fiduciary? The example that is sometimes seen is of a person engaging a lawyer to give him advice, when the lawyer breaches his fiduciary duty of loyalty by rendering advice which, as the lawyer is aware, is contrary to the interest of the person engaging him, thereby causing loss, and the lawyer is assisted by some third party in rendering the false advice. As it appears to be in English law, in Jersey it remains an open question whether a fiduciary relationship by itself is sufficient. It has been held at first instance in England that it is not, and that there must be a trust (or quasi-trust) and trust (or quasi-trust) property.⁵⁵ But the English Court of Appeal has considered that the point is arguable,⁵⁶ and at first instance it has been held that a fiduciary relationship without trust property is sufficient.⁵⁷ A claim for dishonest assistance will certainly fail where there is no trust and no fiduciary relationship. However, a trust might be imposed by operation of law on property in circumstances where there is no fiduciary relationship preceding the occurrence of the events which give rise to the imposition of the trust, and where the duty of the person upon whom the trust is imposed is to restore the property.⁵⁸ This kind of trust, a constructive trust of the second kind,⁵⁹ involves no fiduciary relationship in any meaningful sense, but arises, for example, where property is obtained by fraud, theft or mistake.⁶⁰ The existence of such a trust will however support a claim against a recipient of the property,⁶¹ but also those who assist in its disposal, contrary to the duty of the recipient to restore the property to its true owner.⁶²

⁵⁴ *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45.

⁵⁵ *Goose v Wilson Sandford & Co*, unreported, 1 April 1996, Ch D See also *Satnam Investments Ltd v Dunlop Heywood & Co Ltd* [1999] 3 All ER 652 at 671a, per Nourse LJ. In *Dyson Technology Ltd v Curtis* [2010] EWHC 3289 (Ch) at [210], the Court accepted, without considering all the relevant authorities, a submission that there had to be in existence a trust fund or property subject to fiduciary obligation, and held that this requirement was satisfied on the basis that the property subject to the fiduciary obligation was a bribe obtained by the fiduciary which had become subject to a constructive trust.

⁵⁶ *Goose v Wilson Sandford & Co (No 2)* [2001] Lloyd’s Rep 189, CA, considered in *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734 at [86] and [87]. See also *Brown v Bennett* [1999] 1 BCLC 649 at 658–59, CA.

⁵⁷ *JD Wetherspoon plc v Van de Berg & Co Ltd* [2009] EWHC 639 (Ch) at [503]–[520]; followed *Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 (Comm) at [61] (on appeal *Fiona Trust & Holding Corp v Skarga* sub nom [2013] EWCA Civ 275 where dishonest assistance was not considered); *Goldtrail Travel Ltd v Aydin* [2014] EWHC 1587 (Ch) at [125]–[129].

⁵⁸ In circumstances where the constructive trust arises from fraud or theft of property, which by their nature involve a deliberate appropriation of property from its owner, the constitution of the trust and its breach may occur so close together as to be virtually simultaneous as imperceptibly part of the same action. See *Nolan v Minerva Trust Co Ltd* (n 45) in respect of the breach of a ‘Halley Trust’ at [171]–[175].

⁵⁹ See Ch 6.

⁶⁰ *ibid.*

⁶¹ Whether proprietary, if the recipient is still in possession of the property and is not a bona fides purchaser for value or personally, as a knowing recipient and no longer in possession of the trust property.

⁶² *Cp Brinks Ltd v Abu-Saleh (No 3)*, The Times, 23 October 1995 (where no liability was imposed because other requirements for dishonest assistance were not satisfied). See also *Nolan v Minerva Trust Co Ltd* (n 45) at [146] *et seq*; *Bank Tejarat v Hong Kong and Shanghai Banking Corporation (CI) Ltd* [1995] 1 Lloyd’s Rep 239.

iii. Requirement (2)—a Breach of Trust

- 12-18** A breach of trust, which includes for this purpose a breach of fiduciary obligation (in the absence of a formal trust relationship) is an essential requirement. Dishonest assistance is concerned with the liability of accessories for breach of trust, and if there is no breach of trust the defendant cannot be an accessory. The breach of trust need not be a dishonest one.⁶³ To found the claim, it is the assistance that must be dishonest.⁶⁴ That does not mean that a third party who acts dishonestly in relation to a trust will escape liability if there is no breach of trust, only that the cause of action available against that person will not be dishonest assistance. A trustee may, for example, without any breach of trust engage a dishonest agent who breaches his obligations to the trustee, and in that case the appropriate cause of action is one in contract or tort which will usually be vested in the trustee and may be brought by the trustee, or in special circumstances by a beneficiary as a derivative claim.

a. What Sort of Breach of Trust is Required?

- 12-19** There is some debate as to whether the only breach of trust capable of giving rise to a claim for dishonest assistance must be a breach of trust relating to the misapplication of the trust property or whether any breach of trust will suffice. This question is closely connected with whether a fiduciary relationship by itself is sufficient to satisfy requirement (1) even though it does not relate to any property. There is English authority that the breach of trust must relate to a misapplication of trust property but there is some doubt.⁶⁵ It should be noted that although the leading Privy Council case, *Royal Brunei Airlines Sdn Bhd v Tan*⁶⁶ involved such a misapplication, there is nothing in that decision which positively requires that the breach of trust must necessarily be of this character. The author is not aware of any Jersey authority in which it has been held unnecessary for the breach to relate to the trust property. It remains to be seen whether the Royal Court will extend the framework of the cause of action to encompass breaches of trust that do not relate to the misapplication of trust property. Conceptually, if the requirement is that the breach of trust must relate to the misapplication of the trust property, then there could be no liability if the trustee in breach of his duty of loyalty failed to obtain a profit for the trust fund which could have been obtained and instead allows the profit to be diverted to someone else,⁶⁷ or takes a bribe⁶⁸ as neither of these scenarios strictly involve the misapplication of property subject to a trust that exists prior to the breach.⁶⁹ However, if the breach of trust which counts for the

⁶³ *Royal Brunei Airlines Sdn Bhd v Tan* (n 48).

⁶⁴ See para 12-25.

⁶⁵ *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700 at 754; but cf *Consul Development Pty Ltd v D.P.C. Estates Pty Ltd* (1975) 132 CLR 373, Aus HC, where this requirement was not satisfied.

⁶⁶ Endorsed as authoritative in Jersey by *Cunningham v Cunningham* [2009] JLR 227] at [36].

⁶⁷ Cf *Consul Development Pty Ltd v D.P.C. Pty Ltd* (n 66); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22.

⁶⁸ In *Secretary of State for Justice v Topland Group plc* [2011] EWHC 983 there was no suggestion that a third party who paid a bribe to an agent might have a defence to a claim by the principal for dishonest assistance on the ground that the agent's breach of fiduciary duty in accepting the bribe did not relate to the misappropriation of property; but the relevant authorities were not considered.

⁶⁹ See n 58, where the conceptually distinct imposition of the trust and its breach is practically, imperceptible.

purpose of requirement (2) extends beyond misapplication of property already subject to a trust, it seems doubtful to the authors whether it would extend beyond breach of fiduciary obligations of good faith and loyalty, as distinct from breach of duty by a fiduciary; not every breach of duty by a fiduciary, such as breach of a duty of care and skill, is a breach of fiduciary duty.⁷⁰

The leading Jersey decision on dishonest assistance⁷¹ concerned the inducement of a family of Irish road hauliers, the Nolans, to invest substantial sums of money in various schemes orchestrated by a fraudster, a Mr Walsh, through a group of companies controlled by him, known as the Buchanan Group. The Buchanan Group's directors were Jersey financial services providers who were the subject of the dishonest assistance claim on the basis that they dishonestly carried out Mr Walsh's instructions as to how to apply the funds invested by the Nolans. The trusts that were pleaded to satisfy requirement (1) were two species of constructive trust: the *Quistclose* Trust⁷² and the so-called *Halley* Trust.⁷³ It was the Nolans' case in relation to each fraudulently induced investment that the breach of trust had occurred (in the case of a *Halley* trust) when the relevant Buchanan Group company had not returned the Nolans' monies at once, or (in the case of a *Quistclose* trust) when it disbursed any part of the monies transferred by the Nolans other than for the purpose of investment in accordance with the Nolans' agreement with Mr Walsh, and in particular disbursed any such monies outside the Buchanan Group structure. In respect of the investments said to be subject to *Quistclose* trusts, the Court held that to the extent that the Nolans did eventually receive the shareholdings that had been agreed between them and Mr Walsh, any relevant *Quistclose* trust had in due course been fulfilled and therefore no breach could be proven. The Royal Court held that to the extent that there had been any breach of trust arising out of the monies invested by the Nolans having been paid away prior to such shareholdings being received by them, any such breach of trust was, at worst, merely technical and not causative of any damage to them. It seems therefore that for a breach to qualify the breach must be more than merely technical and must be such as to give rise to a recoverable loss.

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b. Breach of Duty and Trustee Exoneration or Trustee Exemption Clauses

The effect of clauses of this kind in dishonest assistance claims is discussed here, rather than in the section below dealing with general defences, because an effective exemption or exoneration clause can only be deployed to defend the trustee responsible for the breach in which the accessory has dishonestly assisted, and cannot be deployed to defend the accessory itself. A distinction can be drawn between clauses which operate to enlarge trustees' powers or abridge their duties ('exoneration clauses'), and clauses which excuse trustees from personal liability for breach of trust ('exemption clauses').⁷⁴ If an exoneration clause applies, there is no breach of trust and so no question of secondary liability for dishonest assistance by third parties will arise. If an exemption clause applies it only has the effect of

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⁷⁰ As to the distinction, see *Bristol and West Building Society v Mothew* [1998] Ch 1 at 16 *et seq.*, CA.

⁷¹ *Nolan v Minerva Trust Co Ltd* (n 45).

⁷² *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567; *Nolan v Minerva* (n 45) at 163.

⁷³ *Halley v The Law Society* [2003] EWCA Civ 97.

⁷⁴ See Ch 7 on exoneration/exemption clauses.

excusing the trustee from personal liability for breach of trust; the clause is not effective so as to prevent the breach of trust from having taken place. It follows that even with an effective exemption clause a third party who assists the breach of trust dishonestly may be made liable, even though the trustee within the protection of the clause is not personally liable at all.⁷⁵

iv. Requirement (3)—Inducement or Assistance in a Breach of Trust

- 12-22 It is always a question of fact in each case whether the defendant has rendered assistance.⁷⁶ To qualify, assistance must be conduct which in fact assists the commission of the act which is a breach of trust by the trustee. Assistance does not have any mental element in addition to the separate requirement of dishonesty.⁷⁷ The assistance must be of more than minimal importance,⁷⁸ and must enable the breach by the trustee to be committed,⁷⁹ but there is no requirement that what is done by the defendant inevitably has the consequence that a loss is suffered.⁸⁰

a. When Must the Assistance be Rendered?

- 12-23 The assistance normally precedes the breach of trust or is contemporaneous with it. Where the assistance takes the form of inducement, it must necessarily precede the breach. The assistance may even take place before the trustee who commits the breach of trust takes office, for example where a third party facilitates the appointment to office of a fraudulent trustee so as to enable the third party to misappropriate the trust fund.⁸¹ Once the breach of trust has been fully implemented, the subsequent acts or omissions of the defendant will not assist its commission because the breach of trust will already have been committed.⁸² However, in those cases where the breach of trust consists of the misappropriation of assets, the correct approach is to treat the breach as a continuing one, not ending when the assets have initially been removed from the trust fund, but when they have been squirreled away in an attempt to put them beyond the reach of the beneficiaries who might seek their recovery. The assistance that is effectively being rendered in such circumstances, although it may not be described as such, is de facto money laundering and, as the decision in *Nolan* demonstrates, Jersey's corporate, investment and fiduciary service providers are at acute risk of being made liable for dishonest assistance if they fail to undertake proper due diligence on the individuals and funds with whom they deal and fail to give proper consideration to the

⁷⁵ For the effect of such clauses generally see Ch7. Article 30(10) of the Trusts (Jersey) Law 1984 precludes any provision that has the effect of relieving, releasing or exonerating a trustee from liability for breach of trust arising from the trustee's own fraud, wilful misconduct or gross negligence. See also *Armitage v Nurse* [1997] EWCA Civ 1279, per Millett LJ: 'irreducible core of obligations'.

⁷⁶ *Baden v Société Général pour Favoriser le Développement du Commerce et de l'Industrie en France SA* (n 53) at 574–75.

⁷⁷ *Madoff Securities International Ltd v Raven* [2013] EWHC 3147 (Comm).

⁷⁸ *Brinks Ltd v Abu-Saleh* (No 3) (n 62), where a wife accompanied her husband on trips abroad so as to create impression that the trip was a holiday when in fact the husband was engaged in the dissipation of trust assets.

⁷⁹ *Goldtrail Travel Ltd v Aydin* (n 57) at [130]–[142].

⁸⁰ See n 76.

⁸¹ As in *Barnes v Addy* (1874) 9 Ch App 244.

⁸² *Brown v Bennett* (n 56) at 659; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1509]–[1510].

appropriateness of their instructions or requests. Large institutional defendants are also likely to be perceived as having deep pockets and well able to satisfy a claim if the initial wrongdoer has fled the scene or is otherwise not worth pursuing.⁸³ Accordingly, those who assist in money laundering after the breach of trust has first occurred may be made liable for dishonest assistance. In money laundering cases, the assistance will normally take the form of receiving, holding, possibly investing and then parting with money representing the trust property while it is in the course of being laundered.⁸⁴ For the purpose of establishing assistance in this kind of case, it will may be necessary to trace the money representing the trust property into the hands of the defendant, using Jersey's rules as to tracing,⁸⁵ although assistance that consists of services to conceal or disguise the misappropriated property may also attract civil (and criminal) liability even though the property does not come into the assistant's hands.⁸⁶

Where the defendant is a financial institution or one offering fiduciary services, the assistance can take the form of receipt and then distribution of a fund. As an alternative to a claim for dishonest assistance, the defendant may also be made personally liable under the principle in *Guardian Trust*,⁸⁷ which does not require the defendant to have assisted anyone else's breach of trust nor proof of dishonesty, if the defendant is on notice of an adverse claim to the fund at the time of the distribution.

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v. Requirement (4)—Dishonesty

The Royal Court, in line with the now accepted position in England and Wales, has adopted an objective test for dishonesty,⁸⁸ best expressed by Lord Nicholls in *Royal Brunei Airlines v Tan*:

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in the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However, these subjective characteristics of dishonesty do not mean that individuals are free to set their own standards of honesty in the particular circumstances.

⁸³ *Nolan v Minerva Trust Co Ltd* (n 45); *Agip (Africa) Ltd v Jackson* [1990] Ch 265; *Society of England and Wales v Habitable Concepts Ltd* [2010] 1449 (Ch) at [23]. As to cases where the trustee makes a profit from the trust for which he is personally liable to account but which does not become subject to a proprietary constructive trust, and the assistance is merely in the disposal of the profit (but not in the breach of duty in making the profit then dishonest assistance would not arise if the breach must relate to the misapplication of trust property).

⁸⁴ For discussion of the criminal offences with regard to money laundering, see Ch 14 and the discussion of Arts 30 and 31 of the Proceeds of Crime (Jersey) Law 1999.

⁸⁵ See Ch 13 and *Agip (Africa) Ltd v Jackson* (n 83); *Bank Tejarat v Hong Kong and Shanghai Banking Corporation (CI) Ltd* (n 62) at 247–48; and see *Boscawen v Bajwa* [1996] 1 WLR 328 at 334D–E, CA, per Millett LJ.

⁸⁶ Proceeds of Crime (Jersey) Law 1999, Art 30.

⁸⁷ *Guardian Trust and Executors Company of New Zealand Ltd v Public Trustee of New Zealand* [1942] AC 115 at 127; *In the Matter of the Estate of Bamford* [2003 JLR N13]; *In The Matter of the PW Trust* [2010 JLR 619].

⁸⁸ *Cunningham v Cunningham* (n 66).

The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.⁸⁹

- 12-26** In most cases there is unlikely to be any difficulty in applying this test:⁹⁰

Honest people do not intentionally deceive others to their detriment. Honest people do not intentionally take others' property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless.

a. The Subjective and Objective Elements of Dishonesty

- 12-27** It will be observed that the test for dishonesty, while stated to be objective, contains within it both subjective and objective elements. The subjective element is concerned with all the circumstances known to the particular defendant in question: his personal attributes such as his experience and intelligence, and the reason why he acted as he did.⁹¹ For these purposes, knowledge (ie what the defendant actually knew at the time, as distinct from what a reasonable person would have known or appreciated ie constructive knowledge)⁹² includes suspicion relating to the transaction concerned, combined with a conscious decision not to make enquiries which might result in knowledge.⁹³ Significantly, in *Nolan v Minerva* the circumstances known to the defendant were held to include the statutory and regulatory environment to which the defendant was subject as a company carrying on regulated 'trust company business' within the meaning of Article 2(3) of the Financial Services (Jersey) Law 1998.⁹⁴ The defendant's general suspicion that the trustee has been involved in money laundering activities will not suffice as 'knowledge' for these purposes if there is no such suspicion in relation to the particular transaction concerned.⁹⁵
- 12-28** A particular difficulty in relation to assessing subjective knowledge for these purposes is determining whose knowledge is relevant. In large organisations specific pieces of relevant knowledge may be dispersed among individual employees so as to make the overall picture unintelligible until such pieces of relevant knowledge are accumulated together.
- 12-29** In *Nolan v Minerva*, it was argued (unsuccessfully) that in assessing whether a defendant had acted dishonestly in relation to any particular transaction, each transaction had to be viewed in isolation from any of the others, and that it was impermissible to adopt a cumulative approach to an alleged failure to make enquiries. Following this approach to its logical

⁸⁹ *Royal Brunei Airlines Sdn Bhd v Tan* (n 48) at 389B–E, adopted as authoritative in *Nolan v Minerva Trust Co Ltd* (n 45) at 197.

⁹⁰ *Royal Brunei Airlines Sdn Bhd v Tan* (n 48) at 389F.

⁹¹ ibid, at 391B. See too *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 at [12], per Lord Millett.

⁹² *Royal Brunei Airlines Sdn Bhd v Tan* (n 48) at 389D.

⁹³ *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476 at [10]; *Nolan v Minerva Trust Co Ltd* (n 45) at [264]–[266].

⁹⁴ *Nolan v Minerva Trust Co Ltd* (n 45).

⁹⁵ *Abou-Rahmah v Abacha* [2006] EWCA 1492, [2007] 1 All ER.(Comm) 827.

conclusion, if an honest employee would have been obliged to find out some information in relation to a previous transaction and the dishonest employee failed to do so, the Court could not in relation to a subsequent transaction attribute to the dishonest employee the knowledge he would have acquired if he had made the enquiry that an honest employee would have made in relation to the earlier transaction. In short, the Court was being asked to ignore what the defendant ought, or ought not, to have done in relation to any previous transaction. The correct approach was held to be to treat the defendant as having had the knowledge which it would have gained if it had in fact made enquiries in relation to earlier transactions. If in relation to an earlier transaction an honest employee would have made enquiries and thereby acquired knowledge that would have informed a subsequent transaction, one must look at both transactions as a continuum. The suggestion that one should wipe the slate clean at the start of each transaction and ignore the information that an honest employee would have acquired from an earlier transaction was held to be both logically indefensible and legally incorrect.

Having established the defendant's mental state, the objective element of dishonesty is ascertained by objectively assessing the defendant's mental state within the parameters set by his subjective mental state. If by ordinary standards the defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant would judge himself by a different standard.⁹⁶ There is also no need for the defendant to realise that his conduct was dishonest by the normally accepted standards of honest conduct, nor does he need to be conscious that he is transgressing those standards.⁹⁷ In other words, a defendant cannot escape a finding of dishonesty simply because he himself sees nothing wrong in his behaviour.⁹⁸ The objective standard of dishonesty does not depend upon an inquiry into what all (as distinct from some) normal people regard as dishonest and it is irrelevant that there may be a body of opinion which regards the ordinary standard of honest behaviour as being set too high.⁹⁹

Dishonesty is therefore something of an elephant test, which is to say many practitioners will recognise it when they see it. However, at the outer edges of what many practitioners would ordinarily consider to be dishonest there are interesting questions as to the proper conceptual bounds of dishonest assistance and whether the cause of action may be suffering from a form of 'mission creep'. Is a lawyer or other professional who acts on the instructions of a fiduciary, in cases of doubt as to the existence or scope of dispositive powers or in cases of so called 'judicious' breaches of trust, a dishonest assistant? This is still a developing area of jurisprudence on which serious legal and reputational risk can rest on some very fine and, it could be said, not wholly coherent distinctions.

b. Doubts as to whether a Proposed Application of Trust Property is Authorised

Where a defendant has a doubt as to whether a proposed application of trust property falls outside the powers of the trustees, and the defendant, doubts notwithstanding, assists in

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⁹⁶ *Barlow Clowes International Ltd v Eurotrust International Ltd* (n 93) at [10].

⁹⁷ *ibid*, at [15] and [16].

⁹⁸ *Royal Brunei Airlines Sdn Bhd v Tan* (n 48) at 389E.

⁹⁹ *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314, [2011] 1 Lloyd's Rep FC 102.

the application, which is later established to be a misapplication and so a breach of trust, how does one assess the defendant in terms of dishonesty? Lord Nicholls gave the following answer in *Royal Brunei Airlines Sdn Bhd v Tan*:

The only answer to these questions lies in keeping in mind that honesty is an objective standard. The individual is expected to attain the standard which would be observed by an honest person placed in those circumstances. It is impossible to be more specific. Knox J. captured the flavour of this, in a case in a commercial setting, when he referred to a person who is 'guilty of commercially unacceptable conduct in the particular context involved.' see *Cowan de Groot Properties Ltd v Eagle Trust plc*. Acting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty. An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt, the practicability of the trustee or the third party proceeding otherwise and the seriousness of the adverse consequences to the beneficiaries. The circumstances will dictate which one or more of the possible courses should be taken by an honest person. He might, for instance, flatly decline to become involved. He might ask further questions. He might seek advice, or insist on further advice being obtained. He might advise the trustee of the risks but then proceed with his role in the transaction. He might do many things. Ultimately, in most cases, an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct.

- 12-33** Whether an agent of a trustee who becomes involved in doubtful transactions will be liable as a dishonest assistant under the test set out above will turn on a careful appraisal of the facts in order to ascertain whether the individual has attained the standard expected of an honest person placed in those circumstances or fallen below it.
- 12-34** Consider, for example, a situation in which a trustee is minded to advance the trust fund worth £50,000, subject to the reversionary interests of a class of minors and unborns, to the life tenant under a power of advancement which the trustee believes to be vested in it. After consultation with its lawyers the trustee is advised that there is no better than a 50 per cent chance that the power can validly be exercised in the way proposed and that the only means of resolving the matter would be to launch either an application to court for construction of the power, or by way of approval of an arrangement under Article 47 of the Trusts (Jersey) Law 1984. The costs of either application could easily reach £30,000. The trustee informs his lawyers that it does not wish to expend that amount of cost on lawyers at the expense of the fund and the advancement will be made on the basis that the life tenant, who is in good financial standing, will give an indemnity to the trustees secured on his controlling holding in a valuable private company. In light of the factual circumstances, it is the authors' view that that the lawyers would not be acting dishonestly in complying with the trustee's instructions to draft the documents needed to effect the advancement.
- 12-35** One does not have to change the facts radically to lean towards a different conclusion on the lawyers' liability. Suppose that the trust fund is £6 million rather than £50,000. Suppose the life tenant is in straitened financial circumstances and (the trustee suspects) owes a significant sum to his sister. Suppose the trustee's power of advancement requires the consent of the protector (the sister of the life tenant) which, if established, could vitiate the exercise of the power of advancement as being subject to a conflict of interest.

If the lawyers are instructed to prepare the necessary documents having given the same advice (plus advice on the likely conflict of interest in the exercise of the power) which is rejected by the trustee, then having regard to (1) the apparent absence of any plausible reason why the trustee, if acting in good faith, would wish to proceed contrary to advice; (2) the unanswered suspicion as to an improper purpose; (3) the fact that the fund could easily absorb the cost of a court application; and (4) the clear prejudice to the minors' reversionary interest then we consider that the lawyers, if they complied with the trustee's instructions, would be at risk of being held liable for dishonest assistance.

The most appropriate course in these circumstances would be for the lawyers to withdraw, which may be simpler than it sounds if there is trust money in the client account. If the trustee instructs the lawyers to remit the money to it so that it could implement the proposed advancement itself it would not be safe for the solicitors simply to comply with the instruction who could be at risk of inconsistent dealing.¹⁰⁰ The better course would be for lawyers to apply to the Court for directions.

c. Assistance in Improper or Unauthorised Investments or Similar Transactions

There is an important distinction between a trustee misusing its powers and a trustee acting in excess of power. A trustee may misuse its power by making an investment or entering into any transaction falling within its powers but which is imprudent and not in the interests of the trust. If the application of trust funds results in a challenge to the exercise of the power of investment on the basis of imprudence, that is usually insufficient to expose an assistant in that investment to liability for dishonest assistance.¹⁰¹

However, if the challenge to the exercise of the investment power or other transaction goes beyond mere imprudence, then the defendant who consciously assists in it is exposed to risk of a claim for dishonest assistance:

All investment involves risk. Imprudence is not dishonesty, although imprudence may be carried recklessly to lengths which call into question the honesty of the person making the decision. This is especially so if the transaction serves another purpose in which that person has an interest of his own.¹⁰²

The position is different where the investment or other transaction is clearly known by both the trustees and the assistant to be in excess of the trustee's powers. On this matter Lord Nicholls made the following observations:

This type of risk is to be sharply distinguished from the case where a trustee, with or without the benefit of advice, is aware that a particular investment or application of trust property is outside his powers but nevertheless he decides to proceed in the belief or hope that this will be beneficial to the beneficiaries or, at least, not prejudicial to them. He takes a risk that a clearly unauthorised transaction will not cause loss. A risk of this nature is for the account of those who take it. If the

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risk materialises and causes loss, those who knowingly took the risk will be accountable accordingly. This is the type of risk being addressed by Peter Gibson J. in the Baden case, when he accepted that fraud includes 'taking a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take'.¹⁰³

- 12-41** Two points are made. First, if a trustee enters into a transaction which is beyond his powers and causes loss, he is liable even though he believes or hopes that the transaction is beneficial to the beneficiaries or at least not prejudicial to them. That is because the trustee's liability is strict and good motive is not a defence. Not all deliberate breaches of trust are dishonest. There is an important distinction between deliberate breaches of trust, commonly called judicious breaches of trust, which are believed to be in the interests of the beneficiaries and breaches of trust committed with an appreciation of a risk that is prejudicial to the beneficiaries (or with reckless indifference whether they are prejudiced or not) and which is known to be a risk of which there is no right to take. Such a distinction is sometimes seen in the context of discussion of trustee exemption clauses¹⁰⁴ and, in the interest of consistency, the same distinction can and should be made in the context of dishonest assistance. It would seem to us to be a harsh result if third party assistants were made liable for consciously assisting in judicious breaches of trust, and since the test for the defendant's liability is dishonesty rather than knowledge, there is no good reason why in this kind of case the third party, as distinct from the trustee, should be made liable.

d. Assistance in Distributions to Beneficiaries Who Are Not Entitled

- 12-42** Usually there will not be a difficulty in determining the liability of a third party for dishonest assistance in connection with wrongful distributions to beneficiaries. If the defendant is unaware that the beneficiary is not entitled nor that there is at least a doubt, he lacks the knowledge upon which he can be held to be objectively dishonest, and so he escapes liability as a dishonest assistant, even if he may be grossly negligent.
- 12-43** We have already discussed the applicable principles where there is a doubt as to the beneficiary's entitlement.¹⁰⁵ If the defendant is aware that the distribution is unauthorised, even if the trustee is not, then he must surely be liable as a dishonest assistant, in the same way as if a trustee assists in a distribution to a person who is known not to be a beneficiary. Thus if a lawyer drafts documents to affect a wrongful distribution of capital to a life tenant who, as he is aware, has no interest in capital, he could be liable for dishonest assistance.
- 12-44** One stage removed from a situation where the assistant has doubt as to whether the trustee's dispositive powers are being exercised within their scope is a situation in which there is

¹⁰³ *ibid*, at 390A–B, per Lord Nicholls. See *Wakelin v Read* [2000] PLR 319 in which the director of a corporate trustee of a company's pension scheme, who was also the chief executive of the company, which was in financial difficulties and needed money urgently to pay a dividend, arranged for the trustee of the pension scheme to buy land from the company at what was, for a forced sale by the company, at an inflated price, oblivious to the conflict of interest and with more than a touch of Nelsonian blindness, was held liable for dishonest assistance.

¹⁰⁴ See *Armitage v Nurse* [1998] Ch 241 at 251B–D and 252G, CA; *Walker v Stones* [2001] QB 902 at 936–41, CA, where it was accepted that judicious breaches of trust were not dishonest, though a solicitor-trustee's belief that he was acting in the interests of the beneficiaries, though actually held, was characterised as dishonest if the belief was so unreasonable that, by an objective standard, no reasonable solicitor-trustee could have thought that what he did or agreed to do was for the benefit of the beneficiaries.

¹⁰⁵ See above.

a beneficiary presumptively entitled to capital at a set date in the future, but whose interest is contingent on an event which is so likely to occur as to make it a virtual certainty, or is liable to have that presumptive interest defeated by an event which is so unlikely to occur as to make it a very remote possibility. If the defendant is aware that the beneficiary's interest is contingent and has advised the trustee of this but is instructed by the trustee to prepare the documents necessary to give effect to a distribution which the trustee does not otherwise have power to make, on the expectation that nothing can possibly go wrong so as to engage the contingency, does that make the lawyer a dishonest assistant if having executed the documents, the contingency unexpectedly occurs?

The answer, it seems, depends upon whether the probability of the beneficiary becoming absolutely or indefeasibly entitled at the date of distribution is not sufficiently great to justify the distribution under principles which we have previously considered. The trustee might be prepared to take the risks involved, protecting itself by indemnities, in the knowledge that if the unexpected happens it will be liable.

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This is not a scenario that has ever been tested before the Royal Court. In our view, it would be harsh if lawyers or others who assisted the trustees, after giving due warning of the risks involved in giving effect to the distribution, were made liable for dishonest assistance. We consider that this is a case where the test of unacceptable conduct in the particular context involved should be applied to determine whether the objective element in the test of dishonesty is satisfied. It must also be established that the defendant knew that his conduct was unacceptable. It must be said that the authors regard the position as less clear-cut than in a case of a judicious breach of trust because it is undoubtedly the case that the distribution is, and is known by the defendant to be, prejudicial to the interest of the beneficiary who becomes entitled if the unexpected contingency occurs.

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e. Ignorance of the Law—Relevance to Dishonesty

Neither *Royal Brunei Airlines v Tan* nor the Jersey authorities that have followed that decision address the effect of the rule of public policy (which applies also in Jersey) that ignorance of the law is no defence to establishing a defendant's dishonesty. There is a distinction between two categories of ignorance. The first kind of ignorance is where the defendant is unaware that a proposed application of trust money is unauthorised. For example the defendant has misread the trust instrument, perhaps negligently, perhaps not, and considers that the terms of the trust authorises the proposed distribution, though on its true construction it does not. It is our view that a lawyer could not be liable as a dishonest assistant where there has been an honest muddle, simply because of his ignorance of the legal effect of the document.¹⁰⁶ However, if the misapplication of the trust funds arises from having deliberately shut his eyes to the legal effect of the document and acting in clear disregard of its terms without making inquiries which he knows that an honest person would make, then the requirement of dishonesty is satisfied.¹⁰⁷

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¹⁰⁶ Such an 'honest muddle' may found an action, vested in the trustee in negligence.

¹⁰⁷ *Nolan v Minerva Trust & Others* (n 45); *Twinsectra Ltd v Yardley* [2002] UKHL 12 esp at [21] and [22].

- 12-48** The second kind of ignorance is where the defendant is fully aware that the proposed distribution is unauthorised, but is so ignorant of trust law that he does not appreciate the seriousness of the breach of trust involved, and thinks that there is nothing wrong in the distribution taking place. Ignorance of this second kind does not absolve the defendant from a finding of dishonesty. As was said by Lord Hoffmann in *Twinsectra Ltd v Yardley*:¹⁵⁷

I do not suggest that one cannot be dishonest without a full appreciation of the legal analysis of the transaction. A person may dishonestly assist in the commission of a breach of trust without any idea of what a trust means. The necessary dishonest state of mind may be found to exist simply on the fact that he knew perfectly well that he was helping to pay away money to which the recipient was not entitled.

f. Ignorance of the Trust—Relevance to Dishonesty

- 12-49** In principle, a defendant cannot be held liable as a dishonest assistant if he is ignorant of the trust since there is no basis upon which he could have been held to be dishonest. If, for example, someone is the legal owner of property and instructs a lawyer to act in the sale of that property and the remission of the proceeds of sale to an account in the name of the legal owner abroad, there is nothing that appears from the face of the transaction which is improper, and though the solicitor may be negligent in failing to appreciate that the legal owner in fact holds the land on trust, he is not dishonest and not liable for dishonest assistance. However, where the defendant is aware that he is involved in effectively laundering money or shuts his eyes to that obvious fact and allows his services to be used then there is no need to prove that the money launderer had knowledge of the trust, and it is no defence for him to say that he thought that the scheme in which he was involved was 'only' a breach of exchange control or 'only' a case of tax evasion. A man who consciously assists others by making arrangements which he knows are calculated to conceal what is happening from a third party, takes the risk that they are part of a fraud practised on the third party.¹⁰⁸ If it is not plain to the defendant that he is involved in money laundering, then it needs to be shown that the defendant had knowledge of the trust so that dishonesty can be established against him.¹⁰⁹

g. Pleading Dishonesty

- 12-50** An allegation of dishonesty must be clearly pleaded in the Order of Justice.¹¹⁰ This involves setting out concisely the facts upon which the allegation of the subjective element of dishonesty is founded, and also the facts upon which reliance is placed as demonstrating that the objective element is satisfied, at any rate unless it is manifest that if the facts supporting

¹⁰⁸ *Nolan v Minerva Trust & Others* (n 45); *Agip (Africa) Ltd v Jackson* (n 83) at 295A–B; *Barlow Clowes International Ltd v Eurotrust International Ltd* (n 94) at [28]; *Ultraframe (UK) Ltd v Fielding* (n 82) at [1500]–[1506]; *Al Khudairi v Abbey Brokers Ltd* [2010] EWHC 1486 (Ch) at [135].

¹⁰⁹ *Heinl v Jyske Bank (Gibraltar) Ltd* [1999] Lloyd's Rep Bank 511; *Ultraframe (UK) Ltd v Fielding* (n 82) at [1507].

¹¹⁰ *Cunningham v Cunningham* (n 66) at [37]–[47] endorsing *Three Rivers District Council v Bank of England* [2003] 2 AC 1 at [184] and [186].

the subjective element are proved, then the objective element would be satisfied too.¹¹¹ An advocate must not draft any pleading, affidavit, notice of appeal or other document containing an allegation of dishonesty unless he has clear instructions to make such allegation and has before him reasonably credible material which as it stands establishes a *prima facie* case of dishonesty.¹¹²

h. Proving Dishonesty

The Jersey and English authorities on proof of knowledge in the context of claims for knowing receipt¹¹³ are also of application in relation to proof of dishonesty, albeit that the Court is less likely to draw an inference of dishonesty than of knowledge, and where the issue is one of dishonesty, the burden of proof is a heavy one.¹¹⁴ It is not open to the Court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved.¹¹⁵ In discharging that burden, the Court is not looking for a higher degree of probability. It is only that the more inherently improbable the act in question, the more compelling will be the evidence needed to satisfy the Court on a preponderance of probability.¹¹⁶ In the absence of some financial or other incentive, a charge of dishonesty against professional persons is possible but inherently improbable.¹¹⁷ When assessing the probabilities the Court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the Court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence.¹¹⁸ If the facts proved by the plaintiff as to the proper inferences to be drawn from the defendant's conduct are such as to shift the evidential burden to him, it will not be safe for the defendant to call no evidence, since the Court may infer dishonesty even though the defendant might have been able to provide a credible explanation of his conduct had he elected to call evidence.¹¹⁹

Where the defendant is a financial services business regulated by the Jersey Financial Services Commission (JFSC), how can dishonesty be proven? Helpfully, the JFSC has issued Codes of Practice for the purpose of establishing sound principles for the conduct of financial services business under the Financial Service (Jersey) Law 1998.¹²⁰ In addition, the JFSC has

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¹¹¹ See paras on doubt, judicious breaches of trust etc as to examples of cases where it is not manifest that the objective test is satisfied.

¹¹² Para 704 of the Code of Conduct of the English Bar; approach approved in *Nolan & Ors v Minerva Trust Company Limited and Ors* (n 45) at [510].

¹¹³ See Ch 9 as to proof of knowledge for knowing receipt claims.

¹¹⁴ *Heinl v Jyske Bank (Gibraltar) Ltd* (n 109).

¹¹⁵ *Three Rivers District Council v Bank of England* (n 110) at 292A–B.

¹¹⁶ *Aktieselskabet Dansk Skibsfinansiering v Brothers* [2001] 2 BCLC 324, Lord Hoffmann observed (at 329g–h, affirmed in *Nolan v Minerva Trust* (n 45) at [188]).

¹¹⁷ *Three Rivers* (n 111), per Lord Millett at [291D], affirmed in *Nolan v Minerva Trust* (n 45) at [188].

¹¹⁸ *Re H (Minors)* [1996] AC 563, per Lord Nicholls, at 586E, affirmed in *Nolan v Minerva Trust* (n 45) at [188].

¹¹⁹ *Agip (Africa) Ltd v Jackson* (n 83) at 293–94; *Ultraframe (UK) Ltd v Fielding* (n 82) at [1508].

¹²⁰ For these purposes the five Codes of Practice most likely to be relevant are in respect of Trust Company Business, Fund Services Businesses, Deposit Taking Businesses, Investment Businesses and Money Service Business with each of these types of business defined in Art 2.

issued four 'Handbooks' under Article 22 of the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008 for the purpose of establishing sound principles for compliance with that legislation and Jersey's anti-money laundering and counter-terrorism legislation.¹²¹ These Codes/Handbooks set out the standards expected of regulated service providers to which they apply and provide a benchmark by which they can be and are judged by the Commission. Whilst Article 19(3) of the Financial Service (Jersey) Law 1998 and Article 22(4) of the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008 provide, respectively, that failure to follow the Codes/Handbooks shall not of itself render any person liable to proceedings of any kind or invalidate any transaction, Articles 19(4) and 22(4) respectively provide that, subject to a condition of registration indicating that any part or parts of the Codes/Handbooks are to be wholly or partly disregarded by a registered person, the Codes/Handbooks shall be admissible in evidence if it appears to the Court, conducting the proceedings, to be relevant to any questions arising in the proceedings and shall be taken into account in determining any such questions. While a failure to follow the Codes/Handbooks will not inevitably mean there has been dishonesty, in many cases the relevant issue for the Court will be what would an honest person, acting on behalf of the defendant financial services business, have done? Where that is the issue, the standard of honesty is inevitably likely to be judged against the appropriate Code/Handbook.

B. Measure of Liability

- 12-53** A dishonest assistant is in no better position as regards the measure of liability than the trustee whose breach of trust he is dishonestly assisting. Therefore an express trustee's liability to restore trust assets by reference to their value at the date of proceedings and without deduction for fiscal liabilities will apply equally to a constructive trustee.¹²² Under Article 30(2) of the Trusts (Jersey) Law 1984, a plaintiff could recover any profit which it would have made if the breach of trust had not occurred and not merely any profits which the defendants had in fact made.¹²³ The quantum of the dishonest assistant's liability may be greater than that against the trustee, in that if the defendant has been dishonest but the trustee has not, the Court may award compound interest against the defendant but not against the trustee.¹²⁴ In a case where the trustee has committed a series of breaches some only of which have been assisted by the defendant, the defendant's liability is limited to the loss caused by those of the breaches which he has assisted.¹²⁵ Subject to the issue of interest, the liability of the assistant is for such loss as the trustee would be liable for, and it is not necessary to show that the assistance itself is causative of loss.¹²⁶

¹²¹ There is one handbook each for Regulated Financial Services Businesses, the Accountancy Sector, the Legal Sector and for Estate Agents and High Value Dealers.

¹²² *Nolan v Minerva Trust* at [512]–[517]; *United Capital Corp Ltd v Bender* [2006] JLR N [7]—Defendants found to be constructive trustees, on the basis of dishonest assistance are liable to account to the plaintiff as if they were conventional trustees; *Paragon Fin plc v. D.B. Thakerar & Co* [1999] 1 All ER 400, dicta of Millett LJ applied). See also *Re Bell's Indenture* [1980] 1 WLR 1217 at 1231–37, esp 1236.

¹²³ *United Capital Corp Ltd v Bender* (n 122).

¹²⁴ *ibid.* The Court had a general equitable jurisdiction to award compound interest whenever money was misused by someone in a fiduciary position; referring to *Wallersteiner v Moir (No 2)* [1975] QB 373.

¹²⁵ *Grupo Torras SA v Al Sabah* [1999] CLC 1469, AT 1666. But note the potentially expansive definition of assistance in para 12-25 above.

¹²⁶ *Madoff Securities International Ltd v Raven* (n 77) at [340].

i. Protection of Agent by Application to the Court

A lawyer or other agent will find himself in a difficult position if he holds money in trust for his principal and then gains knowledge that the money is or might be the proceeds of a fraud by his principal. If he pays the money over to his principal, or to a third party at his direction, it might be alleged against him that his parting with the money after gaining knowledge of the alleged fraud exposes him to liability either for dishonest assistance, or perhaps under the principle in *Guardian Trust*.¹²⁷ If he refuses to pay the money over to his principal, or on his directions to a third party, or if he alerts the victims of the alleged fraud to the possibility of a claim against his principal, then he is or may be liable for breach of duty to his principal if the fraud claims prove to be ill-founded. Holding money that is or is suspected to be the proceeds of fraud is very likely to require an agent to make a Suspicious Activity Report to the Jersey Financial Crimes Unit under the Proceeds of Crime (Jersey) Law 1999 and, if so, the agent will be bound by the anti-tipping off provisions so as to prevent him communicating with his principal.¹²⁸ The Court is likely to be sympathetic to an agent in this position, who may apply to the Court, with leave, for directions under Article 51(2)(a)(i)¹²⁹ of the Trusts (Jersey) Law 1984 both as to what information, if any, he should give to the trustees, notwithstanding his duties of confidentiality to his client, and as to whether the whole or any part of the property concerned should be released to his client.

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ii. Vicarious Liability of Partners

The English law on the vicarious liability of partners was settled by the House of Lords in *Dubai Aluminium Co Ltd v Salaam*.¹³⁰ Jersey has no statutory equivalent of the Partnership Act 1890 but under customary law principles it is very likely that a firm will be liable (and so individual partners are liable) for dishonest assistance by an individual partner provided he is acting in the ordinary course of the business of the firm or with the authority of his co-partners. For these purposes, the partner guilty of dishonest assistance will be acting in the ordinary course of the business of the firm where the acts sufficient to impose liability on him are so closely connected with acts that he is authorised to perform that he can fairly and properly be regarded as acting in the ordinary course of the business of the firm, as where he, for example, drafts documents such as an instrument of appointment necessary to effect a fraudulent conspiracy to misappropriate trust money.

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C. Defences

Whether a claim for dishonest assistance falls to be defeated by the defence of prescription is discussed in Chapter 16. Other than prescription the only other defences generally avail-

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¹²⁷ [1942] AC 115.

¹²⁸ See Ch 14.

¹²⁹ An order concerning the execution or the administration of any trust; the closest Jersey equivalent of an application under the Civil Procedure Rules 1998, pt 64, r 64.2(a).

¹³⁰ [2002] UKHL 48, applying *Lister v Hesley Hall Ltd* [2001] UKHL 22.

able to a defendant are concurrence, acquiescence or release. Contributory negligence is not a defence to a claim in dishonest assistance and a defence that pleads that the plaintiff had the opportunity to discover the fraud of which complaint is made and failed to take it is liable to be struck out.¹³¹ Only where the plaintiff is the author of his own misfortune will a defence be available. So if a plaintiff discovers the fraud but takes no action to prevent further loss from arising, his inactivity may bar his claim for relief against a wrongdoer in respect of subsequent losses.¹³²

i. The Illegality Defence and the Attribution of Wrongdoing as a Defence

- 12-57 Where a company is the victim of unlawful or fraudulent conduct by its directors, a third party who has dishonestly assisted in the directors' breach of duty will not be able to defend themselves from a claim by the company on the ground that the director's wrongdoing should be attributed to the company so as to bar a claim by the company under the *ex turpi causa* principle.¹³³

ii. Contribution

- 12-58 Unlike in English law,¹³⁴ a defendant to a Jersey action who is held liable for dishonest assistance, or who enters into a bona fide settlement or compromise of such a claim, may not, it seems, seek a contribution from any other person (such as the trustee and any other person held liable as a dishonest assistant) under Article 3(1)(c) of the Law Reform (Miscellaneous Provisions) (Jersey) Law 1960.¹³⁵ That is because Jersey's legislation governing the law on contributions between defendants is drafted in much narrower terms than its modern UK equivalent. The right of a defendant to seek a contribution in Jersey is confined only to contributions for 'damage [that] is suffered by any person as a result of a tort'.¹³⁶ The issue is whether an action for dishonest assistance can be described as a tort. A tort has been defined by in the following terms:

Tortious liability arises from the breach of a duty primarily fixed by the law; such duty is towards persons generally and its breach is redressible by an action for unliquidated damages.¹³⁷

- 12-59 If no contribution claim is possible, consideration needs to be given to whether the Court may join third parties to the proceedings by another means. Rule 6/10(l)(b) RCR 2004 provides that the Court may grant a defendant to an action leave to bring a third party claim if the defendant claims against such a person any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or

¹³¹ *Corporación Nacional del Cobre de Chile v Sogemini Metals Ltd* [1997] 1 WLR 1396.

¹³² *Lipkin Gorman v Karpnale Ltd* [1987] 1 WLR 987 at 1019.

¹³³ *Bilta (UK) Ltd v Nazir* [2013] EWCA Civ 968, [2014] Ch 52 at [15]; *Madoff Securities International Ltd v Raven* (n 77) at [307] *et seq*; *Goldtrail Travel Ltd v Aydin* (n 57) at [120] *et seq*.

¹³⁴ See Civil Liability (Contribution) Act 1978, s 1.

¹³⁵ This legislation replicates, in material terms, s 6 of the Law Reform (Married Women and Tortfeasors) Act 1935 (now repealed and replaced by the Civil Liability (Contribution) Act 1978).

¹³⁶ *Jersey Electricity Company v Brocken & Fitzpatrick Limited and Anor* [2004] JRC132; cf Civil Liability (Contribution) Act 1978, s 6(1).

¹³⁷ PH Winfield, *Province of the Law of Tort* (Cambridge, The University Press, 1931), cited in *Clerk & Lindsell on Torts*, 20th edn (London, Sweet and Maxwell, 2010) at 1-03, fn3.

remedy claimed by the plaintiff. RCR 6/10(l)(b) requires two things: first, that the defendant has a claim for a relief or remedy against the third party which is related to the subject-matter of the action for dishonest assistance, and second, that such relief or remedy be substantially the same as that sought by plaintiff against the dishonest assistant. Whilst it is true that the party with primary liability on the one hand, and the dishonest assistant on the other, are jointly and severally liable to the plaintiff in respect of a breach of the trust, (such that the second limb of the rule may arguably be fulfilled) no *lis* is easily discernible as between the dishonest assistants and the fiduciary who has breached their duties. The fiduciary whom is said to have breached their duties will owe duties to the plaintiff but owes no any actionable duty to the dishonest assistant. It is also questionable whether the determination of a dishonest assistance claim requires that the primary wrongdoers to be joined as parties before the Court so as provide the Court with a basis to order joinder under rule 6/10(l)(c) RCR 2004.

iii. Prescription

The Royal Court's in *Nolan v Minerva Trust* considered the most appropriate prescription period for a claim in dishonest assistance to be analogous to that applicable to the economic torts of deceit and procurement of a breach of a contract, ie three years. It did so on the basis firstly that a dishonest assistant is a type-two constructive trustee and therefore not within the indefinite limitation period for actions under Article 57(1) of the Trusts (Jersey) Law 1984. Secondly, that other jurisdictions had concluded that a dishonest assistance claim was so close to that of accessory liability in the context of economic torts that it would have been perverse to attempt to characterise dishonest assistance by mechanically applying the canons of Jersey customary law, instead of reaching for the clear analogy which is available in other jurisdictions.¹³⁸ However, the Court was clear that in applying the dicta in *Esteem*¹³⁹ of seeking to establish 'some other period is, by analogy, clearly more applicable' as a matter of Jersey law, what has to be analogous is the period, not the cause of action.

It does not appear to have been argued in *Nolan v Minerva Trust* that the analogous limitation period for dishonest assistance (both in terms of the period and the substance of the cause of action) could be three years as 'an action [by a beneficiary] founded on breach of trust' as per the formulation used in Article 57(2) of the Trusts (Jersey) Law 1984. We therefore do not regard the Royal Court as holding that dishonest assistance is an economic tort, thereby capable of giving rise to a defendant's right to seek a contribution under the 1960 Law, but merely that for the purpose of prescription only, dishonest assistance is to be regarded as analogous to an economic tort.¹⁴⁰

While what the beneficiary must prove against a dishonest assistant might loosely be termed 'wrongdoing', the nature of the remedy against a dishonest assistant has a different foundation from the remedy against a defendant liable for deceit or the procurement of a breach

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¹³⁸ *Cattley v Pollard* [2007] Ch 353 at [92]; *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, per Lord Nicholls at 387 and *Peconic Ind Dev Ltd v Lau Kwok Fai* (2009) 11 ITEL 844.

¹³⁹ [2002 JLR 53] at [257].

¹⁴⁰ *Nolan v. Minerva Trust & Others* (n 45) at [482]–[501]; see *Cattley v Pollard* (n 138) at [92]; *Royal Brunei Airlines v Tan* (n 48) at 387.

of contract. The wrongdoing of a dishonest assistant is not the same as the wrongdoing of the trustee or fiduciary. While the recovery of damages for an economic tort will be limited by the principles of remoteness of damage so as to prevent a plaintiff recovering more than that which is the reasonably foreseeable, natural and probable consequences of the tort, a dishonest assistant's liability is derived from and replicates the liability of the primary wrongdoer, the trustee,¹⁴¹ who is not usually able to take advantage of the principles of remoteness to limit the amount of compensation needed to reconstitute the fund when trust property has been misapplied.¹⁴²

IV. The Liability of a Director of a Corporate Trustee—‘Dog-Leg’ Claims

- 12-63** The office of trustee in Jersey is routinely being occupied by a corporate body, rather than an individual. While adding an additional layer of complexity to the structuring of Jersey trusts,¹⁴³ the use of corporate rather than individual trustees has a profound impact on the balance of economic risk in the provision of professional trustee services. Not only does the use of a corporation entail limited liability for the shareholder(s) and directors of the corporate trustee in the event that the corporate trustee is subject to a hostile claim by beneficiaries or a third party but the widespread use of, what are effectively, shell-companies as Private Trust Companies (PTCs)¹⁴⁴ means that while a PTC may legally be the entity that bears most, if not all, of the legal liability for its actions (or omissions) as trustee, it can often be very low on the list of prospective solvent defendants able to satisfy a judgment. Where a breach of trust gives rise to a recoverable loss, who can be made to pay?
- 12-64** From its enactment until 1 January 2007 the Trusts (Jersey Law) 1984 contained the following provision:

56 Liability of directors of a corporate trustee¹⁴⁵

- (1) This Article applies to a corporate trustee which, being constituted or operated for the purpose of acting as a trustee (whether or not it is also constituted or operated for other purposes)—
- (a) is a trustee of a Jersey trust; or
 - (b) is resident in Jersey; or
 - (c) is carrying on business in Jersey or from an address in Jersey.
- (2) Where a breach of trust has been committed by a corporate trustee to which this Article applies, every person who at the time of the commission of the breach of trust was a director of such corporate trustee shall be deemed to be a guarantor of such corporate trustee in respect of any

¹⁴¹ *Grupo Torras SA v Al-Sabah* (n 125).

¹⁴² *In re Dawson* [1966] 2 NSW 211, affirmed by Lord Brown Wilkinson in *Target Holdings Ltd v Redferrs* [1996] AC 421 at 434 and again recently in *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58.

¹⁴³ By requiring an answer as to what to do with the shares of the corporate trustee, which are often vested in trustees of purpose trusts, see the definition of ‘purpose’ in Art 1(1).

¹⁴⁴ See Financial Services (Trust Company Business (Exemptions)) (Jersey) Order 2000) and Ch 11 n 31.

¹⁴⁵ Repealed by Trusts (Amendment No 4) (Jersey) Law 2006, Art 16.

pecuniary damages and costs awarded by the court against such corporate trustee in respect of such breach:

Provided always that the Court may relieve a director either wholly or partly from personal liability as a guarantor of such corporate trustee where it appears to the Court that he ought fairly to be excused from such liability, because—

- (a) he has proved that he was not aware of such breach of trust being contemplated or committed, and in being not so aware, was not behaving in a reckless or negligent manner; or
- (b) he expressly objected, and exercised such rights as he had by way of voting power or otherwise as a shareholder, director or other officer of the company so as to try to prevent the commission of such breach of trust.

(3) For the purposes of paragraph (2)—

- (a) ‘director’ includes a person occupying the position of director by whatever name called, a person in accordance with whose directions or instructions the directors of the corporation or of a corporation of which it is a subsidiary (or any of them) are accustomed to act, and a person who either alone or with or through an associate is entitled to exercise or control the exercise of one third or more of the voting power at a general meeting of the corporation or of a corporation of which it is a subsidiary;
- (b) ‘subsidiary’ means a corporation in respect of which another corporation is entitled to exercise or can control the exercise of one third or more of the voting power;
- (c) where used in this paragraph ‘associate’ in relation to a person means any relative, partner or other person who is, has been or may be influenced by that person.

Those familiar with the position under English law will know that no equivalent provision has ever existed. Despite its repeal from 1 January 2007, because of the way Article 57 of the Trusts (Jersey) Law is structured, Article 56 still has the potential to visit liability on the directors of a corporate trustee until 1 January 2028 (in a case of a non-fraudulent breach of trust not falling with Article 57(1)) and potentially longer in cases of breaches of trust falling within Article 57(1) which are by their nature imprescriptible.

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A. General Position

Following the repeal of Article 56, the current position as to the incidence of liability of a corporate trustee is as follows. If a corporate trustee commits a breach of trust, then the corporate trustee is liable to the beneficiaries unless it has some defence against them. Having satisfied that liability to the beneficiaries, the company may have a claim either itself,¹⁴⁶ or in some circumstances its shareholders,¹⁴⁷ and, if the company is *en désastre*, the Viscount may claim on the company’s behalf,¹⁴⁸ against directors who are in breach of

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¹⁴⁶ *Foss v Harbottle* (1843) 2 Hare 451.

¹⁴⁷ By way of a derivative action under the rule in *Wallersteiner v Moir* (No 2) (n 124), see *Gamlestaden Fastigheter AB v Boleat* 1998 JLR N-6.

¹⁴⁸ The Bankruptcy (Désastre) (Jersey) Law 1990, Art 26 confers a power on the Viscount to bring or institute any action or other legal proceedings relating to the property of the debtor company. ‘Property’ is defined extremely broadly to include cause of action.

their duties to the company.¹⁴⁹ The corporate trustee (or any of those able to act it its place aforementioned) may make a claim against third parties who dishonestly assist the directors in the breach of their fiduciary duties to the company, where those who bring the claim in the name of the company are not themselves parties to fraud.¹⁵⁰ Where the company is solvent the company will, but the beneficiaries will not, be concerned as to whether there is a remedy against the directors; the beneficiaries' remedy against the corporate trustee will usually be adequate.¹⁵¹ However, where the company has insufficient assets to meet the beneficiaries' claim the beneficiaries will not have an effective claim against the corporate trustee, and will have to consider whether they might have a claim against the directors who caused the company to commit the breach of trust to meet any shortfall. This problem most commonly arises with PTCs, specifically created for the sole purposes of acting as a trustee of a single trust, the PTC itself having few, if any significant assets.¹⁵²

B. Claim by Beneficiaries against Directors

- 12-67** The reason that beneficiaries cannot found a claim against the directors of a corporate trustee for a breach of fiduciary duty by the directors to the beneficiaries is because no such duty exists in law.¹⁵³ Nor, in the absence of 'special circumstances', does such a direct duty of care exist in tort¹⁵⁴ or on the basis of piercing the corporate veil unless such grounds exist for doing so.¹⁵⁵ As has been said above, the beneficiaries may sue the directors of a corporate trustee who act dishonestly in causing the corporate trustee to commit or otherwise assist the company to commit a breach of trust, but this is not a 'dog-leg' claim.¹⁵⁶

C. A 'Dog-leg' Action

- 12-68** Taking its name from what we understand to be a golfing term involving negotiating an approach down a crooked fairway, the 'dog-leg' action is based on the cause of action that a corporate trustee may have against its directors for breach of their fiduciary duties to the

¹⁴⁹ *Vilsmeier v AI Airports International Limited and PI Power International Limited* [2014] JRC 257; Companies (Jersey) Law 1991, Art 74.

¹⁵⁰ *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316.

¹⁵¹ Subject to insurance and whether it is a PTC.

¹⁵² In *HR v JAPT* [1997] PLR 99, the company had gross assets of 30p.

¹⁵³ *Alhamrani v Alhamrani* [2007] JRC 027; [2007] JLR 44].

¹⁵⁴ *HR v JAPT* (n 152) at 111–14.

¹⁵⁵ *ibid*, at 119–20. The law on piercing the corporate veil has been recently restated in *Petrodel Resources Ltd v Prest* [2013] UKSC 34.

¹⁵⁶ *Royal Brunei Airlines Sdn Bhd v Tan* (n 48); *Australian Securities Commission v AS Nominees Ltd* [1996] PLR 297 at 312–13, Aus FC; *HR v JAPT* (n 152) at 114–16; *Wakelin v Read* (n 103). Before the decision in the *Brunei Airlines* case, there was a difficulty in establishing liability in view of the previous requirement that the breach of trust by the trustee must be a fraudulent and dishonest design, see §§ 40-017 to 40-023. Although the problem might perhaps have been overcome by imputing the directors' knowledge and hence dishonesty to the company under the principles mentioned in § 42-066, the problem was in fact overcome by treating a fraudulent and dishonest design by the directors as being sufficient, see *Baden v Société Général pour Favoriser le Développement du Commerce et de l'Industrie en France SA* (n 53) at 573–74; *Nimmo v Westpac Banking Corporation* [1993] 3 NZLR 218 at 237.

company. A dog-leg claim is not in principle confined only to cases of dishonesty by the defaulting directors. A 'dog-leg' claim involves the effective usurpation of the corporate trustee's own claim against its directors by the beneficiaries of a trust, for the benefit of the beneficiaries for whom the company is the corporate trustee. The beneficiaries' claim is thus an indirect one against the directors of the corporate trustee. The argument goes that the claims by the company against the directors are trust assets, which vest in the new trustee when appointed in place of the company, so that the claims might be enforced by the new trustee against the directors, or in the alternative where there has not been a transfer to a new trustee, by the beneficiaries, by way of a derivative action. This argument has been countered and, so far, put to bed in all reported decisions in which it has been raised on the basis that it elides the assets of the company with the assets of the trust. The claims by the company against the directors form part of the assets beneficially owned by the company. They are not held in trust, and so the benefit of any claim against the directors passes to the company's general creditors.¹⁵⁷ This rebuttal of the argument in favour of a dog-leg claim is particularly forceful where, as is common in Jersey, trusteeship is vested in a large corporate trustee which provides professional trust services to a large number of different trusts. However, the rebuttal is not so forceful in the case of a breach of trust committed by a PTC at the behest of its directors, the PTC having been established and administered solely for the purpose of serving as trustee for a single trust and having no assets of its own. In these circumstances, which in Jersey are quite common, special considerations may apply so as to make it arguable that the claims against the directors beneficially belong to the trust, thereby opening the door to an indirect or 'dog-leg' action by the beneficiaries against the directors.¹⁵⁸

D. Negligence Claims by Beneficiaries

If a trustee commits a breach of trust having acted on negligent advice given by the trustee's professional advisers, then an action in contract or tort against the advisers is *prima facie* only available to the trustee.¹⁵⁹ An action may perhaps in special circumstances be brought by a beneficiary claiming through the trustee.¹⁶⁰ As under English law¹⁶¹ in Jersey law there is no general tort of negligence in respect of economic loss. That has the effect of precluding an action in negligence by beneficiaries against persons who assist in a breach of trust. The beneficiary will have no direct action in negligence against the professional advisers unless there has been an assumption of responsibility to the beneficiaries, or special circumstances exist.¹⁶²

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¹⁵⁷ *Alhamrani (Sheikh) v Alhamrani* (n 153); *Gregson v HAE Trustees Ltd* [2008] EWHC 1006 (Ch), [2009] 1 All ER (Comm) 457 at [22]–[69].

¹⁵⁸ *HR v JAPT* (n 152) at 116–19.

¹⁵⁹ *Chvetsov v BNP Paribas Jersey Trust Corp Ltd* [2009] JLR 217].

¹⁶⁰ See derivative claims para 12-73 below.

¹⁶¹ *Murphy v Brentwood District Council* [1991] 1 A.C. 398; and *Ross v Caunters* [1980] Ch. 297; *White v Jones* [1995] 2 AC 207, HL.

¹⁶² See para 12-82 below in relation to reflective loss claims by beneficiaries.

V. Economic Torts¹⁶³

- 12-70** Jersey law recognises the economic tort of conspiracy,¹⁶⁴ and a claim in tort could in theory be run in tandem with a claim based on dishonest assistance in the context of a commercial fraud. However, the facts necessary to properly plead a dishonest assistance claim are not coextensive with those necessary to make out a claim in conspiracy. Those constitutive elements are quite distinct and include i) a combination or agreement between two or more individuals, ii) an intention, which (in cases other than unlawful means conspiracy) must be proven to be the sole or predominant purpose of the combination to injure the plaintiff and iii) the act carried out that caused loss or damage the plaintiff pursuant to the combination or agreement and with the requisite intention. There is no need for a plaintiff to prove either a combination or a sole or predominant intention on the part of the assistant to make out a claim in dishonest assistance. Immediately it can be seen that proof of the mental element necessary to properly make out a claim in conspiracy is far more exacting than applicable to dishonest assistance with the former being concerned with the conspirator's subjective intent which may be sufficient but is not necessary to satisfy the test of dishonesty. An inquiry into and determination of the assistant's subjective view about the honesty of what he was assisting in is not required.¹⁶⁵ The native Jersey jurisprudence on conspiracy is not well developed and there are few reported Jersey decisions. As a cause of action in the context of trust disputes, conspiracy is not routinely used as a remedy for beneficiaries in relation to agreements to commit breaches of trust.
- 12-71** The tort of procuring a breach of contract¹⁶⁶ no doubt has a potential application in a case where a particular transaction creates both a contract and a trust, such as with a Quistclose trust,¹⁶⁷ and the breach of contract which is procured also happens to amount to a breach of trust, and the party to the contract who is prejudiced by the breach also happens to be the beneficiary. However, the tort is not a perfect fit in that in reality it is the inducement of the breach of trust that is being complained about so as to make recourse to the tort unnecessary. The tort is not confined to inducement of a breach of contract, and extends to inducement of breach of other obligations, including equitable obligations. But the tort has been held, in England at least,¹⁶⁸ not to extend to inducement of a breach of trust since the equitable accessory liability, then based on *Barnes v Addy*,¹⁶⁹ made adequate provision of a remedy without needing to extend the tort.
- 12-72** We doubt whether the Royal Court would be prepared to extend the scope of tort to include procurement of a breach of trust/dishonest assistance cases where, as is the case, the modern cause of action of dishonest assistance usually suffices. A further objection to the tort would also be that it might provide a means to visit liability on an accessory while circumventing

¹⁶³ See the discussion in *OBG Ltd v Allan* [2007] UKHL 21.

¹⁶⁴ See *Golder v Peak* 1966 JJ 555; there are very few reported modern authorities on conspiracy.

¹⁶⁵ *Nolan v Minerva Trust Company Ltd* 2014 (2) JLR 117 at paras 178–189.

¹⁶⁶ *Pell Frischmann Engr Ltd v Bow Valley Iran Ltd* [2008] JLR 311.

¹⁶⁷ Although a case in the tort of procurement of a breach of contract was not run in *Nolan v Minerva Trust*.

¹⁶⁸ *Metall und Rohstoff AG v Donaldson Lufkin & Jeannette Inc* [1990] 1 QB 391 at 481F–H, CA (overruled but not on this point: *Lonrho plc v Fayed* [1992] 1 AC 448, HL).

¹⁶⁹ (1874) 9 Ch.App 244.

the requirement to prove dishonesty (which is not a requirement of the tortious liability). However, as we have discussed dishonest assistance has not (yet) been developed to be available where there has been assistance in the breach of a fiduciary relationship which does not relate to property.¹⁷⁰ Were the facts of a case to fall between the two stools of dishonest assistance and a claim in conspiracy, the tort of inducement of a breach of contract might be argued to apply so as to fill that gap in the available remedies.

It seems to us doubtful whether the torts of causing loss by unlawful means¹⁷¹ or intimidation¹⁷² have any ready application to this area of trust disputes litigated in Jersey. That is because the breach of trust which the trustee is intimidating or caused by unlawful means to commit is not something that the trustee is otherwise permitted to do. The facts that could support a claim in tort for causing loss by unlawful means or intimidation could conceivably meet the requirements of dishonest assistance (the assistance being the instigation or inducement of the breach of trust), particularly when considering the objective element of the test for dishonesty and the emphasis, as shown in *Nolan v Minerva Trust*, on the commercially unacceptable nature of a defendant's behaviour.

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VI. Derivative Claims by Beneficiaries

In Jersey law, as in English law, a trustee administers a trust as principal, not as agent for the beneficiaries, and so the trustee is normally the proper plaintiff in proceedings brought on behalf of the trust against agents and other third parties in actions based on breach of contract or tort, and other causes of action arising in the course of administration of the trust. Normally beneficiaries have no personal cause of action¹⁷³ against the agents of the trustees,¹⁷⁴ though sometimes beneficiaries may bring a derivative claim on behalf of the trustee. There is no requirement in the Royal Court Rules 2004 for beneficiaries to be joined as co-plaintiffs (or defendants); the trustee will usually represent the trust.¹⁷⁵ If one or more co-trustees refuses to be joined as a plaintiff, or if there are special reasons for his not being a plaintiff, for example because the trustee is implicated in the loss which is the subject matter of the action, then he should be joined as a defendant.¹⁷⁶

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Jersey's trust law does not have an equivalent of section 40(1) of the Trustee Act 1925, whereby a cause of action automatically vests in new trustees upon compliance with that section. It follows that for a cause of action to vest in new trustees, it must be expressly assigned. The Code of 1771 prohibits the assignment of matters that are already in

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¹⁷⁰ See reference above to scope of dishonest assistance claims.

¹⁷¹ *Clerk & Lindsell on Torts*, 21st edn (London, Sweet & Maxwell, 2014) paras 24-70 *et seq.*

¹⁷² *ibid*, paras 24-57 *et seq.*

¹⁷³ See above; *Chvetsov v BNP Paribas Jersey Trust Corp Ltd* (n 159).

¹⁷⁴ *Royal Brunei Airlines Sdn Bhd v Tan* (n 48) at 391, PC; *Roberts v Gill & Co* [2008] EWCA Civ 803, [2007] All ER (D) 89 (Apr) at [22]–[24] (affd [2010] UKSC 22, [2011] 1 AC 240); *Chvetsov v BNP Paribas Trust Corp Ltd* (n 159) (affd [2009] JCA 220); *Webster v Sandersons Solicitors* [2009] EWCA Civ 830 at [31].

¹⁷⁵ RCR 2004, r 4/5.

¹⁷⁶ *ibid*, r 6/36(b).

litigation.¹⁷⁷ It follows that if, following the commencement of proceedings, there is a change in trustee, there is no mechanism to substitute the new trustee for the old as plaintiff and have the outgoing trustee disjoined from the proceedings.¹⁷⁸ Where there is to be a transfer of trusteeship and litigation on behalf of the trust is contemplated, the transfer of trusteeship should be completed before the proceedings are served.¹⁷⁹

- 12-76** Where the claim is for a breach of duty by a director of a former corporate trustee (ie a ‘dog-leg claim’ the locus of the new trustee to sue the director of the outgoing trustee will turn upon whether the benefit of the cause of action vested in the company against the director constitutes ‘trust property’ vested in the new trustee. This involves ensuring that the outgoing trustee assigns its right to sue the director to the new incoming trustee. We have already discussed the scope of a ‘dog-leg’ claim in Jersey. While such a claim is usually not viable where the breach of duty by the director does not relate to a particular trust, or particular item of trust property,¹⁸⁰ it remains arguable that the cause of action is ‘trust property’ for these purposes where the former corporate trustee was trustee of only one trust, so that the breach of duty can only relates to that trust.¹⁸¹

A. Administration Action by Beneficiaries

- 12-77** If the trustees fail to pursue a claim which is vested in them in that capacity, then a beneficiary may commence an administration action by way of Representation under Article 51 of the Trusts (Jersey) Law 1984 against the trustee for an order compelling it to take proceedings to enforce the claim.¹⁸² If a serious question arises as to whether or not the trustee ought to sue, then the Court will determine the question in accordance with the principles applicable to Beddoe proceedings. If the Court in the administration action is satisfied that the claim ought to be brought, then it may direct the trustees to sue or give liberty to the beneficiary to use the trustee’s name to sue the third party.

B. Derivative Action by Beneficiaries

- 12-78** As an alternative to the usual position whereby proceedings are brought in the name of the trustee, a beneficiary may sometimes bring an action in his name on behalf of the trust against a third party.¹⁸³ The character of an action does not change because it is brought by the beneficiary rather than the trustee. The beneficiary stands in the shoes of the trustees and sues in right of the trust, as the trustee would have done. The beneficiary does not enforce duties owed to him but duties owed to the trustee: as such, a beneficiary can be in

¹⁷⁷ *Barclays Wealth Trustees (Jersey) Limited v Equity Trust (Jersey) Limited* [2013] JRC094.

¹⁷⁸ RCR 2004, R 6/36(a) ceasing to be a proper or necessary party.

¹⁷⁹ *In The Matter of the Valetta Trust* 2011] JRC227 at [34(v)].

¹⁸⁰ *Young v Murphy* [1996] 1 V. 279 at 300–03.

¹⁸¹ *HR v JAPT* (n 153) at [69]–[80] but cf *Gregson v HAE Trustees Ltd* (n 158), where certain of the reasoning in support of the decision in *HP v JAPT* was questioned at [65]–[68].

¹⁸² See Ch 3.

¹⁸³ See *Roberts v Gill & Co* (n 174).

no better position than the trustee.¹⁸⁴ The Court has an inherent jurisdiction to grant the equivalent Beddoe style protective cost order in favour of a beneficiary who undertakes a derivative action.¹⁸⁵ A derivative action cannot be brought by a beneficiary against the professional advisers of the trustees in tort if the cause of action in tort is not trust property.¹⁸⁶ Usually, if liability has arisen in the administration of the trust, such a claim will constitute trust property,¹⁸⁷ thereby enabling the beneficiary to sue if the requisite special circumstances are established as explained below.¹⁸⁸

C. Need for Special Circumstances to Bring a Derivative Action

The special circumstances in which a beneficiary can bring a derivative action arise only where the trustee is disabled from suing itself (such as where their acts and conduct with reference to the trust fund are impeached or where there is a conflict between their interest and duty).¹⁸⁹ However, the list of special circumstances is not closed.¹⁹⁰ The guiding principle is that there must be exceptional circumstances which give rise to a failure (whether or not excusable) by the trustees to perform their duties to protect the trust, or to protect the interest of the beneficiaries in the trust property.¹⁹¹ Where the trustee refuses to sue, that will not usually in itself count as a special circumstance justifying an action being brought in a beneficiary's name.¹⁹² The key threshold will be whether, had the beneficiaries brought administrative action for an order compelling the trustee to sue, the trustee would have been so directed.¹⁹³ If the trustee is given leave to discontinue¹⁹⁴ an action already brought on the ground that the trust assets are insufficient to fund the future costs of the action and any adverse cost order it might be ordered to satisfy were the action to fail, a beneficiary cannot rely upon the lack of money in the fund as a special circumstance justifying an order that a beneficiary can carry on the action as a derivative action in the place of the trustees.¹⁹⁵ The trustee's refusal to sue, so as to

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¹⁸⁴ *Hayim v Citibank NA* [1987] AC 730 at 747–48, PC; *Parker-Tweedale v Dunbar Bank plc (No 1)* [1991] Ch 12 at 19–20, CA; *Nimmo v Westpac Banking Corp* (n 156) at 236–37.

¹⁸⁵ *In re X Trust* [2012] (2) JLR 260.

¹⁸⁶ See *Bradstock Trustee Services Ltd v Nabarro Nathanson* [1995] 1 WLR 1405 at 1411F.

¹⁸⁷ *Young v Murphy* (n 179) at 290–92, 316–18, Vic AD; *Royal Brunei Airlines Sdn Bhd v Tan* (n 48) at 391F, PC; both considered in *HR v JAPT* (n 153) at [69]–[80]; and applied in *Bayley v SG Associates* [2014] EWHC 783 (Ch), [2014] WTLR 1315 at [48]–[51].

¹⁸⁸ *Royal Brunei Airlines Sdn. Bhd v Tan* (n 48).

¹⁸⁹ *Davies v Davies* (1837) 2 Keen 534; *Travis v Milne* (1851) 9 Hare 141 at 149–150; *Stainton v Carron Co.* (1854) 18 Beav 146; *Yeatman v Yeatman* (1877) 7 ChD 210; *Beningfield v Baxter* (1886) 12 App Cas 167 at 178–79, PC; *Meldrum v Scorer* (1887) 56 LT 471; *Rae v Meek* (1889) 14 App Cas 558 at 569, HL Sc; *Hayim v Citibank NA* (n 183) at 747–48, PC; *Roberts v Gill & Co* [2010] UKSC 22; *Bayley v SG Associates* (n 186) at [52]–[54].

¹⁹⁰ *Re Field* [1971] 1 WLR 555 at 560–61; and see *Lancaster v Evors* (1841) 4 Beav 158; but cp *Hilliard v Eiffe* (1874) LR 7 HL 39 at 43n–44n. See *Roberts v Gill & Co* (n 173) for a review of other possible special circumstances. Statement in text cited in *Certain Limited Partners in PFI Secondary Fund II LP (a firm) v Henderson PFI Secondary Fund II LP (a firm)* [2012] EWHC 3259 (Comm); [2013] QB 934 at [20].

¹⁹¹ *Hayim v Citibank NA* (n 183) at 748; *Roberts v Gill & Co* (n 173) at [41]; on appeal (n 189) at [53].

¹⁹² *Sharpe v San Paulo Railway Co* (1873) 8 Ch App 597 at 610; *Yeatman v Yeatman* (n 188); *Tsang Yue Joyce v Standard Chartered Bank (Hong Kong) Ltd* [2010] HKCFI 981, [2010] 5 HKLRD 628 at [44].

¹⁹³ *Stainton v Carron Co* (n 188) at 159; *Yeatman v Yeatman* (n 188) at 216; *Harmer v Armstrong* [1934] Ch 65, CA; *Re Field* (n 189) at 559.

¹⁹⁴ RCR 2004, r 6/31.

¹⁹⁵ *Bradstock Trustee Services Ltd v Nabarro Nathanson* (n 185) at 1412.

necessitate a derivative action by the beneficiary in his own name, should be pleaded in the Order of Justice so as to avoid the possibility that the claim might be struck out under RCR 6/13 as disclosing no reasonable cause of action, is vexatious or is otherwise an abuse of the process.¹⁹⁶

D. Dispute between Beneficiaries whether Action to Be Brought

- 12-80** If there is a dispute between the beneficiaries as to whether an action against a third party would be in the interests of the trust, then an administrative action should be brought so that the matter might be determined as between the beneficiaries before proceedings are commenced in the name of any of them or in the name of the trustee.

E. Need for Joinder of Trustees as Defendants

- 12-81** Where a beneficiary brings a derivative action in his own name, the trustee should be joined as defendant if it will not consent to be joined as a plaintiff.¹⁹⁷ The need for joinder of the trustee as a defendant is not a matter of procedural nicety since the beneficiary has no personal right to sue and is suing on behalf of the trustee.¹⁹⁸

F. Do Other Beneficiaries Need to Be Joined to a Derivative Action?

- 12-82** Other beneficiaries should be joined as parties where this is necessary to avoid a multiplicity of actions or where it is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon.¹⁹⁹ A derivative action arguably comes within r 4/3 RCR 2004, so as to make a judgment binding on the beneficiaries notwithstanding they are not named as parties, on the basis that the trustees represent the beneficiaries and the plaintiff is standing in the shoes of the trustee. Alternatively it could be argued that, once the trustees have been joined as defendants in their capacity as such, the claim comes within r 4/5 RCR 2004²⁰⁰ and, although though the trustee will not take an active part in the proceedings, the beneficiary stands in the shoes of the trustees. As such, the same practice, so far as it being unnecessary to join the beneficiaries is concerned, should be applied as if the trustees were the plaintiffs, especially where the beneficiaries are numerous or include minor, unborn or unascertained persons.²⁰¹ Should directions be sought to ascertain the views of the other beneficiaries to a prospective derivative action? If there has been no Beddoe

¹⁹⁶ *Re Field* (n 189) at 558. Such a formal defect in a pleading being capable of amendment with the Court's leave under RCR 2004, r 6/12.

¹⁹⁷ RCR 2004, r 6/36(b).

¹⁹⁸ *Roberts v Gill & Co* (n 188) at [42]–[70] (Lord Collins) with whom Lord Rodger agreed at [86] and Lord Walker at [95]–[112], rather differing views as to the nature and absoluteness of the rule being expressed by Lord Hope at [79]–[84] and by Lord Clarke at [121]–[130].

¹⁹⁹ *Roberts v Gill & Co* (n 173) at [48] (point not considered on appeal [2010] UKSC 22); RCR 2004, r 6/36(b)(i).

²⁰⁰ RCR 2004, r 4/3 does not apply in respect of unidentifiable or ascertained beneficiaries.

²⁰¹ See RCR 2004, r 4/4 under which the court has a power to make a representation order.

application or administration action in relation to the claim, and there are other beneficiaries with substantial interests who may be prejudiced by the claim, eg because, notwithstanding the lack of a Beddoe order, the trust assets are vulnerable to an adverse costs order were the claim to fail, then there is a good argument that a procedure should be devised for canvassing the views of the other beneficiaries in a similar way to the Beddoe procedure. The views of the other beneficiaries to a derivative action will be important when the Court considers (as it must) the financial impact of bringing the action on the trust, in particular the vulnerability of the trust to an adverse costs order if the action fails.²⁰² A trust is vulnerable to such an order, and even if there are no assets apart from the claim, the trustee may be personally vulnerable, since its liability to pay costs in third party claims is not limited to the trust assets.²⁰³ And so, where there are doubts as to the beneficiary's ability to meet a costs order if the claim fails, the other beneficiaries may object to a derivative action if they would be prejudiced by an adverse costs order being met from trust assets.

VII. Claims for Breach of Duty in Relation to Companies in which the Trust Has an Interest—Claims for Reflective Loss

The most authoritative statement of the principle of reflective loss in both Jersey and England is to be found in the decision of the House of Lords in *Johnson v Gore-Wood & Co*.²⁰⁴

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1. A company is a legal entity separate and distinct from its shareholders. It has its own assets and liabilities and its own creditors. The company's property belongs to the company and not to its shareholders. If the company has a cause of action, this is a legal chose in action which represents part of its assets.
2. Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss.
3. Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a

²⁰² *Roberts v Gill & Co* (n 173) at [43].

²⁰³ The limited liability provisions in Art 32 of the Trusts (Jersey) Law 1984 have yet to be interpreted in a way that limits a third party who sues a trustee, knowing them to be a trustee, to the value of the trust assets. See *Investec Trust (Guernsey) Limited v Glenalla Properties Limited and Ors* [2014] (29 October 2014) Guernsey CA.

²⁰⁴ [2002] 2 AC 1, referred to but distinguished in *Freeman v Ansbacher Trustees (Jersey) Ltd* [2009 JLR 1].

- cause of action to do so), even though the loss is a diminution in the value of the shareholding.
4. Where a company suffers loss caused by a breach of duty owed to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other.

- 12-84** In each case what falls to be scrutinised is whether the loss claimed appears to be or is one which would be made good if the company had enforced its full rights against the party responsible, and whether the loss claimed is 'merely a reflection of the loss suffered by the company'.²⁰⁵ In some cases the answer will be clear, as where the shareholder claims the loss of dividend or a diminution in the value of a shareholding attributable solely to depletion of the company's assets.
- 12-85** The principle of reflective loss is not engaged where the company has a cause of action and the shareholder has none; or where the shareholder has a cause of action and the company has none. Where the company suffers loss as a result of a wrong to the shareholder but has no cause of action in respect of its loss, the shareholder can sue and recover damages for his own loss, whether of a capital or income nature, measured by the diminution in the value of his shareholding. The shareholder must, of course, show that he has an independent cause of action of his own and that he has suffered personal loss caused by the defendant's actionable wrong. Since the company itself has no cause of action in respect of its loss, its assets are not depleted by the recovery of damages by the shareholder. The position is different where the company suffers loss caused by the breach of a duty owed both to the company and to the shareholder. In such a case the shareholder's loss, in so far as this is measured by the diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder.²⁰⁶
- 12-86** Jersey law does recognise the principle of reflective loss as essentially a reaffirmation and explanation of the rule in *Foss v Harbottle*²⁰⁷ to the effect that the proper plaintiff in respect of loss suffered by a company as a result of a wrong done to the company is the company itself and not its shareholder(s).²⁰⁸ As we will see, the Royal Court has expressed more doubt²⁰⁹ as to the principle's applicability in the context of a claim by a beneficiary against a trustee of a discretionary trust.

²⁰⁵ *Johnson v Gore-Wood & Co* [2002] 2 AC 1 at 35–36, per Lord Bingham.

²⁰⁶ *ibid*, at 61–62, per Lord Millett.

²⁰⁷ (1843) 2 Hare 451.

²⁰⁸ *Freeman v Ansbacher Trustees (Jersey) Ltd* (n 203) at 74.

²⁰⁹ To date, put no higher than 'strongly arguable' that the principle of reflective loss does not apply to a claim by an object of a discretionary power for restitution of the trust fund; see *Freeman v Ansbacher* (n 203).

The usual measure of loss is the diminution in the value of the shares in the company²¹⁰ or of a direct or indirect subsidiary of that company.²¹¹ The defendant to an action bears the onus of establishing that the loss sought to be recovered is subject to the reflective loss principle, by showing not merely that the company has a cause of action of its own to recover the claimed loss but also that such a claim is available to it on the facts.²¹²

The reflective loss principle applies to preclude a claim by the shareholder of the company even though the company that has suffered the loss chooses not to pursue its own claim,²¹³ compromises the claim,²¹⁴ or the company's claim becomes time barred.²¹⁵ Would a beneficiary's claim be struck out by reason of the reflective loss principle from making a claim against the trustee if any of these circumstances applied? In the case of a company's claim becoming barred by limitation, the rationale for exclusion of recovery of reflective loss is not that it is needed to prevent double recovery or to protect the company's creditors, but that the shareholder's loss has been caused by the company's failure to pursue its claim in time.²¹⁶ If the company itself has no claim against anyone for allowing the claim to become time barred, then the company's shareholder, whether directly or through the company, can have no claim against anyone either. However, the beneficiaries will still have a claim against the trustees on a loss of chance basis for having allowed the company's claim to become time barred. That claim is not caught by the reflective loss principle because that is not the company's claim.

There is English Court of Appeal authority²¹⁷ (which does not have universal acclaim because it encroaches upon the rationale that a claim for reflective loss by shareholders is harmful to the interests of a company's creditors),²¹⁸ that the reflective loss principle does not apply if the defendant's conduct is such as to prevent the company from pursuing its own claim by denuding it of funds.²¹⁹ This may be the case where the directors of the company are all employees or directors of the trustee and, because of their position, either no consideration is given to the company making a claim against the directors or the company is positively prevented from doing so.

What has been accepted in Jersey law is the principle that where the company is wholly owned by the trust, and the trustees as its sole shareholders authorise the company to enter into a transaction which prejudices the company and which, apart from such authority would have generated a claim by the company against the directors or others, the

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²¹⁰ *Re Lucking's Will Trusts* [1968] 1 WLR 866 at 878; *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515 at 535.

²¹¹ *Walker v Stones* (n 104) at 927.

²¹² *Shaker v Al-Bedrawi* [2002] EWCA Civ 1452 at [83].

²¹³ *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 at 471, CA; *Johnson v Gore-Wood & Co* (n 204), at 66, HL.

²¹⁴ *Johnson v Gore-Wood & Co* (n 204) esp at 66.

²¹⁵ *Barings plc v Coopers & Lybrand* [2002] 2 BCLC 364.

²¹⁶ *Johnson v Gore-Wood & Co* (n 204) at 66.

²¹⁷ *Giles v Rhind* [2002] EWCA Civ 1428, [2003] Ch 618.

²¹⁸ Although Millet NJP in *Waddington Ltd v Chan Chun Hoo Thomas* [2008] HKCFA 86 at [88] has suggested that this is not the case; *Webster v Sandersons* (n 173) at [36]. There is no Jersey authority on the point and the Royal Court is free to follow or disregard the decision in *Giles v Rhind* (n 216).

²¹⁹ The alternative course in such a situation is not to circumvent the reflective loss principle by allowing a shareholder a cause of action but by pursuing a derivative claim, so as to step into the company's own shoes and sue on its behalf on its cause of action.

beneficiaries may maintain a claim against the trustees since the company has never had a claim at all and therefore no the reflective loss principle is not engaged at all.²²⁰

- 12-91** The importance of the application of the reflective loss principle to a trust dispute arises because the structure that practitioners will encounter time and again in many Jersey trusts is that of a trustee (usually a corporation) vested directly or indirectly with the shares of an underlying company which itself holds the individual trust assets. At trust level, the only directly held trust assets are the shares in the holding company. Typically, the directors of the wholly owned company will be the same employees of the corporate trustee who are responsible for administering the affairs of the trust. A strict application of the reflective loss principle would preclude the beneficiaries in a breach of trust claim from recovering the diminution in the value of the trust shareholding caused by a breach of duty by the trustee as a director of the company concerned for which the company has a claim against the director.
- 12-92** The question whether the principle of reflective loss qualifies for different treatment in a trust context arises because the following circumstances will usually exist which may not exist in the classic application of the principle against a shareholder. The first important difference is that the plaintiff in a trust dispute will not be shareholders in the company concerned (or indeed its parent company), but will be beneficiaries of the trust with a beneficial interest in a trust fund comprising those shares. Secondly, the defendants to such a claim will not necessarily be the same as those against whom the company has a claim. The beneficiaries' claim will be against the trustees while the company's claim will usually be against one or more of its directors. Only where there is an identity between the trustees and the directors against whom the company has a claim can it be said that the defendants to both claims will be the same. It is, however, not clear from either the Jersey or English authorities whether the reflective loss principle only applies to cases where the defendants to both claims are the same.²²¹
- 12-93** If the company sustains a loss, on the basis of the principles discussed above, the loss is the company's, not the trust's and the beneficiaries cannot sue the trustee for that loss. While the directors of the company will be appointed by the trustee, and will usually be employees of the trustee, the beneficiaries are usually also unable to sue the directors for breach of their duties because the directors owe the beneficiaries no duties qua directors.²²² The position should be contrasted with a situation where the investments are held directly by the trustee. The beneficiaries' remedy in such a case is simple. They may sue the trustee for breach of trust in making imprudent investments and seek the reconstitution of the

²²⁰ Note the distinction drawn in *Barings plc v Coopers & Lybrand* (n 214) at [113]–[125] and [128] between the defendant having a defence to the company's claim and the company having no claim at all; and note *Re Gee & Co (Woolwich) Ltd* [1975] Ch 52 at 71D on the effect of shareholder approval. See *Freeman v Ansbacher Trustees (Jersey) Ltd* [2009] JRC 003 also at [79].

²²¹ The lack of identity of defendants was one of the reasons given in *Walker v Stones* (n 104) at 933, why the beneficiaries' loss was separate and distinct from the company's loss. In *Gardner v Parker* [2004] EWCA Civ 781, however, Neuberger LJ considered, at [52], in relation to a case of lack of identity of defendants posited at [38], that it might well be that the reflective loss principle may apply even in relation to trustees against whom the company had no claim. See too *Freeman v Ansbacher Trustees (Jersey) Ltd* (n 219) at [97(vi)], where the point was discussed, but not decided.

²²² See dog-leg claims reference at para 12-67.

trust fund. If, on the other hand, the investments have been made through a wholly owned company and the reflective loss principle applies, such an action cannot be brought. From the beneficiaries' perspective and as a matter of practical consequence there is no difference between the situation where the trustee holds the trust investments directly and where it does so through a company wholly owned by the trust and yet if the reflective loss principle applies, the beneficiaries are without a remedy in the latter case but not in the former simply because of the structure that is used.

The twin rationale that underpins the reflective loss principle is to eliminate the risk of double recovery (ie if both the company and the shareholder can sue for the wrong done by the defendant, the defendant may have to pay twice for what is ultimately the same loss), and secondly, that the company's assets are preserved in the interests of its creditors so that their claims takes precedence over the claims of persons interested in its shares.²²³ The reflective loss principle ensures that the monies recovered will not be paid directly to the shareholder but are instead company funds, made available to the company's creditors. The reflective loss principle also appears to prevent beneficiaries claiming against a dishonest assistant of the directors of the company in misappropriating the company's assets.²²⁴

The reflective loss principle, as it applies to discretionary trusts, was only considered for the first time relatively in *Freeman v Ansbacher Trustees (Jersey) Limited*.²²⁵ The report concerns whether a claim by a beneficiary of a discretionary trust to sue the former trustee for negligence in its management of an underlying company was liable to be struck out. As such, the Court was only asked to consider whether the claim surmounted the relatively low threshold of reasonable prospect of success. A degree of caution should therefore be adopted in considering what can be taken from *Ansbacher* to be the current state of Jersey law. The Court concluded that the claim would not be struck out, emphasising that the scope of the reflective loss principle was unclear and that it was reluctant to strike out a claim in a developing area of jurisprudence but that it was strongly arguable that the reflective loss principle had no application in Jersey law where a discretionary beneficiary was seeking reconstitution of the trust fund because of a failure by the trustee to supervise the investments of a wholly owned company for a variety of reasons of legal principle and policy.²²⁶

Prominent among these was a practical concern that if the reflective loss principle precluded a beneficiary from suing the trustee, that created a lacuna in the practical remedies available to beneficiaries, which was undesirable given Jersey's status as a leading offshore jurisdiction in respect of trusts. The dramatic distinction in consequences that flowed from whether the trust assets were held directly by the trustee or via an intermediary holding company was an unsustainable and seemingly artificial distinction, especially where the company is likely to be administered by employees of the trustee. Neither was it desirable

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²²³ *Johnson v Gore-Wood & Co* (n 204) esp at 62–63, considered in *Freeman v Ansbacher Trustees (Jersey) Ltd* (n 203) at 76.

²²⁴ *Walker v Stones* (n 104) at 953. This is clearly consistent with *Johnson v Gore-Wood & Co* (n 204).

²²⁵ [2009 JLR 1].

²²⁶ *ibid*, at, [97].

to direct beneficiaries down the tangential rabbit hole of seeking the removal of a trustee who refuses to resign in the face of the inevitable conflict of interest in having to sue its own appointees as directors, with the additional cost associated with the appointment of a new trustee and any applications for Beddoe relief or directions in respect of the claim to recover the losses.

- 12-97** It has been held strongly arguable that these twin rationales set out above are not undermined in the trust context where what is sought is the reconstitution of the trust fund by a discretionary beneficiary.²²⁷ The Court went further to suggest that it was strongly arguable that the reflective loss principle could be disregarded entirely in the context of a claim by a discretionary beneficiary where neither of the two underlying rationales for it are applicable.
- 12-98** The bases upon which this was said to be strongly arguable are, first, that the claim by a discretionary beneficiary (having no vested interest in the fund that is sought to be reconstituted) does not personally benefit from the recovery and is therefore not analogous to a shareholder recovering the company's loss for itself personally so as to deprive the company's creditors of the fruits of the action. Secondly, because of the nature of the relief sought in reconstituting the Court could mould the relief to suit the circumstances of the case. In the event of the breaches of trust being proved, the Court could order the trustee to reconstitute the fund by reimbursing that particular part of the fund which had been primarily affected by the breach of trust. Thus, the Court could order Ansbacher to reimburse the underlying company from where the funds had been lost in the first place. Alternatively, the Court could direct the trustee, as a term of the relief that the funds were to be used to acquire new assets in the company's name, so that the funds would eventually find their way onto the company's balance sheet, raising the value of those shares. This latter solution would have the effect of exactly reconstituting the trust fund because it would take the value of the shares in the underlying company back to what they had been previously and the financial position of the company back to what it had been. Such remedies may not be available in all cases but are likely to be available where the company in question is wholly owned by a discretionary trust. It follows that the company will have been reimbursed and will therefore no longer have suffered any loss. Accordingly it may no longer bring any claim against its directors, thereby precluding a risk of double recovery. Secondly, because the moneys will have been replaced into the underlying company, there is no prejudice to any creditor as they will be in the same position as they were prior to the wrongful investments which gave rise to the breaches of trust.

A. Conclusions

- 12-99** Notwithstanding the considerations the then Bailiff thought to be 'strongly arguable' in severely narrowing the application of the reflective loss principle in relation to trust disputes, the continuing dearth of authority in Jersey means there continues to be uncertainty as to the precise application of the reflective loss principle in relation to trusts. Strictly speaking, the reflective loss principle does not bar causes of action but only the recoverabil-

²²⁷ *ibid*, at [97(iv)] and [97(v)].

ity of certain types of loss. Arguably the principle should be confined to cases where without it the beneficiaries and the company could recover the same damages from the trustee/directors of the company.²²⁸ Beneficiaries may be well advised, in a case where the company does or may have a claim in respect of the subject matter of the loss, to consider the prospects of a claim by the company against its directors rather than a claim from the other end of the structure, ie by them against the trustee. This may be the most expedient course where, as is very common in Jersey, the trust contains an ‘anti-Bartlett’²²⁹ clause with the effect of impeding a claim by the beneficiaries against the trustees for failing to ensure the company was properly managed. An ‘anti-Bartlett’ clause will not preclude a claim by the company against the directors, whether or not also the trustees (or associated with them). That said, this may well be easier said than done. The beneficiaries will be strangers to the company’s internal corporate governance structure and there is no obvious mechanism by which the beneficiaries can force the issue. It will be the trustee as the company’s shareholder, rather than the beneficiaries, that has the power to cause the company to bring proceedings. Where the directors are employees or associates of the trustee, the trustee may prove obstructive to a claim. Where the trustee places itself in a position of conflict like this, appropriate trust proceedings can be brought by the beneficiaries under Article 51 of the Trusts (Jersey) Law 1984 (convening the trustee) for directions to be given to the trustee to ensure either that the requisite proceedings are taken by the company, that the trustee is removed (if it refuses to acknowledge its conflicted position and resign) or the trustees concede that the company has no claim so that no reflective loss defence can subsequently be raised against the beneficiaries by the trustee. Where there has been a diminution in the value of the assets held by an underlying company, the shares of which are vested in the trustee, the first question is to consider whether there is a claim against the trustee for failing to consider or use its powers as shareholders of the company to properly supervise the company’s management.

²²⁸ *Gardner v Parker* (n 220) at [49], per Neuberger LJ.

²²⁹ *Bartlett v Barclays Bank Trust Co Ltd* (n 209).

13

Proprietary Remedies against Trustees and Third Parties

I. Introduction—Tracing in Jersey

This chapter is concerned with the ability of beneficiaries of a trust (or a trustee on their behalf) to assert a proprietary remedy which vindicates the beneficiaries' continuing beneficial interest in property that has been misappropriated in breach of trust or in circumstances which have given rise to a constructive trust. This chapter should therefore be read in conjunction with Chapter 6 as to the applicable legal principles by which a constructive trust arises in Jersey law. The proprietary remedy extends to claims against the original property (if it remains in its original form) or property representing the original property, whether in the hands of a trustee who has appropriated the property in a breach of trust, or in certain circumstances against a third party into whose hands that property has come. Owing to the different historical basis upon which the courts of England and Jersey have approached their respective jurisdictions to grant equitable remedies, Jersey has not followed England in preserving what is now (even in English law) a technical and increasingly arcane distinction between *following* at common law and *tracing* in equity.¹ While the approach in Jersey and England is closely aligned in many respects, in certain important respects they should not be regarded as identical and while English law is likely to inform how the Royal Court will approach proprietary remedies, where Jersey's rules differ this is highlighted. Somewhat surprisingly, there have only been a handful of significant decisions of the Royal Court and Jersey Court of Appeal on the nature and extent of the proprietary remedies available where assets subject to a trust have been misappropriated. This has resulted in a number of unsatisfactory lacunae in Jersey's law. Where there are gaps, the more extensively developed jurisprudence from the onshore jurisdictions such as England, Australia and New Zealand and even North America may be persuasive.

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¹ *Federal Republic of Brazil and Anor v Durant International Corporation and Anor* [2013] JCA 071 at [51]: 'In short, the law of Jersey should and does recognise tracing. In particular, it should and does recognise tracing as a unitary concept, unencumbered by the burden of history which has complicated the position in England with separate rules of equitable and common law tracing.'

II. Terminology Relevant to Proprietary Remedies and Tracing in Jersey Trust Litigation

A. Following

- 13-2** A trustee may, in breach of trust, misapply trust assets so as to either appropriate them to itself or to part with them contrary to the terms of the trust by transferring them to a third party. Indeed, the assets may have passed, in specie, along a chain of third parties to the trust before the breach comes to the attention of the beneficiaries. If the beneficiary wishes to assert a beneficial interest in a particular asset then it is necessary first and foremost for the beneficiaries to be able to follow it as it passes along such a chain. The process of *following* is that by which the same asset, in specie, is followed as it moves from hand to hand.² Jersey does not observe a strict distinction between following at common law and tracing in equity. In *Re The Esteem Settlement*³ it was said:

The rules to be applied should, as a starting point, be those established in English law. However, the court is not bound by any English rule of tracing and is free to depart from such a rule if convinced that there is a better alternative. When we talk of the rules of tracing, we are, for the purposes of this case, speaking of the rules of equitable tracing because we are dealing with an equitable proprietary interest [...]. There is much debate in England as to whether the time has come for the common-law tracing rules to be subsumed into the more flexible rules of equitable tracing. In particular, this would allow tracing through a mixed fund. We have not heard argument on this and therefore offer no definitive view. We express the preliminary view, however, that the differences between the two systems of tracing in England have an historical origin which has no application in Jersey. On the face of it, there would seem to be little reason to incorporate such technical distinctions into Jersey law and there would seem to be some advantage in applying the more flexible rules of equitable tracing (as constituting the Jersey rules of tracing) to all tracing actions.⁴

B. Purchase without Notice

- 13-3** In the vast majority of cases, the process of following a misapplied asset subject to a trust is of very limited practical utility. Following relies on, first, being able to identify the person into whose hands the trust asset has passed (and who, even if identified, may not practically be capable of being subject to the jurisdiction of the Royal Court to restore the trust property) and, secondly, assuming the property is still readily identifiable, following relies upon the property not having passed to into the hands of '*equity's darling*'; a bona fides purchaser for value without notice.⁵ While it may still be possible to follow the property, a bona fides

² *Foskett v McKeown* [2001] 1 AC 102 at 127B, per Lord Millett.

³ [2002 JLR.53] at 105.

⁴ *ibid*, at 105.

⁵ A bona fides purchaser for value may deal with a trustee in relation to trust property as if the trustee was the beneficial owner of the trust property; and shall not be affected by any trusts on which such property is held unless he has actual notice of it. Constructive notice is insufficient; *Trusts (Jersey) Law 1984*, Art 55.

purchase for value without notice effectively extinguishes the beneficiary's prior interest in whatever property they have purchased. A receiver of property who is a purchaser without notice that the property is subject to a prior beneficial interest therefore has an iron-clad defence to any proprietary claim by the beneficiary.

C. Tracing

Even if the asset subject to a trust has passed to a bone fides purchaser for value without notice, while the original property may be wiped clean of any prior beneficial proprietary interest, it may still be represented by any property, including purchase money, that is exchanged for the trust property that remains in the hands of a wrongdoer in another form.⁶ The beneficiary's proprietary interest in this substituted property is preserved even though the original asset has passed beyond the reach of a proprietary claim. A similar exercise is possible where the original asset has been exchanged for another without the interposition of a bona fides purchaser for value in the chain. So for example, where a trustee misapplies trust money in breach of trust and purchases shares or securities with the money, the original money may have gone but the proprietary remedy is available against the shares; they represent and are the substitute for the original trust money. The process by which a new asset is identified as the substitute for the old in both Jersey and English law is called tracing.⁷ Tracing is a conceptually distinct exercise from following.⁸ It is the inherent value in the original trust asset that is traced and not the physical asset itself.⁹ It is not possible to both follow the original asset and to trace the proceeds of sale of the original asset so as to end up asserting a proprietary claim over the inherent value twice over; that would amount to an impermissible double recovery.¹⁰

13-4

⁶ A 'purchaser' for 'value' will usually have conveyed something in exchange for the property he has acquired which can still be the subject of a tracing exercise in support of a proprietary claim.

⁷ *Foskett v McKeown* (n 2) at 127B.

⁸ *In re Esteem Settlement* [2002 JLR 53] at [93]. The classic statement of Lord Millett in *Foskett v McKeown* (n 2) distinguishes the concepts of 'following', 'tracing' and 'claiming' in the following terms:

The processes of following and tracing are, however, distinct. Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old. Where one asset is exchanged for another, a claimant can elect whether to follow the original asset into the hands of the new owner or to trace its value into the new asset in the hands of the same owner. The rules of following and tracing are evidential in nature and are concerned with identifying property in the hands of another or property that has assumed another form...Tracing is thus neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property. Tracing is also distinct from claiming. It identifies the traceable proceeds of the claimant's property. It enables the claimant to substitute the traceable proceeds for the original asset as the subject matter of his claim. But it does not affect or establish his claim. That will depend on a number of factors including the nature of his interest in the original asset. He will normally be able to maintain the same claim to the substituted asset as he could have maintained to the original asset. If he held only a security interest in the original asset, he cannot claim more than a security interest in its proceeds. But his claim may also be exposed to potential defences as a result of intervening transactions.

⁹ *ibid*, at 128C.

¹⁰ *ibid*, at 127B.

D. Recovery

- 13-5** Tracing and following are not in themselves either remedies or causes of action.¹¹ Both are merely evidential processes which provide the means to identify an asset or an individual that can then be subject to either a proprietary or personal claim.¹² The process of tracing is relevant to proprietary as well as personal equitable remedies (such as an obligation to account ‘as a constructive trustee’), for example where trust property is applied in breach of trust and traced into other property that is handled or received by a defendant against whom a claim is brought for knowing receipt.

E. Clean and Mixed Substitutions

- 13-6** Tracing is concerned with the identification of a substitution of one asset for another. Where the inherent value that is represented in a new asset is wholly attributable to the inherent value in the old one that amounts to a clean substitution. However, in many cases, where the whole of the value inherent in the new asset is not attributable wholly to the original asset, but is comprised in part from another source; that is described as a mixed substitution. Where there has been a mixed substitution it is necessary for the plaintiff to identify what assets are attributable to them to enable tracing to take place.¹³

III. Proprietary Remedy

- 13-7** The process of tracing is a means by which beneficiaries (or trustees on their behalf) are able to assert and vindicate their continuing beneficial interest in trust assets which have been misappropriated in breach of trust, or in assets representing them.¹⁴ It is a precondition for the availability of a proprietary remedy to first establish that the property sought to be traced is subject to a trust and that the property has been misappropriated in breach of that trust.¹⁵ If these preconditions are satisfied then a proprietary remedy is available not only against the trustee in respect of the trust asset that has been applied in breach of trust still in the hands of the trustee or in respect of assets into which those assets are traceable, but also against any other person into whose hands those assets are followed or in whose hands their inherent value is traced, other than a bona fides purchaser for value without actual notice.

¹¹ *Boscawen v Bajwa* [1996] 1 WLR 328 at 334, CA.

¹² *Foskett v McKeown* (n 2) at 127–28, per Lord Millett; and *Federal Republic of Brazil and Anor v Durant International Corporation and Anor* [2012] (2) JLR 356] at [204].

¹³ *Durant Intl Corp v Brazil (Fed Rep)* [2013] (1) JLR 273], affirmed in the Privy Council [2015] (2) JLR 1].

¹⁴ *In re Esteem Settlement* (n 8) at [102]: ‘Tracing offers an effective method of vindicating and safeguarding proprietary rights, particularly in cases of fraud’.

¹⁵ As to the circumstances in which Jersey law will recognise a constructive trust to have arisen, see Ch 6.

A. The Trust to which the Traceable Property Is Subject

The trust to which property must be subject in the first place is not confined to express trusts, but can include any property which at the outset is the subject of a fiduciary relationship.¹⁶ Thus the person in the position of a director who defrauds the company of which he is a director holds the proceeds on constructive trust for the company, which has an equitable proprietary interest in the property in question.¹⁷ A beneficiary of a constructive trust arising under Article 33 of the Trusts (Jersey) Law 1984 has a proprietary interest in the assets thereof sufficient to bring a proprietary claim.¹⁸ Where property is obtained by fraud, equity will declare the property to be subject to a constructive trust in favour of the victim of the fraud.¹⁹ An object of a discretionary power has a sufficient proprietary interest in a misapplied trust asset to mount a tracing exercise even though his entitlement to the property which is subject to the trust is only to be considered as a possible object of the trustee's discretionary power of appointment.²⁰

13-8

B. The Breach of Trust

If a trust asset has been distributed in accordance with the terms of a validly exercised power of advancement or appointment in the trust, any subsisting proprietary interest in the property advanced or appointed that might be vindicated by way of a proprietary claim will have been extinguished. A trustee who enters into a contract for the sale of trust assets (assuming this is a transaction within his powers), but fails to chase the purchase money or obtain the best possible price, is very likely to still be effective to overreach the beneficiaries' interests in the assets provided that a proper discharge is given in respect of any purchase moneys so that there should no question of the purchaser taking the property subject to the trusts and powers in favour of the beneficiaries, even if the recipient was aware that the trustee might have done better for his beneficiaries had he negotiated more vigorously.²¹ A transaction in which a trustee abuses his power of sale by selling or dealing with trust property for an improper purpose, or by deliberately selling at a gross undervalue, would *prima facie* be ineffective in equity save in favour of a bona fides purchaser for value without notice. A recipient with actual notice or who is not acting bona fides could be subject to a proprietary remedy against the property in his hands or a personal action for knowing receipt.²²

13-9

¹⁶ *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 715–16; *In The Matter Of The Esteem Settlement* [2003] JLR 188; *Nolan v Minerva Trust Company Limited* [2014] JRC 078A.

¹⁷ *In re Esteem Settlement* (n 8) at [82], [102]–[106]; *Lloyds Trust Company (CI) Limited v Fragoso and Ors* [2013] (2) JLR 444; *FHR LLP v Cedar Capital LLC* [2014] UKSC 45; *AG for Hong Kong v Reid* [1994] 1 AC 324.

¹⁸ *In re Esteem Settlement* (n 8) at [87].

¹⁹ *ibid*, following *Westdeutsche Landesbank Girozentrale v Islington LBC* (n 16).

²⁰ *Freeman v Ansacher Trustees (Jersey) Limited* [2009] JLR 1].

²¹ Such negligence may give rise to a claim for compensation by the beneficiaries but such a claim would be on ordinary tortious principles of negligence. See *Trusts (Jersey) Law 1984*, Art 55.

²² *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700 at 760–61; and see *Palmer v Monk* [1962] NSW 786 at 788; C Harpum, 'The Stranger as Constructive Trustee' (1986) 102 LQR 114.

C. Breach of Trust and Proprietary Constructive Trusts

- 13-10** While establishing the existence of a trust and a breach of it will usually be two actual and conceptually separate steps in the case of the misappropriation of assets subject to an express trust or fiduciary relationship with the latter following the former, in the case of a proprietary constructive trust²³ the breach and the constitution of the trust will arise simultaneously.²⁴ In this instance the beneficiary must establish the constructive trust and then pursue the proprietary remedy in relation to the asset which it is alleged is subject to the constructive trust or any substitute property that represents it. Where an asset becomes subject to a constructive trust under the no-profit rule,²⁵ the beneficiary must establish the necessary facts giving rise a breach of fiduciary duty which causes the asset to become subject to a constructive trust under the rule in order for a proprietary remedy to be capable of being asserted against that asset or any asset into which it is traceable.²⁶

D. Evidence to Establish what Property or Money Is Subject to the Proprietary Remedy: General Principle in Relation to Trustee

- 13-11** Where a trustee mixes money subject to a trust of which he is a trustee, with his own money, the rule in English law, but perhaps not in Jersey, is that the beneficiary will be entitled to assert a proprietary remedy against every portion of the mixed fund which the trustee cannot prove to be his own.²⁷ While the principle in Jersey law is that there should be a ‘clear link’ between the plaintiff property and the assets in the hands of the wrongdoer, a tracing exercise should not fail because the wrongdoer has acted particularly dishonestly or cunningly by creating a maelstrom of transactions in which it becomes difficult, if not impossible to identify the source of the funds.²⁸ Perhaps mindful of the fact that a defendant trustee should not be able to benefit by creating a flurry of transactions so as to obfuscate the ability of a plaintiff to follow the path of the money and of the need to avoid a perception that Jersey affords any safe harbour to fraudsters or those who seek to hide money from those who have a legitimate claim upon it, the Royal Court in *Durant* resoundingly rejected what it perceived to be the ‘conceptual’ limitations in the English tracing rules. The Royal Court in paragraph 219 of its judgment said:

The appropriate way for the courts of this jurisdiction to address the subject is, we suggest, not by reference to any pre-conceptions of what is or is not conceptually possible or arguably supported by English authority, but ... as a matter of evidence—at least in cases where, as here, the account in question remains in credit throughout the relevant period, there is no question of possible

²³ See Ch 6, para 6-12.

²⁴ As is the case where property is obtained fraudulently; see *Westdeutsche Landesbank Girozentrale v Islington LBC* (n 16), approved in *In re Esteem Settlement* (n 8). The breach of trust could be taken as being the failure of the constructive trustee to restore to the rightful owner the assets which become subject to the trust.

²⁵ See elsewhere in the text.

²⁶ L Tucker, N Le Poidevin and J Brightwell, *Lewin on Trusts*, 18th edn (London, Sweet and Maxwell, 2012) at 41–51.

²⁷ *Re Hallett's Estate* (1879) 13 ChD 696 at 719, referred to but not followed in *Durant Intl Corp v Federal Republic of Brazil* (n 13)—the ‘first-in first-out’ rule derived from the *Re Hallett* was not followed.

²⁸ *Federal Republic of Brazil and Anor v Durant International Corporation and Anor* (n 12) at [208]; and *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* (in administrative receivership) [2011] EWCA Civ 347.

insolvency and prejudice to unsecured creditors, and there is no suggestion of any intervention by a bona fide purchaser for value. The question is, or should be, simply whether there is sufficient evidence to establish a clear link between credits and debits to an account, irrespective (within a reasonable time frame) of the order in which they occur or the state of the balance on the account. It is unnecessary to posit any limitation on how, as a matter of evidence the necessary link can be proved: it might be by means of bank documentation ... or by reference to the defendant account-holders' intentions or in some other way

Therefore once a plaintiff can prove that assets in which they have a proprietary interest have moved into a so-called 'maelstrom' of transactions, the burden of proof shifts to the defendant trustee to show what part of the mixed fund is in fact his. The Court of Appeal in *Durant* endorsed this approach noting that in appropriate cases, the necessary links can be inferred from the circumstances, even in the absence of direct evidence.²⁹

13-12

E. Tracing into Jersey Land

An interesting issue of principle (although perhaps of more limited practical import)³⁰ that is peculiar to Jersey and which is yet to be satisfactorily determined is whether it is possible for a beneficiary to trace a proprietary interest into Jersey land. An express trust of Jersey immovable property is prohibited by statute.³¹ There is no binding decision of the Royal Court as to whether or not there can be a constructive trust (in a proprietary sense).³² In *Flynn v Reid*, it was said:

13-13

69. The matter was touched upon in the matter of the *Esteem Settlement* 2002 JLR 53 where at paragraph 92, Birt, DB said this:-

'We appreciate that the recognition of constructive trusts in such circumstances may raise questions concerning Art. 10(2)(a)(iii) of the 1984 Law [now Art 11(2)(a)(iii)], which provides that a trust shall be invalid to the extent that "it purports to apply directly to immovable property situated in Jersey". That would be for a decision on another occasion but, as at present advised, we think it is strongly arguable that that provision does not apply to constructive trusts. Articles 29 and 50 [now Arts 33 and 54 respectively] and refer to "property" which is defined by Art. 1(1) to mean "property of any description wherever situated". It is hard to envisage that Jersey law would accept that, if a trustee, in breach of trust, uses trust monies to purchase immovable property for his own benefit, he should be permitted to hold that immovable property free from any trust for the beneficiaries. In any event, any concerns about Jersey immovable property are not sufficient in our judgment, to negate the general principle which we have described.'

[...]

71. The analysis of the Royal Court in the extract cited above comes in that part of the judgment which considers whether the victim of fraud has an equitable proprietary interest in the proceeds

²⁹ *Durant Intl Corp v Federal Republic of Brazil* (n 13) at 63–69.

³⁰ Practically, owing to the highly regulated nature of the island's real property market, the circumstances in which a professional Jersey trustee would invest the traceable proceeds of a breach of trust in land are likely be infrequent. It remains a possibility that a constructive trustee or wrongdoing third party may apply money imbued with a trust to purchase or improve land in Jersey.

³¹ Trusts (Jersey) Law 1984, Art 11(2)(iii).

³² *Flynn v Reid* [2012 (1) JLR 370] at [69].

of the fraud. At paragraph 88 of the Court's judgment, Birt, DB held that a beneficiary under a constructive trust does have an equitable proprietary interest in the assets which are the subject of that trust and then applied himself to the question as to whether Jersey law should hold that a constructive trust existed in circumstances such as those in that case. The Court concluded that when property is obtained by fraud, equity did impose a constructive trust on the fraudulent recipient so that the victim had a proprietary interest in that property. That is the background to paragraph 92 where the Court expressed a provisional view that what is now Article 11(2)(a)(iii) of the Trust Law did not apply in the case of constructive trusts, where the proceeds of fraud had been invested by the trustee in Jersey real estate for his own benefit.

72. This is not a case of trustee fraud, and therefore we do not have to decide whether there is some special category of constructive trust which could apply to Jersey real estate in the context of trustee fraud and the issue is left over should such a case ever arise. Nonetheless we do comment that the issue is not necessarily straightforward. Of course at one end of that spectrum, one could be faced with a trustee who has fraudulently deprived the beneficiaries of the trust estate, and purchased with the proceeds some real property in Jersey. There, equity may indeed demand that the beneficiaries should have recompense. More difficult is where there are competing equities, even in such circumstances. The fraudulent trustee may have other creditors and where there has been an insufficiency of assets, it would then be an issue as to whether, in effect, the beneficiaries who have been fraudulently deprived of the trust estate should be preferred to other creditors, who might also be the victims of fraud, albeit not as beneficiaries.

73. Like Birt, DB in *Re Esteem*, we do not have to decide this issue today because the factual circumstances are quite different. We are considering today only whether a constructive trust in relation to Jersey real estate can arise in the circumstances of this case.

- 13-14** If it is impossible to trace into Jersey immovables that clearly risks creating something of a safe harbour for wrongdoers and for that reason, it seems likely that if the matter ever required a decision, the Royal Court would fashion some remedy to vindicate the beneficiary's rights although the precise means by which this would be achieved would have to be shaped around the existing parameters of Jersey's law of immovable property as well as dealing satisfactorily with the protection of the rights of third party creditors of the fiduciary. Where the land is subject to security against which the trust money has been applied, principles of subordination might provide a means around the general prohibition on separate equitable interest subsisting in land separate to the legal interest. It would also seem to be possible for a beneficiary to seek vindication of their interest by pursuing the constructive trustee for unjust enrichment³³ to the extent of their contribution and then seek to enforce that judgment by way of *hypothèque judiciaire*. This is a somewhat unwieldy mechanism and does not provide the beneficiary with any priority against charge holders who have priority to the beneficiary's own *hypothèque*,³⁴ nor does it provide any security for the beneficiary if the trustee becomes insolvent prior to judgment.

F. Bank Accounts

- 13-15** Trust money, provided it remains identifiable as cash, may conceptually be traced through any number of bank accounts, the only limitation being an evidential one such as where a

³³ *ibid.*

³⁴ Save perhaps the right to be called to take first among the debtor's secured creditors in a specialist form of Jersey bankruptcy procedure known as a *dégrèvement*.

number of bank accounts are involved, some of which may be outside Jersey and banking records showing the order of credits and debits are incomplete or not available.³⁵ In such cases the Court may be prepared to draw the inference that a payment into one account is attributable to a previous payment out of another account and therefore traceable where the two payments are of a similar though not identical amount and the time gap between them is not unreasonably long.³⁶

IV. Remedies against a Trustee

A proprietary remedy may be brought against an original trustee who appropriates a trust asset in breach of trust, if the asset still remains in the hands of the trustee. If not, a proprietary remedy can be sought against an asset that represents that asset which is traced in a clean or mixed substitution. In general terms the beneficiary is entitled to assert either one of two things: (1) a continuing beneficial interest in the original trust assets (if they survive) or in the assets or a share in the assets representing them, or (2) a claim (frequently referred to as an equitable lien in English law, although there are no reported decisions in Jersey that use the term lien in this context) over the original trust assets or asset which represent them, whether through clean or mixed substitution, as security for the trustee's personal liability to pay compensation for breach of trust. In *Re PKT Consultants (Jersey) Ltd*,³⁷ later affirmed by the seminal decision of *Re Esteem Settlement*,³⁸ the Court was clear that it had adequate powers to declare an equitable charge on a mixed fund in order to assist a beneficiary in the vindication of their proprietary rights or to effect to assist a tracing claim. Although the term 'lien' is not the label used in Jersey to describe this claim, it is used below to refer to it.

13-16

A. Proprietary Claims against an Original Trust Asset

Where the trustee appropriates a trust asset to himself in breach of trust, no question of tracing arises because the asset is never deemed to have left the trust.³⁹ The remedy available is so obvious that it hardly needs stating. The beneficiary may at his election either assert a proprietary interest in the asset or claim a lien over the asset to secure the personal liability of the trustee to make good his breach of trust in appropriating the asset. The choice between a lien or an equitable proprietary interest will turn on whether the asset has increased or decreased in value since it was misappropriated. This is exactly the same remedy where there has been a clean substitution, as to which see below.

13-17

³⁵ For the detailed consideration of tracing through a mixed bank account, see para 13-37 below.

³⁶ *Durant Intl Corp v Federal Republic of Brazil* (n 13).

³⁷ [1991 JLR N-5] (1 August 1991) JU 110c.

³⁸ *Re The Esteem Settlement* (n 8).

³⁹ See the Trusts (Jersey) Law 1984, Art 57(1) by which claims against a trustee to recover the trust property are imprescriptible.

B. Tracing into a Clean Substitution

- 13-18** The simplest type of tracing case is where a clean substitution has taken place; where the inherent value in a newly acquired asset is wholly attributable to the value inherent in the old one. Stated by Lord Millett in *Foskett v McKeown*:⁴⁰

The simplest case is where the trustee wrongfully misappropriates trust property and uses it exclusively to acquire other property for his own benefit. In such a case the beneficiary is entitled at his option either to assert his beneficial ownership of the proceeds or to bring a personal claim against the trustee for breach of trust and enforce an equitable lien or charge on the proceeds to secure restoration of the trust fund.

C. Tracing into a Mixed Substitution

- 13-19** In cases of mixed substitution; where the whole of the inherent value in the substituted asset is not wholly attributable to the inherent value in the original asset, but is comprised in part from another source or sources, the beneficiary is entitled to a charge on the whole substituted asset to the extent of the amount of the trust money laid out in its purchase.⁴¹ The charge operates on a basis similar to that in the case of a clean substitution, save that the charge, or lien as it is termed in English law, extends to the asset as a whole rather than some part of it attributable to the trust's contribution to its acquisition. The House of Lords in *Foskett v McKeown*⁴² stated that the general rule for mixed substitutions is that the beneficiary can opt to take a proportionate share in assets bought through a mixed substitution. The rule as stated by Lord Millett is as follows:

Where a trustee wrongfully uses trust money to provide part of the cost of acquiring an asset, the beneficiary is entitled at his option either to claim a proportionate share of the asset or to enforce a lien upon it to secure his personal claim against the trustee for the amount of the misapplied money. It does not matter whether the trustee mixed the trust money with his own in a single fund before using it to acquire the asset, or made separate payments (whether simultaneously or sequentially) out of the differently owned funds to acquire a single asset.

- 13-20** It should be noted that this is a rule about the remedy available to the beneficiary and not a rule about the process of tracing. Below we consider how the beneficiary's share in an asset bought using money in a mixed bank account is quantified under Jersey's tracing rules.⁴³ The beneficiary is entitled either to assert a claim to trust property applied in breach of trust, and the property representing it in a clean or mixed substitution, in vindication of his equitable proprietary rights⁴⁴ or to take a charge or lien for the amount due in compensation to the trust. The two remedies work in different ways and have different rationales. The lien provides the beneficiary with security for the obligation of the trustee to restore the value of the misappropriated asset to the trust fund. The lien may be enforced and to the

⁴⁰ *Foskett v McKeown* (n 2) at 130.

⁴¹ *Re Hallett's Estate* (n 27) at 709, approved in *Re The Esteem Settlement* (n 8).

⁴² *Foskett v McKeown* (n 2) at 131.

⁴³ Para 13-67.

⁴⁴ *Foskett v McKeown* (n 2) at 108, 110, 115, 127, 129.

extent that the surviving trust property is insufficient to cover the loss, a personal remedy for compensation may be pursued against the trustee.⁴⁵ When the trustee has made good the breach of trust by restoring the trust fund, then the beneficiary will cease to have any proprietary interest in the property on which the lien is secured. Often the lien is claimed in cases where the trustee has become insolvent and the surviving fund is insufficient to make full restoration. In such cases there may be little or no practical difference whether the surviving fund is taken in satisfaction of the lien or by way of assertion of a proprietary interest.⁴⁶ Where the election is a meaningful one it should usually be exercised at the time of judgment or, if issues of tracing trust assets are dealt with by an inquiry or account subsequent to judgment, then at the time of judgment in the inquiry or the account.⁴⁷

D. Subordination of Trustee's Interest in a Mixed Substitution

Where there has been a mixed substitution the lien which the beneficiary is entitled to claim secures priority for the beneficiary over the trustee (and all those claiming through the trustee) over all the property comprised in the mixed substitution, not merely a proportionate share in it. So where misappropriated trust money is used to purchase assets from a mixed substitution, the beneficiary can trace the trust money or property into any number of those assets and enforce his lien over all or any of them.⁴⁸ Consequently the beneficiary can identify his contribution in any part of the mixed substitution and subordinate any claim the trustee may have in any share in it until the beneficiary's own claim has been satisfied.⁴⁹ The equities are described to be unequal as between the beneficiary and the trustee and in favour of the beneficiary.⁵⁰ The principle of subordination allows the beneficiary to (1) claim the credit balance surviving in a mixed bank account, to the extent that it falls within the amount secured by the lien, when the trustee has made withdrawals from the account and dissipated them; and (2) conversely, to exercise his lien over surviving traceable assets or their proceeds of sale bought by the trustee with money withdrawn from the account when the trustee has dissipated the balance in the account; and (3) to combine both (1) and (2) by exercising his lien over assets which have been bought with withdrawals from the account and the credit balance which remains in the account.⁵¹

13-21

⁴⁵ *ibid*, at 130.

⁴⁶ *ibid*, at 130.

⁴⁷ Compare the principles on election between alternative remedies stated in *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514, PC. As to the procedure for an account, see Ch 8.

⁴⁸ *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 at 735.

⁴⁹ *Foskett v McKeown* (n 2) at 132, per Lord Millett; and see LD Smith, *The Law of Tracing* (Oxford, Clarendon Press 1997) 199 *et seq.* Apparently approved in *Re Esteem Settlement* (n 8) at [146], approving the principle stated at 139 of *Foskett v McKeown*, that 'it is morally offensive as well as contrary to principle to subordinate the claims of the victims of a fraud to those of the objects of the fraudster's bounty' although the context in which this paragraph was referred to was focused on the realisation of an asset traced rather than the identification of what assets were traceable.

⁵⁰ See *Re Tilley's Will Trusts* [1967] Ch 1179 at 1189.

⁵¹ *Re Ontario Securities Commission and Greymac Credit Corp* (1986) 30 DLR (4th) 1 at 12, Ont CA; affd (1988) 52 DLR (4th) 767, Can SC.

E. Income and Interest Derived from a Traceable Asset

- 13-22** A beneficiary's proprietary claim to the whole or a share of assets misapplied in breach of trust or assets representing those assets, will extend to, or to a share in, any income or interest derived from those assets.⁵² Where the beneficiary claims a lien in respect of trust money or assets applied in breach of trust, the personal claim against the trustee for breach of trust which the lien secures will normally carry interest which can include compound interest.⁵³ Because Jersey's case law on the nature of the beneficiary's lien has rarely been properly articulated, it is unclear whether the interest element in personal claim against the trustee is to be added to the security so that the sum secured by the lien increases over time as interest is added to it, without reference to any income actually earned by the property representing the trust assets which have been misapplied. In the English cases involving disentanglement of bank accounts, interest has not been added to the security in this way⁵⁴ and it is questionable whether in other cases interest should be added to the security without reference to any income actually earned.⁵⁵

F. Locus standi to Trace

- 13-23** The same principles that apply in bringing a breach of trust claim also apply in bringing a claim for a proprietary remedy.⁵⁶ The beneficiaries of the trust that has been depleted owing to the misapplication of trust money, a new replacement trustee or co-trustee will have locus.⁵⁷

G. Forms of Relief

- 13-24** The forms of relief that may be granted so as to give effect to a proprietary remedy in favour of a beneficiary will vary according to the circumstances of a case. If a pure money fund is involved, the Court will usually declare what part of it belongs to the trust and order payment to the fund. If assets other than money are involved, and it is established that those assets belong wholly to the trust, or that the amount of a lien that is claimed plainly exceeds the value of the assets, the Court will direct a transfer of the assets in specie to be vested in the trustee. In cases where the beneficiaries have a proportionate share in assets, or a lien over the assets the amount of which is less than or does not clearly exceed the value of the assets, the Court may order a sale or other appropriate mode of realisation of the assets

⁵² *Re Diplock* [1948] Ch 465 at 517, 557; and see *Banton v CIBC Trust Corp* (2000) 182 DLR (4th) 486 at 504–06.

⁵³ *United Capital Corp Ltd v Bender* [2006] JLR N [7]]; *Federal Republic of Brazil v Durant Intl Corp* [2013 (1) JLR 103].

⁵⁴ *In Re Hallett's Estate* (n 27) at 226 *et seq*, eg, no interest was added to the trust money paid into the account (presumably a non-interest bearing account), and the Hallett trustees received precisely the capital sum paid in.

⁵⁵ *Foskett v McKeown* [1998] Ch 265 at 277G–278B, CA, suggests that interest might be added.

⁵⁶ As to which see Ch 7.

⁵⁷ A trustee who has himself concurred in a breach of trust may, notwithstanding such concurrence, take proceedings against his co-trustee to claim the trust property.

before ordering a division of the proceeds. While a proprietary remedy is not discretionary⁵⁸ the particular form of relief may involve an exercise of discretion by the Court. Particularly where a trustee is guilty of misappropriation, the Court can be expected to exercise its discretion in a way which facilitates a prompt payment to the beneficiaries,⁵⁹ although if the Court is satisfied that a premature realisation would be contrary to the interest of the beneficiaries as a whole, an order for realisation may be postponed.

H. Reinstatement of Misappropriated Funds by the Trustee

Where a trustee restores the trust by repaying the money taken from the trust and mixed in a bank account, the *remaining* money in the account will be released from any proprietary claim.⁶⁰ It follows that the beneficiary has no claim on assets that are subsequently purchased with money remaining in the account following restoration.⁶¹ However, where the trustee purchases assets for his own benefit wholly or partly from trust money, and those assets then appreciate in value, the trustee cannot free the assets from a proprietary claim in them by restoring the trust money wrongly applied in their purchase after the purchase has been made and the assets have increased in value.⁶² A penitent trustee who wishes to reinstate a trust fund which has become mixed up with his own assets should apply to the Court for directions so that the Court may direct him whether to implement his proposal to reinstate and if not, what he should do, making full and frank disclosure to the Court and consulting with adult beneficiaries as appropriate.⁶³

13-25

V. Proprietary Remedy against Purchasers with Notice and Volunteers

In relation to a proprietary remedy by a beneficiary to recover misapplied trust assets, there is a distinction between three categories of recipients of trust assets: first, purchasers or volunteer recipients who have actual notice that the property which they have received is transferred to them in breach of trust; secondly, innocent persons to whom trust money or property is distributed in breach of trust in the mistaken belief that they are beneficiaries entitled under the trusts (whom in English law are referred to as '*Diplock* recipients'⁶⁴ although that term is not used in Jersey); and, thirdly, innocent donees from a trustee of

13-26

⁵⁸ *In re Esteem Settlement* (n 16); *Foskett v McKeown* (n 2) at 109.

⁵⁹ *Foskett v McKeown* (n 2) at 135G–H.

⁶⁰ Although this is not a universally held view; see *Lewin on Trusts*, 19th edn (London, Sweet & Maxwell, 2014) at 41–37 and cp *Scott, The Law of Trusts*, 4th edn (USA, Aspen Publishers, 1998), vol V, §§ 517.3, 519.2; but see contra Smith, *The Law of Tracing* (n 48) at 206–08.

⁶¹ *Re Oatway* [1903] 2 Ch 356.

⁶² *Scott v Scott* (1962) 109 CLR 649, Aus HC.

⁶³ The trustee would normally bear his own costs of the application and pay the costs of the respondent beneficiaries, on the basis that the application was wholly necessitated by the trustee's breach of trust.

⁶⁴ *Re Diplock* (n 51).

money or assets being or representing trust money or assets misappropriated by the trustee. In English law, a proprietary remedy is available against all three categories of recipient but the remedy is not necessarily of the same character as that available against the trustee who commits the breach of trust in the first place.⁶⁵

- 13-27** A purchaser or volunteer with actual notice of the breach of trust is treated in the same way as the trustee and is subject to the same remedies of a claim to a proprietary interest or a lien on the asset securing the beneficiary's personal remedy against the trustee for breach of trust. A purchaser or volunteer with actual notice will, like a trustee, have their interests in the proceeds of the trust property subordinated to the interests of the plaintiff beneficiary's interest.⁶⁶ If the recipient can be made personally liable as a knowing recipient, we consider the beneficiary's lien would secure the knowing recipient's personal liability to 'account as if a constructive trustee' against the recipient to make good the breach of trust.
- 13-28** A *Diplock*⁶⁷ recipient is an innocent recipient of assets misapplied in breach of trust that are subject to a proprietary remedy in favour of the true beneficiaries but who are treated as sharing the assets proportionately with the beneficiaries on the basis that the equities between them and the true beneficiaries are equal. The interest of a *Diplock* recipient in such assets is therefore not subject to the principle of subordination.⁶⁸ The true beneficiary's remedy against a *Diplock* recipient is a right for the beneficiary to assert a proportionate share in assets acquired through a mixed substitution.
- 13-29** The proprietary remedy available against innocent recipients of misappropriated trust assets was not fully considered until *Foskett v McKeown*. The recipients, though themselves innocent were treated as being in a position analogous to a wrongdoing trustee from whom they had gratuitously derived title to the assets and, the innocent donee's, interests were subordinated to the interests of the claimant beneficiaries.⁶⁹ Thus it appears that an innocent donee and a *Diplock* recipient are different categories of innocent recipient, the latter sharing with the plaintiff in a proprietary claim in proportion to their contribution with the former's interest in a mixed substitution being subordinated.

A. Tracing Trust Money into and through a Loan between a Donee of Misappropriated Trust Money and a Company

- 13-30** Where a donee receives money that is impressed with a trust and lends it on, the plaintiffs can either seek to trace into the loan and recover the amount of the loan from the borrower, or if the borrower is not a purchaser without notice, trace through the loan into any

⁶⁵ *ibid*; *Sinclair v Brougham* [1914] AC 398 at 439, departed from in *Westdeutsche Landesbank Girozentrale v Islington LBC* (n 16) but not in this respect.

⁶⁶ *Sinclair v Brougham* (n 64) at 442–43; *Re Diplock* (n 51) at 534. See also *Banton v CIBC Trust Corp* (n 51) at 503–04.

⁶⁷ [1948] Ch 465, CA.

⁶⁸ *Re Diplock* (n 51) was concerned with a distribution by executors of a residuary estate to a number of charities under a purported charitable gift in the relevant will which was later challenged by the next of kin and held to be invalid, the charities in the meantime having applied part of what they had received in mixed substitutions.

⁶⁹ *Foskett v McKeown* (n 2) at 132A, 132F–133B, 133D, 139H–140A.

property acquired by the borrower with the money lent. Where the loan to a company (which is wholly owned by the donee) is interest free, it has been held that the company does not provide 'value' for its borrowing and so a plaintiff beneficiary is entitled to trace through the loan into profitable assets acquired by the company and assert a proprietary claim to them.⁷⁰ This decision was later considered in *Re The Esteem Settlement* where the plaintiff, having established that it could trace into the assets acquired by the company with the loan, then sought to trace into the loan itself. It was held that the plaintiff was not entitled to trace into the loan itself.⁷¹ This decision was justified on both a narrow and a broad ground. The narrow ground was that the plaintiff, having elected to trace through the loan into assets acquired by the company on the basis that no value was provided for the loan, could not at the same time seek to trace into the loan itself: the plaintiff had to elect whether to trace into the loan or trace through the loan into the assets acquired with the loan but he could not do both.⁷² The broad ground was that the economic reality of the relationship between the donee and the donee's wholly owned company was that the loan was not really a separate asset into which a plaintiff could trace and as a consequence the tracing exercise must be continued into what the company does with the money.⁷³ The result in *Esteem* (certainly as far as the narrow ground) seems to turn on the outcome in the English proceedings. In a case where the plaintiff beneficiary has never sought to trace through the loan into the assets acquired with the loan but merely seeks to trace into the loan itself there is no inconsistency of position and, the narrow ground clearly will not apply to defeat the beneficiary's proprietary claim. It would not be acceptable for a trustee who misappropriates trust money and lends it to his own company which remains good for the money if sued, to compel the beneficiary to trace through the loan into the assets acquired by the company with the loan if the plaintiff only wishes to trace into the loan. By the same logic, a donee of a misappropriated trust asset should be in no better position than the wrongdoing trustee.

VI. Proprietary Remedy between Innocent Contributors to a Mixed Substitution

Innocent contributors to a mixed substitution rank equally in terms of priority among themselves.⁷⁴ The innocent contributors can choose the remedy that is overall most advantageous to them. The options in include applying the rules in *Re Hallett*⁷⁵ and in *Re Oatway*.⁷⁶ The rule in *Re Hallett* prevents the trustee from saying that the innocent

13-31

⁷⁰ *Grupo Torras SA v Al Sabah* [1999] CLC 1469 at 1674.

⁷¹ *Re The Esteem Settlement* (n 8).

⁷² *ibid* at [205]–[208].

⁷³ *ibid* at [203].

⁷⁴ *Foskett v McKeown* (n 2) at 132, per Lord Millett: 'as against the wrongdoer and his successors, the beneficiary is entitled to locate his contribution in any part of the mixture to subordinate their claims to share in the mixture until his own contribution has been satisfied.'

⁷⁵ (1880) 13 Ch D 696.

⁷⁶ [1903] 2 Ch 356.

party's money was lost in a bad investment; the trustee is presumed, subject to evidence to the contrary, to have acted honestly and in accordance with his duties as a fiduciary and therefore is presumed to spend his own money in a mixed substitution first. The rule in *Re Oatway* prevents the defaulting trustee from claiming that he has used his own money to buy an asset which has increased in value in circumstances where the beneficiaries' money in a mixed substitution would then be treated as having been dissipated (and therefore untraceable).

- 13-32** The combination of these rules and the ability of the beneficiaries to elect between them has introduced the possibility of cherry-picking.⁷⁷ One of the criticisms of cherry-picking is that it can operate arbitrarily where the outcome depends upon the choices made by the beneficiaries after the event, which does not fit comfortably with the idea of tracing as being an evidential exercise, concerned with the identification of existing proprietary rights, especially so where those choices could seriously prejudice the position of the trustee's personal creditors. *Durant* does not say anything about the position of innocent contributors to a mixed fund as between themselves. The apparent priority given in *Durant* to questions of intention and causation could be taken as an open invitation to plaintiffs to seek to argue around the presumptions in *Re Hallett* and *Re Oatway* to the effect that their trust money alone was spent from a mixed fund to acquire an asset. Such an approach would put Jersey at odds with the House of Lords in *Foskett v McKeown* in allowing one of multiple innocent contributors to a mixed fund to assert only a beneficial ownership share in the fund or its traceable process and not permitting the plaintiff to assert a lien for repayment of his or her contribution.⁷⁸
- 13-33** In the absence of Jersey authority on the point, we consider the House of Lords authority to be a guide to the position, by which innocent contributors to a mixed fund share rateably in the fund concerned, in proportion to their contribution and none has a lien which subordinates the interest of any one of them to the interest of any other.⁷⁹ Such a situation will arise if a wrongdoer takes money from different trusts to which he is a trustee and pools them before purchasing a new asset. If the trustee has also contributed to the mixed substitution, the principle of subordination will be applied against the trustee so as to eliminate the trustee's interest if the fund is deficient upon enforcement, with the fund then being divided proportionately between the innocent contributors.⁸⁰

A. A Proprietary Constructive Trust Imposed by the No-profit Rule

- 13-34** The proprietary remedy discussed above entitles the plaintiff to assert a continuing beneficial interest in trust property applied in breach of trust, and in property representing that

⁷⁷ *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 at [144], per Rimer J: 'the justice of this [cherry-picking] is that, if the beneficiary is not entitled to do this, the wrongdoing trustee may be left with all the cherries and the victim with nothing.'

⁷⁸ *Foskett v McKeown* (n 2) at 132.

⁷⁹ ibid, at 132; *Barlow Clowes International v Vaughan* [1992] 4 All ER 22.

⁸⁰ *Re Ontario Securities Commission and Greymarc Credit Corp* (n 50).

original trust property through a clean or mixed substitution, with a view to vindicating his proprietary rights. The proprietary remedy available to beneficiaries has been much influenced by the principle that a trustee or fiduciary must not profit from their trust,⁸¹ ensuring that a beneficiary is entitled to assert and vindicate his proprietary interest in a profitable asset acquired with trust money through a mixed (as well as a clean) substitution and is not restricted to a claim to the amount original misappropriated, in effect allowing the trustee to keep the profit subject to the satisfaction of the beneficiary's personal claim.⁸² It is first necessary to identify the secret profit/property which has become subject to a constructive trust and only then does tracing become relevant. The constructive trust imposed under the no-profit rule is not confined to cases where the 'fruit' of the original property can be identified as representing the original property, but is imposed whenever the trustee makes a profit by reason of his use of the trust property or position of trustee, for instance when he takes a bribe or secret commission from a third party.⁸³ A proprietary remedy is concerned with the attribution of the inherent value in one asset to the inherent value in another.⁸⁴ The no-profit rule is concerned with the causal connection between the use of trust property or a trustee's position and the making of a profit. It is possible that the inherent value in an asset might be attributed, in part, to trust money contributed to its acquisition, and the inherent value in that asset in turn attributed to another asset which in the event is a much more valuable one, though the use of the trust money may not have caused the profit to be made. On the other hand, use of trust money or the trustee's position as such may cause the trustee to make a profitable acquisition which becomes subject to a constructive trust even though under the proprietary remedy the interest of the beneficiary would be much less. That would be so, for example, if an opportunity to make an acquisition which proved to be profitable arose because an offer had been made to the trustee in his capacity as such and the trustee in breach of trust funded part of the purchase price from the trust money. Under the proprietary remedy the beneficiaries are confined to seeking recovery of a proportionate share or a lien for the amount of trust money wrongly applied in the acquisition. Under the no-profit rule the beneficiaries are entitled to claim the entire beneficial interest in the asset subject only to a lien in favour of the trustee in respect of his own money contributed to the purchase. There may be cases too where the proprietary remedy is not available because no substitution has taken place, and the trust property has been lost, yet because trust property or the position of trustee has been used and enabled the trustee to make a profit, a constructive trust can still be imposed. The rigour of the profit rule is in some cases ameliorated by an allowance to the trustee for his skill and labour in making the profit. It is not clear whether a similar allowance is available in connection with the proprietary remedy.

⁸¹ See Trusts (Jersey) Law 1984, Art 21(4). A trustee who makes a profit from their office falls within the Trusts (Jersey) Law 1984, Art 33.

⁸² *Foskett v McKeown* (n 2) at 130B.

⁸³ *Lloyds Trust Company (Channel Islands) Limited v Fragoso and Ors* (n 17); *FHR European Ventures LLP and Ors v Cedar Capital Partners LLC* (n 17).

⁸⁴ *Foskett v McKeown* (n 2) at 137.

VII. Mixed Substitutions in a Bank Account

- 13-35** This section is concerned with proprietary claims against the holder of a bank account in respect of the beneficial title to the account holders' chose in action against the bank. Lord Millett in *Foskett v McKeown* explained the nature of a mixed substitution in a bank account as follows.⁸⁵

We speak of money at the bank, and of money passing into and out of a bank account. But of course the account holder has no money at the bank. Money paid into a bank account belongs legally and beneficially to the bank and not to the account holder. The bank gives value for it, and it is accordingly not usually possible to make the money itself the subject of an adverse claim. Instead a claimant normally sues the account holder rather than the bank and lays claim to the proceeds of the money in his hands. These consist of the debt or part of the debt due to him from the bank. We speak of tracing money into and out of the account, but there is no money in the account. There is merely a single debt of an amount equal to the final balance standing to the credit of the account holder. No money passes from paying bank to receiving bank or through the clearing system (where the money flows may be in the opposite direction). There is simply a series of debits and credits which are causally and transactionally linked.

- 13-36** The inherent value of cash paid into a bank account becomes represented in the chose in action or debt claim the account holder has against the bank; the chose in action is the substitute of the cash deposited with the bank. When a credit balance is transferred from one bank account to another, the inherent value in that credit becomes represented in the chose in action against the transferee bank.

A. Mixed Substitutions in a Bank Account

- 13-37** There is a mixed substitution in a bank account when the sum standing to the credit of the account is not wholly attributable to payments into it from a single source. In a trust context, there will commonly be a mixed substitution in a bank account where the sum standing in credit is in part attributable to payments into the account of money belonging beneficially to the trustee and in part attributable to other money held by him in trust, or where that sum is attributable to payments into the account from multiple different sources, none of which belong beneficially to the trustee.
- 13-38** If the payments into the account have been derived exclusively from one source, say a trust, there is a clean substitution. A clean substitution will become a mixed substitution if later payments into the account are made from any source other than the same trust. If the same trust is and remains the sole source of payments into a bank account (and the account remains in credit), generally no evidential difficulty arises when it comes to tracing and no legal difficulty arises when it comes to enforcing a proprietary interest: the chose in action will entirely beneficially to the trust. Greater difficulty arises in a mixed substitution because it becomes necessary to determine the extent of the trust's (or other contributors') proprietary interest in the chose in action. A mixed substitution does not necessarily

⁸⁵ *ibid*, at 127–128.

involve the acquisition of a new asset. It will suffice if the inherent value in one asset passes into another asset that is already held beneficially by another.⁸⁶

B. Simple Case: A Mixed Substitution in a Bank Account

Where there is a mixed substitution, the credit balance in the bank account belongs to the trust and any other contributor to the account proportionately according to their respective contributions into it.⁸⁷ If the trustee transfers £1,000 of trust money into his own bank account which is £9,000 in credit, the trustee will, following the payment in of trust money, own 90 per cent of a chose in action worth £10,000. Assuming the plaintiff brings his proprietary claim before there have been any further movements in the account, he will have a proprietary claim for £1,000. In a simple case a similar approach will apply as between innocent contributors to the account, as where the trustee mixes trust money from different trusts in the same account as his own, or against a *Diplock* recipient who pays trust money into his own account which is in credit.

13-39

C. Running Account

Very few cases are as simple as that outlined above. Most involve an examination of a running account of deposits and withdrawals from the account, after the first payment of trust money into the account. It then becomes necessary to determine to what extent the credit balance surviving in the account and the sums withdrawn to purchase traceable assets is attributed to the trust money paid in, both for the purpose of claiming a lien against a trustee or other wrongdoer and for the purpose of determining the beneficiary's proprietary share of the chose in action. In a case where the claim is against the trustee or other wrongdoer the straightforward approach is that the beneficiary can, in view of the principle of subordination, locate the value of the trust money in any part of the bank account to the extent that that is possible and assert a lien accordingly.⁸⁸ In a case where the claim is not against the trustee or other wrongdoer it is not possible to apply the concept of subordination and the proportionate share can be determined by working out new proportionate shares every time there is a withdrawal from or deposit into the account. That approach, has found favour in Jersey and is sometimes called 'the North American model'.⁸⁹ The North American model has been rejected in England on the ground of its complexity and perceived impracticability.⁹⁰ In England, the starting point is *Clayton's Case*,⁹¹ which is not itself a tracing case,⁹² but which nonetheless provides a mechanism for attributing withdrawals out of a running bank account to payments into it.

13-40

⁸⁶ *Foskett v McKeown* (n 2) at 102 and 110.

⁸⁷ *ibid*, at 110.

⁸⁸ *ibid*.

⁸⁹ *Re The Esteem Settlement* (n 8) at [196]; *Barlow Clowes International Ltd v Vaughan* (n 78).

⁹⁰ *Barlow Clowes International Ltd v Vaughan* (n 78). But see *Smith* (n 48) 267–70.

⁹¹ *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 572.

⁹² For a detailed analysis of *Clayton's Case*, see *Smith* (n 48) 184–94.

D. The Rule in *Clayton's Case*

- 13-41** Under the rule in *Clayton's Case*, also known as the 'first-in, first-out' rule, payments out of a bank account are matched or attributed to payments into the account in the order in which payments were paid in. The first payment out is attributed to the first payment in, and so on. The effect of the rule, where withdrawals have been made and dissipated, is to establish a reverse order of priority; the later the payment into the account the greater the likelihood of that payment not being attributed to a payment out and hence of still being represented as a portion of the credit balance remaining in the account when the account falls to be disentangled. Jersey has rejected the rule in *Clayton's Case* in favour of the North American, apportionment method whereby there is a rateable apportionment on the basis of the contributions.⁹³
- 13-42** The first-in, first-out rule, when applied to a claim against a trustee or other wrongdoer, contrary to the principle that underpins subordination, can in fact operate to the advantage of the trustee or wrongdoer where the trustee or wrongdoer makes payments of his own money into the account *after* the payment in of trust money and then makes withdrawals. As between innocent contributors, where the principle of subordination does not apply, the application of the first-in, first-out rule means that payments in by late contributors are more likely to survive in the account than payments in of earlier contributors.⁹⁴ However, whether in respect of actions against innocent co-contributors or wrongdoing trustees, the first-in, first-out rule is not routinely applied in Jersey.

E. Running Account—Claim against Trustee or other Wrongdoer: The Rule in *Re Hallett*

- 13-43** An strict application of the first-in, first-out rule as against a trustee may result in the attribution of the trust money paid into the account to withdrawals by the trustee which are then dissipated (becoming untraceable) and the attribution of the remaining credit balance in the account to the trustee's own payments into the account, thereby conferring a benefit on the trustee.⁹⁵
- 13-44** The unfairness of this result has been modified, so far as the claim is only between the beneficiaries and the trustee (or other wrongdoer). So long as withdrawals made by the trustee can be attributed to money paid by him into the account, those withdrawals, if spent by him, may be attributed to the trustee's own money, leaving the trust money intact, ie the trustee is presumed not to spend the trust money if it can be attributed to his own money.⁹⁶ This is the *Re Hallett* rule and arises from the general proposition that where a person does

⁹³ *Re The Esteem Settlement* (n 8) at [105]–[111].

⁹⁴ *Barlow Clowes International Ltd v Vaughan* (n 78), per Dillon LJ; but for a more critical view, see at 44, per Leggatt LJ.

⁹⁵ See n 76 and the comments made in *Shalson v Russo*, per Rimer J as to need for flexibility in the application of the first-in, first-out rule.

⁹⁶ *Re Hallett's Estate* (n 27) at 726.

an act which may be rightfully performed, he cannot say that the act was intentionally, and in fact, done wrongly; so far as possible the honest intention of drawing out his own money must be attributed to the trustee. That is to say that notwithstanding the breach of trust in misapplying the money, the rule presumes the trustee remains honest. The *Hallett* rule is the way the principle of subordination is applied to mixed bank accounts. Thus the beneficiary is able to locate the value represented by the trust money paid into the account in the credit balance remaining in the account. The *Hallett* rule does not preclude a beneficiary from tracing the value represented by the trust money in withdrawals made by the trustee which survive in a traceable form. There are no Jersey cases in which the *Re Hallett* rule, as expressed above, has been applied although the Royal Court in *PKT Consultants Jersey*⁹⁷ did (albeit without the benefit of detailed argument) adopt *Hallett*⁹⁸ and that was not departed from by the Royal Court in *Esteem*. In *Esteem* the Royal Court decided that Jersey would not follow *Clayton's Case* but made no comments as regards the applicability of the *Hallett* rule because *Esteem* concerned claims between competing innocent contributors to a mixed account. It would appear that notwithstanding that the first-in, first-out rule does not apply to Jersey and therefore part of the rationale for having the *Hallett* rule is undermined, in the absence of any express disavowal of it the rule that a trustee is presumed to spend his own money from a mixed fund first can, still be presumed to have survived as a free-standing principle of Jersey law.

F. The Lowest Intermediate Balance

The *Hallett* rule does not have the effect of preserving the value representing the trust money paid into the account *greater* than the balance in the account when withdrawals are made by the trustee *after* the payment in of the trust money. So if the trustee makes further withdrawals from the bank account so as to further reduce the credit balance down to near zero that will *prima facie*⁹⁹ be the limit of the amount which the beneficiary can claim. The trustee may subsequently pay in further money of his own, but that cannot be attributed to the trust money paid into the account because *prima facie* that does not have its source in trust monies and does not represent the trust money.¹⁰⁰

13-45

In English law, the beneficiary's claim is limited to such an amount as does not exceed the lowest intermediate balance in the account during the intervening period between the payment in of the trust money and the time when the disentanglement of the account falls to be made. Jersey does not recognise the 'lowest intermediate balance rule' as having the status of a rule¹⁰¹ on the ground that it afforded a fraudster a means to defeat a tracing claim by manipulating the sequence of credits and debits in a bank account. The Jersey Court of

13-46

⁹⁷ [1991 JLR N-5c].

⁹⁸ (1880) 13 Ch D 696.

⁹⁹ Subject to arguments about backwards tracing, considered below.

¹⁰⁰ *James Roscoe (Bolton) Ltd v Winder* [1915] 1 Ch 62; *Bishopsgate Investment Management Ltd v Homan* [1995] Ch 211, CA.

¹⁰¹ [2013] JCA071.

Appeal has considered the 'lowest intermediate balance rule' to be¹⁰² simply another aspect of requiring a beneficiary to establish a sufficiently clear link between the original property and its traceable proceeds and if that is possible the lowest intermediate balance rule will yield to it.

- 13-47** Even as a matter of English law, the lowest intermediate balance rule will not be applied if it can clearly be shown that the trustee, by making the subsequent payment into the account intended to reinstate the trust money previously taken out, but the trustee will not be taken as having made the subsequent payment in for that purpose merely from the fact that previously trust money has been withdrawn.¹⁰³ The lowest intermediate balance rule is consistent with the principle of subordination because the value representing the payment in of trust money cannot, by reason of the later withdrawals, be attributed to anything more than the lowest intermediate balance and the excess above the lowest intermediate balance must necessarily be attributable to the trustee's or wrongdoer's later payments in.¹⁰⁴

G. Claims and Priorities as between Innocent Contributors and Innocent Donees and Innocent Recipients

- 13-48** The *Hallett* rule has no application where the equities are equal, that is to say as between competing beneficial plaintiffs for a determination as to the beneficial ownership of the credit balance remaining in a mixed bank account held by the trustee. The first-in, first-out rule will *prima facie* not be applied, and the sums withdrawn will, in the absence of evidence to the contrary, be apportioned proportionately, ie as the different contributions in the account bear to one another at the moment before each withdrawal is made.¹⁰⁵ It is to be noted that the apportionment method may result in some contributors, particularly earlier contributors, receiving an amount greater than would be available to them under the lowest intermediate balance rule, a point which, though not considered expressly by the Jersey courts, has been considered in Canada where the conclusion has been reached that the lowest intermediate balance rule is irrelevant in the present context.¹⁰⁶ Where there are full computerised banking records available, the application of the apportionment method referred to above, may be straightforward, although not necessarily inexpensive to carry out.¹⁰⁷

¹⁰² *ibid.*

¹⁰³ *James Roscoe (Bolton) Ltd v Winder* (n 99) at 68; *Bishopsgate Investment Management Ltd v Homan* (n 99) at 220. And see Smith (n 48), where it is pointed out that the beneficiary's interest in the added money is acquired through the trustee making a payment with intent to reinstate the trust money rather than through tracing.

¹⁰⁴ A more detailed consideration of the issue of 'backwards' tracing is found at paras 13-86 *et seq.*

¹⁰⁵ *Esteem* (n 8) at [111]; *Barlow Clowes International Ltd v Vaughan* (n 78) 361; *Commerzbank Aktiengesellschaft v IMB Morgan plc* [2004] EWHC 2771 (Ch), at [48].

¹⁰⁶ *Law Society of Upper Canada v Toronto-Dominion Bank* (1998) 169 DLR 453, Ont CA; considered *Re Sutherland; Re French Caledonia Travel Service Pty Ltd (in liq)* [2003] NSWSC 1008 at [191]–[193].

¹⁰⁷ The North American model was considered in *Barlow Clowes International Ltd v Vaughan* (n 78) as being fair. The only objection to it was its complexity and impracticability on the facts of the case.

VIII. Mixed Substitutions—Tracing into Assets Acquired with Trust Monies

This section considers two scenarios where questions arise as to how the tracing rules apply for the purpose of identifying assets against which either a lien or proprietary claim to a proportionate share may be asserted against a trustee or other wrongdoer:

1. assets acquired with the aid of a borrowing secured on the asset; and
2. assets acquired out of a previously mixed bank account

As a general rule, where an asset is acquired through a mixed substitution, a beneficiary can assert a proportionate share in the asset. Where the asset is acquired by the trustee or other wrongdoer the beneficiary may in the alternative claim a lien or charge over the asset to secure his personal claim against the trustee for breach of trust.

A. Asset Purchase with Credit Secured on the Asset

If a trustee, in breach of trust applies trust money to at least some of the deposit or part of the purchase money on an asset, with the balance of the purchase money being raised by the trustee or other wrongdoer by way of credit secured on the asset, the money raised by the trustee virtue of the security does not count as a contribution by him to the purchase, since his ability to obtain the loan was dependent on the unauthorised acquisition with trust money of the asset which formed the security.¹⁰⁸ If the trustee contributes nothing to the deposit or the purchase price beyond raising money on the security of the asset, the beneficiary will take the whole beneficial interest in the asset subject to the security interest if the security holder is a bona fides security holder without actual notice of the trustee's breach of trust.¹⁰⁹ If the trustee pays off the principal sum that is the subject of the security with his own money, the trustee is entitled to credit as against the plaintiff beneficiary against the proceeds of sale of the asset of an amount equal to the principal repaid or advanced, but not to any sums incurred in respect of interest, costs or charges on the mortgage. Thus, the beneficiary takes the benefit of all the increase in value of the asset.¹¹⁰

¹⁰⁸ *Paul A Davies (Australia) Pty Ltd v Davies* [1983] 1 NSWLR 440, NSW CA; Scott, *The Law of Trusts* (n 59) vol V, § 516.2. This is a proprietary remedy arising by virtue of a combination of tracing principles but also the no-profit rule; see para 13-34 above.

¹⁰⁹ Para 13-34 above.

¹¹⁰ *Australian Postal Corporation v Lutak* (1991) 21 NSWLR 584, where an equitable mortgagee recovered out of the proceeds of sale of land bought by the trustee with trust money and money raised on the equitable mortgage the principal advanced, but not the full sum due under the mortgage. An equitable mortgagee does not gain priority over the beneficiary through a defence of purchase without notice. Even where the mortgage is in favour of a legal mortgagee the trustee may be unable to circumvent or mitigate the result stated in the text by taking an assignment from the mortgagee.

B. Trust Money Used to Discharge Credit Secured on the Asset

- 13-52 Where the trustee or other recipient of trust money uses it to pay off the principal on a loan which is secured on the asset, either in whole or in part, the beneficiary will acquire an interest in the asset in the proportion that the trust's 'contribution' to the security bears to the purchase price.¹¹¹
- 13-53 It seems at least arguable that where trust money is used to discharge a debt incurred by the trustee for the purpose of acquiring a specific asset, and the debt or the loan is repaid out of trust money, a beneficiary can trace into the repayment of a debt or loan so as to give him a remedy of a proprietary character by way of subrogation to the lender's right of security.¹¹² Whether it is possible for a plaintiff beneficiary to be subrogated to the rights of a mortgagee of Jersey land in this fashion is unclear—English law principles do not readily apply to a system of real property that is unique to the island. In *Durant*, it was suggested that, proving the implied intention of the defendant to reimburse the depleted trust fund or acquire an asset in the expectation of receiving money imbued with a trust would be a sufficient, but not necessary way of establishing a sufficient link between the original assets and their traceable proceeds.¹¹³

C. Assets Purchased with Money Withdrawn by Trustee or other Wrongdoer from a Mixed Bank Account—the *Re Oatway* Rule

- 13-54 In a case where withdrawals have been made from a mixed account and spent by the trustee the *Hallett* rule permits the beneficiary to locate the value represented by the trust money paid into a mixed bank account in the credit balance remaining in the account. Where withdrawals have been made by the trustee from a mixed bank account and applied to buy traceable assets or their proceeds of sale, but the credit balance remaining in the account is then dissipated by the trustee, the trustee is not permitted to maintain that the assets bought by him with money withdrawn from the account, or their traceable proceeds of sale, represent his money alone.¹¹⁴ The assets are subject to a lien in favour of the beneficiary. The rule in *Re Oatway* is entirely consistent with the principle of subordination and preserves a beneficiary's ability to trace.

¹¹¹ This analysis relies upon reverse or backwards tracing being possible under Jersey law. As to backwards tracing generally, and its place in Jersey specifically see para 13-86 below.

¹¹² *Lewin on Trusts* (n 26) 41–110; *Smith* (n 48) 146 *et seq.* See *Bishopsgate Investment Management Ltd v Homan* (n 99) at [216G–217B], per Dillon LJ and *Foskett v McKeown* (n 2) at 283G–284A, per Scott V-C. In *Jyske Bank (Gibraltar) Ltd v Spjeldnaes*, 23 July 1997 (unreported) at 331–34, it was held that where there is evidence from which the Court can infer that a fraudulent trustee intended to acquire an asset with money overdrawn from a bank account knowing that the overdraft would either be paid off or restored within its limit by money obtained in breach of trust over which the trustee had direct or indirect control, it is appropriate in those circumstances for the Court to impose on the asset to be acquired a constructive trust on its acquisition. It is to be noted that the decision, although not the reasoning leading to it, turns on the existence of circumstances (including fraud on the part of the trustee) justifying the imposition of a constructive trust rather than an application of a backwards tracing rule.

¹¹³ *Federal Republic of Brazil and Anor v Durant International Corporation and Anor* (n 1) at [69].

¹¹⁴ *Re Oatway* (n 60).

The lien is not limited to the amount withdrawn to purchase the assets. Any movement in the value of the asset has no bearing on the amount of the lien, though they may affect the amount that is actually recovered on enforcement if the value of the assets falls below the amount secured. Where the value of the asset falls within the amount secured by the lien, the beneficiary is entitled, on enforcement, to the whole of the profit (to the extent of the profit falling within the amount secured) deriving from an asset bought with money withdrawn from a mixed bank account.

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It makes no difference that the money that is withdrawn in order to purchase the assets exceeds the amount of trust money paid into the account. The ability of the beneficiary to identify the trust money paid into the account (at least in part) in the assets which have been bought with the mixed fund supports a lien over the whole of those assets under the general rule concerning mixed substitutions.

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Because Jersey does not subscribe to the lowest intermediate balance rule, it would seem that the amount that can be recovered through enforcement of the lien is, unlike in England, unaffected by the lowest intermediate balance rule.¹¹⁵ If £3,000 of trust money is paid into an account and following withdrawals by the trustee the balance in the account reduces to £2,000. The trustee then applies that £2,000 together with £1,000 of his own funds later added to the account in the purchase of an asset for £3,000 which maintains its value: does the beneficiary have a lien for the value of £3,000 or £2,000? Applying the lowest intermediate balance rule means the claim is limited to £2,000. Under English law if the lowest intermediate balance rule were not applied to the above situation the beneficiary would obtain a windfall of an extra £1,000 that he would not otherwise have obtained had the money remained in the bank account. Therefore, while under English law the amount of the lien will not be affected by movements in value of assets bought out of the mixed bank account, it will be affected by reductions in the credit balance of the account below the amount of trust money paid in before the purchase has taken place, that is not the case in Jersey.

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The principle of subordination on which the *Oatway* rule is based can be used in more complex cases than *Re Oatway* itself. Suppose, for example, that £3,000 of trust money is paid into the account which is £2,000 in credit with the trustee's own money, and the trustee applies £1,000 in the purchase of assets which he then sells, the proceeds of sale being dissipated; applies £2,000 in the purchase of assets which increase in value to £2,500 and are retained by the trustee; and withdraws and spends £1,500 leaving a credit balance of £500 in the account. The beneficiary can identify the trust money paid into the account partly in the retained assets and partly in the remaining credit balance and, through enforcement of his lien, recover the original value of £3,000.

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D. Claim to a Proportionate Share against Assets Bought by a Trustee with Money Withdrawn from a Mixed Bank Account

The beneficiary's lien will be the best remedy where the assets bought with money withdrawn from a mixed bank account or their proceeds, and with any remaining balance in the

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¹¹⁵ Inconsistent views on this point are expressed in the American Law Institute, *Restatement of the Law of Restitution, Quasi-Contracts and Constructive Trusts*; and Smith (n 48) 201, fn 150.

account, do not exceed the trust money paid into the account. Where the assets, proceeds or money do exceed the amount of the original trust money paid into the account, the beneficiary's lien securing the trustee's obligation to make good the breach of trust cannot be used to recover any of the excess, subject to any interest on the sum secured by the lien. If the beneficiary wishes to claim the excess, they must claim a beneficial interest and cannot at the same time rely on their lien. This involves tracing the value representing trust money paid into a mixed bank account into an asset bought out of it which has proved to be a profitable one.

E. Dissipation and Mixed Performing Assets Purchased with Mixed Funds

- 13-60** There is a greater degree of complexity in cases in which either the trustee makes withdrawals from a mixed account and dissipates them, or where a number of different assets are bought with money from the mixed account, and those assets assume different values by the time of the claim.

i. Dissipation by the Trustee

- 13-61** Where the trustee pays £5,000 of trust money into his own bank account which is £7,000 in credit, withdraws and dissipates £4,000, and then buys with the £8,000 remaining in the account some asset which later increases in value. The possible solutions are as follows:

1. The beneficiary's proportionate share in the asset bought for £8,000 is five-twelfths on the footing that the principle of subordination is to be disregarded, ie the beneficiary is taken as having a five-twelfths share in the whole fund, even the £4,000 withdrawn by the trustee even though they are spent by the trustee for his own benefit ('solution one').
2. The beneficiary's proportionate share in that asset is five-eighths on the footing that the £4,000 withdrawals can be attributed wholly to the trustee in accordance with the principle of subordination ('solution two').

- 13-62** An English court, in accordance with the *Hallett* rule, would apply the principle of subordination, at least to the extent of attributing money withdrawn and dissipated before the purchase to the trustee's own money, thereby adopting the second solution. However, under English law, unlike in Jersey law, the beneficiary's claim to a proportionate share will be limited by the lowest intermediate balance rule.

ii. Asset Cherry-Picking to Maximise Recovery¹¹⁶

- 13-63** The trustee pays £5,000 of trust money into his own bank account which is already £3,000 in credit. The trustee then purchases shares in Company A for £6,000, which later treble in value, and shares in Company B for £2,000, which maintain their value. The possible

¹¹⁶ See comments of Rimer J in *Shalson v Russo* (n 76).

solutions to the situation in which the trustee applies a mixed fund to purchase a number of assets that by the time of the claim have widely disparate values, are as follows:

1. the beneficiary has a five-eighths share in both assets with the result that his claim is worth £12,500 ('solution one'); or
2. the beneficiary is entitled under the principle of subordination to identify the £5,000 of trust money only in the purchase of the asset which trebles in value so that he has a five-sixths share of that asset and no share in the other asset with the result that his claim is worth £15,000 ('solution two').

The second solution is clearly of greater benefit to the beneficiary. It might be said that if subordination applies at least to the extent that money withdrawn and dissipated by the trustee is attributed to the trustee's own money, the principle should logically apply also so as to allow the beneficiary to cherry-pick the most profitable investment as that to which the trust money is to be attributed.¹¹⁷ The second solution is very likely to be adopted if it can be proven that that result accorded with the trustee's or other wrongdoer's intention to apply trust money to the maximum extent possible in the acquisition of the asset which proved to be the most profitable.¹¹⁸

However, where no such intention is apparent, the authors' have reservations as to whether the principle of subordination can be deployed so as to permit a beneficiary to cherry-pick what turns out to be the most profitable asset. It is one thing to say that the trustee cannot claim that money which he has withdrawn and spent for his own benefit should be attributed to the trust money paid into the account if it can be attributed to his own money. It is quite another to say that the beneficiary can locate the trust money in the most profitable investment to the maximum extent possible. Subordination has no effect on either the amount which is secured by the lien or the extent of the beneficiary's share in any assets bought from the mixed bank account. Subordination's role is to enable the beneficiary to identify the trust money in anything that survives from the trustee's wrongdoing by mixing trust money with his own. Though the beneficiary can take the whole of the benefit of profits made from assets bought out of the mixed bank account so far as they fall within the amount secured by the lien, the beneficiary can never make a profit out of the principle of subordination if he claims a lien, because the amount of recovery is necessarily limited to the amount secured which does not change depending on the fluctuating value of the assets into which it is possible to trace.

Notwithstanding our reservations, Jersey's tracing rules, including those rules applicable to the quantification of the beneficiary's proportionate share in assets bought from the mixed account are still in the process of development and refinement. The Royal Court may yet be persuaded to extend the principle of subordination so as to allow the beneficiary to maximise his share in the most profitable investment at the expense of a trustee who has misappropriated trust money for his own benefit or the benefit of another and then mixed it with his own. There is some authority which suggests that the principle of subordination may be extended in this way as against a trustee who misappropriates trust money.¹¹⁹

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¹¹⁷ Smith (n 48) 199 *et seq*; and see P Birks (ed), *Laundering and Tracing* (Oxford, Oxford University Press, 1995) 7–10 (Hayton).

¹¹⁸ *Re Tilley's Will Trusts* (n 49) at 1192–93; and see Smith (n 48) 136–39.

¹¹⁹ See the Scottish case of *Southern Commodities Property Ltd v Martin* 1991 SLT 83; *Foskett v McKeown* (n 2) at 132, though those observations were made in the context of a claim to a lien and nothing else in *Foskett*

F. Assets Bought with Money Withdrawn from a Mixed Bank Account—
Claim to a Proportionate Share between Innocent Contributors or
against a *Diplock* Recipient

- 13-67** The principle of subordination has no role to play as between the innocent contributors, nor against a *Diplock* recipient. The Court will adopt a *pari passu* or rateable approach¹²⁰ that is sometimes adopted between innocent parties in relation to money surviving in a bank account, rather than apply the first-in, first-out rule in *Clayton's Case*, which, apart from not being part of the law of Jersey, is also liable to produce highly arbitrary results.¹²¹ In a case where a payment of trust money into an account corresponds identically or at least closely in amount with a withdrawal from the account shortly afterwards for the purpose of buying some asset, the withdrawal may be attributed wholly to that payment into the account.¹²²

IX. Improvements to Traceable Assets

- 13-68** Hitherto we have examined the possibility of a proprietary remedy where trust money has been applied to acquire, either by way of a clean or mixed substitution a new asset. A different issue arises as to whether trust money spent on improvements to land (which because of the prohibition on trusts over immovable property within the island, is confined to improvements to property outside Jersey)¹²³ and chattels is capable of amounting to a mixed substitution so that a proprietary remedy is available as against the improved asset? This issue marks one of the frontiers between proprietary remedies and the law of unjust enrichment. The distinction is of practical importance especially where a change of position defence may be available.
- 13-69** Expenditure on improvement to property can take a variety of forms: the cost of services provided by construction contractors, the cost of professional fees and disbursements, and the cost of materials used and becoming affixed to or acceded to the existing asset. Such expenditure merits different treatment from a mixed substitution of cash in a bank account because it may not be reflected in the eventual value of the property that has been improved. In some cases, say the repainting of a house in a particularly offensive colour scheme, the value of the asset 'improved' in the eyes of the owner may in fact depreciate in value.
- 13-70** It has been held in Jersey that where funds are spent on improvements to property already owned by an innocent volunteer, the plaintiff beneficiary can trace into the increased value of the property which is attributable to those funds.¹²⁴ If there has been no increase in value

v McKeown suggests that the principle of subordination allows cherry-picking in the quantification of the beneficiary's proportionate share in different assets bought from a mixed bank account. See also *Shalson v Russo* (n 76) at [143]–[144].

¹²⁰ *Sinclair v Brougham* (n 64) at 442, HL, per Lord Parker; *Re Diplock* (n 51) at 539.

¹²¹ *Barlow Clowes International Ltd v Clowes* (n 78) at 35c.

¹²² *Re Diplock* (n 51).

¹²³ As to whether land in Jersey can even be subject to tracing or a proprietary remedy, see para 15-13 above.

¹²⁴ *Re the Esteem Settlement* (n 8) at [131]. Lord Walker has expressed the extra-judicial view that the decision on this point represents a 'better direction' than English law: 'Fraud, Fault and Fiduciary Liability' (2006) 1 *Jersey*

attributable to the traceable funds there can be no tracing at all.¹²⁵ Even where there is an increase in value, tracing may be barred where the Court considers it inequitable to allow the plaintiff beneficiary to trace.¹²⁶ This effectively means there is a change of position defence available to an innocent volunteer who spends trust money on their own property. In the case of expenditure on land or chattels of the trustee or wrongdoer, the beneficiary would acquire the option of either a lien for the amount of the expenditure or a proportionate share and no change of position defence is available.

Where there has been a clean or mixed substitution in the nature of an acquisition, there is no question of the principles of unjust enrichment and its defence of change of position having any bearing on the remedy available. In such cases the claim is to vindicate the beneficiary's continuing beneficial rights in the property itself—the defendant has not been enriched to any degree. A beneficiary's claim to the increase in value is based not in the vindication of the beneficiaries' rights in the thing acquired with his money; the rationale is to reverse the defendant's unjust enrichment by use of the plaintiff beneficiary's money.

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The use of the term 'trace' in *Esteem* in relation to expenditure on improvements to pre-existing assets is potentially misleading. While it is possible to trace into an increase in value, that is not to say that the beneficiary's interest in tracing will inevitably lead to a proprietary remedy. Tracing is an exercise, not a claim or remedy and can be relevant otherwise than for the purpose of asserting a proprietary remedy. The purpose of tracing in this context is to identify whether there has been an increase in value due to the expenditure and to identify into whose hands that increase in value resides. Even if there has been an increase in value the beneficiary's claim may still be defeated if the Court considers it inequitable to permit enforcement.

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The position in Jersey differs from that in English law where expenditure on improvements to land or chattels is not considered to be analogous to a mixed substitution in a bank account for the following reason. In the case of a bank account the chose in action is a right to sue the bank and it is easy to attribute the value inherent in the chose in action to the money paid into the account or the premiums paid on the policy. In the case of land or chattels the value inherent in the rights of a landowner against the world is attributable to his acquisition of the land or chattels, not to the improvements to them. While it may be the case that expenditure has resulted in a physical alteration to the land or chattels that of itself cannot form the basis for a mixed substitution because the same could be said of expenditure which reduces rather than increases the market value of the land or chattels.

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A. Improvement of Trustee's or Wrongdoer's own Assets with Trust Money

A proprietary remedy, by way of a constructive trust, will arise against a trustee who makes a profit from expenditure of trust money on improvements to or maintenance of his own assets. Such a profit would be recoverable under the no-profit rule, which depends on the

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Law Review 139 at 31. Such an innocent volunteer recipient will concurrently be liable to make restitution to a beneficiary but only to the extent that the recipient remains unjustly enriched.

¹²⁵ *Re the Esteem Settlement* (n 8) at [131].

¹²⁶ *ibid*, at [134]–[136].

causal connection between the use of trust money and the making of a profit by the trustee, not on the attribution of the value of the asset after the expenditure in part to the trust money which has been spent as though a mixed substitution has taken place. For example, if the trustee acquires a plot of land (outside Jersey) for £100,000 with his own money and develops it with £500,000 of trust money so that the site becomes worth £1 million, the developed property would, under the no-profit rule at least, be held on a constructive trust as to five-sixths for the beneficiary. It might conceivably be argued to be held as to the whole on a constructive trust for the beneficiary subject to a lien in favour of the trustee for £100,000 in respect of the acquisition cost with perhaps also an allowance for the trustee's skill and labour in making the profit. No change of position defence is available against a trustee who spends trust money improving his own property. The basis of the beneficiaries' claim is not unjust enrichment but an assertion of the beneficiary's continued beneficial ownership and its proceeds.

B. Improvement to an Innocent Recipient's Land or Chattels with Trust Money

- 13-75** Where trust funds are spent improving a property that is already owned by an innocent volunteer, the plaintiff beneficiary may trace into any increased value of the property which is attributable to those funds. If there has been no increase in value attributable to the traceable funds there can be no tracing at all¹²⁷ on the basis that the defendant is no longer enriched. While it is possible to trace, that is not to say that the beneficiary's interest in tracing will inevitably lead to a proprietary remedy. Tracing is an evidential exercise, not a claim or remedy and can be relevant otherwise than for the purpose of asserting a proprietary remedy. The purpose of tracing in this context is to identify whether there has been an increase in value due to the expenditure and to identify into whose hands that increase in value resides. Even if there has been an increase in value the beneficiary's claim may still be defeated if the Court considers it inequitable to permit enforcement.

C. Trustee Spending Money of one Trust on Improvements to Assets in another Trust

- 13-76** Where a trustee misappropriates money from trust A (of which he is the trustee) and spends it to improve assets comprised in trust B of which he is also trustee, without any consideration being paid by trust B then the position is the same as where the trustee spends trust money to improve his own assets.¹²⁸ Where money from one trust is mistakenly applied to pay for improvements to assets of another trust, the case is closely analogous to the case of expenditure by an innocent recipient of trust money on improvements to his own land or chattels.

¹²⁷ *Re the Esteem Settlement* (n 8) at [131].

¹²⁸ But see *Shalson v Russo* (n 76) at [157], where Rimer J. considered that voluntary expenditure by a wrongdoing trustee on construction of a boat owned by an innocent third party would not give the beneficiary a proprietary interest in or charge over the boat, though did not exclude the possibility of a personal restitutionary claim against the owner of the boat.

There would be a defence of change of position if the expenditure by the trustee was not authorised by the terms of the trust that owned the assets, or could not be regarded as reasonable expenditure so far as that trust was concerned, such that the trustee would have no right of indemnity in respect of it had he spent his own money. The defence is also likely to be available where a proprietary remedy is sought by way of subrogation; the innocent volunteer having discharged secured debts with the trust money. There might be a defence if the means of enforcement of the beneficiary's right to trace would work harshly against the beneficiaries of the trust owning the land or chattels, for example if enforcement would involve the sale of an asset that provided the livelihood of those beneficiaries.¹²⁹

13-77

The innocent recipient of an asset subject to a proprietary tracing claim owes no duties in relation to it until they have notice of the proprietary claim made to the asset. Until that time the innocent recipient cannot be held liable for disposal of it.¹³⁰ The only liability such a person has is as a constructive bare trustee, holding and preserving the assets pending a transfer to the true beneficial owner. The position established since *Lipkin Gorman v Karpnale*¹³¹ is that a change of position is a defence to a personal restitutionary claim to reverse unjust enrichment. A tracing claim on the other hand is said to be premised on the vindication of proprietary rights and it therefore follows that a change of position defence is not available as a defence to a tracing claim. The loosening of the link between the beneficiaries' original entitlement to the asset and the assets subsequently liable to be subject to a proprietary claim brings into question (eg by the possibility of backwards tracing) whether there is such a clear demarcation between cases of unjust enrichment and cases involving proprietary relief. If tracing is to become a more flexible, merits based exercise, then the intuitive appeal of a defence of change of position by an innocent recipient whose position would be prejudiced by reliance on the receipt of traceable funds or assets representing them may be a siren call for the courts in future cases.¹³²

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The Court in *Esteem* considered what remedy it could grant to give effect to a tracing remedy were there had been trust money spent on improvements. It posited that it might be able to impose an equitable charge but came to the view on the facts that an order for sale would not be inequitable. Since in this situation one is concerned with a remedy founded on unjust enrichment and not a remedy vindicating property rights, it would be permissible to take a variety of factors into account in determining whether a charge or lien should be imposed and if so to what extent and on what terms. An alternative approach¹³³ may be that the beneficiaries of the trust whose money has been spent should be entitled to be subrogated to the trustee's right of indemnity as trustee of the trust owning the assets that have been improved to recover the money spent, provided that it was authorised expenditure or, even if unauthorised, that it benefited the trust owning the land or chattels, and provided

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¹²⁹ However, that might afford a ground for suspending enforcement rather than refusing to grant a charge or lien altogether.

¹³⁰ *ITS v Susan Morris* [2012] EWCA Civ 195, per Lloyd LJ.

¹³¹ [1991] 2 AC 548.

¹³² See *Menelaou v Bank of Cyprus UK Limited* [2015] UKCS 66 in which both Lord Neuberger and Lord Clark (Lords Kerr and Wilson agreeing) acknowledged, albeit obiter as the issue did not arise on the facts, that a change of position defence could in principle be available in respect of a proprietary claim to subrogation to an unpaid vendor's lien.

¹³³ *Foskett v McKeown* (n 54), per Scott V-C.

that the money was spent by the trustee in his capacity as trustee of the trust owning the land or chattels and not as settlor.¹³⁴

X. Mixtures and Identification—Shares in Companies

- 13-80** If the trustee adds a number of shares in Company A, that are owned by the trust, to his own holding, then the beneficiary is entitled to seek recovery of the same number of shares back. If the trustee has disposed of part of the overall holding and the trust shares cannot be identified by number or otherwise, the trustee will be treated as having disposed of his own shares before the trust shares so as to allow the plaintiff to the tracing claim, if he wishes, to claim back the trust shares out of the residue of the holding.¹³⁵ If the shares are numbered and the numbers of the shares are known, or they can be identified in some other way, there is no mixture. In such a case the trust shares retained by the trustee can be claimed directly from him and the others can be traced into the hands of a transferee who is not a purchaser for value without notice.
- 13-81** Where two trust funds are wrongly mixed together and administered together as one fund, the mixed fund will be divided between the two trusts in the same proportions that the value of the two separate funds bear to each other at the date of the mixture. The Court will not seek to trace the individual assets of the two funds into their separate product. Thus where the funds of two charities had been intermixed and dealt with as a common fund for the best part of two centuries, and part of the trust funds, which, however, could be traced as having originally belonged to one of the charities, had been invested in land which subsequently increased considerably in value, it was held that the profit must be taken to have been made by the whole trust, and must be apportioned between the charities in the proportions in which they were originally entitled to the common fund.¹³⁶ We question, however, whether this rule would be applied where the mixture has not subsisted for an inordinate period of time, and sufficient records of the trusts are available to enable the original separate assets of the two trusts to be identified or traced through into the assets held in the mixed fund at the time of division.

XI. When Assets Become Untraceable

- 13-82** A tracing exercise and a proprietary remedy will fail if trust property applied in breach of trust has passed into the hands of equity's darling; a bona fides purchaser of the legal estate without actual notice,¹³⁷ or there ceases to be any property which represents the trust property over which the remedy can be asserted.

¹³⁴ *Foskett v McKeown* (n 2) at 140.

¹³⁵ Applying *Re Hallett's Estate* (n 27).

¹³⁶ *Edinburgh Corporation v Lord Advocate* (1879) 4 App Cas 823, HL Sc; considered in *Foskett v McKeown* (n 2) at 123.

¹³⁷ Trusts (Jersey) Law 1984, Art 55, discussed at para 13-94 below.

A. Tracing through Overdrawn Bank Accounts

Prima facie, money cannot be traced through an overdrawn bank account.¹³⁸ If the withdrawals from the account into which trust money has been paid reduce the balance to nil, or put the account into overdraft, there is nothing which can be said to represent the trust money paid into the account and nothing for the beneficiary to claim. It makes no difference that the trustee subsequently replenishes the account with money of his own.¹³⁹ For the same reason, if trust money is paid into an account that is already overdrawn,¹⁴⁰ there is nothing which can be traced since the money goes to pay off the trustee's debt to the bank and in that way is dissipated. There is usually no prospect of being able to trace against the bank itself which is usually a purchaser for value without notice. The same rationale applies to the traceability of trust money that is used to satisfy a debt; the receiving creditor will usually be a purchaser without notice, neither will there usually be anything which can be said to represent the trust money.

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Following the Court of Appeal and Privy Council decisions in *Federal Republic of Brazil v Durant*¹⁴¹ it seems that provided a plaintiff can establish a coordinated scheme between the depletion of the trust fund and the acquisition of a traceable asset such as to warrant the Court attributing the value of the interest acquired in the asset to the misuse of the trust fund, then it does not seem to matter if the misappropriated funds were paid into an overdrawn bank account (and so on an orthodox analysis treated as having been dissipated before the asset is acquired). Where there is evidence of an intention to obfuscate the tracing exercise, the Court will not be rigidly bound by the order of the transactions appearing in the running account.¹⁴² However, in *Durant*, the Privy Council was careful to make clear that it did not wish to go so far as to completely abrogate the principle against tracing through debts and overdrawn accounts and the loser approach only appears to apply where there is evidence of a coordinated scheme. In the absence of evidence of an intention of a coordinated scheme between the depletion of the fund and the acquisition of an asset, then it appears that recourse should be had to the orthodox principle that no tracing is possible. It is wholly unclear how the transaction could be unravelled if the bank withdrew the overdraft facility as soon as the trust money was credited into it. In those circumstances, it would be difficult to avoid the orthodox position that it is not possible to trace through an overdrawn account.

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¹³⁸ *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 at 104–05, PC (explaining *Space Investments Ltd v Canadian Imperial Bank of Commerce (Bahamas) Ltd* [1986] 1 WLR 1072, PC, considered in *In The Matter Of The Esteem Settlement* (n 16) and *Federal Republic of Brazil v Durant* [2015] (2) JLR 1]; *Bishopsgate Investment Management Ltd v Homan* (n 99). The general rule cannot be avoided by seeking to consolidate the overdrawn account into which the trust money is paid with another account between the same account holder and same bank which is in credit: *Shalson v Russo* (n 76).

¹³⁹ *Bishopsgate Investment Management Limited v Homan* (n 99).

¹⁴⁰ *ibid.*

¹⁴¹ [2013] (1) JLR 273], [2015] UKPC 35.

¹⁴² ‘a court should not allow a camouflage of interconnected transactions to obscure its vision of their true overall purpose and effect’, per Lord Toulson [2015] UKPC 35, ie where there is evidence of a coordinated scheme it does not matter whether a debit entry in an account appears before a credit entry.

B. Assets Purchased with the Assistance of a Credit Facility

- 13-85** Where a trustee or other recipient of trust money purchases an asset by reason of an overdraft on an account or a credit card, into which trust money has been paid, on an orthodox analysis the trust money cannot generally be traced into the asset that has already been acquired with the credit facility prior to the trust funds being credited in.¹⁴³ Although it seems tolerably clear that in a case where the purchase is made by a trustee, the no-profit rule¹⁴⁴ will apply because the trustee has been enabled to make the acquisition by his use of trust money ('use' in this sense being to reduce his own debt rather than its direct application to acquire an asset), thereby allowing the beneficiaries to claim that the asset that has been acquired is held on a constructive trust for them. However, post-*Durant* the fact that the wrongdoer uses a credit facility to acquire an asset is not a bar to a plaintiff being able to trace. Provided there is a causal connection between the misappropriation and the acquisition of the asset, the formal intricacies of the transaction do not matter. If there is evidence of an intention on the part of the wrongdoer, in misappropriating the funds to use them to acquire an asset and a credit card or credit facility is interposed in the purchase, the misapplied funds that are used to discharge the liability of the wrongdoer owed to the bank or card issuer is not a bar to a tracing claim.

C. Backwards or 'Reverse' Tracing

- 13-86** The concept of backwards or 'reverse' tracing has arisen as a possible means to combat two circumstances, which are largely separate although they can be interrelated, which are usually fatal to the possibility of tracing leading to a proprietary claim at all:
1. payment of trust money into an overdrawn account; and
 2. where the defaulting fiduciary deposits trust money into an account after the defaulting fiduciary has drawn against the account to acquire an asset.
- 13-87** Both (1) and (2) above are techniques often exploited by fraudsters who are able to either manipulate the timing of payments between bank accounts such that monies imbued with a trust are credited to an account *after* an equivalent or related amount has been debited from that account but also by interposing at least one overdrawn bank account into a chain through which trust money is in transit between its source and eventual depository. The technique of reverse tracing as a means to counter either (1) or (2) is controversial because it violates the principle that a beneficiary can only trace into money that represents property that beneficially belonged to him. In Jersey, *Durant* has held that (2) is not an insurmountable bar to a beneficiary being able to trace. The Court did not endorse wholesale adoption of the concept of backwards tracing into Jersey law but suggested that any objection to the practice was indicative only of the need to establish a sufficient link between the original property and its traceable proceeds. It follows that where a sufficient link can be found, a formal process of 'backwards tracing' is not required.

¹⁴³ *Re Tilley's Will Trusts* (n 49); *Bishopsgate Investment Management Ltd v Homan* (n 99).

¹⁴⁴ *Keech v Sandford* (1729) Sel Cas Ch 61.

13-88

The rule in English law is that trust money cannot be traced into an asset bought before the money was misappropriated from the trust since the asset bought does not represent the trust money.¹⁴⁵ Under English law, the plaintiff is limited to asserting a claim against the account for the ‘lowest intermediate balance’ that his money has fallen to between the date of the deposit of his money and the subsequent deposit of the trustee’s own money. Jersey has rejected the lowest intermediate balance approach has the status of a formal rule and held that it was simply another aspect of requiring a beneficiary to establish a sufficient link between the original property and its traceable proceeds.¹⁴⁶ This result is said to be consistent with the general presumptions operating in cases of mixture: the subsequent deposit of the trustee’s otherwise ‘clean money’ does not originate from either the mixed fund or the trust money, and so the trustee can easily displace the evidential presumption that it is attributable to the plaintiff beneficiaries.¹⁴⁷

13-89

The English rule that tracing will be defeated by payments into an overdrawn account is not without controversy. One can readily imagine a situation, in which a fiduciary or other recipient, who is £5,000 overdrawn, pays £4,000 of trust money into the account and then the next day buys an asset for £3,000 out of the account. As a matter of English law, notwithstanding the payment into the account enabled the trustee to use his overdraft facility to buy the asset, the money paid into the account went to reduce the debt to the bank and not to pay for the asset and therefore cannot be traced into the new asset.¹⁴⁸ Perhaps mindful of the fact that a defendant should not be able to benefit by creating a maelstrom so as to obfuscate the ability of the plaintiff to follow the path of the money and mindful of the need to avoid a perception that Jersey affords any safe harbour to fraudsters or those who seek to hide money from those who have a legitimate claim upon it, the Royal Court in *Durant* resoundingly rejected what it referred to as the ‘conceptual’ limitations in the English tracing rules. The Royal Court in paragraph 219 of its judgment said:

The appropriate way for the courts of this jurisdiction to address the subject is, we suggest, not by reference to any pre-conceptions of what is or is not conceptually possible or arguably supported by English authority, but ... as a matter of evidence—at least in cases where, as here, the account in question remains in credit throughout the relevant period, there is no question of possible insolvency and prejudice to unsecured creditors, and there is no suggestion of any intervention by a bona fide purchaser for value. The question is, or should be, simply whether there is sufficient evidence to establish a clear link between credits and debits to an account, irrespective (within a reasonable time frame) of the order in which they occur or the state of the balance on the account. It is unnecessary to posit any limitation on how, as a matter of evidence the necessary link can be proved: it might be by means of bank documentation ... or by reference to the defendant account-holders’ intentions or in some other way. Nor is there any cause to diminish the effect of such a link, once recognised, by introducing the concept of a ‘lowest intermediate balance rule’. As a matter of judicial policy, this approach appears to us to accord most closely with considerations of justice and practicality. Apart from anything else, to do otherwise would ... confer on any sophisticated

¹⁴⁵ *Bishopsgate Investment Management Ltd v Homan* (n 99) although in *Durant* it was open to the plaintiff to suggest that this was in fact the intention of the defendant in order to establish a sufficient link between the original property and its traceable proceeds notwithstanding the difficulties in being able to follow the precise path of the money because of the order of payments.

¹⁴⁶ *Durant* [2012 (2) JLR 356] affirmed in 2013 (1) JLR 273 (CA) and 2015 (2) JLR 1 (PC).

¹⁴⁷ cf *El Ajou v Dollar Land Holdings plc* (n 47), at 735–36.

¹⁴⁸ *Federal Republic of Brazil and Anor v Durant International Corporation and Anor* (n 12).

fraudster the ability to defeat an otherwise effective tracing claim simply by manipulating the sequence in which credits and debits are made to his bank account.

- 13-90** It remains to be seen how this broad statement of principle will be developed in future cases. By the Court's own admission the relevant accounts to which the tracing exercise was subject in *Durant* remained in credit throughout the relevant period, therefore the Court's apparent endorsement of the technique of 'reverse tracing' does not extend to situation (1) above (payment of trust money into an overdrawn account). If in a future case monies subject to a trust are deposited in an account that is overdrawn there will have to be a determination as to whether the deposit is the bank's money or the plaintiff beneficiary's, no matter how clear the evidence may be.
- 13-91** *Durant* does not explore whether it is the subjective or the objective intention of the wrongdoer that is necessary to establish evidence of a coordinated scheme. We assume it is sufficient to show an objective intention on the part of the fiduciary. It is less clear what is to happen were a trustee to establish that subjectively he did not intend to use the misappropriated funds to acquire an asset, but a court were to hold that objectively such intention might be inferred by a reasonable observer, cognisant of all the circumstances of the transaction. In practice the heavy burden of the wrongdoer's fiduciary obligations will serve to act against the wrongdoer, establishing the necessary link.
- 13-92** As a possible alternative to backwards tracing, it seems at least arguable that where trust money is used to discharge a debt incurred by the trustee for the purpose of acquiring a specific asset, and the debt or the loan is repaid out of trust money, a beneficiary can trace into the repayment of a debt or loan so as to give him a remedy of a proprietary character by way of subrogation to the seller's lien (in the case of an asset provided on credit) or a lender's right of security.¹⁴⁹ Such a remedy is of course quite different in character from a proprietary remedy: with the beneficiary not seeking to vindicate his own rights in the trust money but rather seeking to avail himself of someone else's security rights through subrogation. There is no objection to tracing being used in aid of such a remedy.¹⁵⁰ Whether it is possible for a plaintiff beneficiary to be subrogated to the rights of a mortgagee of Jersey land in this fashion is unclear, English law principles do not readily apply to a system of real property that is peculiar to Jersey. In *Durant*, it was suggested that, proving the implied intention of the defendant to reimburse the depleted trust fund or acquire an asset in the expectation of receiving money imbued with trust would be a sufficient, but not necessarily the only way of establishing a sufficient link between the original assets and their traceable proceeds.¹⁵¹
- 13-93** A fiduciary agent who uses the principal's money to pay a secured debt cannot say that he paid out the principal's money otherwise than for the benefit of the principal.¹⁵² A similar analysis would apply to the case of a trustee (or other wrongdoer) who uses trust money to pay off the trustee's (or wrongdoer's) own secured debt: the trustee must be taken as having paid off the debt for the benefit of the beneficiary and accordingly the beneficiary should

¹⁴⁹ See n 114 above.

¹⁵⁰ *Boscawen v Bajwa* (n 11).

¹⁵¹ *Federal Republic of Brazil and Anor v Durant International Corporation and Anor* (n 1) at [69].

¹⁵² *Boscawen v Bajwa* (n 11) esp at 339.

have an equitable remedy by way of subrogation so as to preserve the benefit of the secured debt for the beneficiary, as the trustee (or wrongdoer) who paid off the debt must be taken to have intended.¹⁵³ A subrogation claim against a *Diplock* recipient may be founded on the principle that subrogation reverses or prevents unjust enrichment,¹⁵⁴ and that since the payment in discharge of the secured debt enriches the *Diplock* recipient at the expense of the beneficiary, and the enrichment is unjust because the secured debt was discharged with the beneficiary's money, the remedy should be available irrespective of the intentions of the *Diplock* recipient, subject to change of position defence.

XII. 'Equity's Darling'—a bona fides Purchaser for Value without Notice

A purchaser with actual notice of the trust to which property is subject is bound to the same extent and in the same manner as the person from whom he bought irrespective of what type of notice the purchaser has, whether he has paid full value. Conversely, a bona fides purchaser for value of a without actual notice of the trust has an absolute defence to any claim, whether proprietary or personal by the beneficiaries in relation to the trust property that has been misappropriated in breach of trust. Purchase without actual notice is a defence to an action by the plaintiff beneficiaries; it is for the purchaser to discharge the burden of proving both that he gave value and that he had no notice.

13-94

Article 55 of the Trusts (Jersey) Law 1984 provides;¹⁵⁵

13-95

55 Protection to persons dealing with trustee

(1) A bona fide purchaser for value without actual notice of any breach of trust—

- (a) may deal with a trustee in relation to trust property as if the trustee was the beneficial owner of the trust property; and
- (b) shall not be affected by the trusts on which such property is held.

(2) No person paying or advancing money to a trustee shall be concerned to see that such money is wanted, or that no more than is wanted is raised, or otherwise as to the propriety of the transaction or the application of the money.

13-96

Article 55 has never, since the enactment of 1984 legislation, been subject to judicial consideration by the Royal Court. It is the authors' view that English law may be referred to in interpreting the various concepts mentioned therein. A person dealing with a trustee in Jersey law is afforded a comparatively generously latitude (compared with English law which includes the doctrine of constructive notice) in being able to take free of any

¹⁵³ That the trustee should not be permitted to maintain that his intention was to destroy the debt is consistent with *Re Hallett's Estate* (n 27) at 726 *et seq*; and *Re Oatway* (n 60). See too *Bishopsgate Investment Management Ltd v Homan* (n 99) at 221H, per Leggatt LJ.

¹⁵⁴ As to the general character of the remedy of equitable subrogation, and the role which intention plays in it, see *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221.

¹⁵⁵ This provision is found in pt 4 of the 1984 Law and therefore applies to trusts that have Jersey as well as a foreign law, as their proper or governing law.

beneficial interest attaching to property in the hands of the trustee provided they have no actual notice of a breach of trust.

A. A Purchase for Value

- 13-97** There must be a purchase for a consideration¹⁵⁶ in money or money's worth, but there is no requirement of full value having to be paid. It is unclear whether the Jersey law doctrine of *déception d'outre moitié de juste prix* applies to the transaction between the trustee and third party purchaser and it is likely to depend on the law governing the transaction. If the principle does apply, the English decisions suggesting that a purchase for a small fraction of the true value of the property concerned suffices to support the defence¹⁵⁷ may be put into doubt. A purchase for value includes the discharge of an existing debt. A purchase price consisting of money must actually be paid, it seems in full. This requirement rules out the defence being available to volunteers; however, a volunteer may benefit from the defence if they derive title from a purchaser who satisfies the requirements of the defence.

B. Purchase in Good Faith or bona fides

- 13-98** While the requirement of good faith is, in English law, closely allied to the requirement of notice (the English authorities suggesting that not only absence of notice but genuine and honest absence of notice is required)¹⁵⁸ good faith remains an independent threshold which must be satisfied even though absence of actual notice is proved.¹⁵⁹ There are no reported cases where the requirement of absence of notice has been established but the requirement of good faith has not.¹⁶⁰

C. Without Notice

- 13-99** In Jersey law, only actual notice will suffice.¹⁶¹ Actual notice no doubt also includes knowledge which would have been acquired but for wilfully shutting one's eyes to the obvious, or wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make.¹⁶² Jersey law does not admit of a concept of constructive notice by which a

¹⁵⁶ Although the term 'consideration' as understood in the English law of contract is not a term of art in Jersey law and in Jersey contract law, the French concept of '*cause*' has a greater pedigree.

¹⁵⁷ *Midland Bank Trust Co Ltd v Green* [1981] AC 513.

¹⁵⁸ *ibid*, per Lord Wilberforce at 528E.

¹⁵⁹ *Pilcher v Rawlins* (1872) 7 Ch App 259 at 269, per James LJ as interpreted by Lord Wilberforce in *Midland Bank Trust Co Ltd v Green* (n 156) at 528F, HL; James LJ did not make the statement attributed to him by Lord Wilberforce set out in the text but rather that the purchaser 'may be interrogated and tested to any extent as to the valuable consideration which he has given in order to shew the bona fides or mala fides of his purchase, and also the presence or the absence of notice.'

¹⁶⁰ cp *Midland Bank Trust Co Ltd v Green* (n 156) where the HL rejected the CA's attempts to give the requirement of good faith a significance beyond that of absence of notice.

¹⁶¹ Trusts (Jersey) Law 1984, Art 55.

¹⁶² cp with knowledge for the purposes of a claim in knowing receipt; *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie* [1993] 1 WLR 509 at 575–76.

purchaser is taken to have notice of what would have come to his knowledge if such inquiries and inspections had been made as ought reasonably (meaning ought as a matter of prudence, having regard to what is usually done by men of business in similar circumstances) to have been made by him.¹⁶³ Actual notice also includes a fact contained in or indicated by some document in the possession of the purchaser, whether or not read or remembered.¹⁶⁴ An agent who has actual notice will impute notice to his principal. The attribution of an individual's to a company is considered elsewhere.¹⁶⁵

i. Notice of Doubtful Claims on the Property

If an equitable interest is so doubtful or uncertain that it can only be established by a decision of the Court, knowledge that a claim is being made to it does not necessarily amount to notice of the equity such as can bind a purchaser even if the claim is subsequently found to be good.¹⁶⁶

13-100

ii. Notice and Trustees of Multiple Trusts

Owing to the proliferation of large, institutional trust companies in Jersey, the following provision in the Trusts (Jersey) Law 1984 contains the following provision, which is of relevance in any consideration of notice.

13-101

31 Trustee acting in respect of more than one trust¹⁶⁷

(1) A trustee acting for the purposes of more than one trust shall not, in the absence of fraud, be affected by notice of any instrument, matter, fact or thing in relation to any particular trust if the trustee has obtained notice of it by reason of the trustee's acting or having acted for the purposes of another trust.

Notice, consistent with Article 55 of the Trusts (Jersey) Law 1984, means actual notice. The effect of the provision means that a trust company, formerly trustee of trust A, could purchase trust property from the new trustee of trust A on behalf of trust B, and would take free of beneficial interests under trust A, if its only knowledge of them was acquired as its former trustee.

13-102

iii. No Notice at the Time of Transfer of the Legal Estate

The purchaser must have no actual notice, at the time of the purchase. If the purchaser acquires notice after the acquisition, then he can avail himself of the defence, which will be available to his successors in title as well.

13-103

¹⁶³ *Bailey v Barnes* [1894] 1 Ch 25 at 35, CA, per Lindley LJ; and see *Taylor v London and County Banking Co* [1901] 2 Ch 231 at 258, CA; *Hunt v Luck* [1902] 1 Ch 428 at 434, CA; *Eagle Trust plc v SBC Securities Ltd* [1993] 1 WLR 484 at 494.

¹⁶⁴ *Re Montagu's Settlement Trusts* [1987] Ch 264; *Eagle Trust plc v SBC Securities Ltd* (n 162) at 494.

¹⁶⁵ See Ch 9.

¹⁶⁶ *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276, CA, where the receipt of costs by a party's solicitor was attacked; considered *Eagle Trust plc v SBC Securities Ltd* (n 162) at 498–500.

¹⁶⁷ Which is in virtually identical terms to the Trustee Act 1925, s 28.

iv. Purchasers without Notice from a Purchaser with Notice and Purchasers with Notice from a Purchaser without Notice

- 13-104** The defence is still available where the original purchase is tainted by having actual notice but a subsequent purchase is not. A purchaser without notice from a purchaser with notice takes free of the trust. The want of good faith in the original or prior purchaser does not contaminate subsequent purchasers. A purchaser who takes the legal estate without actual notice of the trust, but taking it from a person who had notice of the trust by virtue of an instrument, but of which instrument the purchaser was ignorant at the time of purchase, can protect himself as a purchaser without notice.¹⁶⁸ A purchaser with notice of the trust from a purchaser without notice takes free of the trust notwithstanding his notice. The first purchaser without notice has already extinguished the beneficiaries' interest in the property.¹⁶⁹ Bar one exception, anyone claiming under a bona fides purchaser for value without notice takes free of the trust. That exception arises where the trustee sells to a bona fides purchaser without notice and, subsequently, himself becomes the owner, even if he purchases for good and valuable consideration: the trust will revive as against the trustee.¹⁷⁰

D. Governing Law

- 13-105** Whether a person can avail themselves of the defence of a purchase for value without notice should be determined by reference to the *lex situs* in the case of immovable property, chattels and negotiable instruments. In relation to transfers of things in action it will be the law governing where the thing is treated as being situated; and in the case of shares in particular, the law of the place where the company was incorporated and where the shares are treated as situated.¹⁷¹

¹⁶⁸ *Pilcher v Rawlins* (n 158).

¹⁶⁹ *Burrow's Case* (1880) 14 ChD 432, CA.

¹⁷⁰ *Re Stapleford Colliery Co, Barrow's Case* (1880) 14 ChD 432 at 445, CA, per Jessel MR: 'The only exception, and the well-known exception, to the rule which protects a purchaser with notice taking from a purchaser without notice, is that which prevents a trustee buying back trust property which he has sold, or, a fraudulent man who has acquired property by fraud saying he sold it to a bona fide purchaser without notice, and has got it back again.'

¹⁷¹ *FG Hemisphere Assocs LLC v Democratic Republic of Congo* [2011] JLR 486].

14

Trust Property and the Proceeds of Crime

I. Introduction

The idea that a trustee could be accountable to law enforcement authorities for the persons with whom the trustee had dealt in the course of the administration of the trust and the provenance of the trust assets¹ was, until approximately 30 years ago, an anathema. That position has now irrevocably changed in Jersey as a consequence of a raft of legislative measures introduced from the late 1990s that are directed to protect the island's financial services industry from being used as a safe harbour for nefarious funds, and to strengthen the tools available to law enforcement authorities both in Jersey and abroad, to deal with serious crime and terrorism. In addition to conventional criminal sanctions for the underlying criminal activity itself, there are now wide-ranging provisions that prohibit what might broadly be described as 'dealing with' property that is or represents the proceeds of criminal conduct and for seizing or confiscating it. A detailed examination of the criminal law is beyond the scope of this work which is concerned, primarily, with trust litigation in a civil context. Practitioners involved in trust litigation will primarily be concerned with the consequences that Jersey's anti-money laundering(AML)/anti-terrorist financing (ATF) regime has on the rights of beneficiaries and the powers and duties of trustees in respect of the trust property as well as the civil and criminal and regulatory liability of trustees arising from infringement of the AML/ATF legislation. Those carrying on trust company business are subject to a requirement of registration as 'fit and proper' registered persons with the Jersey Financial Services Commission (JFSC) and must regard those to whom they provide services and others with a healthy degree of suspicion, satisfying themselves (at least) of their identity (and in the case of legal persons those individuals that stand behind them) as well to the provenance of funds under their control.²

14-1

¹ Subject perhaps only to the possibility that the settlor was not in fact the true owner of those assets.

² See also Ch 12 in relation to dishonest assistance.

A. Primary Legislation

- 14-2** Jersey's legislative response to the threat of money laundering, while predating the UK's Proceeds of Crime Act 2002, has since largely followed the UK's,³ with a framework consisting of a handful of pieces of primary legislation under which secondary legislation and guidance from the JFSC has been drawn up and promulgated. The first Jersey legislation dealing explicitly with money laundering was the Drug Trafficking Offences (Jersey) Law 1988 (now repealed).⁴ The current legislative framework comprises a Proceeds of Crime (Jersey) Law 1999 (as amended) and the Terrorism (Jersey) Law 2002. In addition to the above, which may be regarded as the main prohibitive statutes, are five additional primary legislative measures relevant to anti-money laundering and the obtaining of evidence, namely: the Bankers Books Evidence (Jersey) Law 1986;⁵ the Investigation of Fraud (Jersey) Law 1991;⁶ the Criminal Justice (International Co-operation) (Jersey) Law 2001;⁷ the Proceeds of Crime (Cash Seizure) (Jersey) Law 2008⁸ and the Civil Asset Recovery (International Co-operation) (Jersey) Law 2007.⁹

B. Secondary Legislation

- 14-3** Both the Proceeds of Crime (Jersey) Law 1999 and Terrorism (Jersey) Law 2002 are supplemented by the Money Laundering (Jersey) Order 2008 (MLJO) which was introduced specifically to target businesses listed in Schedule 2 to the Proceeds of Crime (Jersey) Law 1999.¹⁰ The MLJO requires all businesses to which it applies (including those persons regulated by the JFSC to conduct trust company business) to establish risk-based procedures for

³ Amendments to the Proceeds of Crime (Jersey) Law 1999 (taking effect from 4 August 2014) have reformulated the offences in Arts 29-34D to bring them into line with the UK's Proceeds of Crime Act 2002.

⁴ Proceeds of Crime and Terrorism (Miscellaneous Provisions) (Jersey) Law 2014.

⁵ Art 6, which provides that on the application of any party to a legal proceeding to which the bank is not a party, the Royal Court may order that a party be at liberty to inspect and take copies of any entries in a bankers' book for any of the purposes of such proceedings.

⁶ Which empowers HM Attorney General to require the production of documents and the provision of information for the purposes of assisting investigating authorities in matters of serious or complex fraud. On the request of an overseas prosecuting authority, the AG may issue a notice to those thought to be in possession of relevant documentation or information requiring copies of documents, or requiring that answers are provided to questions relevant to the investigation.

⁷ Which provides for the service of overseas process in Jersey and for taking of formal evidence in Jersey for the purposes of overseas criminal proceedings or investigations (thus going further than the Evidence (Proceedings in Other Jurisdictions) (Jersey) Order 1983. This legislation also enables warrants to be issued for the search of premises and seizure of evidence in connection with any serious offence. Whereas Art 40 of the Proceeds of Crime (Jersey) Law 1999 is limited to identifying and then tracing and recovering the proceeds of crime, the powers under this law enable information to be obtained for the purposes of investigating the original offence. In addition, this legislation allows for the enforcement of overseas orders for the forfeiture and destruction (or other disposal) of anything used or intended for use in connection with a serious offence.

⁸ Which contains powers of civil forfeiture specifically in relation to tainted cash. No conviction is needed and the Court would decide the matter on the balance of probabilities.

⁹ Which empowers the AG to require the production of evidence for use in civil recovery proceedings outside of Jersey and a regime by which external civil asset recovery orders may be given effect to in Jersey. Considered below at para 14-59.

¹⁰ A Private Trust Company exempted from the Financial Services (Jersey) Law 1998 under the Trust Company Business (Exemptions) (Jersey) Order 2000 is excluded from the definition of 'financial services business' to which the Money Laundering (Jersey) Order 2008 applies.

the purpose of forestalling or preventing money laundering and combating the financing of terrorism. The failure to establish and maintain such procedures is an offence.¹¹ The supervision of the businesses covered by the MLJO is the responsibility of the JFSC.

C. JFSC Guidance

The JFSC has issued regulated sector-specific guidance in the form of a Handbook for the Prevention and Detection of Money Laundering and the Financing of Terrorism which contains a section specifically for regulated trust company businesses.¹² The handbook is intended to represent best practice and while it does not have the force of law, for those in the regulated sector (such as those carrying on trust company business) the guidance is widely regarded as mandatory.

14-4

II. Jersey's Money Laundering Offences

Jersey's proceeds of crime legislation¹³ criminalises the following activities:

14-5

1. the acquisition, use of, possession or control of criminal property;¹⁴
2. entering into or otherwise being concerned in an arrangement knowing or suspecting that the arrangement facilitates the acquisition, use, control or possession of criminal property by another;¹⁵
3. concealing, disguising, converting, transferring or removing from Jersey any criminal property (ie money laundering);¹⁶
4. tipping off the money launderer and/or his associates;¹⁷ and
5. failing to disclose knowledge or suspicion of money laundering.¹⁸

A trustee that receives and deals with trust property that is the proceeds of crime could find itself at risk of criminal liability under any of the offences listed above.

¹¹ Proceeds of Crime (Jersey) Law 1999, Art 37(4).

¹² The Commission has also issued handbooks for the legal sector containing important provisions relating to legal professional privilege.

¹³ Money laundering is any conduct which would constitute an offence under either Arts 30 and 31 of the Proceeds of Crime (Jersey) Law 1999 or Arts 15 and 16 of the Terrorism (Jersey) Law 2002. See Proceeds of Crime & Terrorism (Miscellaneous Provisions) (Jersey) Law 2014, Art 23, amending Proceeds of Crime (Jersey) Law 1999, Art 1.

¹⁴ Proceeds of Crime (Jersey) Law 1999, Art 30(1).

¹⁵ ibid, Art 30(3).

¹⁶ ibid, Art 31.

¹⁷ ibid, Art 35.

¹⁸ ibid, Art 34A-D.

A. Proceeds of Crime

i. *The Acquisition, Use, Control or Possession or Use of the Proceeds of Criminal Property*

14-6 The terms of the offence are set out at Article 30 of the Proceeds of Crime (Jersey) Law 1999, which provides:

30 Offences of dealing with criminal property

(1) A person who –

- (a) acquires criminal property;
- (b) uses criminal property; or
- (c) has possession or control of criminal property,

is guilty of an offence.

(2) For the purposes of paragraph (1) –

- (a) having possession or control of property includes doing an act in relation to the property; and
- (b) it does not matter whether the acquisition, use, possession or control is for the person's own benefit or for the benefit of another.

a. Criminal Property

14-7 'Criminal property' is defined¹⁹ as property²⁰ that constitutes the proceeds of criminal conduct or represents such proceeds, whether in whole or in part and whether directly or indirectly. The proceeds of criminal conduct, in relation to any person who has benefited from criminal conduct, means that benefit.²¹ It does not matter whether the criminal conduct was conduct of the alleged offender or of another person, whether the person who benefited from the criminal conduct was the alleged offender or another person or whether the criminal conduct occurred before or after the coming into force of this provision.²² 'Property' means all property, whether movable or immovable, vested or contingent, and whether situated in Jersey or elsewhere.²³ Any property that in whole or in part directly or indirectly represented in a person's hands his or her proceeds of criminal conduct also comes within the definition of proceeds of criminal conduct.²⁴

¹⁹ ibid, Art 29.

²⁰ 'Property' is defined widely in Art 1(1) to include all property, whether movable or immovable, or vested or contingent, and whether in Jersey or elsewhere, including (a) any legal document or instrument evidencing title to or interest in any such property; (b) any interest in or power in respect of any such property, and (c) in relation to movable property, any right, including a right to possession.

²¹ Proceeds of Crime (Jersey) Law 1999, Art 1(1). For the purposes of the 1999 Law, a person benefits from any criminal conduct if that person obtains property as a result of or in connection with the conduct; including if the person receives any payment or other reward in connection with such conduct, whether carried on by that person or by another; Proceeds of Crime (Jersey) Law 1999, Art 1(2A).

²² ibid, Art 29(2).

²³ ibid, Art 1(1).

²⁴ ibid, Art 31(2).

b. Criminal Conduct

'Criminal conduct' is defined²⁵ as conduct which constitutes an offence in Jersey for which the person is liable upon conviction to imprisonment for a term of at least one year²⁶ or conduct which if it occurs or has occurred outside Jersey (whether or not the person is also liable to any other penalty) would have constituted an offence under Schedule 1 of the 1999 Law, if it had occurred in Jersey.²⁷ A crime is included whether or not anyone has been convicted of it, tried for it, or even charged with it. It is also irrelevant who carried out the conduct and who benefited from it.²⁸ Accordingly, they need not be the same people. Conduct is criminal conduct whether it was committed before or after the passing of the 1999 Law, though laundering its proceeds is not within the scope of the Law if the laundering was committed before Part 3 of the Law was brought into force on 1 July 1999.²⁹ In relation to conduct which takes place outside Jersey, whether such conduct will constitute an offence under the law of the jurisdiction in which it took place is not relevant provided it falls within Schedule 1 of Proceeds of Crime (Jersey) Law 1999. There is therefore no requirement for dual criminality in order for conduct to be criminal conduct for the purposes of Jersey Law. It is to be noted that the definition of criminal conduct contains no temporal limit and may therefore include a crime committed at any time before the enactment of Proceeds of Crime (Jersey) Law 1999.³⁰

14-8

Tax-related Offences

No exemption or special category applies to tax-related offences as against any other kind of criminal conduct; the question is simply whether a fiscal offence constitutes an offence in Jersey for which a person is liable and on conviction would be liable for a term of imprisonment for more than one year. The penalty under Article 137 of the Income Tax (Jersey) Law 1961 for fraudulently or negligently making incorrect statements in connection with a tax return was, until 27 May 2009, a fine rather than a sentence of imprisonment.³¹ Since that date, offences under Article 137 that are committed fraudulently (ie tax evasion) are imprisonable for a period of up to 15 years and as such fall within the scope of Schedule 1 of the Proceeds of Crime (Jersey) Law 1999. The Royal Court has since held that offences committed prior to the change in the sentencing for such conduct are capable of falling within the scope of Proceeds of Crime (Jersey) Law 1999 and amenable to domestic and external confiscation regime notwithstanding that prior to May 2009 they would only have been

14-9

²⁵ *ibid*, Art 1.

²⁶ *ibid*, Sch 1. This includes all of Jersey's customary law offences and the more serious statutory offences.

²⁷ The definition of criminal conduct excludes a drug trafficking or terrorism offence (which are dealt with under the Drug Trafficking Offences (Jersey) Law 1988 and Terrorism (Jersey) Law 2002 respectively). This is a narrower definition of criminal conduct than current applies in the UK under the Proceeds of Crime Act 2002.

²⁸ Proceeds of Crime (Jersey) Law 1999, Art 29(2(a)–(b).

²⁹ Proceeds Of Crime (Jersey) Law 1999 (Appointed Day) Act 1999 (R&O.9400), although evidence of conduct prior to commencement of Proceeds of Crime (Jersey) Law 1999 is admissible on a charge of money laundering to show the accused had the requisite state of mind (ie knowing or suspecting that the third parties had been engaged in or had benefited from criminal conduct) for offences committed after the coming into force of pt 3); see *Michel & Gallichan v AG* [2006 JLR 287].

³⁰ Proceeds of Crime (Jersey) Law 1999, Art 29(2)(c).

³¹ Modified by Income Tax (Amendment No 31) (Jersey) Law 2009.

publishable by a fine.³² The Jersey Court of Appeal in *Michel & Gallichan v AG*³³ confirmed that tax evasion may also be prosecuted under the Jersey customary law offence of fraud.³⁴ It is now settled that tax evasion, whether in Jersey or elsewhere, can constitute criminal conduct for the purposes of the Jersey's money laundering offences.

- 14-10** Where the criminal conduct comprises the unlawful non-declaration of assets or income for taxation purposes the property obtained from the criminal conduct is to be treated as a pecuniary advantage equal to the tax charge not incurred on the non-declared funds. Given the wide definitions of 'benefiting from any criminal conduct' includes obtaining property obtained *in connection*³⁵ with criminal conduct, all of the undeclared funds held in a Jersey bank account could constitute criminal property. In determining the benefit, the focus should be on the gross receipt of what the person has actually obtained as a result of or in connection with the offence and not the profit net of expenses.³⁶ A person who obtains a pecuniary advantage as a result of or in connection with the criminal conduct (or in that and some other connection) is to be taken to obtain, as a result of or in connection with the conduct, a sum of money equal to the value of the pecuniary advantage.³⁷
- 14-11** A trustee who accepts office as trustee and then goes on to become vested with assets that he knows or could with reasonable due diligence have discovered are tainted as criminal property, is *prima facie* guilty of an offence.³⁸ It is the authors' view that the common practice used by offshore trustees by which the trustee does not hold trust property directly but instead holds the property indirectly through a nominee corporate vehicle, either by acquisition of its shares or by way of bare trust, comes within the definition of 'acquisition, use or possession'. The criminal property that is acquired, used or in the possession of the trustee must have been the proceeds of criminal conduct before the act which is alleged to constitute the offence under Article 30; it is not enough that the property became criminal property only as a result of the trustee acquiring, using or having possession of the property.³⁹

Knowledge or Suspicion

- 14-12** Property will not be criminal property unless the person accused under either Article 30 or 31 knows or suspects that the property constitutes or represents the proceeds of criminal conduct.⁴⁰ This is an important qualification to the breadth of the definition of criminal property in Article 29(1)(b). However knowledge or suspicion is a necessary but not sufficient requirement for the property to be criminal property. It seems that the mere suspicion that property is criminal property is insufficient and that it must be established as being so before either Article 30 or 31 will bite.⁴¹ To be guilty of a money laundering offence under Article 30, the offender (here meaning not the original person who carried out the criminal

³² *AG v Arne Rosenlund and FNB International Trustees Limited* [2015] JRC 186.

³³ *Michel & Gallichan v AG* (n 29).

³⁴ As to the components of which see *Foster v AG* [1992] JLR 287].

³⁵ Proceeds of Crime (Jersey) Law 1999, Art 1(2A)

³⁶ *R v Banks* [1997] 2 CrAppR (S) 110.

³⁷ *R v Seager* [2009] EWCA Crim 1303; see also Proceeds of Crime (Jersey) Law 1999, Art 1(2).

³⁸ Subject to being able to raise one of the defences discussed below.

³⁹ *R v Geary* [2010] EWCA Crim 1925.

⁴⁰ Proceeds of Crime (Jersey) Law 1999, Art 29(1).

⁴¹ *In re Bird Charitable Trust* [2008] JLR 1].

conduct but the person, such as a trustee, acquiring using or possessing criminal property or who is engaged in a prohibited arrangement facilitating its acquisition, use, possession or control) must 'know or suspect' that the property constitutes proceeds of criminal conduct or represents such proceeds, whether in whole or in part and whether directly or indirectly or have benefited from criminal conduct. Suspicion is a difficult and amorphous concept.⁴² In recent years there has been a sustained period of heightened awareness of the risks of money laundering which has led to a tendency among trustees to war-game a worst case scenario approach to customers, making the *prima facie* threshold for suspicion a low one. The English Court of Appeal⁴³ has said that a person:

must think that there is a possibility, which is more than fanciful, that the relevant facts exist. But the statute does not require the suspicion to be 'clear' or 'firmly grounded and targeted on specific facts' or based on 'reasonable grounds'

A mere feeling of unease has been held in England not to amount to a suspicion.⁴⁴ It is the authors' view that a trustee who wonders whether or not they should suspect money laundering but then decides that the circumstances do not raise any real suspicion will be able, if necessary, to give honest and credible evidence that they did not suspect criminal proceeds. We do not consider that mere general mistrust of the source of the property would amount to the kind of suspicion required. In a recent appeal to the Privy Council on the construction of similar legislation in the Isle of Man⁴⁵ it was held that reasonable grounds for suspicion will not suffice in the absence of actual suspicion.

14-13

c. The Adequate Consideration Defence

It is a defence under Article 30(6) to prove that the person acquired or used the property or had control or possession of it for adequate consideration.⁴⁶ This provision is an example of Jersey's tendency to incorporate concepts into its legislation from neighbouring jurisdictions without making local adaptations.⁴⁷ 'Consideration', as understood in the technical English sense of that term, is not a concept native to Jersey's customary law. In Jersey law, the broader principle of *cause*⁴⁸ stands in place of the role consideration plays in English contract law. A person acquires property for inadequate consideration if the value of the payment is significantly less than the value of the property and a person uses or has possession of property for inadequate consideration if the value of the payment

14-14

⁴² See *Oxford English Dictionary*: 'to imagine something evil or wrong on slight or no evidence'. See also *Hussien v Chong Fook Kam* [1970] AC 942 at 948B, PC, per Lord Devlin: 'Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove"; no sufficient explanation for dealing with large suspicious sums of money; *Lloyd v AG* 2004 JLR N[28].

⁴³ *R v Da Silva* [2006] EWCA Crim 1654, approved in *K Ltd v National Westminster Bank plc* [2006] EWCA Civ 1039, [2007] 1 WLR 311.

⁴⁴ *Shah v HSBC Private Bank (UK) Ltd* [2009] EWHC 79 (QB) at [45]–[48] (reversed, although on different grounds [2010] EWCA Civ 31).

⁴⁵ *Holt v AG* [2014] UKPC 4.

⁴⁶ 'Consideration' here is to be understood in the technical sense with which that term is used under English law.

⁴⁷ This provision is clearly copied from Proceeds of Crime Act 2002, s 329.

⁴⁸ Broadly speaking, *cause* is the basis of or the reason for the contract. It is thus constituted by the interdependence of promises or the mutual performance of obligations; see *Osment v Constable of St Helier* 1974 JJ and *Marett v Marett* [2008] JLR 384].

is significantly less than the value of the property acquired or the value of the person's possession or use of it.⁴⁹ However, the provision of services or goods for any person that are of assistance to the person in their criminal conduct shall not be treated as consideration for these purposes.⁵⁰ The defence of having given adequate consideration will not avail a trustee who accepts original property or assets subsequently settled into trust after it is first established, because they give no consideration for such receipt. But for the offence to bite at all the trustee would have to know or suspect that the trust assets they were accepting were themselves, or represented, the proceeds of criminal conduct which would be a free-standing criminal offence under Article 30. A successor trustee is obliged to give reasonable security (usually in the form of a contractual indemnity) to an outgoing or retiring trustee in respect of any outstanding or contingent liabilities before that outgoing trustee can be compelled to part with trust property.⁵¹ In the authors' view, this will amount to adequate consideration. A trustee who purchases property, for example by changing investments, will ordinarily be able to avail themselves of the defence if they give full consideration for the new investments.

ii. Arrangements that Facilitate the Acquisition, Use, Control or Possession of Criminal Property

- 14-15** The terms of the offence are set out at Article 30(3) of the Proceeds of Crime (Jersey) Law 1999, which provides:

30 Offences of dealing with criminal property

[...]

(3) A person who –

- (a) enters into or becomes concerned in an arrangement; and
- (b) knows or suspects that the arrangement facilitates, by any means, the acquisition, use, possession or control of criminal property by or on behalf of another person,

a. Prohibited Arrangements

- 14-16** The arrangement must be entered into by the offender or be otherwise concerned with it.⁵² An arrangement is prohibited if it facilitates, whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise (which we take as meaning 'by whatever means'), the retention or control of any person's criminal conduct by or on behalf of another. Article 30(2)(b) provides that if the criminal property is placed at the disposal of any person or is used for any person's benefit, whether or not to acquire any property by way of an investment, then the arrangement is also prohibited. As can be seen, the

⁴⁹ Proceeds of Crime (Jersey) Law 1999, Art 33(7)(c).

⁵⁰ ibid, Art 33(7)(a); note also Art 33(7)(b), which provides that the defence under Art 33(6) will not be available to a person providing property or services to another person if they know, suspect, or have reasonable grounds to suspect that the property or services will or may assist the other person in criminal conduct even if they actually do not.

⁵¹ Trusts (Jersey) Law 1984, Art 34(2).

⁵² 'Concerned with' is clearly wider than 'being a party to'.

definition of an arrangement is extremely wide. A legally binding contract is not required.⁵³ However, the property must have been criminal property as a result of some conduct occurring before the act which is alleged to constitute the offence under Article 30; it is not enough that the property became criminal only as a result of carrying out the arrangement.⁵⁴

A trust is an arrangement within the meaning of Article 30(3). If the trustee knows or suspects that the settlor is using the trust as a receptacle for his criminal property then, subject to the available defences, the trustee will contravene Article 30(1) by merely accepting the property. The exercise of a power of appointment, advancement or resettlement from a trust is likely to be an arrangement.⁵⁵ However, it has been held that the exercise of a power of appointment of a successor protector and additional trustees in order to remove a trust from Jersey to avoid restrictions under the Proceeds of Crime (Jersey) Law 1999 because the trustee was refusing to make a payment from the trust without police consent after making a suspicious activity report) was held not to facilitate the retention or control by the incoming trustees of the proceeds of criminal conduct (so as to be unlawful) or a fraud on a power as the exercise was made in good faith in best interests of beneficiaries.⁵⁶ The authors agree with the learned authors of *Lewin on Trusts* that lawyers are not to be deemed as participating in a prohibited arrangement contrary to Article 30(3) merely by conducting ordinary civil litigation, or by participating in a compromise of proceedings, even if the subject matter of the proceedings includes or is tainted by criminal property, and in any case the client's legal professional privilege is not prejudiced.⁵⁷

14-17

B. Offence of Money Laundering

Unlike the offences under Article 30(1) and 30(3) of the Proceeds of Crime (Jersey) Law 1999 the offence in Article 31 criminalises money laundering proper. The terms of the offence are as follows:

14-18

31 Concealment etc. of criminal property

(1) A person who –

- (a) conceals criminal property;
- (b) disguises criminal property;
- (c) converts or transfers criminal property; or
- (d) removes criminal property from Jersey,

is guilty of an offence.

⁵³ See the wide construction given to the term arrangement in *Mubarik v Mubarak* [2008 JLR 430]; cf *Re Steed's Will Trusts* [1960] Ch 407 at 419.

⁵⁴ *R v Geary* (n 39); *R v Akhtar* [2011] EWCA Crim 146; [2011] 4 All ER 417.

⁵⁵ *Holt v AG* (n 45); on comparable Manx legislation.

⁵⁶ *In re Bird Charitable Trust* (n 41) at [101]–[108], [112]. A significant factor in the Court's decision in this case prompting the informal freeze of the trust's assets was based only on a suspicion that the trust assets were connected with or the proceeds of illegal gambling, racketeering and tax evasion for which the settlor had only been indicted and not yet charged or convicted, and so had not yet proven to be criminal property.

⁵⁷ *Bowman v Fels* [2005] EWCA 226 Civ.

- 14-19** As with the offences under Article 30, criminal property that is concealed, disguised etc must have become criminal property as a result of some conduct occurring before the act or acts which are alleged to constitute the offence under Article 31 take place; the offence is not made out if the property became criminal only as a result of concealing or disguising otherwise ‘clean’ property, as yet untainted by criminality.⁵⁸ Concealing, disguising, converting, transferring or removing are to be read as disjunctive alternative particulars of the offence of money laundering. Reference to concealing or disguising property includes concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it.⁵⁹ It is to be noted that the concealment, disguising etc need not be directed for any particular purpose.

C. Defences

- 14-20** It is a defence to any act which would otherwise constitute an offence under either Article 30 or Article 31 if a person who would otherwise be committing an offence under those provisions makes a disclosure (known as a suspicious activity report or ‘SAR’) to a police officer.⁶⁰ The disclosure must consist of either the fact of his or her suspicion or belief that any property constitutes or represents proceeds of criminal conduct (including any matter on which such suspicion or belief is based); or of information, for the purposes of a criminal investigation or criminal proceedings in Jersey.⁶¹ If a SAR is made before the person making the disclosure does anything that would otherwise be prohibited under Article 30 and 31, provided they have the consent of a police officer in advance, the consent will operate as a complete defence.⁶² A defence is also available if a SAR is made after the person making the disclosure does anything that would otherwise be prohibited under Article 30 or 31 provided the disclosure is made on the person’s initiative and as soon as it is reasonably practicable after the person has done the act in question.⁶³
- 14-21** There is no offence if the offender either did not actually know or suspect that the arrangement related to any person’s proceeds of criminal conduct or did not actually know or suspect that the retention or control of said property was facilitated by the arrangement.⁶⁴ A defence also exists if an offender intended to disclose to a police officer a suspicion, belief or matter under Article 30(3) in relation to the arrangement and there is reasonable excuse for the person’s failure to have done so.⁶⁵ These latter defences are rarely relied upon by

⁵⁸ *R v Geary* (n 39).

⁵⁹ Proceeds of Crime (Jersey) Law 1999, Art 31(2).

⁶⁰ *ibid*, Art 32(3). A police officer for these purposes includes a member of the island’s Honorary Police, a member of the States of Jersey Police Force, the Agent of the Impôts or any other officer of the Impôts; however, a SAR is usually delivered to the Joint Financial Crimes Unit (‘JFCU’), a joint police and customs unit with the States of Jersey Police Force with responsibility for combating financial crime within Jersey. Where knowledge or suspicion comes to an employee, their obligations are satisfied if they make the appropriate disclosure to the relevant Money Laundering Reporting Officer within their organisation; see Art 32(5).

⁶¹ *ibid*, Art 32(1).

⁶² *ibid*, Art 32(4)(a).

⁶³ *ibid*, Art 32(4)(b).

⁶⁴ *ibid*, Art 29(1)(b) and Art 32(3).

⁶⁵ *ibid*, Art 32(7).

trustees in preference to the disclosure procedure because they are only engaged when a crime has already been committed and a trustee is unlikely to run the risk that it may not discharge the burden in proving its defence. A disclosure made under Article 32 will not constitute an offence of tipping off under Article 35 or constitute an actionable breach of any restriction on the disclosure of information.⁶⁶

D. The Informal Freeze

A SAR effectively results in property known or suspected to be criminal property being informally frozen pending consent by the JFCU. The person making the SAR cannot proceed to deal with the property without committing an offence and cannot inform the person whose property is suspected to be the proceeds of crime (or anyone else) because of the prohibition on tipping off.⁶⁷ The requirement for JFCU consent to proceed with what would otherwise be an offence under Article 30 gives rise to a significant practical problem for trustees.⁶⁸ Unlike the equivalent UK legislation that provides a time limit by which consent must be refused,⁶⁹ or how the power of consent or refusal is to be exercised, Jersey's proceeds of crime regime places no effective put-up-or-shut-up requirement on the JFCU as to whether it will take steps to investigate or prosecute the underlying offences, resulting in a freeze on the property of potentially indefinite duration. The Jersey Court of Appeal in *Gichuru v States of Jersey Police*⁷⁰ confirmed that two legal avenues are available to challenge an informal freeze of funds resulting from a SAR to which the police refuse consent to deal (although significant doubts remain as to their effectiveness). The possible alternatives are, first, a civil action for debt against the financial institution, and/or, secondly, a judicial review of the police's refusal to consent. It is to be noted that although these two alternatives are directed at the same ultimate objective—freeing funds—they involve different issues and different parties. A judicial review action is concerned with (as the case may be) the illegality, irrationality or procedural impropriety⁷¹ of the police's refusal to consent, which would not be in issue in the civil proceedings, while a civil claim for debt will not quash the police's refusal to consent and so a taint may still hang over the funds suspected of being the proceeds of criminal conduct. The burden and threshold to defeat a debt claim would be on the financial institution to show on the balance of probabilities that by paying the funds it would be committing a money laundering offence. Further, if a financial institution party to civil proceedings allows a customer to obtain a decision in his favour without having maintained a proper defence so as to get itself off the hook, it will not have fulfilled its obligations under the law⁷² and, accordingly, any decision of the court in ordering payment to the customer may not protect the financial institution from future criminal

14-22

⁶⁶ *ibid*, Art 32(2).

⁶⁷ See Art 35 and para 14-39 below.

⁶⁸ *Chief Officer of the States of Jersey Police v Minwalla* [2007] JRC 137.

⁶⁹ 7 days from the first working day after disclosure is given; see Proceeds of Crime Act 2002, s 336(7).

⁷⁰ *Gichuru v States of Jersey Police* [2008] JCA 163A.

⁷¹ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. Grounds for judicial review in Jersey affirmed in *Acturus Properties Limited & Ors v AG* [2001 JLR 43].

⁷² *Amalgamated Metal Trading Limited v City of London Police Financial Investigation Unit* [2003] 4 All ER 1225 at [32], affirmed in *Chief Officer of the States of Jersey Police v Minwalla* (n 68) at [23].

proceedings against it. Clearly, if a regulated person does not know its client, it is not going to be in a position to take ‘such steps as are reasonable’ to defend any proceedings. In such circumstances, were the court to make an order directing payment away of funds, such an institution may become liable on two fronts, not simply for having paid away monies, but also for having failed to comply with applicable anti-money laundering regulations in the first place.

III. Jersey’s Anti-Terrorism Finance Offences

- 14-23** The Terrorism (Jersey) Law 2002 creates offences of laundering ‘terrorist property’⁷³ that are designed to mirror those created by the Proceeds of Crime (Jersey) Law 1999 concerning ‘criminal property’; however, the 2002 Law relies on a different formulation, focusing on the destination or use of property rather than its source. ‘Terrorist property’ includes any property, wholly or partly, and directly or indirectly that is likely to be used for the purposes of terrorism or for the support of a terrorist entity.⁷⁴ This formulation creates a practical difficulty for trustees, as a trustee may be in difficulty knowing how an appointment of trust property may be used after they have parted with it.

A. ‘Terrorism’

- 14-24** Terrorism is defined⁷⁵ by reference to the use or threat of action anywhere in the world that is intended or may reasonably be regarded as intended to influence, coerce or compel the States of Jersey or any other government or an international organisation to do or refrain from doing any act or to intimidate the public or a section of the public in Jersey or elsewhere, and is made for the purpose of advancing a political, religious, racial or ideological cause. Action so designed and purposed is within the definition if it:⁷⁶
- (a) is intended to cause the death of, or serious injury to, a person not taking an active part in hostilities in a situation of armed conflict;
 - (b) creates a serious risk to the health or safety of the public or a section of the public;
 - (c) involves serious damage to property;
 - (d) seriously disrupts or seriously interferes with any electronic system or the provision of any service directly relating to communications infrastructure, banking and financial services, public utilities, transportation or other infrastructure;
 - (e) seriously disrupts or seriously interferes with the provision of emergency police, fire and rescue or medical services; or
 - (f) involves prejudice to national security or national defence.

⁷³ Terrorism (Jersey) Law 2002, Art 3(1).

⁷⁴ ibid, Art 3.

⁷⁵ ibid, Art 2.

⁷⁶ A reference to any action taken for the purposes of terrorism includes a reference to action taken for the benefit or support by way of providing or subsidising educational or other day-to-day living expenses of a terrorist entity; ibid, Art 1(3).

The use or threat of action falling within Article 2(2)(a)–(f) that involves the use of firearms or explosives is terrorism whether or not it is designed to influence the government or an international organisation or to intimidate the public or a section of the public. The handful of offences contained in Schedule 10 to the Terrorism (Jersey) Law 2002 also amount to terrorism for these purposes although these offences will amount to terrorism even if the acts of which they comprise do not come within Article 2(2). 14-25

B. ‘Terrorist Property’

‘Terrorist property’⁷⁷ is property which is intended to be used or likely to be used, in whole or in part, directly or indirectly, for the purposes of terrorism or for the support of a terrorist entity; and includes, but is not limited to, the resources of a terrorist entity.⁷⁸ It is to be noted that Jersey’s legislation does not include within its definition of terrorist property any property which wholly or partly, directly or indirectly, represents the proceeds of the commission of acts of terrorism (including payments or other rewards in connection with its commission) or the proceeds of acts carried out for the purposes of terrorism.⁷⁹ 14-26

C. ‘Terrorist Entity’

A ‘terrorist entity’⁸⁰ is one that commits, prepares or instigates an act of terrorism or facilitates the commission, preparation or instigation of an act of terrorism. An entity will still be a terrorist entity whether or not a specific act of terrorism is committed or, if an act of terrorism is in fact committed, whether or not it is committed by an entity charged with an offence under the 2002 Law or any other enactment, or by a related entity. ‘Entity’ includes an organisation (whether or not proscribed), and a legal or natural person. An entity is a ‘related entity’ if (1) one entity directs or controls another; or (2) one entity participates as an accomplice in the acts of another; or (3) one entity contributes to the commission of acts by the other intentionally and with the knowledge of the intention of the other to commit such acts.⁸¹ 14-27

D. Proscribed Organisations

Any organisation proscribed under section 3 of the UK’s Terrorism Act 2000 will also be a proscribed organisation for the purposes of the Terrorism (Jersey) Law 2002.⁸² Jersey may also itself proscribe organisations under Article 6 of the Terrorism (Jersey) Law 2002. To date, there are 82 international terrorist organisations that have been proscribed under

⁷⁷ *ibid*, Art 3.

⁷⁸ The reference to ‘resources’ includes reference to any property which is applied or made available, or is intended to be applied or made available, for use by a terrorist entity; see Terrorism (Jersey) Law 2002, Art 3(2).

⁷⁹ Cf Terrorism Act 2000, s 14 although the proceeds of the commission of terrorist acts will be ‘criminal property’ for the purposes of the Proceeds of Crime (Jersey) Law 1999.

⁸⁰ Terrorism (Jersey) Law 2002, Art 4.

⁸¹ *ibid*, Art 4(3).

⁸² *ibid*, Art 6(1)(c).

this provision. The list of prescribed organisations in Schedule 1 of the 2002 Law may be amended from time to time by order of the Minister for Home Affairs.

E. Offences Relating to Terrorist Financing

- 14-29** Jersey's offences relating to terrorist financing comprise two sets of offences: under Article 15 relating broadly to the 'use and possession, provision etc. of property for purposes of terrorism'; and offences under Article 16 relating to otherwise 'dealing' with terrorist property. The offences under Articles 15 and 16 have extra-territorial effect.⁸³ It is therefore not a defence that the acts which constitute the offence were done outside Jersey.

i. Use and Possession etc of Property for Purposes of Terrorism

- 14-30** By virtue of Article 15 of the Terrorism (Jersey) Law 2002 it is an offence, punishable by a maximum penalty of 14 years' imprisonment or a fine, or both, for a person to use⁸⁴ property for the purposes of terrorism or for the support of a terrorist entity. It is also an offence under the same provision to either possess terrorist property, or to provide, or invite another to provide terrorist property or a financial service, or to collect or receive terrorist property, intending knowing, suspecting, or having reasonable grounds to suspect that the property or financial service be used for the purposes of terrorism or for the support of a terrorist entity. This provision poses a particular risk to trustees of funds for charitable purposes or private purpose trusts⁸⁵ who may find themselves in contravention of these provisions if trust property is applied for a particular use or purpose. Note it is not a requirement of the offence that the property be 'terrorist property'. While it is assumed that trustees do not themselves intend their trust funds to be used for terrorist purposes, trustees of a fund could find themselves in danger, especially in view of the wording about suspicion if, for example, they distribute funds for the relief of poverty in some troubled corner of the world and find that the money has been distributed to a person there who was poor but was subsequently used to finance terrorism.

ii. '... has reasonable cause to suspect that ...'

- 14-31** This formulation of the mental element necessary to make out the offence is different from that used in the Proceeds of Crime (Jersey) Law 1999, which requires actual knowledge or suspicion.⁸⁶ The Terrorism (Jersey) Law 2002 requires only that the accused has reasonable cause to suspect. As an accused must 'have' the cause to suspect, the facts that should reasonably have aroused his suspicion presumably need to have come to his attention, but they need not have aroused any actual suspicion in his mind—the test is an objective not a subjective one. The offence will have been committed even though the accused does not draw the conclusion that could reasonably be drawn, that the property 'may be used ... for the purposes of terrorism'. The words 'may be used' widens the scope of the offence even

⁸³ ibid, Art 17.

⁸⁴ Including use in whole or in part, directly or indirectly; see Art 15(3)(a).

⁸⁵ See Trusts (Jersey) Law 1984, Art 12.

⁸⁶ See Proceeds of Crime (Jersey) Law 1999, Art 30(3).

further, although it is difficult to see a difference between suspecting that property will be used in a given way and suspecting that it may be so used—any property *may* be used for terrorism. Presumably some degree of foreseeability and proximity is required for the offence to be committed, but if a distribution is in fact used for terrorist purposes, that will in hindsight establish that it might have been so used, and a trustee who did not foresee that when he accepted it into the trust fund would be left having to explain why he failed to foresee it. Trustees must therefore exercise extreme caution in accepting property, and be continuously vigilant in considering how it ‘may’ be used by those to whom it is distributed.

iii. Providing Property or Financial Services that May be Used for Terrorism

Article 15(2)(a) of the Terrorism (Jersey) Law 2002 criminalises the provision of money or other property or financial services⁸⁷ knowing or having reasonable cause to suspect that it will or may be used for the purposes of terrorism. The reference to the provision of money or other property is ‘a reference to its being given, lent or otherwise made available, whether or not for consideration’.⁸⁸ An appointment of capital or income from a trust to a beneficiary is a provision of money or other property on the part of the trustee. A trustee who makes a distribution and ‘has reasonable cause to suspect’ that the beneficiary ‘may’ use it to finance the purchase of material for a bomb to be detonated for some political or religious purpose, will commit an offence. Note that the offence will have been committed even if the fund is entirely clean; the appointment out does not have to be ‘terrorist property’. By simply acting as a trustee (or more accurately, by ‘carrying out trust company business’)⁸⁹ a person will also have committed an offence under this provision, if they know or have reasonable cause to suspect that such services may be used for the purposes of terrorism.

14-32

iv. Dealing with Terrorist Property

In a similarly broad drafting style to the preceding article, under Article 16 of the Terrorism (Jersey) Law 2002 it is an offence, punishable by a maximum penalty of 14 years’ imprisonment or a fine, or both, for a person to do any act⁹⁰ which facilitates the retention or control of terrorist property; to conceal or disguise terrorist property,⁹¹ to remove terrorist property from Jersey;⁹² or to transfer terrorist property to nominees. It is a complete defence to prove on the balance of probabilities that a person did not know, suspect or had no reasonable grounds to suspect that the purpose of the relevant act or omission was to facilitate the retention or control of terrorist property; or that they did not know, suspect or had no reasonable grounds to suspect the property in question was terrorist property.⁹³

14-33

⁸⁷ Defined in the Terrorist Asset-Freezing (Jersey) Law 2011, Art 3. Note that the provision of any service falling within the definition of ‘financial service business’ in Art 2 of the Financial Services (Jersey) Law 1998 is also included.

⁸⁸ Terrorism (Jersey) Law 2002, Art 15(3)(b).

⁸⁹ Financial Services (Jersey) Law 1998, Art 2.

⁹⁰ An act also includes an omission to do something; see Terrorism (Jersey) Law 2002, Art 16(4).

⁹¹ Reference to concealing or disguising property includes concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it; see Art 16(5).

⁹² Or a country or place outside Jersey; see Art 17(2).

⁹³ Terrorism (Jersey) Law 2002, Art 16(2).

We are assuming that the trustees would not knowingly harbour terrorist property, but terrorist property is defined widely and the test of reasonable cause to suspect is an objective one. The trustee's position is more difficult under Article 16 than under Article 15 because under Article 16 the onus is on the trustee to prove a negative—that they had no reasonable cause to suspect terrorist property. However, because the trustee only needs to prove that they had no grounds for thinking that the trust property was *likely* to be used for the purpose of terrorism, a theoretical or fanciful possibility that some beneficiary might one day unexpectedly join in some terrorist operation will not be sufficient to make out the offence against the trustee.

F. A Trustee Accepting Trust Property Must Take Necessary Precautions

- 14-34** It is insufficient that the trustee knows the identity of the settlor. The trustee must enquire and satisfy themselves as to the source of the funds intended to be the subject matter of the trust. The trustee should consult the official list⁹⁴ of proscribed terrorist groups or organisations, Jersey's list of financial sanctions targets and persons subject to restrictive measures and the list of designated persons under the Terrorist Asset-Freezing (Jersey) Law 2011.⁹⁵ If the settlor is a 'politically exposed person' (PEP) or an immediate family member, or person known to be closely associated, with such a person, the trustee will be required to undertake enhanced due diligence.⁹⁶ If, having made reasonable enquiries, a trustee is satisfied concerning the identity of the settlor and the source of funds, but yet in fact the trust property turns out to be the proceeds of criminal conduct, no offence will have been committed because the trustee will not have any actual knowledge or suspicion that it was the proceeds of crime.⁹⁷ They should make and preserve a record of their enquiries, so that, if necessary, they can rebut any suggestion that they had such actual knowledge or suspicion. If the trustees are not satisfied by their enquiries, they should decline to accept office as trustee.

IV. Disclosure and Non-disclosure

- 14-35** Article 34A–34D of the Proceeds of Crime (Jersey) Law 1999 and Articles 19 and 21 of the Terrorism (Jersey) Law 2002 effectively impose a positive duty to inform the authorities about dealings with criminal or terrorist property and make it an offence in its own right to fail to make the required disclosure. There are two schemes of offences for failing to make a disclosure: the first applies generally where the knowledge or suspicion arises in the course of a person's trade, profession, business or employment⁹⁸ and the second, distinct regime,

⁹⁴ Available from the JFSC.

⁹⁵ Being (1) a person who is the subject of a designation, being a designation within the meaning of the Terrorist Asset-Freezing etc Act 2010; or (2) a natural or legal person, group or entity included in the list (as in force from time to time) provided for by Art 2(3) of Council Regulation (EC) No 2580/2001 of 27 December 2001.

⁹⁶ Money Laundering (Jersey) Order 2008, Art 15(6).

⁹⁷ Proceeds of Crime (Jersey) Law 1999, Art 30(3)(b).

⁹⁸ *ibid*, Art 34A; and Terrorism (Jersey) Law 2002, Art 19.

applies to financial services businesses⁹⁹ and financial institutions.¹⁰⁰ Both pieces of primary legislation also impose restrictions, backed by criminal penalties, on tipping off those suspected of involvement in money laundering or terrorist financing about any investigations and proceedings brought against them.

A. Duties of Disclosure

The terms of Article 34A are as follows:

14-36

34A Failure to disclose knowledge or suspicion of money laundering¹⁰¹

(1) This Article applies where –

- (a) a person ('A') knows or suspects that another person is engaged in money laundering;¹⁰² and
- (b) the information or other matter on which that knowledge or suspicion is based comes to A's attention in the course of A's trade, profession, business or employment.

(1A) Where this Article applies, A must disclose, in accordance with the conditions set out in paragraph (1B) –

- (a) the knowledge or suspicion mentioned in paragraph (1)(a); and
- (b) the information or other matter mentioned in paragraph (1)(b),

and if A does not make such a disclosure, A commits an offence.

14-37

Article 34A criminalises a failure to report knowledge or suspicion of an offence under Articles 30 or 31.¹⁰³ This provision excludes from its ambit a failure to disclose information that comes to a lawyer in circumstances of legal professional privilege.¹⁰⁴ Statutory exemption is provided by Article 34A(3) to the effect that a disclosure under Article 34A will not be treated as a breach of any restriction imposed by statute, contract or otherwise. It is therefore not a defence to a charge under Article 34A of failure to report knowledge or suspicion of money laundering owing to a concern about confidentiality or confidence. The only defences available to a charge under Article 34A are that there was a reasonable excuse for not making the appropriate reporting¹⁰⁵ or that, in the case of a person in employment, the person disclosed the information or other matter in question to the appropriate person in accordance with the procedure established by the person's employer for the making of such disclosures.¹⁰⁶ If A fails to make a disclosure to a designated police officer, a designated

⁹⁹ The scope of which is defined in the Proceeds of Crime (Jersey) Law 1999, Sch 2.

¹⁰⁰ Proceeds of Crime (Jersey) Law 1999, Art 34A; and Terrorism (Jersey) Law 2002, Art 21.

¹⁰¹ Proceeds of Crime (Jersey) Law 1999, Art 34A does not apply to information or other matter that comes to a person, as an employer or employee, in the course of the carrying on of a financial services business; see Arts 34C and 34D for an offence of non-reporting specifically applicable to the regulated financial sector.

¹⁰² Defined to include contrary to the Proceeds of Crime (Jersey) Law, Arts 30 and 31 or of the Terrorism (Jersey) Law 2002, Arts 15 and 16 or knowledge of conduct outside Jersey which, if occurring in Jersey, would be an offence under those provisions; Proceeds of Crime (Jersey) Law 1999, Art 1(1).

¹⁰³ And Terrorism (Jersey) Law 2002, Arts 15-18.

¹⁰⁴ Proceeds of Crime (Jersey) Law 1999, Arts 34A(2) and 34D(5).

¹⁰⁵ *ibid*, Art 34B(1).

¹⁰⁶ *ibid*, Art 34B(2).

customs officer or a nominated officer¹⁰⁷ for cases falling within Article 34D) in good faith, as soon as is practicable after the information or other matter came to A's attention, A will commit an offence.¹⁰⁸ What is required to be disclosed is the fact of A's knowledge or suspicion of money laundering and the information on which A's knowledge or suspicion is based.

34D Failure in a financial institution to report to designated police officer, designated customs officer or nominated officer

(1) This Article applies where the conditions in both paragraph (2) and paragraph (3) are fulfilled.

(2) The first condition is that a person ('A') knows, suspects or has reasonable grounds for suspecting that –

(a) another person is engaged in money laundering; or

(b) any property constitutes or represents proceeds of criminal conduct.

(3) The second condition is that the information or other matter on which A's knowledge or suspicion is based, or which gives reasonable grounds for such suspicion, came to A in the course of the carrying on of a financial services business.¹⁰⁹

(4) Where this Article applies, A must disclose, in accordance with the conditions set out in paragraph (4A) –

(a) the knowledge, suspicion or grounds for suspicion mentioned in paragraph (2); and

(b) the information or other matter mentioned in paragraph (3),

and if A does not make such a disclosure, A commits an offence.

- 14-38** This is effectively the same offence as that in Article 34A of the Proceeds of Crime (Jersey) Law 1999 but applicable only to financial services businesses as defined by Jersey legislation.¹¹⁰ The key question for a practitioner with reason to consider this offence is whether the knowledge or suspicion comes to a person in the course of the carrying on of a financial services business, as defined. In deciding whether a person has committed an offence under this article, the court shall take account of any relevant Code of Practice or guidance that applies to that person or the business carried on by that person issued by the JFSC.¹¹¹ If each of the conditions is satisfied and no disclosure is made, the only defences available are: (1) that the person has a reasonable excuse for not disclosing the information or other matter;¹¹² (2) the information is otherwise protected by legal professional privilege,¹¹³ or

¹⁰⁷ A person nominated by the employer of the person making the disclosure to receive disclosures under Art 34D of the Proceeds of Crime (Jersey) Law 1999; see Proceeds of Crime (Jersey) Law 1999, Art 34D(8)(a).

¹⁰⁸ ibid, Art 34A(1A).

¹⁰⁹ Defined by Proceeds of Crime (Jersey) Law 1999, Art 36(1) as the list of businesses in Sch 2 to the 1999 Law. The exemption of a private trust company business in para 4(d) to that schedule is to be noted. Such an entity would still come within the scope of the Proceeds of Crime (Jersey) Law 1999, Art 34A.

¹¹⁰ It is to be contrasted with the conditions that must be satisfied under Proceeds of Crime Act 2002, s 330; note esp the absence of an equivalent to s 330(3A) in the Jersey legislation.

¹¹¹ Proceeds of Crime (Jersey) Law 1999, Art 34D(6)–(7). See Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008. Failure to comply with Code of Practice or guidance issued by the Commission or conviction for an offence relating to money laundering are grounds on which the Commission may revoke a registered person's status at any time.

¹¹² Proceeds of Crime (Jersey) Law 1999, Art 34A(5)(a).

¹¹³ ibid, Art 34A(5)(b).

(3) the person is an employee in a financial services business, does not actually know or suspect that another person is engaged in money laundering, and he has not been provided by the person carrying on the financial services business with such training as is specified under the Money Laundering (Jersey) Order 2008.¹¹⁴

B. Restrictions on Disclosure—Anti-tipping off

In order to prevent a risk of prejudice to any investigation of money laundering (which may or may not have been instigated by a disclosure made under Articles 32, 34A or 34D), Article 35 of the Proceeds of Crime (Jersey) Law 1999 criminalises disclosure of any information relating to or likely to be relevant to such an investigation¹¹⁵ or to disclose to another person either the fact that such a disclosure has been or will be made, or any information otherwise relating to such a disclosure¹¹⁶ or to otherwise to interfere with material¹¹⁷ which is likely to be relevant to an investigation resulting from such a disclosure.¹¹⁸ The offence in Article 35 applies only in circumstances where a person knows or suspects that the Attorney General or any police officer is acting or proposing to act in connection with an investigation that is being or is about to be conducted into money laundering.¹¹⁹ Statutory exemption from the anti-tipping off offences is provided for in circumstances where the disclosure is made in circumstances where the communication would be protected by legal professional privilege.¹²⁰ An exemption also exists where the disclosure is made by a person who is the client of an accountant to that accountant for the purpose of enabling him or her to provide any of a list of proscribed services.¹²¹ There are also a handful of relevant exemptions for certain internal disclosures and to connected bodies.¹²²

Trustees who find themselves in possession of trust assets and become aware or have a suspicion that the assets are the proceeds of crime or property involved in terrorism come under a statutory obligation to make an authorised disclosure under Article 34D. Provided the trustee makes an authorised disclosure as soon as they become aware or suspicious that they are holding the proceeds of crime, the trustee will not be at risk of prosecution. Having made a disclosure, the trustee is prohibited by the anti-tipping off provisions from making any disclosure to the beneficiaries, settlor (or any other person for that matter) about their suspicion or their disclosure and is generally prohibited from doing anything else that would prejudice any investigation. The trustee is also prohibited from making any distributions from the trust fund to the beneficiaries or to make investments with the trust fund without the consent of the JFCU. To do so would be to contravene the prohibitions on transferring criminal property in Article 31(1)(c) and/or entering into or becoming

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¹¹⁴ ibid, Art 34A(6).

¹¹⁵ ibid, Art 35(2).

¹¹⁶ ibid, Art 35(4).

¹¹⁷ ibid, Art 35(7) which includes falsifying, concealing, destroying or disposing of the material or part of it.

¹¹⁸ ibid, Art 35(4)(b).

¹¹⁹ ibid, Art 35(1).

¹²⁰ ibid, Art 35(6)(a)–(b).

¹²¹ ibid, Sch 2, pt B, para 2(1).

¹²² Proceeds of Crime and Terrorism (Tipping Off—Exceptions) (Jersey) Regulations 2014.

concerned in an arrangement for the purposes of Article 30(3). Distributions and changes in the composition of the trust fund may be made with consent under Article 32(4).

V. Confiscation Orders and *Saisie Judiciaire*

- 14-41** The regime in Part 2 of the Proceeds of Crime (Jersey) Law 1999 is directed to deprive criminals of the benefit of their criminal conduct. Part 2 of the 1999 Law empowers HM Attorney General to seek, or the Royal Court of its own motion to make, an order that the defendant pay an amount assessed by the Court to be the value of the defendant's benefit from the relevant criminal conduct. This is known as a confiscation order. A confiscation order is not an order directed at the specific proceeds of criminal conduct but for confiscation of a sum of money equal to the proceeds of such conduct.¹²³ A confiscation order is a monetary order and not a proprietary order, made against any person convicted of a criminal offence in Schedule 1. The scope of a confiscation order can be made against any of the defendant's assets, whatever their origin. The standard of proof required in making a confiscation order is the civil standard of the balance of probabilities.¹²⁴ Jersey does not have any equivalent jurisdiction to that that exists in the UK to make a confiscation order against a person on the basis of them having benefited from a criminal lifestyle.¹²⁵ Property is vulnerable to being subject to a confiscation order where the defendant is convicted of an offence listed in Schedule 1 of the Proceeds of Crime (Jersey) Law 1999 within a period of six years prior to the confiscation order being made and the Court determines that the defendant has benefited from criminal conduct. In determining whether the defendant has benefited from criminal conduct, the Court is entitled to adopt certain rebuttable presumptions.¹²⁶ Those presumptions are, first, that any property appearing to the Court to be held by the defendant at any time since the date of the defendant's conviction, or appearing to the Court to have been transferred to the defendant at any time since the beginning of the relevant period was (1) received by the defendant at the earliest time when he or she appears to the Court to have held it, and (2) was received by the defendant as a result of or in connection with the commission of offences specified in Schedule 1.¹²⁷ The second presumption is that any of the defendant's expenditure since the beginning of the relevant period was met out of payments received by the defendant as a result of or in connection with the commission of offences specified in Schedule 1¹²⁸ and the third presumption is that, for the purposes of valuing any property that the defendant had or is assumed to have had at any time, the defendant received the property free of any other interests in it.¹²⁹

¹²³ Proceeds of Crime (Jersey) Law 1999, Art 4(1).

¹²⁴ *ibid*, Art 3(8).

¹²⁵ As per the Proceeds of Crime Act 2002, ss 10 and 75.

¹²⁶ See the Proceeds of Crime (Jersey) Law 1999, Art 5(6) for the circumstances in which the presumptions will not apply.

¹²⁷ *ibid*, Art 5(5)(a).

¹²⁸ *ibid*, Art 5(5)(b).

¹²⁹ *ibid*, Art 5(5)(a).

Perhaps of greater significance than Jersey's domestic regime for the making of confiscation orders from the perspective of the litigation of trust disputes is the jurisdiction of the Royal Court to give effect to a confiscation order made overseas against property representing the benefit of criminal conduct located in Jersey, such as property settled into trust.¹³⁰ The 2008 Regulations contain a list of prescribed matters of which the Royal Court has to be satisfied of (and how they may be proven) before it will make a confiscation order in support of a foreign order.

14-42

In support of a domestic¹³¹ or external confiscation order,¹³² the Court has power to make an order, known as a *saisie judiciaire*. A *saisie judiciaire* has the effect of freezing¹³³ a person's¹³⁴ realisable property situated in Jersey (whether movable or immovable) by vesting it in the Viscount on the application of the Attorney General.¹³⁵ The purpose of a *saisie* (literally 'seizure') is to 'hold the ring' and prevent the dissipation of assets pending the determination of proceedings in which a confiscation order may be made.¹³⁶ A *saisie* is the Jersey equivalent of a restraint order under the UK's Proceeds of Crime Act 2002. However, unlike a restraint order or a freezing injunction obtained under the Court's Mareva jurisdiction, a *saisie* operates *in rem* rather than *in personam* and has the effect of transferring property in an asset subject to the *saisie* to the Viscount.

14-43

The statutory regime applying to external confiscation orders is a replica, with specific amendments, of the regime that applies to domestic confiscation orders set out in Part 2 of the 1999 Law, but in the form of regulations.¹³⁷ In respect of a *saisie* granted in support of external confiscation orders pursuant to the 2008 Regulations, we refer to the provisions of the '1999 Law, as modified'. In respect of a *saisie* granted in support of domestic confiscation orders, pursuant to the main legislation, we refer to the '1999 Law'. Practitioners need to be clear as to whether they are dealing with a domestic or external confiscation order before resorting to either the Law or the Regulations to avoid mixing the provisions of the two pieces of legislation together. While they are largely similar, they contain important differences.

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For the vast majority of practitioners dealing with trust litigation, their first encounter with a *saisie judiciaire* is likely to be when a party affected by it, such as a trustee or settlor/beneficiary, is served with the order. This is because only the Attorney General has locus to seek

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¹³⁰ Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008, amending the Proceeds of Crime (Jersey) Law 1999.

¹³¹ Under the Proceeds of Crime (Jersey) Law 1999, pt 2.

¹³² Defined under the Proceeds Of Crime (Enforcement Of Confiscation Orders) (Jersey) Regulations 2008, Art 1(1) as an order made by a court in a country or territory outside Jersey: (1) for the purpose of recovering property obtained as a result of or in connection with conduct corresponding to an offence specified in Sch 1; (2) for the purpose of recovering the value of the property so obtained; or (3) for the purpose of depriving a person of a pecuniary advantage so obtained.

¹³³ Meaning the property cannot be removed from Jersey, transferred to any person whether or not in exchange for consideration and no debt may be satisfied in whole or in part from the property.

¹³⁴ In the case of a domestic confiscation order, confined to mean a person against whom proceedings have been instituted for an offence specified in Sch 1 to the 1999 Law (whether or not he or she has been convicted). In the case of an external confiscation order, confined to mean (1) a person against whom an external confiscation order has been made; or (2) a person against whom proceedings have been or are to be instituted in a court in a country or territory outside Jersey that may result in an external confiscation order being made.

¹³⁵ Proceeds of Crime (Jersey) Law 1999, Art 16.

¹³⁶ *Tantular v AG* [2014] JRC 243 at [19].

¹³⁷ See the Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008, Sch 2.

a *saisie*, which are proceedings brought under public law powers, not within the everyday ambit of civil proceedings,¹³⁸ and such orders are usually sought on an ex parte basis so there is little that can be done to resist them in advance of the order being made. While granted ex parte, the standard terms of the order require it to be brought to the attention of the person affected by the order. As a matter of practical reality the important issues are likely to be what trust property can properly be made subject to a *saisie*, the consequences of such an order for the future administration of the trust and the rights of beneficiaries and whether there are any grounds to seek to have the order varied or discharged.

A. Realisable Property

- 14-46** Whether in support of a domestic or an external confiscation order, a *saisie judiciaire* may only be granted in respect of ‘realisable property’. ‘Realisable property’ for the purposes of a domestic confiscation order is defined¹³⁹ as being (1) any property held by the defendant; (2) any property held by a person to whom the defendant has directly or indirectly made a gift falling within Article 2(9) of the Law;¹⁴⁰ and (3) any property to which the defendant is beneficially entitled. ‘Realisable property’ for the purposes of an external confiscation order is defined in Article 2(1) of the 1999 Law as modified as including (1)–(3) above and also in relation to an external confiscation order in respect of specified property, the property that is specified in the order. It has been acknowledged that, if an external confiscation order has been made and if property in Jersey is specified in that external confiscation order, it might be argued that such property could be made the subject of a *saisie* even if it is not realisable property falling within the three categories set out in Article 2(1)(b) of the 1999 Law. In *Tantular v HM Attorney General*,¹⁴¹ it was posited by the Court, in a postscript to its judgment, that on any application to register an external confiscation order in Jersey, the Court would have to bear in mind Article 39(1)(c)¹⁴² and that an external confiscation order which applied to property in Jersey which did not fall within Article 2(1)(b), would ‘clearly’ give rise to a strong argument that to confiscate such property would be contrary to the interests of justice.¹⁴³ Trust assets whose *situs* is outside Jersey are deemed situated in Jersey (and thereby are realisable property) if they are held by a Jersey registered company,

¹³⁸ Proceeds of Crime (Jersey) Law 1999, Art 16(1).

¹³⁹ *ibid*, Art 2(1).

¹⁴⁰ Meaning, in the case of a domestic confiscation order (1) a gift made by the defendant at any time *after* the commission of the offence or, if more than one, the earliest of the offences to which the proceedings for the time being relate; and (2) a gift that the Court otherwise considers is appropriate in all the circumstances to take the gift into account and in the case of an external confiscation order meaning, (1) a gift made by the defendant at any time *after* the conduct to which the external confiscation order relates; and (2) the Court considers it appropriate in all the circumstances to take the gift into account.

¹⁴¹ *Tantular v AG* (n 136).

¹⁴² Which provides that the Court may register an external confiscation order if it is of the opinion that enforcing the order in Jersey would not be contrary to the interests of justice.

¹⁴³ To date, this proposition has not been tested and it remains to be established whether it is in fact sound. It is the authors’ view that the 2008 Regulations were not intended to establish a parallel system applying to external confiscation orders that was different from the existing framework of the 1999 Law. While, *prima facie* the fact that Art 2(1)(a) and Art 2(1)(b) are separate provisions would suggest they are to be read disjunctively which, if correct, would have the effect of overturning the outcome of the earlier *Tantular* decision discussed below, the more likely explanation for the separate provision is as a result of untidy drafting.

the shares of which are subject to a *saisie*.¹⁴⁴ While only property in Jersey *situs* property vests in the Viscount automatically on the making of a *saisie*, the Viscount has power to require the repatriation to Jersey of overseas property.¹⁴⁵

B. Basis upon which a *saisie judiciaire* May Be Granted

In the support of an external confiscation order, the Court may grant a *saisie judiciaire* in two circumstances: first, where proceedings have been instituted against the defendant in a country or territory outside Jersey and those proceedings have not been concluded, and either an external confiscation order¹⁴⁶ has been made in those proceedings, or it appears to the Court that there are reasonable grounds for believing that such an order may be made in the proceedings; or, secondly, where it appears to the Court that proceedings are to be instituted against the defendant in a country or territory outside Jersey, and that there are reasonable grounds for believing that an external confiscation order may be made in those proceedings.¹⁴⁷ The Royal Court must be satisfied that (1) there is a reasonable likelihood that there either there is confiscation order or (2) there are reasonable grounds for believing that an external confiscation order may be made. If the Court is not satisfied that this will be the case, there is no likelihood that an application to register the external order will be successful and the *saisie judiciaire* should therefore be discharged.¹⁴⁸

The circumstances in which the court may make a *saisie judiciaire* in support of a domestic confiscation order under the 1999 Law are more complex and include:¹⁴⁹

14-47

1. where the Court has already made a confiscation order;
2. where proceedings have already been instituted in Jersey against the defendant for an offence specified in Schedule 1 of the Proceeds of Crime (Jersey) Law 1999. For this purpose, the Court will apply Jersey law as that law exists at the time the application for a *saisie* is made to the Royal Court;¹⁵⁰

14-48

¹⁴⁴ *In re Kaplan* [2009] JLR 88.

¹⁴⁵ Proceeds of Crime (Jersey) Law 1999, Art 16(4) and 1999 Law, Art 16(4) as modified. This power may be of more theoretical than of practical significance because in order to exercise it the Viscount requires a specified person within the jurisdiction of the Jersey Court who can be compelled to assist him or must seek the assistance of overseas authorities in preserving or recovering property.

¹⁴⁶ Defined in the Proceeds of Crime (Jersey) Law 1999, Art 1 as an order made by a court in a country or territory outside Jersey: (1) for the purpose of recovering property obtained as a result of or in connection with conduct corresponding to an offence specified in Schedule 1; (2) for the purpose of recovering the value of the property so obtained; or (3) for the purpose of depriving a person of a pecuniary advantage so obtained.

¹⁴⁷ Proceeds of Crime (Jersey) Law 1999, Art 15.

¹⁴⁸ *Tantular v AG* (n 136) at [19]. The Court must satisfy itself that it has reasonable grounds for believing an external confiscation order may be made in foreign proceedings. Evidence of the belief of a person running those proceedings is insufficient; see *In re Kaplan* (n 144) at [22]–[24]. This is a low threshold—in the *Tantular* decision above, the fact that the order stated on its face that that the assets in question ‘are seized for the state’ was held sufficient to satisfy the Court.

¹⁴⁹ Proceeds of Crime (Jersey) Law 1999, Art 15(1)–(1A).

¹⁵⁰ *AG v Rosenlund and FNB International Limited* (n 32).

3. Where the Attorney General makes an application under any of Article 9,¹⁵¹ 12,¹⁵² 13,¹⁵³ 14¹⁵⁴ and 19¹⁵⁵ and the proceedings have not, or the application has not, been concluded, and the Court is satisfied that there is reasonable cause to believe; in the case of an application under Article 14 or 19, that the Court will be satisfied, as mentioned in Article 14(3)¹⁵⁶ or (as the case may be) Article 19(2),¹⁵⁷ or in any other case, that the defendant has benefited from the offence;
4. where the Court is satisfied that proceedings are to be instituted in Jersey against a person for an offence specified in Schedule 1, or that an application of a kind mentioned in paragraph (3) above, and also that the defendant has benefited from the offence; and
5. where a criminal investigation has been started in Jersey in respect of alleged criminal conduct; and the Court is satisfied that there is reasonable cause to believe that the alleged offender has benefited from the criminal conduct.

C. Consequences and Duration of a *saisie judiciaire*

- 14-49** If a confiscation order is made (or in the case of an external confiscation order, the foreign proceedings are concluded and an external confiscation order is made and registered in Jersey), the Court may empower the Viscount to realise any realisable property which has been vested in him in order to satisfy the confiscation order at which point the *saisie* is discharged.¹⁵⁸ Theoretically, the Viscount has power to require repatriation of realisable overseas property;¹⁵⁹ however, the Court has given a strong indication that this power should be exercised only in exceptional circumstances, particularly in external confiscation cases.¹⁶⁰ If no confiscation order is made the Royal Court may discharge the *saisie judiciaire* and the

¹⁵¹ Under which the Court may make a confiscation order against a defendant, if satisfied that the defendant has died or absconded.

¹⁵² Under which the Court may make a confiscation order against a defendant for an offence under Sch 1 for which at the time the defendant was originally sentenced, a confiscation order had not been made.

¹⁵³ Under which the Court may make a confiscation order where an original determination that there had been no benefit from any relevant criminal conduct is made unsound by further evidence.

¹⁵⁴ Under which the Court may make a confiscation order pursuant to a revised assessment of the benefit from any relevant criminal conduct.

¹⁵⁵ Under which the AG may apply to the Court for an increase in the amount to be recovered under the confiscation order where the amount that might be realised is greater than the amount of a person's benefit from relevant criminal conduct taken into account in making the confiscation order

¹⁵⁶ ie that the real value of the defendant's benefit from relevant criminal conduct is greater than its assessed value (whether because the real value was higher at the time of the current determination than was thought or because the value of the benefit in question has subsequently increased).

¹⁵⁷ ie that the amount that might be realised in the case of the person in question is greater than the amount taken into account in making the confiscation order (whether it was greater than was thought when the order was made, or it has subsequently increased).

¹⁵⁸ Proceeds of Crime (Jersey) Law 1999, Art 17.

¹⁵⁹ *In re Kaplan* (n 144).

¹⁶⁰ ibid, endorsing *King v Serious Fraud Office* [2009] UKHL 17 at [31]:

If a country wishes assistance from other countries in preserving or recovering property that is related to criminal activity, it makes sense for its request to each of those other countries to be restricted to the provision of assistance in relation to property located within its own jurisdiction. If each country were requested to take steps to procure the preservation or recovery of property on a worldwide basis, this would lead to a confusing, and possibly conflicting, overlap of international requests for assistance. Not only would such multiplication of activity be confusing, it would also involve significant and unnecessary multiplication of effort and expense.

realisable property will be returned to the owner. The Court also has discretion to discharge the *saisie* prior to a confiscation order coming into effect if to continue to maintain it results in serious practical difficulties.¹⁶¹ The Royal Court may also vary the terms of a *saisie judiciaire* pending a final determination so as to authorise the Viscount to release assets that would otherwise be frozen in his hands. While property subject to a *saisie* is vested in the Viscount, the Viscount is under an obligation in accordance with the Court's directions, to manage or otherwise deal with any such realisable property.¹⁶² However, the Viscount's liability in respect of the property is limited in respect of any loss or damage resulting from the Viscount's action, except in so far as the loss or damage is caused by the Viscount's negligence.¹⁶³

D. Trusts and *saisies judiciaires*

In *Tantular v HM Attorney General*,¹⁶⁴ the Royal Court concluded that a beneficiary of a discretionary trust is not 'beneficially entitled' for the purposes of Article 2(1)(b)(iii) of the 1999 Law (or as modified by the 2008 Regulations) to any of the assets of that trust and, as such,¹⁶⁵ the Court had no power to grant a *saisie judiciaire* over all the assets of a discretionary trust merely on the ground that the offender (or suspected offender) is a beneficiary of such a trust.

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All things being equal, there is no difference as a matter of law between the position of one discretionary beneficiary and another. The fact that one may be the settlor does not make his legal position different, nor does anything said in any letter of wishes. In *Tantular*, the fact that the settlor referred to himself as the 'principal beneficiary' in the letter of wishes did not alter the legal position. Even if in reality it may be more likely (as a result of the letter of wishes) that the trustee would appoint assets to the settlor than to any of the other discretionary objects that does mean that the settlor is *entitled* to those assets.¹⁶⁶

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The object of a discretionary power has no proprietary interest in the trust property. Article 1 of the 1999 Law defines 'property' very widely and includes all property, whether movable or immovable, or vested or contingent, and whether situated in Jersey or elsewhere. To the extent that a discretionary beneficiary's interest can be described as '*contingent property*', it is only that interest which can conceivably be so described, not the underlying property that is subject to the trust. Thus all that could be made the subject of a *saisie judiciaire* would be the discretionary beneficiary's interest under the trust, which is no more than his right to be considered for appointment by the trustee, which is by itself worthless to be worth confiscating. This, of course, is a completely different proposition from the suggestion that

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¹⁶¹ See para 14-55 below.

¹⁶² Proceeds of Crime (Jersey) Law 1999, Art 16(4).

¹⁶³ Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008, Art 23. The provision is an exact mirror of the limitation in the Proceeds of Crime (Jersey) Law 1999, Art 23.

¹⁶⁴ [2014] JRC 128.

¹⁶⁵ See *Gartside v Inland Revenue Commissioners* [1968] AC 553 at 617. See also *Snell's Equity*, 32nd edn (London, Sweet and Maxwell, 2010) at [22-005(b)]; *Lewin on Trusts*, 19th edn (London, Sweet & Maxwell, 2014) at 1-008; P Matthews and T Sowden, *The Jersey Law of Trusts*, 3rd edn (London, Key Haven, 1993) at 12.13.

¹⁶⁶ *Tantular v AG* (n 136) at [33].

the beneficiary is beneficially entitled to all or any part of the trust property.¹⁶⁷ Where the beneficiary's interest in the trust property is vested rather than contingent on the exercise of a discretionary power, the Court in *Tantular* suggested, albeit obiter, without argument and only by way of an example to demonstrate the fallacy in the Crown's primary case that the whole fund of a discretionary trust should vest in the Viscount, that the *saisie* would be limited in scope only to the beneficiary's fixed interest, whether vested in possession or vested in interest.¹⁶⁸ It should be noted that indefeasible fixed interests in either capital or income are rare in modern trust drafting; most are subject to some overriding power of appointment.

- 14-53** However, that is not to say that a *saisie judiciaire* can never be ordered against the assets of a discretionary trust. It will often be the case that there is evidence that the offender (or suspected offender) has settled assets to the trust *after* the date upon which the alleged criminal conduct began. Peculiar to the facts in *Tantular* was a challenge to the scope of the *saisie* on the grounds that some of the assets were settled into trust before any alleged criminal conduct began and, therefore, were not dispositions caught by Article 2(9) of the 1999 Law. Where assets are contributed after the date upon which the alleged criminal conduct began those trust assets would be realisable property under Article 2(1)(b)(ii) to the extent of any such dispositions. It follows that it might well be appropriate to make an application for a *saisie judiciaire* against a trust in support of an anticipated application for a confiscation order where there is evidence of gifts to a trust *after* the date upon which the criminal conduct in question began. In deciding whether to grant the *saisie* at that stage the Court will have regard to the policy objectives of the legislation in seeking to remove from offenders¹⁶⁹ the benefit of criminal conduct but must at the same time have regard to the need for any order to be proportionate. The *Tantular* decision also leaves the door ajar to the possibility of a *saisie judiciaire* being made in respect of the entire extent of the trust fund where, for example, all the trust property has been settled after the alleged criminal conduct began and in circumstances where the settlor was the only discretionary object of the trust and there would be no 'innocent' beneficiaries who would be prejudiced in the fund being frozen.
- 14-54** Ordering that trust property be subject to a *saisie judiciaire* engages Article 1 of the First Protocol of the European Convention on Human Rights (ECHR),¹⁷⁰ incorporated in Jersey Law by the Human Rights (Jersey) Law 2000, Article 4(1) of which requires local legislation to be read down so as to provide that the court could only make an order which would be compatible with the ECHR.¹⁷¹ Article 1 requires a balance to be struck and imports the requirement that there must be a reasonable relationship of proportionality between the means employed by the state in, *inter alia*, the deprivation of property as a form of penalty,

¹⁶⁷ *ibid*, at [31].

¹⁶⁸ *ibid*, at [35].

¹⁶⁹ See endorsement of a purposive approach to construction in *Re Kaplan* (n 144); and *In re Illinois District Court* [2001] JLR 160].

¹⁷⁰ Which provides: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'.

¹⁷¹ *R v Waya* [2013] 1 All ER 89, albeit on the English statutory provisions which required the Court to make a confiscation order.

and the legitimate aim which is sought to be realised by the deprivation. A *saisie* granted over the entirety of the trust assets merely on the ground that the suspected offender is a discretionary beneficiary to the prejudice of innocent beneficiaries is liable to be subject to challenge both on the aforementioned grounds and as a disproportionate exercise of state power.

E. Discharge or Variation of a *saisie*

Any person affected by a *saisie* may make an application for its discharge or variation to the Bailiff in chambers, who may rule upon the application or may refer it to the Court for adjudication.¹⁷² An application to discharge or vary a *saisie* should be commenced by way of Representation, convening, naturally, the Attorney General, the Viscount and any other party, such as a trustee, that has been affected by the *saisie* or may be affected by its discharge or variation. In seeking to discharge or vary a *saisie*, there is no burden of proof on either the Attorney General to maintain the order or on the applicant to discharge it. The Court will instead consider whether, having regard to the policy objectives of the Proceeds of Crime (Jersey) Law 1999, ie to deprive criminals of the proceeds of criminal conduct, whether it is fair, reasonable and proportionate to maintain the order in force.¹⁷³ It is also to be noted that a *saisie* differs in one other significant respect from a Mareva or freezing injunction in that neither the Attorney General nor any foreign government on whose behalf a *saisie* is being sought in support of an external confiscation order, can be required to give any kind of cross-undertaking in damages with respect to any loss suffered as a consequence of applying for or seeking to maintain the *saisie*.¹⁷⁴

The *Kaplan* case makes it clear that a *saisie* is to be considered only as a temporary measure to prevent dissipation of assets pending either confiscation or some other mechanism to secure the property from dissipation in the meantime, whichever comes sooner.¹⁷⁵ While the policy objectives that underpin the jurisdiction to grant a *saisie* is taken very seriously by the Court, the Court will not insist that a *saisie* be maintained indefinitely¹⁷⁶ or in circumstances so as to create practical difficulties for those otherwise innocent or a neutral party adversely affected by how a *saisie* works. The Court's primary concern will be to ensure that the continuation of a *saisie* does not put the Viscount in a position of practical difficulty in administering the property vested in him. The purpose of the *saisie* is entirely undermined if the property cannot be properly secured. This sort of situation may arise in circumstances where although property is realisable and vested in him, the property is overseas, illiquid (such as land), cannot be repatriated to Jersey or the Viscount is unable

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¹⁷² Art 16(7), the Court here being the Inferior Number.

¹⁷³ *In re Kaplan* (n 144), approving *In The Matter of the Representation of O'Brien* [2003 JLR 1].

¹⁷⁴ *In The Matter of Batalla-Esquival* [2002 JLR 192] albeit in the context of the Drug Trafficking Offences (Jersey) Law 1988, but in the authors' view the principle that no statutory or inherent jurisdiction exists is easily extendable by analogy to the 1999 Law which contains no requirement for an undertaking.

¹⁷⁵ eg a freezing injunction in the jurisdiction in which the property is located. However, a freezing injunction may give rise to circumstances that make it unnecessary or undesirable for the Court to maintain the *saisie*; see *In re Kaplan* (n 144).

¹⁷⁶ Note Art 15(5)(a) of the 1999 Law whereby the Court must refuse an application to grant a *saisie* if there has been undue delay in continuing the proceedings or application in question.

to obtain the assistance of local authorities in the property's preservation or realisation.¹⁷⁷ The Viscount is a public official whose costs and expenses in administering property subject to the *saisie* are met from that property. Where it becomes practically difficult for the Viscount's costs and expenses to continue to be met from the fund and the possibility arises that recourse will instead have to be had to public funds, the Court will be sympathetic to relieve the Viscount from his duties and discharge the *saisie*.

- 14-57** After the Viscount, a close second for the Court's concern in permitting a *saisie* to continue will be the position of a trustee. The transfer of property in the trust assets to the Viscount has a number of significant consequences that place him in a difficult position: (1) the trustee's right of indemnity and remuneration from the fund becomes ineffective; (2) the trustee cannot deal with or administer the trust property; (3) the trustee is unable to fulfil any of his fiduciary obligations to the beneficiaries; and (4) the trustee cannot resign or retire because there must always be at least one trustee in office¹⁷⁸ and to retire would require transferring the trust property, no longer vested in the trustee, to new trustees.
- 14-58** When a *saisie judiciaire* is subsequently varied or discharged at the instance of the defendant, it will generally be appropriate for the defendant to be awarded his costs out of public funds.¹⁷⁹ However there are only very limited circumstances under which compensation may be payable to a person who has suffered loss as a result of a *saisie* being granted.¹⁸⁰

VI. Civil Recovery of Criminal Property

- 14-59** Jersey does not have a domestic legal framework equivalent to the regime in Part 5 of the UK's Proceeds of Crime Act 2002 by which property that is or represents the proceeds of unlawful conduct may be recovered by way of civil proceedings from the hands of any person holding it. However, Jersey does have a legislative regime permitting the enforcement of civil recovery orders made in foreign jurisdictions against assets that are amenable to the jurisdiction of the Royal Court, whether or not located in Jersey,¹⁸¹ including property held by trustees.¹⁸² Only a limited number of jurisdictions have a civil forfeiture scheme and asset sharing agreement with Jersey.¹⁸³ As observed in a recent case, at its most basic, the 2007 Law provides a means whereby individuals in Jersey can be deprived of their property following proceedings in a foreign jurisdiction that they may not have taken part in.¹⁸⁴

¹⁷⁷ *In re Kaplan* (n 144), per Bailhache, Bailiff at [67]: 'Power without responsibility is the prerogative of the harlot, but responsibility without power is equally dangerous.'

¹⁷⁸ Trusts (Jersey) Law 1984, Art 19.

¹⁷⁹ *In re Kaplan* 2009 JLR N [28].

¹⁸⁰ Proceeds of Crime (Jersey) Law 1999, Art 25. Note there is no mirror provision in Sch 2 of the 2008 Regulations, meaning no compensation is payable to a person in consequence of anything done in relation to the property by or in pursuance of a *saisie judiciaire* in support of an external confiscation order.

¹⁸¹ Civil Asset Recovery (International Co-Operation) (Jersey) Law 2007, Art 1(1): 'property' means all property whether movable or immovable, vested or contingent and whether situated in Jersey or elsewhere;

¹⁸² *ibid*, pt 1.

¹⁸³ The following jurisdictions were identified while the 2007 Law was still a *projet de loi*: England and Wales, Scotland, Northern Ireland, Republic of Ireland, Switzerland, Italy, USA, Australia, South Africa and various Canadian provinces.

¹⁸⁴ *Doraville Properties Corporation v AG* [2016] JRC128 at [48].

It follows that the making of a civil recovery order outside Jersey can still have a significant impact within the island on the way trust property is administered. Because the 2007 Law is directed to assist the enforcement of foreign civil asset recovery orders, the Royal Court will invariably require factual evidence of foreign law and procedure as to precisely what has occurred in the foreign jurisdiction and the nature of those proceedings. The 2007 Law was enacted having regard to the recommendations of the Financial Action Task Force (FATF) and in anticipation of an International Monetary Fund (IMF) assessment of Jersey against the standards set out in those recommendations. A number of international conventions are relevant aids to the interpretation of legislation such as the 2007 Law.¹⁸⁵

The 2007 Law contains a regime to compel the taking of evidence or the disclosure of documents from any person, including a trustee, in relation to property that is or may be the subject of external civil recovery proceedings.¹⁸⁶ Under Part 2 of the 2007 Law, a foreign responsible authority¹⁸⁷ may apply to HM Attorney General for assistance in obtaining evidence in Jersey either in connection with external civil asset recovery proceedings that have been instituted in a country or territory, or an investigation for the purpose of external civil asset recovery proceedings that are being, or may be, instituted in a country or territory; where there are reasonable grounds to suspect that the evidence is, or relates to, property that is either tainted property¹⁸⁸ or is intended to be used in, obtained in the course of, from the proceeds of, or in connection with, unlawful conduct. HM Attorney General may issue a notice to any person requiring (1) the production of any documents or other articles to the Attorney General, the Viscount or the Royal Court; and/or (2) attendance before the Royal Court or the Viscount to give evidence on the content of the documentation. HM Attorney General must be satisfied that the assistance sought is in connection with either external civil asset recovery proceedings which have been instituted or an investigation for the purpose of such proceedings that are, or may be, instituted in the foreign country. Jersey has stated its reluctance to act as ‘the world’s policeman’ to give assistance under the 2007 legislation in relation to property situate outside Jersey.¹⁸⁹

The Royal Court and Viscount have the same powers for securing the attendance of a person to whom a notice has been given or any other witness as it has for the purpose of other civil proceedings before it.¹⁹⁰ Nothing in the 2007 Law affects the jurisdiction that

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¹⁸⁵ *ibid*, at [82], such as the Vienna Convention 1988; the Palermo Convention 2000; the United Nations Convention against Corruption 2003; and the Terrorist Financing Convention 1999, the Council of Europe Convention on Cybercrime 2001; the inter-American Convention against Terrorism 2002; and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2005; see *SOCA v Perry* [2013] AC 182 at [18] as an example.

¹⁸⁶ Civil Asset Recovery (International Co-operation) (Jersey) Law 2007, pt 2.

¹⁸⁷ Defined in the Proceeds of Crime and Terrorism (Tipping Off—Exceptions) (Jersey) Regulations 2014, Art 1 to be (1) a foreign court, tribunal, or other body or person, authorised, to make external civil asset recovery orders; (2) a foreign person or body who or which is authorised to conduct investigations on behalf of the country or territory in relation to external civil asset recovery proceedings that are or may be instituted, and who is conducting such an investigation; and (3) any other foreign authority having the function of making requests, in relation to external civil asset recovery proceedings, of the kind to which Art 2 or 3 applies.

¹⁸⁸ Defined in the Proceeds of Crime And Terrorism (Tipping Off—Exceptions) (Jersey) Regulations 2014, Art 1 as property that has been found by an external decision-making body to have been (1) used in, or intended to be used in, unlawful conduct; or (2) obtained in the course of, from the proceeds of, or in connection with, unlawful conduct.

¹⁸⁹ *In re Kaplan* (n 144).

¹⁹⁰ Civil Asset Recovery (International Co-operation) (Jersey) Law 2007, Arts 5 and 6.

exists under the Bankers' Books Evidence (Jersey) Law 1986 to order the production of evidence under that legislation¹⁹¹ and the Bankers' Books Evidence (Jersey) Law 1986 applies to the giving to the Attorney General pursuant to a requirement to provide material under Article 3(2)(a) of the 2007 Law of any evidence to which the 1986 Law applies, as if the giving of the evidence to the Attorney General took place in proceedings before a court.¹⁹²

- 14-62** A person served with a notice under Article 3(2) from the Attorney General shall not, upon pain of criminal penalty, without reasonable excuse, fail to comply with it in relation to evidence that the person may under Article 4 of the 2007 Law be compelled to give. No one may be compelled to give evidence¹⁹³ under the 2007 Law unless the evidence could be compellable from them in civil proceedings in Jersey or in civil proceedings the jurisdiction from which the request for evidence originates.¹⁹⁴ However, the evidence will not be compellable if the claim of the person questioned to be exempt from giving the evidence, is conceded by the responsible authority making the request in the civil proceedings from which the request for evidence originates.¹⁹⁵ If the claim made by a person questioned to be exempt from giving the evidence is not conceded, the person may be required to give the evidence to which the claim relates; but their evidence cannot be transmitted to the responsible authority which requested it if a court in the country or territory in question, on the matter being referred to it, upholds the claim.¹⁹⁶
- 14-63** The enforcement of an external civil asset recovery order in Jersey is usually comprised of two stages. The first stage involves an application for a property restraint order over specified property located within Jersey or otherwise amenable to the jurisdiction of the Royal Court. The second stage involves the registration with the Royal Court of a civil asset recovery order obtained abroad and its subsequent enforcement in Jersey against assets, at least some of which will usually have been already been restrained. Under Part 3 of the 2007 Law, a foreign government may seek the Attorney General's assistance to apply on its behalf to the Royal Court for a property restraint order¹⁹⁷ and directions over the management of or dealing with the identified property. An order may be granted if the Court is satisfied that certain specified requirements are met: namely there are reasonable grounds for believing that a civil asset recovery order may be made by the relevant foreign court in civil asset recovery proceedings already instituted or shortly to be instituted in that country.¹⁹⁸ An external civil asset recovery order is defined as an order made by a foreign court, not in criminal proceedings, and must specify either: (1) the property used, or intended to be used, in unlawful conduct or obtained in the course of, from the proceeds of, or in connection with unlawful conduct; or (2) the sum of money to be forfeit or recovered in lieu of tainted

¹⁹¹ ibid, Art 3(9).

¹⁹² ibid, Art 3(10).

¹⁹³ Which includes answering any question and producing any document or other article and includes the giving of evidence to the AG pursuant to a requirement that is specified in a notice given under the Civil Asset Recovery (International Co-operation) (Jersey) Law 2007, Arts 3(2) and Art 4(4)–(5).

¹⁹⁴ ibid, Art 4(1).

¹⁹⁵ ibid, Art 4(2).

¹⁹⁶ ibid, Art 4(3).

¹⁹⁷ As defined in Art 7, the terms of a property restraint order must be compliant with Art 6(7).

¹⁹⁸ Civil Asset Recovery (International Co-operation) (Jersey) Law 2007, Art 6(5) or 6(6).

property.¹⁹⁹ The definition of ‘tainted property’ has two parts. Under the first part it means property ‘found’ to have been ‘used in, or intended to be used in, unlawful conduct’. In broad terms, this first part is concerned with property which is not necessarily the proceeds of crime but the instrumentalities of crime. The second part is concerned with property ‘found’ to have been ‘obtained in the course of, from the proceeds of, or in connection with, unlawful conduct’. This second part is concerned with the proceeds of crime. It must be the case that the first part of the definition adds something to the second part. If property ‘used in’ unlawful conduct has itself to comprise the proceeds of crime, then the first part of the definition becomes redundant. Thus in the first part of the definition, the property ‘used in’ unlawful conduct may comprise property from legitimate sources that is used in unlawful conduct.²⁰⁰ The second part of the definition of ‘tainted property’—the proceeds of crime—in the 2007 Law, appears wider than the definition of ‘criminal property’ for a domestic laundering offence.²⁰¹ Neither of these definitions includes the words ‘obtained in the course of’. It is important to note, however, that the test does not require a tracing exercise as would be required in a civil case.²⁰² A judgment in default obtained outside of Jersey is capable of being sufficient to obtain an external restraint order under Article 6 of the 2007 Law.²⁰³ It should also be borne in mind that it is not necessary that the words used in the 2007 Law be interpreted in the same way as those words might be interpreted as part of a wholly domestic statute. The question is always what the words mean in the particular statute in question, the Court being guided by the expert evidence of foreign law.²⁰⁴

The principal effects of a property restraint order are that the specified property vests in the Viscount subject to all existing security interests, that the persons specified are prohibited from dealing with the specified property²⁰⁵ and are required to deliver the property up to the Viscount;²⁰⁶ and that if concerned the property may be removed from the jurisdiction, the police are authorised to seize it.²⁰⁷ Where the Royal Court has made a property restraint order, the order may be discharged if external asset recovery proceedings are not instituted within a reasonable time as stipulated by the Royal Court.²⁰⁸ Once made, a property restraint order may be discharged or varied in respect of any property to which the external civil asset recovery proceedings in respect of which the order was made may relate and shall be discharged on satisfaction of an order made under Article 10 of the 2007 Law. An application to discharge or vary a property restraint order may be made to the

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¹⁹⁹ *ibid*, Art 1(1), being property ‘that has been found by an external decision-making body to have been either (a) used in, or intended to be used in, unlawful conduct; or (b) obtained in the course of, from the proceeds of, or in connection with, unlawful conduct’.

²⁰⁰ *Doraville Properties Corporation v AG* (n 182) at [123]–[124].

²⁰¹ See para 14-7 above.

²⁰² *R v Keith and Ors* [2010] EWCA Crim 477 at [30], [40]–[42] and [45] (criminal proceeds owed to defendant B by defendant A. Before defendant A paid defendant B, he dissipated all the criminal money. Defendant A sold shares and paid the clean proceeds to defendant B).

²⁰³ *Doraville Properties Corporation v AG* (n 182).

²⁰⁴ *AG v Rosenlund and Another* (n 32).

²⁰⁵ Civil Asset Recovery (International Co-operation) (Jersey) Law 2007, Art 7(6) to include, where a debt is owed to that person, making a payment to any person in reduction of the amount of the debt and removing the property from Jersey.

²⁰⁶ *ibid*, Art 7.

²⁰⁷ *ibid*, Art 7(9).

²⁰⁸ *ibid*, Art 6(6).

Bailiff in Chambers by any person affected by it and the Bailiff may rule upon the application or may refer it to the Royal Court for adjudication.

- 14-65** In addition to the registration of foreign judgments considered in Chapter 15, the Royal Court may order that a civil asset recovery order made by a foreign court be registered provided it is not subject to appeal, the respondent received notice of the proceedings and enforcement would not be contrary to the interests of justice. A judgment in default obtained outside of Jersey is capable of qualifying for registration as a finding that property is 'tainted property' under Article 9 of the 2007 Law.²⁰⁹
- 14-66** In registering an external confiscation order under Article 9, the Court is required to consider the following issues:²¹⁰
1. Is it an order or other judicial authority made other than in the course of criminal proceedings by a court or tribunal (or other body or person), who is authorised under a law of another country or territory to make orders of the type in (2) below?
 2. Does the order specify that property specified in the order has been found (by a relevant court or person) to have been either:
 - i. used in, or intended to be used in, unlawful conduct; or
 - ii. obtained in the course of, from the proceeds of, or in connection with, unlawful conduct; or specify an amount of money to be money forfeited or recovered in lieu of property; or
 - iii. used in, or intended to be used in, unlawful conduct; or
 - iv. obtained in the course of, from the proceeds of, or in connection with, unlawful conduct?
 3. Is the order in force and not subject to appeal?
 4. If the respondent did not appear in the foreign court, is the Court satisfied that he or she received notice of the proceedings in sufficient time to enable him or her to defend them?
 5. Is the Court of the opinion that enforcing the order in Jersey would not be contrary to the interests of justice?
- 14-67** As with a judgment sought to be recognised or registered in Jersey pursuant to the principles discussed in Chapter 15, there are very few bases upon which the Royal Court may seek to go behind the external confiscation order to establish whether the foreign court was justified in reaching the conclusion it did.²¹¹
- 14-68** Unlike the regime applicable to the recognition and enforcement of foreign judgments, in the light of Article 9(b) foreign judgments obtained in default can be registered and enforced in Jersey under the 2007 Law. Not to recognise and enforce default judgments would severely emasculate the scheme for the recognition and enforcement of such overseas orders. One would only have to ignore the overseas domestic proceedings and allow

²⁰⁹ *Doraville Properties Corporation v AG* (n 184), which appears to be contemplated by Art 9(b): 'Where the respondent in relation to the order did not appear in the proceedings in which the order was made, it is satisfied that he or she received notice of the proceedings in sufficient time to enable him or her to defend them'.

²¹⁰ *ibid*, at 96.

²¹¹ *Showlag v Mansour* [1995] 1 AC 431 at 440B; and *In re IMK Family Trust* [2008 JLR 250] at [62] cited in *Doraville Properties Corporation v AG* (n 184) at [104].

the overseas domestic court to enter judgment by default to be able to easily avoid the confiscation or forfeiture of Jersey assets. Indeed, it could lead to the anomalous position whereby judgments based on stronger, uncontested cases would be more difficult to enforce in practice than judgments based on weaker cases that were contested.

Once an external civil asset recovery order is registered, the Court may, on the application of the Attorney General, order that so much of the property, specified in the order as is not subject to a property restraint order, shall vest in the Viscount and may, in accordance with the directions of the Court, be managed, dealt with or realised by the Viscount; and any property specified in the order that is subject to a property restraint order may, in accordance with the directions of the Court, be managed, dealt with or realised by the Viscount. However, the Royal Court may not exercise these powers until it has afforded persons holding any interest in the property a reasonable opportunity to make representations to the Court.²¹² Once the Court has directed for the vesting of property subject to the property restraint order to vest in the Viscount, all the recoverable property that is specified in the order shall vest in the Viscount, subject to all hypothecs and security interests with which the property was burdened before it was so vested,²¹³ and the Viscount shall, in accordance with the Court's directions, manage or otherwise deal with, any recoverable property that is specified in the order.²¹⁴ Proceedings to register and enforce an external civil asset recovery order are civil proceedings and are solely concerned with the enforcement of the pre-existing rights of a foreign government against Jersey assets.²¹⁵

Funds obtained by the Viscount, including the realised proceeds of assets that become vested in the Viscount or obtained under an asset sharing agreement²¹⁶ are credited in a designated fund, the 'Civil Asset Recovery Fund', managed by the States of Jersey. The Civil Asset Recovery Fund may be used to discharge Jersey's obligations under any asset sharing agreement with a foreign country or territory and a variety of expenses of the Viscount or Attorney General, but those funds not applied or not required to be applied, to discharge the obligation described in Article 11(6)(a), (b) or (d) of the 2007 Law, are credited into Jersey's consolidated fund or held by the Treasurer of the States of Jersey at the close of each financial year.²¹⁷ It follows that funds taken by the Viscount under Articles 9 to 11 of the 2007 Law are washed clean of any subsisting beneficial interest.

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²¹² Civil Asset Recovery (International Co-operation) (Jersey) Law 2007, Art 10(2).

²¹³ ibid, Art 10(4).

²¹⁴ ibid, Art 10(3).

²¹⁵ *Doraville Properties Corporation v AG* (n 184), affirming *AG v Rosenlund and Another* (n 32) at [39] and [41]; and *Saccoccia v Austria* App No 69917/01 (ECtHR, 5 July 2007).

²¹⁶ Defined as any agreement or arrangement made by or on behalf of Jersey with a country or territory outside Jersey for the sharing of the proceeds of unlawful conduct that, as a result of mutual assistance in proceedings (other than criminal proceedings), have been confiscated or forfeited either in Jersey or elsewhere; Art 11(9).

²¹⁷ Civil Asset Recovery (International Co-operation) (Jersey) Law 2007, Art 11(7)–(8).

15

The Recognition and Enforcement of Judgments against Jersey Trust Assets and Trustees

I. Introduction

As a leading international finance centre in which hundreds of billions of pounds of assets are held in bank accounts and under administration in the island's fund and trust sectors,¹ an understanding of the local regime that applies to the enforcement and execution of foreign judgments is of major practical importance when Jersey trusts and trust assets are the subject of litigation.

15-1

Subject to one significant statutory exception relevant to enforcement against Jersey trusts,² Jersey's customary law principles on the conflict of laws as they pertain to the enforcement of foreign judgments are heavily influenced by English common law principles.³

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A foreign judgment is any judgment that is not a judgment of the Petty Debts Court, the Royal Court, the Jersey Court of Appeal or the Judicial Committee of the Privy Council (for appeals from Jersey).⁴ A foreign judgment has no direct operation in Jersey and cannot be immediately enforced by way of execution without more. However a foreign judgment may be recognised or enforced in Jersey either by way of suing on the foreign judgment at customary law or by way of registration of the foreign judgment, under statute, followed by execution as with any other Jersey judgment.

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II. Recognition and Enforcement

There is a distinction between the recognition of a foreign judgment and its enforcement. While by necessary implication the Royal Court will recognise every foreign judgment which it enforces, it need not enforce every foreign judgment which it recognises.

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¹ www.jerseyfinance.je/quarterly-reports--and-statistics.

² Trusts (Jersey) Law 1984, Art 9.

³ S Nicholle, *The Origin & Development of Jersey Law: an Outline Guide*, 5th edn (Jersey and Guernsey Law Review Ltd, St Helier, 2009) para 15.33.

⁴ Judgments (Reciprocal Enforcement) (Jersey) Law 1960, Art 1(1).

A judgment creditor in proceedings from another jurisdiction may come to Jersey seeking to have that judgment executed or otherwise carried into effect as against the person against whom it is given. This is a classic case of the judgment creditor seeking to have the foreign judgment enforced in Jersey. Obviously not every type of judgment is capable of enforcement in this way; obviously a party to foreign proceedings against whom a claim has been dismissed cannot seek to have that determination enforced. Equally the Royal Court has no jurisdiction to enforce a determination as to the title to a foreign *situs* immovable.⁵

- 15-5** The Royal Court may also give practical effect to the judgment of a foreign court that does not involve execution or enforcement in the sense described above by recognising a judgment as determinative of the issue between the parties. A person in whose favour a judgment is given may seek to resist an attempt by the party with whom they have been in litigation from seeking to re-litigate the same issue in Jersey. Conversely a party against whom judgment has been entered abroad may seek to use the judgment or the fact that it has already been satisfied to resist a further claim by the party in whose favour judgment was entered.

III. Enforcement and Recognition of Foreign Judgments at Customary Law

- 15-6** Despite the heavy influence of English conflict of laws principles, not all the Jersey authorities speak with one voice or are consistent with the approach long taken in England as to the proper jurisdictional basis for the enforcement and recognition of foreign judgments by the Royal Court. For many years, the principle of comity appears to have been the basis upon which the Royal Court would recognise and give effect to foreign judgments at customary law.⁶
- 15-7** While some notion of comity lies behind the jurisdictional basis for the enforcement of foreign judgments in Jersey, comity is far too broad and loose a principle so as to provide the basis of a rule.⁷ Comity is a policy factor that underpins how rules have developed over time rather than a rule in and of itself and as such cannot be applied so as to provide any measure of certainty in the outcome of specific cases. To describe comity as a rule for

⁵ Although it may still be given effect to and enforced as a judgment *in personam* if it satisfies certain conditions, at least where to do so is consistent with the substance of the judgment; see *Patni v Ali* [2007] 2 AC 85, [2006] UKPC 51.

⁶ *Lane v Lane (née Coverdale)* [1985–86 JLR 48]; *Compass Trustees Ltd v McBarnett* [2002 JLR 321]; *In re Bald Eagle Trust* [2003 JLR N 16]; *In re Fountain Trust* [2005 JLR 359]; *In re H Trust* [2006 JLR 280]; *In re B Trust* [2006 JLR 562], but cf *IMK Family Trust* [2008 JLR 250]; *Showlag v Mansour* [1994 JLR 113], per Lord Keith of Kinkel.

⁷ ‘Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws’; *Hilton v Guyot* (1895) 159 US 113 at 163–64. Note too that the 1960 Law provides no discretionary basis by which the Royal Court may refuse to register a foreign judgment falling within its scope.

the recognition of foreign judgments is analogous to describing the principle of freedom of contract as a term of a contract, or the principle of testamentary freedom as a term of a will.⁸ Many of the cases cited above that appear to approve the principle that comity is the touchstone can be equally reconciled as being consistent with principle of obligation (discussed below). The limits of the principle of comity as the jurisdictional basis by which the Royal Court recognises and gives effect to foreign judgments is easily demonstrated in that the Royal Court will not conduct an investigation as to what reciprocal rights of enforcement are conceded by a foreign jurisdiction in respect of Jersey judgments, nor does it limit the exercise of its own jurisdiction to that which is capable of being recognised and given effect to abroad. It is also to be observed that the doctrine of comity affords the enforcing court with a discretion whether or not to enforce or give effect to the judgment of a foreign court whereas the later principles have tended to regard the enforcement of a foreign judgment *in personam* as being mandatory rather than a matter of discretion.⁹

Comity, as the basis upon which judgments of foreign courts are to be recognised and given effect to, as a matter of English law, was displaced by what has become known as the doctrine of obligation, which is expressed in the following way:¹⁰

We think that ... the true principle on which the judgments of foreign tribunals are enforced in England is ... that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action.¹¹

Therefore, provided the foreign court had jurisdiction to give the judgment according to the English (and by extension Jersey) rules of the conflict of laws, the judgment is conclusive and will be recognised and given effect to in England as a judgment *in personam* (unless it is impeachable, eg by reason of fraud, the contravention of principles of public policy or natural justice, or in Jersey, by reason of Article 9(4) of the Trusts (Jersey) Law 1984).¹²

A judgment creditor seeking to enforce a foreign judgment in Jersey at customary law must bring an action (usually by way of Order of Justice) on the foreign judgment. However, the judgment creditor is not obliged to conduct a full trial of the original action again and can apply for summary judgment pursuant to Part 7 of the RCR 2004, on the ground that the defendant has no arguable defence to the claim;¹³ and if a summary judgment application succeeds, the defendant will not be given leave to defend. A litigant seeking recognition of a foreign judgment, for the purposes described above,¹⁴ would

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⁸ J Harris, 'Comity Overcomes Statutory Resistance: In The Matter Of The B Trust' (2007) 3 *Jersey & Guernsey Law Review* 184, at 13.

⁹ *Showlag v Mansour* (n 6), per Lord Keith of Kinkel. See also P Matthews, 'No Black Holes, please, we're Jersey' (1997) 1 *Jersey Law Review* 132 at 140–41.

¹⁰ *Schibsby v Westenholz* (1870) LR 6 QB 155; *Adams v Cape Industries plc* [1990] Ch 433, per Scott J.

¹¹ *Schibsby v Westenholz* (n 10) at 159.

¹² *Adams v Cape Industries plc* (n 10), per Scott J; see also *Owens Bank Ltd v Bracco* [1992] AC at 484 per Lord Bridge, affirmed in *Showlag v Mansour* (n 6) as part of the law of Jersey.

¹³ *Toothill v HSBC Bank plc* [2008] JLR 77], at [29], per Birt, Deputy Bailiff; see also 1 *Supreme Court Practice* 1999, 14/4/3–14/4/5, at 172–73, approved in *Tomes v Coke-Wallis* [2002] JRC 131A.

¹⁴ Para 15-06 above.

achieve recognition by raising the foreign judgment as a substantive defence in their Answer or as an abuse of process under RCR 6/13(1)(d) by applying to strike out the claim.

A. Enforcement of Foreign Judgments *in personam*

- 15-11** A foreign judgment for a debt or definite sum of money, given *in personam* by the court of a foreign country with jurisdiction to give it, which is conclusive and final and which is not otherwise impeachable, may be recognised and enforced by a claim or counterclaim in Jersey for the amount due.¹⁵ Consistent with long-established authority, the Royal Court will not entertain an action or the enforcement, either directly or indirectly, of a claim for a debt or definite sum of money in the nature of a fine or like penalty¹⁶ or a fiscal liability of a foreign state.¹⁷ An action by a foreign state to recover stolen property or to enforce contractual rights is justiciable in Jersey as the enforcement of *in personam* rights and does not fall within the usual preclusionary rule that a Jersey court will not enforce public law of a foreign state.¹⁸

B. A Judgment Given *in personam*

- 15-12** An judgment given *in personam* is a judgment in respect of a claim brought against a person to compel him to do a particular thing, eg the payment of a debt or damages for a breach of contract or for tort, or the specific performance of a contract; or to compel him not to do something, eg when an injunction is sought. A claim against a person in equity is a claim *in personam*, even where superficially the proceedings concern the beneficial entitlement to property, eg a claim asserting that the defendant is a constructive trustee of assets held beneficially by the plaintiff.¹⁹ A claim *in personam* may also be described as any claim which is not a claim *in rem*, a probate claim, or an administration claim.²⁰ A claim *in personam* does not include a proceeding for divorce or judicial separation,²¹ or for a declaration of nullity of marriage or of legitimacy or proceedings in bankruptcy (which concern status and are therefore claims *in rem*).

¹⁵ Dicey, Morris and Collins, *The Conflict of Laws*, 15th edn (London, Sweet and Maxwell, 2012) r 42, approved as a statement of principle of Jersey law in *In The Matter Of The IMK Family Trust* (n 6) at [37] (at least in respect of claims for a debts or definite sums of money).

¹⁶ *Huntington v Attrill* [1893] AC 150 (PC). A penalty in this sense is usually a sum payable to the state or an emanation of a state.

¹⁷ *Government of India v Taylor* [1955] AC 491; *In re Bomford* 2002 JLR N [34].

¹⁸ *Brunei Inv Agency v Fidelis Nominees Ltd* [2008 JLR 337]; *Islamic Republic of Iran v Barakat Galleries Ltd* [2007] EWCA Civ 1374.

¹⁹ Financial Management Service, Sheridan [2002 JLR NII].

²⁰ *Von Lorang v Administrator of Austrian Property* [1927] AC 641, at 662. Discussed below. A judgment *in rem* is a judgment whereunder either (1) possession or property in a thing is adjudged to a person, or (2) the sale of a thing is decreed in satisfaction of a claim against the thing itself. The term is used also to describe (3) an adjudication as to status such as a decree of nullity or dissolution of marriage, and (4) a judgment ordering property to be sold by way of administration in bankruptcy or death.

²¹ *ibid*, at 662. Although an order in ancillary relief proceedings that a party pay the other party money is clearly a claim *in personam*.

C. A Judgment for a Debt or Definite Sum of Money

Consistent with authority from Canada,²² the Cayman Islands²³ and the Isle of Man,²⁴ Jersey's Royal Court also has a discretion (consistent with that exercised in the earlier Jersey decision of *Lane v Lane*)²⁵ to recognise and enforce a non-money judgment given *in personam* at customary law. That discretion is not confined to the Court's supervisory jurisdiction under Article 51 of the Trusts (Jersey) Law 1984. However, it is a discretion that is to be exercised cautiously²⁶ and cannot be exercised where to do so would be inconsistent with Article 9 of the Trusts (Jersey) Law 1984. The flexibility to enforce non-money judgments that was recognised to exist in Brunei does not alter the requirement that the party against whom the judgment is sought to be enforced in Jersey must have submitted to the jurisdiction of the court whose order is sought to be enforced.²⁷

15-13

i. Judgment Must be Final and Conclusive

No foreign judgment may be enforced at customary law unless it is final and conclusive. The test of finality is whether the judgment by the foreign court would be treated by it as *chose jugée* (a Jersey customary law concept similar to the principle of *res judicata*) but a judgment which was liable to be abrogated or varied by the court which meant it was not a final judgment. The possibility of an appeal in the foreign court to a higher court does not alter the finality of the foreign judgment. Where the Royal Court is presented with conflicting final judgments by foreign courts of competent jurisdiction the Royal Court will give effect to the earliest in time unless it would be unfair to do so, eg if the judgment creditor seeking to enforce the foreign judgment was estopped by representation from relying upon it.²⁸ The judgment of a foreign court remains final and conclusive and therefore capable of recognition and enforcement at customary law notwithstanding that the decision of the foreign court is appealed against in breach of undertakings given to the Jersey Royal Court not to do so.²⁹

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Where difficulties arise in determining whether a foreign order providing for periodical payments (eg for maintenance) is final and conclusive, the applicable principles appear to be that such orders are final and conclusive if they incapable of alteration by the court that made them but if they are capable of variation by the court which made them (such as orders of periodical payments made by the Family Division of the High Court) no action is maintainable on them at customary law; however, a statutory mechanism exists for the registration and enforcement in Jersey of maintenance orders made in any Commonwealth

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²² *ProSwing Inc v Elta Golf Inc* [2006] SCR 612.

²³ *Miller v Gianne* [2007] CILR 18.

²⁴ *Pattini v Ali* (n 5) at [30] (albeit obiter).

²⁵ *Lane v Lane (née Coverdale)* (n 6).

²⁶ *Brunei Investment Agency v Fidelis Nominees Limited* (n 18); doubt was also expressed in *In The Matter Of The IMK Family Trust* (n 6) at [40] whether Jersey law admitted of a discretion as a matter of comity to enforce non-money judgments outside of the rule as stated in the then r 35(1); Dicey & Morris, *The Conflict of Laws*, 14th edn (London, Sweet and Maxwell, 2006) (now Dicey & Morris, *The Conflict of Laws* 15th edn, r 42).

²⁷ *In The Matter Of The IMK Family Trust* (n 6) at [40]; *Lane v Lane (née Coverdale)* (n 6) at [49].

²⁸ *Showlag v Mansour* (n 6); the decision is applicable to the interpretation of the Judgments (Reciprocal Enforcement) (Jersey) Law 1960, Arts 6(1)(b) and 9(2)(b).

²⁹ *Abdel Rahman v Chase Bank (C.I.) Trust Co Ltd* [1990] JLR 59].

country if the payer is resident in Jersey.³⁰ However, an order that is variable in respect of future payments may not be variable in so far as arrears are concerned in which case an action may be brought for the recovery of the arrears.

- 15-16** A judgment may be final and conclusive notwithstanding an appeal is actually pending in the foreign jurisdiction. The test for finality is whether it is final and unalterable in the court which pronounced it.³¹ If the judgment of the foreign court is appealed, the Royal Court may take steps to protect the interests of the appealing party while still proceeding to recognition and enforcement of the foreign judgment (eg by granting a stay of execution in Jersey pending the outcome of the appeal). The effect of registration of a foreign judgment that is subsequently successfully appealed pending enforcement in Jersey is that the Jersey action to enforce melts away as there is no judgment capable of enforcement or registration under the 1960 Law.³² That proposition is subject to the Royal Court being prepared to recognise the judgment of the appellate court.³³

ii. Whether the Foreign Court Is to Be Treated as Having Jurisdiction

- 15-17** A judgment of a foreign court is impeachable if the foreign court did not have jurisdiction to give the judgment.³⁴ In the leading English Court of Appeal decision of *Adams v Cape Industries plc*,³⁵ it was said that in the absence of submission to the jurisdiction of the foreign court, the competence of a foreign court to summon the defendant before it depended on the physical presence of the defendant in the country concerned at the time of suit.³⁶ Whether the Royal Court regards the foreign court as having jurisdiction is to be decided in accordance with Jersey law and not the law of the foreign court.³⁷
- 15-18** The four principal bases upon which the foreign court will be judged in Jersey to have had jurisdiction are:
1. If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign jurisdiction.
 2. If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.

³⁰ Maintenance Orders (Facilities For Enforcement) (Jersey) Law 2000.

³¹ *In re Bell* [1995] JLR 23] at 29–30 (a judgment concerning registration under the 1960 Law but the principle applies to customary law enforcement of judgments as well).

³² *ibid*, at 30–32.

³³ See factors which may vitiate the recognition of a foreign judgment at 15–55 below.

³⁴ *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] AC 670 (PC): ‘In a personal action, [...] a decree pronounced in *absentem* by a foreign court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity [...] by the courts of every nation, except [...] in the country of the forum by which it was pronounced’; at 683–84, per Lord Selborne.

³⁵ [1990] Ch 433, cited in *Brunei Investment Agency v Fidelis Nominees Limited* (n 18) in support of the proposition that at least in so far a foreign money judgments are concerned, comity is not a basis for the recognition and enforcement of judgments.

³⁶ *Adams v Cape Industries Plc* (n 10) at 519:

‘So long as he remains physically present in that country, he has the benefit of its laws, and must take the rough with the smooth, by accepting his amenability to the process of its courts. In the absence of authority compelling a contrary conclusion, we would conclude that the voluntary presence of an individual in a foreign country, whether permanent or temporary and whether or not accompanied by residence, is sufficient to give the courts of that country territorial jurisdiction over him under our rules of private international law.

³⁷ *Adams v Cape Industries Plc* (n 10) at 517–19.

3. If the person against whom the judgment was given, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.
 4. If the person against whom the judgment was given, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country.³⁸
- a. Presence in the Foreign Jurisdiction at the Time the Foreign Proceedings Are Commenced

Individuals

In Jersey law, an individual defendant's mere presence, as distinct from their residence, is a sufficient basis to found jurisdiction. This is to be contrasted with the 1960 Law which adopts residence, a concept that has inherently more permanence to it, as opposed to the defendant's mere presence as the basis of jurisdiction over individuals.³⁹

15-19

Corporations

A corporation is neither resident nor present in the sense those terms apply to an individual. In Jersey law a company resides either where the company is incorporated, the location of its registered office or the fixed place from which it carries on its business for more than a minimal time (its principal office) regardless of the location of its directors or bank accounts.⁴⁰ The long line of English cases dealing with the question of whether a foreign corporation does or does not carry on business in England so as to render itself amenable to the jurisdiction of the English courts at common law are likely to be persuasive in Jersey.⁴¹ A corporation can also be regarded as present within the jurisdiction of the courts of a foreign country if its representative has, for more than a minimal period of time, been carrying on the corporation's business in that country at or from some fixed place of business.⁴² A company may be deemed resident in a foreign jurisdiction through its subsidiary if the

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³⁸ Dicey & Morris, *The Conflict of Laws* (n 15) r 43; eg *E.M.M. Capricorn Trustees Ltd v Compass Trustees Ltd* [2001 JLR 205].

³⁹ Judgments (Reciprocal Enforcement) (Jersey) Law 1960, Art 6(2)(iv).

⁴⁰ *FG Hemisphere Assocs LLC v Democratic Republic of Congo* [2011 JLR 486].

⁴¹ Discussed in *Adams v Cape Industries Plc* (n 10).

⁴² *ibid*, at 523–531: (a) whether or not the fixed place of business from which the representative operated was originally acquired for the purpose of enabling him to act on behalf of the corporation; (b) whether the corporation had directly reimbursed him for (i) the cost of his accommodation at the fixed place of business; (ii) the cost of his staff; (c) what other contribution, if any, the overseas corporation made to the financing of the business carried on by the representative; (d) whether the representative was remunerated by reference to transactions, eg by commission, or by fixed regular payments or in some other way; (e) what degree of control the corporation exercised over the running of the business conducted by the representative; (f) whether the representative reserved part of his accommodation or part of his staff for conducting business related to the corporation; (g) whether the representative displayed the corporation's name at his premises or on his stationery, and if so, whether he did so in such a way as to indicate that he was a representative of the corporation; (h) what business, if any, the representative transacted as principal exclusively on his own behalf; (i) whether the representative made contracts with customers or other third parties in the name of the corporation, or otherwise in such manner as to bind it; (j) if so, whether the representative required specific authority in advance before binding the corporation to contractual obligations.

subsidiary was as acting the parent company's agent. It may also treat the subsidiary as the alter ego of the parent if special circumstances exist which indicate that there is a 'mere facade concealing the true facts'.⁴³ If the agent or subsidiary has authority to enter into contracts on behalf of the corporation without seeking the prior approval of the parent or principal, that will be a powerful indicator that the corporation is present.⁴⁴

- 15-21** The 1960 Law requires that the corporation must either reside or have its principal place of business (and not merely be carrying on business) in the foreign country.⁴⁵ In the authors' view the statutory rule and the customary law rule are consistent: the test of jurisdiction as against a body corporate is satisfied if the corporation is carrying on business at a definite and fixed place with a degree of permanence about it within the jurisdiction of the foreign court.⁴⁶ Neither at customary law nor under the statute is the presence of a corporation comparable to what may be the fleeting presence of an individual in the jurisdiction.

b. Entering an Appearance in Proceedings

- 15-22** A person that applies to a foreign court in the position of a plaintiff⁴⁷ will be deemed to have bound himself to submit to the jurisdiction of the foreign court. A litigant who voluntarily submits himself to the jurisdiction of a court by appearing before it cannot afterwards dispute its jurisdiction. Where a defendant appears and pleads to the merits without contesting the jurisdiction there is clearly a voluntary submission. In the context of submission to the jurisdiction of an English court, the House of Lords has held that taking a step in proceedings will only amount to a submission where the defendant takes a step which is only necessary or useful if his objection to the jurisdiction is waived.⁴⁸ Entering a voluntary appearance renders a litigant subject to the jurisdiction of the foreign court both to the original claim but also to such further claims as the court allows to be added by the plaintiff that concern the same subject matter, and to related claims which ought to be dealt with in the same proceedings. This will not extend to a defendant being deemed to subject himself to claims by new plaintiffs.⁴⁹

c. Challenges to Jurisdiction of the Foreign Court

- 15-23** Where the defendant to foreign proceedings contests the jurisdiction of the court, the position is regulated by Royal Court Rule 6/7(9). A party who makes a challenge to the jurisdiction of the foreign court is not deemed to have submitted to the jurisdiction in making its challenge. A successful challenge to the jurisdiction of the foreign court will mean that no question of submission arises. A litigant who unsuccessfully challenges the jurisdiction of the court but goes on anyway to contest the merits of the action is deemed to have submitted. But what of a litigant who, having challenged the jurisdiction of the court, takes no further part in the foreign proceedings? There is no Jersey equivalent to section 33 of the Civil Jurisdiction and Judgments Act 1982, which provides that a judgment debtor shall

⁴³ *Adams v Cape Industries Plc* (n 10) at 539.

⁴⁴ *ibid*, at 531.

⁴⁵ Judgments (Reciprocal Enforcement) (Jersey) Law 1960, Art 6(2)(iv).

⁴⁶ *FG Hemisphere Assocs LLC v Democratic Republic of Congo* (n 39).

⁴⁷ To include any claim of set-off, counterclaim or cross/third party claim, whether as a plaintiff or a defendant.

⁴⁸ *Williams & Glyn's Bank v Astro Dinamico* [1984] 1 WLR 428.

⁴⁹ *Murthy v Sivajothi* [1999] 1WLR 467 (CA), applied in *Whyte v Whyte* [2005] EWCA Civ 858.

not be regarded as having submitted to the foreign court by reason only of the fact that he appeared (conditionally or otherwise) in the foreign proceedings:

1. to contest the jurisdiction of the court;
2. to ask the court to dismiss or stay the proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another country; or
3. to protect, or obtain the release of, property seized or threatened with seizure in the proceedings.⁵⁰

Prior to the enactment of the 1982 Act the English Court of Appeal in *Harris v Taylor*⁵¹ decided under English common law, that a defendant who entered a conditional appearance in the Isle of Man court in order to set aside the proceedings on jurisdictional grounds was held to have submitted to the jurisdiction of the Manx Court, even though he took no further part in the proceedings after his application to set aside was unsuccessful. This decision was followed in *Henry v Geoprosco International*,⁵² where the English Court of Appeal held that there was a voluntary appearance where the defendant appeared before the foreign court to invite that court in its discretion not to exercise a jurisdiction which it had under its local law; and that there was also a voluntary appearance if the defendant merely protested against the jurisdiction of the foreign court if the protest took the form of a conditional appearance which was converted automatically by operation of law into an unconditional appearance if the decision on jurisdiction went against the defendant. The Court left open the question whether an appearance the sole purpose and effect of which was to protest against the jurisdiction of the foreign court would be a voluntary appearance. The status of the *Taylor* and *Geoprosco* decisions in Jersey has been expressly left open by the Jersey Court of Appeal.⁵³ It is also to be noted that the rule in RCR 6/7(9) is that a party who makes a challenge to the jurisdiction of the foreign court is not deemed to have submitted to the jurisdiction in making its challenge *unless the Court shall otherwise order* (emphasis added), leaving open the possibility that the Royal Court may regard an unsuccessful jurisdiction challenge in the foreign court to amount to a voluntary appearance.

15-24

d. Agreement to Submit to the Jurisdiction

The final basis upon which the Royal Court will deem a party to have submitted to the jurisdiction of a foreign court is where a contract that provides that all disputes between the parties to it shall be referred to the exclusive jurisdiction⁵⁴ of a foreign court or tribunal.⁵⁵ The same is true for a jurisdiction clause that is non-exclusive.

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⁵⁰ Note that the Judgments (Reciprocal Enforcement) (Jersey) Law 1960, Art 6(2)(a) provides for something similar to s 33 of the 1982 Act in that a submission for the purpose of protecting, or obtaining the release of, property seized, or threatened with seizure, in the proceedings, or of contesting the jurisdiction of the foreign court does not amount to a submission for the purposes of registration of a judgment under that legislation.

⁵¹ [1914] 3 KB 580 (CA).

⁵² [1976] QB 726 (CA).

⁵³ *Solvalub Limited v Match Investments Limited* [1996 JLR 361].

⁵⁴ As to the circumstances in which an express provision is to be regarded as an exclusive jurisdiction clause, see *Crociani v Crociani* [2014 (1) JLR 426].

⁵⁵ *E.M.M. Capricorn Trustees Ltd v Compass Trustees Ltd* (n 37); *G.K.N. (Jersey) Limited v Resources Recovery Board* [1982 JJ 359].

- 15-26** A contractual submission to the exclusive jurisdiction of a foreign court is not to be regarded, in and of itself, as a submission for all purposes to all the courts of the foreign jurisdiction. Whether a particular contractual provision is a jurisdiction clause and the scope of such provision is one of construction.⁵⁶ A jurisdiction clause in a trust instrument is not to be treated as being analogous to a jurisdiction clause in a contract for the purposes of determining whether a party to a trust dispute conducted before a foreign court has submitted to the proceedings.⁵⁷ An agreement to submit is not necessarily required to be in the form of a contractual jurisdiction clause but may take the form of an agreement to accept service of process at a particular address.
- 15-27** An agreement to submit to the jurisdiction of a foreign court must be express and cannot be implied.⁵⁸ The agreement between parties that a contract or trust instrument is governed by the proper law of a particular country does not mean the parties are in agreement to submit to the jurisdiction of the courts to which that law applies. Nor can an agreement be implied from the fact that the particular cause of action arose in the foreign jurisdiction or that the defendant was physically present when the cause of action arose.⁵⁹ While an agreement to submit cannot be implied, it is arguable that an alleged consent which was not contractually enforceable could be treated as a representation by the defendant of a willingness to submit to the jurisdiction (which he could be estopped from denying) if acted upon by the plaintiff provided that the representation was intended to be acted upon, or at least was one which the plaintiff reasonably believed was intended to be acted upon.⁶⁰

D. Reliance on Foreign *in personam* Judgments for Purposes other than Enforcement

- 15-28** A litigant may seek to rely upon a foreign judgment in Jersey other than for the purposes of enforcing it. A plaintiff who has brought proceedings abroad and lost may seek to bring a similar claim in Jersey; or in proceedings on a different claim may raise an issue which has been already decided abroad. A foreign judgment may be recognised without being enforced, by refusing to allow the party against whom it has been given to re-open the question decided. In such cases a foreign judgment entitled to recognition may give rise to what in Jersey is known as a *chose jugée* (a Jersey species of estoppel) which has the effect of preventing a party to proceedings from asserting or denying, as against the other party, the existence of a cause of action,⁶¹ the non-existence or existence of which has been determined by the foreign court, or to an issue estoppel, which will prevent a matter of fact or law necessarily decided by a foreign court from being re-litigated in Jersey).⁶²

⁵⁶ *Crociani v Crociani* (n 53).

⁵⁷ *Crociani v Crociani* [2014 (2) JLR 508].

⁵⁸ *Sirdar Gurdyal Sign v Rajah of Faridkote* (n 33); *Adams v Cape Industries* (n 10).

⁵⁹ *Sirdar Gurdyal Sign v Rajah of Faridkote* (n 33).

⁶⁰ *Adams v Cape Industries* (n 10) at 465-66, per Scott J.

⁶¹ *Cooper v Resch* [1987-88 JLR 428]; *Showlag v Mansour* (n 6).

⁶² *Ernest Farley & Sons Ltd v Takilla Ltd* [1992 JLR 54]; *Minories Finance v Arya Holdings Limited* [1994 JLR 149], *Showlag v Mansour* (n 6); *Pallot Limited v Gechena Limited* 1996 JLR 241 (confirming the extension of the doctrine to arbitration proceedings).

There are recognised to be four interrelated heads of estoppel under the banner of *chose jugée*.⁶³ 15-29

1. A cause of action estoppel par *chose jugée* which will arise where the cause of action is identical to a cause of action determined in the foreign proceedings between the same parties and in relation to the same subject matter.
2. An issue estoppel par *chose jugée* which will arise where an identical issue between the same parties or their privies⁶⁴ has been decided by a judgment in a foreign court, being a court of competent jurisdiction, on the merits⁶⁵ finally and conclusively.⁶⁶
3. A Henderson-style⁶⁷ estoppel par *chose jugée* which will arise where a party to Jersey proceedings raises a matter which could and should have been litigated in the foreign proceedings.
4. A collateral attack which will arise where a party seeks to challenge the correctness of a decision of a court other than by way of an appeal.⁶⁸

A foreign judgment which is final and conclusive on its merits in favour of the defendant is at customary law a good defence to a claim in Jersey for the same matter.⁶⁹ There is no *chose jugée* against a different remedy,⁷⁰ although there may be an issue estoppel if a relevant issue has been decided directly in the foreign action. Where two conflicting foreign judgments, each of which would satisfy the criteria for recognition, have determined issues which arise in the English proceedings, the general rule is that the one given first in time is to be recognised, to the exclusion of the latter.⁷¹ 15-30

Special caution is required before a foreign judgment can be held to give rise to an issue estoppel on the basis that the Royal Court may be unfamiliar with the civil procedure of a foreign jurisdiction. Without that understanding it may be difficult to see whether a foreign court has decided a particular issue or whether it was merely obiter. The Court must be alive to the risk of injustice for a litigant to be barred from putting forward his case in Jersey because he failed to do so in an earlier case abroad.⁷² 15-31

The question of who is estopped by the decision of a foreign court may be more complex than the ‘same parties (or their privies)’ formula suggests. For example, if a foreign court has decided an issue against one, but not both, of the parties to an action, it may be an abuse of process for the other to seek to litigate the point already decided against his co-party.⁷³ Likewise, the question whether a person was a party and on that basis may be estopped in

⁶³ *Minories Finance v Arya Holdings Limited* (n 61); see also *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* [2013] UKSC 46 at [17]–[25], per Lord Sumption.

⁶⁴ *Channel Islands & International Law Trust Company v Pike* [1999] JLR 28.

⁶⁵ In *Brazil v Durant International Corporation* [2012] JCA 025, it was held that the doctrine of *chose jugée* was capable of being applied to interlocutory applications including case management decisions.

⁶⁶ *Carl Zeiss Stiftung v Rayner & Keeler (No 2)* [1967] 1 AC 853 at 910–11, 928–29, 936–37, 944–46.

⁶⁷ *Henderson v Henderson* (1843) 3 Hare 100.

⁶⁸ *T.A. Picot (CI) Limited v Crills* [1995] JLR 33; *Hacon v Olsen, Blackhurst & Dorey* [1998] JLR N9B.

⁶⁹ *Carl Zeiss Stiftung v Rayner & Keeler (No 2)* (n 65), applied by a unanimous House in *The Sennar (No 2)* [1985] 1 WLR 490 (HL), affirmed in *Showlag v Mansour* (n 6) and not overturned on appeal to the Privy Council.

⁷⁰ *Minories Finance v Arya Holdings Ltd* (n 61).

⁷¹ *Showlag v Mansour* (n 6).

⁷² *Carl Zeiss Stiftung v Rayner & Keeler (No 2)* (n 65) at 918, per Lord Reid.

⁷³ *Rayner v Bank fur Gemeinwirtschaft AG* [1983] 1 Lloyd's Rep 462 (CA).

Jersey requires careful examination. A person may be ‘represented’ before a foreign court in the sense that the foreign court may have ordered them to be convened to the proceedings or deems them to be bound according to local procedure even though they have not given any expression of assent. *Chose jugée* will only arise against such a party if the foreign court is regarded by the Jersey court as one of competent jurisdiction so far as the individual person is concerned.

- 15-33** The judgment must be on the merits. A decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned.⁷⁴ In *Republic of Brazil v Durant*,⁷⁵ the Jersey Court of Appeal accepted in principle that issue estoppel could arise from an interlocutory judgment, including a case management decision on a procedural, non-substantive issue where there was express submission of the issue in question to the foreign court. In England, the effect of the Foreign Limitation Periods Act 1984⁷⁶ is that a foreign judgment determining any matter by reference to limitation is deemed to be on the merits and subject to the *lex causae*. However, Jersey law contains no equivalent provision to the 1984 Act and under its own conflict of laws rules, limitation is at customary law, a matter of procedure and thus governed by the *lex fori*.⁷⁷ Jersey law therefore appears to adopt the position prevailing in English law prior to the enactment of the 1984 Act, namely that a judgment given in favour of a defendant in the foreign court on the ground that the action is barred by limitation is not a decision on the merits.⁷⁸

E. Procedure to Enforce a Foreign Judgment at Customary Law

- 15-34** Proceedings to enforce a foreign judgment at customary law are often (although not invariably) commenced by Order of Justice.⁷⁹ Where the defendant to the enforcement action is in Jersey, the proceedings on the foreign judgment are to be served on him personally through the Viscount in the usual fashion for actions commenced by Order of Justice. Where the defendant is outside the jurisdiction, the plaintiff will have to make an application to serve Order of Justice out of the jurisdiction.⁸⁰ Where the Jersey proceedings on the foreign judgment have been served on the defendant and the defendant has indicated a desire to defend and the proceedings are placed on the pending list, the plaintiff may apply for summary judgment even before the defendant has filed an Answer.⁸¹ Where the defendant does not appear to defend or enter an Answer the judgment creditor plaintiff may enter judgment against him. Unless the defendant satisfies the Court that there is an

⁷⁴ *In The Sennar (No 2)* (n 68) at 494, per Lord Brandon.

⁷⁵ [2012] JCA025.

⁷⁶ s 3.

⁷⁷ *Pell Frischmann Engineering Limited v Bow Valley Iran Limited* [2007] JRC105A.

⁷⁸ *Black-Clawson Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591, based on s 8(1), the Jersey equivalent of which is the Judgments (Reciprocal Enforcement) (Jersey) Law 1960, Art 9(1).

⁷⁹ The proceedings to enforce the order for the transfer of shares in *Brunei Investment Agency v Fidelis Nominees Limited and Ors* (n 18) were commenced by way of Representation.

⁸⁰ Relying on Service of Process Rules 1994, r 7(m).

⁸¹ RCR 2004, r 7/1.

issue or question in dispute which ought to be tried—for instance, on the ground that the judgment was obtained by fraud—the Court may give judgment for the plaintiff.⁸² Issues of *chose jugée* will often fall to be determined at an early stage in the proceedings, commonly by way of a summons to strike out the proceedings under RCR 6/13(1)(d).

F. Defences to Proceedings Seeking the Recognition or Enforcement of a Foreign Judgment at Customary Law

As in England, a foreign judgment cannot be re-examined on its merits or impeached for an error of either fact or of law provided the foreign court had jurisdiction according to the Jersey rules on the conflict of laws.⁸³ This principle holds good whether the judgment is relied upon by a plaintiff or a defendant, whether the judgment is *in personam* or *in rem* (and so, in the latter instance, being unimpeachable against the whole world). The sole exception to this principle appears to be where the foreign judgment falls within the scope of Article 9(1) of the Trusts (Jersey) Law 1984. The implication of Article 9 is that the Royal Court is entitled to conduct a review as to the substance of a foreign court's decision before deciding whether it will give effect to it in Jersey which runs wholly contrary to the tenor of the principles discussed so far in relation to the enforcement and recognition of foreign judgments at customary law.

'Judgment' in this context is not thought to extend to a decision of a foreign court that the judgment of a court of a third foreign country is entitled to be enforced under the law of the foreign country, even where the proceedings in the foreign court were contested by parties who submitted to its jurisdiction in relation to this issue.⁸⁴ However, an issue estoppel par *chose jugée* may arise in an appropriate case, from rulings made by the third country foreign court.⁸⁵

A foreign judgment may be impeachable for fraud and on that basis may be refused recognition or effect in Jersey.

A foreign judgment may likewise be impeachable on the ground that its enforcement or recognition in Jersey would be contrary to public policy or on the ground that the proceedings in which the judgment was obtained were an affront to natural justice.

G. Enforcement and Recognition of a Foreign Judgment *in rem* at Customary Law

Jersey will enforce and recognise a judgment of a foreign court that gives a judgment in *rem* if the property that is the subject matter of the foreign proceedings was situated within

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⁸² *ibid*, r 7/2.

⁸³ See Dicey & Morris (n 15) r 48. A doctrine known as *per rem judicatam*; *Showlag v Mansour* (n 6) at 118; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* (n 65) at 917, 925, 965–66. Subject to the Trusts (Jersey) Law 1984, Art 9.

⁸⁴ Dicey & Morris (n 15) para 14-121.

⁸⁵ *Owens Bank Plc v Bracco* (n 12) at 470–71, approved in *Showlag v Mansour* (n 6) at 118 and *In The Matter Of The IMK Family Trust* [2008] JRC 136 at [61].

the jurisdiction of the foreign court.⁸⁶ However, the Royal Court will not usually recognise a foreign court as having jurisdiction (and will therefore neither enforce nor recognise a judgment) that purports to adjudicate upon the title to or right to possession of any immovable property situated outside the jurisdiction of the foreign court. The jurisdiction of the courts of the *situs* of movables to give a judgment *in rem* is not exclusive to that jurisdiction.⁸⁷

- 15-40** A judgment *in rem* is a judgment which determines the right to possession of property or property in a thing to a person. A judgment *in rem* is also used to describe a determination as to status of a person (such as decree of dissolution of a marriage). A judgment *in rem* is said to operate as against the whole world.⁸⁸ A foreign judgment to the effect that the beneficial interest in property held subject to a Jersey trust is actually held beneficially on a constructive trust for another person, although superficially appearing to be an action *in rem*, is in fact an action based in equity and therefore is a claim *in personam*.
- 15-41** A foreign judgment must purport to operate *in rem* for it to be recognised in Jersey as a judgment *in rem*. If the foreign judgment is capable of being construed as a judgment *in rem* but in which quality it would not qualify for recognition in Jersey, yet the judgment also contains orders which require a person to pay money or otherwise perform acts, it may be recognised or enforced in Jersey to that extent as a judgment which binds the parties *in personam* if it otherwise satisfies the requirements above.⁸⁹
- 15-42** Foreign judgments *in rem* rarely call to be enforced in Jersey (although are freely recognised) on the basis that a foreign judgment *in rem* determines title to or possession of property that is within the jurisdiction of the foreign court, and so no question of enforcement in Jersey arises, or the property is outside the foreign court's jurisdiction, in which case the Royal Court will not recognise the jurisdiction of the foreign court to have made the order in the first place. A person may sue in Jersey to defend against the interference with his rights to property pursuant to a foreign judgment *in rem*, but is recognised as doing so not pursuant to the foreign judgment qua judgment but on the basis of the foreign judgment *qua* assignment.
- 15-43** The Royal Court has held that a declaratory judgment is capable of enforcement at customary law provided that it is clear to the Royal Court that the foreign court was competent to make the declaration; the same parties had submitted to the jurisdiction and the decision had not been appealed and the judgment debtor had every opportunity to raise all relevant defences at the hearing of the original action. A judgment debtor will be deemed to have had such opportunity even if he chooses to absent himself from the proceedings.⁹⁰ There may be ancillary orders to a declaratory judgment, which because they order the payment of money, (eg in a divorce or orders of the payment of costs) are themselves capable of enforcement as a judgment *in personam*.⁹¹

⁸⁶ Dicey & Morris (n 15) r 47.

⁸⁷ eg Jersey courts will recognise that a foreign court has jurisdiction to determine the succession to all movables wherever located if the deceased is domiciled in the jurisdiction of the foreign court.

⁸⁸ *Castrique v Inrie* (1870) LR 4 HL 414 at 429, per Lord Blackburn: 'if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere'.

⁸⁹ *Brunel Investment Agency v Fidelis Nominees Limited* (n 18), affirming *Pattni v Ali* (n 5).

⁹⁰ *C.I. Law Trustees Limited v Minwalla & Ors* [2005 JLR 359] at [24]–[25].

⁹¹ Dicey & Morris (n 15) para 14–003.

IV. The Enforcement and Recognition of Foreign Judgments under Statute

<p>The registration of foreign judgments in Jersey is governed by the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 (as amended) by the Judgments (Reciprocal Enforcement) (Jersey) Act 1973. The 1960 Law is also supplemented by the Judgments (Reciprocal Enforcement) (Jersey) Rules 1961. The 1960 Law is based upon the UK's Foreign Judgments (Reciprocal Enforcement) Act 1933. The basis of the application of the 1960 Law in regard to any territory within its scope is the existence of a substantial measure of reciprocity with those jurisdictions.⁹² Jersey is not a party to the prevailing statutory regime in force in the UK giving effect to the Brussels I Regulation⁹³ or the Lugano Convention. Enforcement of judgments in Jersey from EU countries must be by way of an action at customary law.⁹⁴</p> <p>When Part II of the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 is extended to the superior courts of any foreign country, a judgment creditor under a judgment⁹⁵ to which the 1960 Law applies, may apply to the Royal Court at any time within six years after the date of such judgment to have the judgment registered in the Royal Court, and on any such application the Royal Court will order the judgment to be registered.⁹⁶ No judgment may be ordered by the Royal Court to be registered in Jersey if it has already been wholly satisfied; or if it could not be enforced by execution in the country of the original court.⁹⁷</p> <p>Subject to the provisions of the 1960 Law with respect to the setting aside of registration, a judgment once registered will be of the same force and effect as if the judgment had been a judgment originally given by the Royal Court of Jersey and entered on the date of registration.⁹⁸</p> <p>Any judgment of a recognised superior court⁹⁹ of a country to which the 1960 Law applies¹⁰⁰ is capable of registration if it is final and conclusive as between the judgment debtor and</p>	15-44
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⁹² See Judgments (Reciprocal Enforcement) (Jersey) Law 1960, Art 10. To date, the States of Jersey has never had recourse to this provision.

⁹³ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12, 1–23, as amended by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351.

⁹⁴ The schedule of senior courts to which the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 applies is confined to a narrow number of jurisdictions; see note 99 below.

⁹⁵ Defined to mean a judgment or order given or made by a court in any civil proceedings, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party; Judgments (Reciprocal Enforcement) (Jersey) Law 1960, Art 2(1).

⁹⁶ Judgments (Reciprocal Enforcement) (Jersey) Law 1960, Art 4(1).

⁹⁷ *ibid*, Art 4(1).

⁹⁸ *ibid*, Art 4(2).

⁹⁹ Despite earlier authority to the contrary a judgment of an English county court is a judgment of a senior court for the purposes of Art 3 where the county court's judgment had been transferred for enforcement to the High Court and under English law was to be treated as a judgment of the High Court; *In re Marbeck Associates* [2014 (1) JLR 140]; cf *In The Matter Of The Application of Hardwick* [1995 JLR 245]; see also *Manches LLP v Interglobal Financial Ltd* [2009–10] GLR 284 (Guernsey) which had already rejected the approach in *Hardwick*.

¹⁰⁰ Which are confined to England and Wales: the UK Supreme Court, the House of Lords, the Court of Appeal and the High Court; for Scotland: the UK Supreme Court, the Court of Session and the Sheriff Court; for

the judgment creditor or requires the former to make an interim payment to the latter; and there is payable thereunder a sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty).¹⁰¹ It is also to be implied that a foreign judgment is incapable of registration in Jersey if it contravenes Article 9(4) of the Trusts (Jersey) Law 1984. Although the 1960 Law has not been amended to reflect that position, it must be deemed to have been impliedly amended by the later legislation.¹⁰²

- 15-48** The Jersey statutory regime pertaining to the enforcement of foreign judgments is of limited geographical application and the judgments of courts of very many foreign countries are not within its scope. It also, oddly, omits judgments of the Privy Council originating from Guernsey and the Isle of Man which, it seems, can only be enforced in Jersey at customary law. Notwithstanding its status as a leading international finance centre, Jersey is not currently a party to any bilateral or multilateral treaty for the reciprocal enforcement and recognition of judgments that exist alongside the 1960 Law. Therefore the vast majority of foreign judgments that are capable of being enforced or recognised in Jersey are only capable of being so at customary law.
- 15-49** Registration under the 1960 Law is available as of right and not at the discretion of the Court. However, registration may or must be set aside if the judgment debtor shows certain grounds and the judgment creditor may not levy execution until the time has passed within which an application for setting it aside may be made.¹⁰³
- 15-50** As at customary law, a judgment is deemed to be final and conclusive notwithstanding that an appeal is pending or that it may still be subject to appeal in the foreign jurisdiction.¹⁰⁴ However, the Court has a discretionary power to stay the execution of a judgment that is registered or to set aside the registration of a judgment on such terms as it thinks fit, if the applicant satisfies the Court that an appeal is pending or that he is entitled and intends to appeal.¹⁰⁵ And if upon an application for registration it appears that part or parts only of the judgment are capable of registration, then such part or parts may be registered alone. Registration is for the sum payable under the original judgment, plus interest due under the law of the original court up to the date of registration, plus reasonable costs incidental to registration.¹⁰⁶ Where the judgment has been partially satisfied, registration is for the unsatisfied balance.¹⁰⁷

Northern Ireland: the UK Supreme Court and the Court of Judicature of Northern Ireland; for the Isle of Man: Her Majesty's High Court of Justice of the Isle of Man (including the Staff of Government Division); and for Guernsey: the Royal Court of Guernsey and the Guernsey Court of Appeal. See sch to the Judgments (Reciprocal Enforcement) (Jersey) Act 1973.

¹⁰¹ Judgments (Reciprocal Enforcement) (Jersey) Law 1960, Art 3(2)(b) consistent with the long-established principle in *Government of India v Taylor* (n 17).

¹⁰² Trusts (Amendment No 5) (Jersey) Law 2012, taking effect from 2 November 2012.

¹⁰³ Judgments (Reciprocal Enforcement) (Jersey) Law 1960, Art 4(2).

¹⁰⁴ *ibid*, Art 3(3).

¹⁰⁵ *ibid*, Art 7(1); *In The Matter of Bell's Application* [1995 JLR 23].

¹⁰⁶ *ibid*, Art 4(6).

¹⁰⁷ *ibid*, Art 7(3).

A. Jurisdiction of the Foreign Court

The 1960 Law contains detailed rules on when foreign courts are deemed to have jurisdiction for the purposes of its provisions;¹⁰⁸ these rules are modelled very closely on those of the customary law rules.

The foreign court is deemed to have had jurisdiction in an action *in personam*:¹⁰⁹

1. if the judgment debtor submitted by voluntarily appearing otherwise than for the purpose of protecting, or obtaining the release of, property seized, or threatened with seizure, in the proceedings, or of contesting the jurisdiction of that court; or¹¹⁰
2. if the judgment debtor was plaintiff in, or counterclaimed in, the proceedings in the original court; or
3. if the judgment debtor had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the country of that court; or
4. if the judgment debtor was at the time when the proceedings were instituted resident in, or being a body corporate, had its principal place of business in, the country of that court; or
5. if the judgment debtor had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place.

The foreign court is deemed to have had jurisdiction in an action of which the subject matter was immovable property or in an action *in rem* if the property in question was, at the time of the proceedings in the original court, situated in the country of that court.¹¹¹

The grounds of jurisdiction in the 1960 Law are framed so as to reproduce the rules of the customary law as closely as possible. No judgment can be registered under the 1960 Law unless the jurisdiction of the foreign court can be brought under one of these heads, they are exclusive not permissive.¹¹²

The principal differences between the customary law rules and the 1960 Law rules for the recognition and enforcement of a foreign judgment are that under the 1960 Law the foreign court is not treated as having jurisdiction over an individual simply by virtue of his mere

¹⁰⁸ *ibid*, Art 6(2) and the proviso in Art 6(3).

¹⁰⁹ *ibid*, 6(2)(a). A judgment *in personam* for the purposes of the 1960 Law does not include any matrimonial cause or any proceedings in connection with any of the following matters: ie, matrimonial matters, administration of the estates of deceased persons, bankruptcy, winding up of companies, lunacy or guardianship of infants (see Art 2(2)), and so the foreign jurisdiction requirements will be based not on the statutory tests in Art 6 but on customary law tests discussed above.

¹¹⁰ This is the equivalent of the Civil Jurisdiction and Judgments Act 1982, s 33 which has no substantive equivalent at customary law; see para 15-22 above.

¹¹¹ Judgments (Reciprocal Enforcement) (Jersey) Law 1960, Art 6(2)(b).

¹¹² Note the 'only' in Art 6(2) of the Judgments (Reciprocal Enforcement) (Jersey) Law 1960. In *New Cap Reinsurance Corp Ltd (In Liquidation) v Grant* [2011] EWCA Civ 971, [2011] BPIR 1428, it was held that that even though the foreign court could not be shown to have had jurisdiction by reference to any of the jurisdictional grounds in the Act, if a judgment were nevertheless registered and an application made to set it aside, that application could be resisted if the judgment was the subject of a request for assistance in insolvency, following *Rubin v Eurofinance SA* [2010] EWCA Civ 895, [2011] Ch 133.

presence in the foreign jurisdiction. Presence in the jurisdiction is a head of jurisdiction at customary law.¹¹³ Further, under the 1960 Law the foreign court will have jurisdiction over a corporation only if either (1) it was resident or has its principal place of business in the foreign country or (2) it has an office or place of business in the foreign country and the cause of action arose from a transaction effected through that office.¹¹⁴ At common law it is sufficient that there be a place of business irrespective of its status or how or where the cause of action arose.¹¹⁵

- 15-56** The complete satisfaction of the foreign judgment, or the circumstance that mean it could not be enforced by execution in the place where it was given, are absolute bars to registration under the 1960 Law.¹¹⁶
- 15-57** Registration is liable to be set aside on certain specified grounds upon the application of any party against whom it is enforceable made within a time specified in the registration order¹¹⁷ if the Court is satisfied:
1. that the judgment is incapable of registration under the Act or has been registered in contravention of it; or
 2. that the courts of the country of the original court had no jurisdiction in the circumstances of the case; or
 3. that the judgment debtor, being the defendant in the original proceedings, did not receive sufficient notice to enable him to defend and he did not appear; or
 4. that the judgment was obtained by fraud; or
 5. that the enforcement of the judgment would be contrary to English public policy; or
 6. that the rights under the judgment are not vested in the applicant for registration.¹¹⁸
- 15-58** While notice of proceedings is not a requirement at customary law, it does have relevance in so far as a foreign judgment may be impeachable for want of compliance with principles of natural justice. The provisions with regard to fraud and public policy are the same as the common law rules.¹¹⁹
- 15-59** Registration may be set aside under the 1960 Law if the Court is satisfied that the matter in dispute in the original proceedings had previously to the date of judgment in those proceedings been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.¹²⁰
- 15-60** Where registration is set aside on the ground that an appeal is pending or that the applicant is entitled and intends to appeal the right of a judgment creditor to apply again later for registration is not prejudiced.¹²¹ The same rule applies in a case where registration is

¹¹³ *Adams v Cape Industries Plc* (n 10).

¹¹⁴ Judgments (Reciprocal Enforcement) (Jersey) Law 1960, Art 6(2)(a)(iv)–(v).

¹¹⁵ See paras 15-20 and 15-21 above.

¹¹⁶ Judgments (Reciprocal Enforcement) (Jersey) Law 1960, Art 4(1)(a)–(b).

¹¹⁷ *ibid*, Art 6(1)(a).

¹¹⁸ Which includes any person in whom the rights under the judgment have become vested by succession or assignment or otherwise.

¹¹⁹ *Owens Bank Ltd v Bracco* (n 12), suggesting (obiter) that the fraud exception in the 1933 Act was subject to the same rule, suggesting that the same may be true in Jersey where the provision is identical; Judgments (Reciprocal Enforcement) (Jersey) Law 1960, Art 6(1)(a)(iv); cf Foreign Judgments (Reciprocal Enforcement) Act 1933, s 4(1)(a)).

¹²⁰ Judgments (Reciprocal Enforcement) (Jersey) Law 1960, Art 6(1)(b).

¹²¹ *ibid*, Art 7(2).

set aside on the sole ground either that the judgment was not enforceable by execution in the country of the original court or that, having been registered for the whole sum payable thereunder, it has been partially satisfied.¹²² In all other cases the setting aside of registration is presumably a bar to a second application for registration.

B. The Procedure for Registration of a Foreign Judgment under the Judgments (Reciprocal Enforcement) (Jersey) Law 1960

An application for registration in accordance with the 1960 Law is made by way of an ex parte application.¹²³ An application for registration under the 1960 Law is business that may be transacted before the Greffier and it is unnecessary to convene the Inferior Number unless it appears to be doubtful whether an application to register the foreign judgment should be granted.¹²⁴

The application for registration must be supported by a certified copy of the foreign judgment (with a certified translation thereof if the judgment is not either in French or English) as well as an affidavit the contents of which are prescribed by the rules.¹²⁵ The affidavit must address that to the best of the deponent's information and belief:

1. that the applicant is entitled to enforce the judgment;
2. as the case may require, either that at the date of the application the judgment has not been satisfied, or, if the judgment has been satisfied in part, what is the amount that remains unsatisfied;
3. that at the date of the application the judgment can be enforced by execution in the country of the court from which it was obtained;
4. that if the judgment were registered in Jersey, the registration would not be, or be liable to be, set aside under Article 6 of the 1960 Law; and
5. specifying the amount of the interest, if any, which under the law of the country of the court that gave the foreign judgment is due up to the time of registration.

A notice and the Act of Court¹²⁶ granting leave to register the foreign judgment must be served on the judgment debtor.¹²⁷ If the judgment debtor is out of the jurisdiction, the notice can be served on him without seeking leave.¹²⁸ Enforcement under the 1960 Law is by way of registration (unlike at customary law where it is by action), and so the judgment

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¹²² *ibid*, Art 7(3).

¹²³ Judgments (Reciprocal Enforcement) Rules 1961, r 3.

¹²⁴ *ibid*, rr 2(2) and (3). Where such a question arises, the Judicial Greffier shall present a statement of the matter in question to the Bailiff for the directions of the Inferior Number, and the Court may order such persons to be convened, such evidence to be taken and such enquiries to be made as the Court may deem necessary.

¹²⁵ *ibid*, r 4. Note that there is no English equivalent of r 4(2) concerning the conversion of non-sterling judgments into sterling, s 2(3) of the 1933 Act having been repealed by the Administration of Justice Act 1977, s 4(2)(b) (i)(4), Sch 5, pt I. Accordingly, in Jersey, the conversion is at the exchange rate prevailing at the date of the original judgment and not, as in England, at the date of payment.

¹²⁶ Note r 7 and sch to Judgments (Reciprocal Enforcement) Rules 1961. The draft Act of Court should provide for the costs of the application and registration to be taxed if not agreed and added to the judgment.

¹²⁷ If the judgment debtor is within Jersey, service must be personal service through the Viscount; Judgments (Reciprocal Enforcement) Rules 1961, r 9(1)(a).

¹²⁸ *ibid*, r 9(1)(b).

debtor need have no connection with Jersey or have submitted to the jurisdiction of the Royal Court, although in practice registration will be pointless unless he has assets in Jersey.

- 15-64** Within three days of service, the person serving the notice and Act of Court¹²⁹ must endorse the notice (or provide an affidavit of service) stating the date it was served. A failure to endorse the notice renders the registered judgment unenforceable in Jersey without leave of the Court.¹³⁰ The Court may of its own volition require the judgment creditor to provide security for costs of the application for registration and of any proceedings which may be brought to set the registration aside.¹³¹

C. The Effect of Registration

- 15-65** The effect of registration of a foreign judgment under the 1960 Law is to render it, for purposes of execution, of the same force and effect as if it were a judgment of the Royal Court.¹³² The Royal Court has the same control over execution as it has over the execution of its own judgments. There may be no execution of the judgment so long as it is open to any party to make an application for the setting aside of the judgment or until the final determination of any such application.¹³³ Proceedings may be taken upon a registered judgment exactly as if it were a judgment of the Royal Court.¹³⁴ Where the judgment sum for which registration is sought is in a currency other than sterling, there will be a conversion to sterling on the basis of the rate of exchange prevailing at the date of the judgment of the original court.¹³⁵ The judgment will be registered for the reasonable costs of and incidental to registration, including the costs of obtaining a certified copy of the judgment from the original court.¹³⁶ The sum for which a foreign judgment is registered carries interest in the same manner as any other Jersey judgment debt.¹³⁷

D. Basis upon which Registration May Be Set Aside

- 15-66** Registration *must* be set aside under the 1960 Law if the Royal Court is satisfied that the courts of the country of the original court had no jurisdiction in the circumstances of the case.¹³⁸ Whether the foreign court had jurisdiction is to be determined by reference to the principles discussed above.¹³⁹ The Court must also set aside the registration of a judgment if the bringing of the proceedings in the original court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts

¹²⁹ In the case of service within the jurisdiction through the Viscount, a proof of service will be provided automatically.

¹³⁰ Judgments (Reciprocal Enforcement) Rules 1961, r 10.

¹³¹ *ibid*, r 5.

¹³² Judgments (Reciprocal Enforcement) (Jersey) Law, Art 4(2).

¹³³ Judgments (Reciprocal Enforcement) Rules 1961, r 12.

¹³⁴ PR RC 05/18 and Royal Court Rules 2004, r 11/3.

¹³⁵ Judgments (Reciprocal Enforcement) (Jersey) Law 1960, Art 4(3).

¹³⁶ *ibid*.

¹³⁷ Interest On Debts And Damages (Jersey) Law 1996, supplemented by RC 05/09,

¹³⁸ Judgments (Reciprocal Enforcement) (Jersey) Law 1960, Art 6(1)(a)(ii); cf Art 6(3) in which the Court will have jurisdiction.

¹³⁹ Para 15-51 above.

of the country of that court¹⁴⁰ or if the judgment debtor, being a defendant in the original proceedings, was a person who under the rules of public international law was entitled to immunity from the jurisdiction of the courts of the country of the original court and did not submit to the jurisdiction of that court.¹⁴¹

The Court must also set aside the registration in any of the following circumstances:¹⁴²

15-67

1. that the judgment debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on the judgment debtor in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable the judgment debtor to defend the proceedings and did not appear;
2. that the judgment was obtained by fraud;
3. that the enforcement of the judgment would be contrary to public policy in Jersey, or
4. that the rights under the judgment are not vested in the person by whom the application for registration was made.

The registration *may* be set aside if the Royal Court is satisfied that the matter in dispute in the proceedings in the original court had previously to the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.¹⁴³

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E. Procedure to Set Aside the Registration of a Foreign Judgment

An application to challenge the registration of the judgment is made by summons.¹⁴⁴ The summons must be served within the time specified in the Notice/Act of Court. The judgment debtor may apply to extend the time to set aside (usually as an additional head of relief in the summons to set aside) and may do so even after the expiration of the time period allowed in the Notice/Act of Court if the Court has set a time limit without full knowledge of the circumstances.¹⁴⁵ Upon receipt of the summons, the Court may order such persons to be convened, such evidence to be taken and such enquiries to be made as the Court may deem necessary to dispose of the summons.¹⁴⁶

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F. The Recognition of a Foreign Judgment under the Judgments (Reciprocal Enforcement) (Jersey) Law 1960

Registration under the 1960 Law Act does not prevent the judgment being given effect to in Jersey, so long as it does not amount to its enforcement by bringing an action at customary

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¹⁴⁰ Except in the cases mentioned in the Judgments (Reciprocal Enforcement) (Jersey) Law 1960, Art 6 paras (2)(a)(i), (2)(a)(ii), (2)(a)(iii) and (2)(c).

¹⁴¹ *ibid*, Art 6(3).

¹⁴² *ibid*, Art 6(1)(a)(iii)–(vi).

¹⁴³ *ibid*, Art 6(1)(b).

¹⁴⁴ Judgments (Reciprocal Enforcement) Rules 1961, r 11.

¹⁴⁵ *ibid*, r 7(5); *E.D. & F. Man (Sugar) Ltd v Haryanto* [1990 JLR 169].

¹⁴⁶ *ibid*, r 2(3).

law to collect on the judgment debt (ie the a judgment (or parts thereof) that cannot be the subject of enforcement in Jersey are still capable of being recognised at customary law). The 1960 Law, like the Foreign Judgments (Reciprocal Enforcement) Act 1933 upon which it is based, preserves the common law rule as to the conclusiveness of any matter of law or fact decided therein.¹⁴⁷ The 1960 Law also contains a provision which states that a judgment to which Part II of the 1960 Law applies, or would have applied if a sum of money had been payable thereunder, whether it can be registered or not, and whether it is registered or not, 'shall be recognised in any court in Jersey as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counterclaim in any such proceedings'.¹⁴⁸ This provision is expressed not to apply where the registration of a foreign judgment has been or could be set aside on any of the grounds on which registration under Article 6(2) of the 1960 Law require it to be set aside (ie lack of jurisdiction, fraud, lack of notice of the proceedings, public policy). The effect of Article 9 is to make applicable for the purpose of regulating the recognition of foreign judgments as a general question the principles contained in Article 6. Thus where a judgment, had it been a registered judgment, would have been liable to have its registration set aside either under Article 6(1)(a) or Article 6(1)(b), then it is not to receive recognition.¹⁴⁹

- 15-71** The expression 'a judgment to which Part II of this Act ... would have applied if a sum of money had been payable' is somewhat obscure. The House of Lords held by a majority in relation to the identically worded provisions in the UK's 1933 Act (which is likely to be instructive) that the section applies to judgments in favour of a defendant dismissing the plaintiff's claim.¹⁵⁰
- 15-72** Under the 1960 Law, as at customary law, a foreign judgment is only conclusive as regards the question actually adjudicated upon, so a foreign judgment obtained otherwise than on its merits, such as one given in the defendant's favour on the basis that the action was time barred, was not a bar to a subsequent action in England.¹⁵¹ Whether Article 9(1) is capable of applying to foreign judgments that go to status rather than being just confined to judgments *in personam* has not been definitively concluded in England in relation to the equivalent provision to Article 9 in the 1960 Law, section 8(1) in the 1933 Act. The extrinsic material on which the 1933 Act was based, and by extension the 1960 Law,¹⁵² do not suggest that section 8 was intended only to be confined to judgments *in personam*.¹⁵³ A literal interpretation of Article 9, in conjunction with the definition of judgment in Article 3(2), suggests that judgments as to status are within the scope of Article 9(1). This

¹⁴⁷ Judgments (Reciprocal Enforcement) (Jersey) Law 1960, Art 9(3). See paras 15-28 and 15-35.

¹⁴⁸ *ibid*, Art 9(1); see the identical provision in the Foreign Judgments (Reciprocal Enforcement) Act 1933, s 8(1).

¹⁴⁹ *Showlag v Mansour* (n 6).

¹⁵⁰ *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* (n 77) 591 at 619, 635 and 652,

¹⁵¹ *ibid*. Note that Jersey does not have any equivalent to the UK's Foreign Limitation Periods Act 1984. See para 15-33 above.

¹⁵² Report of the Foreign Judgments (Reciprocal Enforcement) Committee (Cmd 4213, 1932) para 4.

¹⁵³ K Lipstein [1981] *CLJ* 201; KW Patchett, *Recognition of Commercial Judgments and Awards in the Commonwealth* (London, Butterworths, 1984) pt I.

view found favour with Sir John Arnold in *Vervaeke v Smith* in relation to section 8(1).¹⁵⁴ But the majority in the same decision¹⁵⁵ cited the dissenting judgment of Lord Reid in *Black-Clawson International Ltd*¹⁵⁶ to the effect that section 8(1) (and by implication Article 9(1) in the Jersey legislation) did not apply to decrees in matrimonial cases concerning status (as opposed to money judgments).¹⁵⁷

V. Article 9 Trusts (Jersey) Law 1984—The Firewall

Any party to foreign proceedings seeking to enforce or have effect given to a foreign judgment in Jersey that concerns a trust governed by Jersey law should be aware of the terms and effect of Article 9 of the Trusts (Jersey) Law 1984 which are set out here in full:¹⁵⁸

15-73

9 Extent of application of law of Jersey to creation, etc. of a trust

(1) Subject to paragraph (3), any question concerning—

- (a) the validity or interpretation of a trust;¹⁵⁹
- (b) the validity or effect of any transfer or other disposition of property to a trust;
- (c) the capacity of a settlor;¹⁶⁰
- (d) the administration of the trust, whether the administration be conducted in Jersey or elsewhere, including questions as to the powers, obligations, liabilities and rights of trustees and their appointment or removal;¹⁶¹
- (e) the existence and extent of powers, conferred or retained, including powers of variation or revocation of the trust and powers of appointment and the validity of any exercise of such powers;
- (f) the exercise or purported exercise by a foreign court of any statutory or non-statutory power to vary the terms of a trust;¹⁶² or
- (g) the nature and extent of any beneficial rights or interests in the property,

shall be determined in accordance with the law of Jersey and no rule of foreign law shall affect such question.

¹⁵⁴ [1981] Fam 77 at 126 on the basis that the exclusion of matrimonial proceedings from *in personam* claims occurs only in s 4(2) of the Act (Art 6(2) of the 1960 Law), in a context in which the deemed exclusion would be altogether unnecessary if a judgment did not comprehend a judgment in matrimonial proceedings. The point was not addressed in *Vervaeke v Smith* [1983] 1 AC 145.

¹⁵⁵ [1981] Fam 77 at 126–27, with which Cumming-Bruce and Eveleigh LJ agreed.

¹⁵⁶ [1975] AC 591 at 617.

¹⁵⁷ See also *Maples v Maples* [1988] Fam 14, agreeing with the majority of the English Court of Appeal in *Vervaeke*.

¹⁵⁸ See J Harris, ‘Jersey’s New Private International Law Rules for Trusts—a Retrograde Step?’ (2007) 11(1) *Jersey Law Review* 9; D Hochberg, ‘Jersey’s New Private International Law Rules for Trusts—A Response’ (2007) 11(1) *Jersey Law Review* 20; and Harris, ‘Comity Overcomes Statutory Resistance’ (n 8) on the formulation of Art 9 as enacted by the Trusts (Amendment No 4) (Jersey) Law 2006 and since refined by the Trusts (Amendment No 5) (Jersey) Law 2012, following the decision in *In The Matter Of The IMK Family Trust* (n 6).

¹⁵⁹ The question of whether a Jersey trust is a sham is a question going to the validity of the trust.

¹⁶⁰ See Harris, ‘Jersey’s New Private International Law Rules for Trusts’ (n 157).

¹⁶¹ *dépeçage*.

¹⁶² Such as the Matrimonial Causes Act 1973, s 24, or the Variation of Trusts Act 1958, s 1.

(2) Without prejudice to the generality of paragraph (1), any question mentioned in that paragraph shall be determined without consideration of whether or not –

- (a) any foreign law prohibits or does not recognise the concept of a trust; or
- (b) the trust or disposition avoids or defeats rights, claims, or interests conferred by any foreign law upon any person by reason of a personal relationship or by way of heirship rights, or contravenes any rule of foreign law or any foreign judicial or administrative order or action intended to recognize, protect, enforce or give effect to any such rights, claims or interests.

(2A) Subject to paragraph (2), paragraph (1) –

- (a) does not validate any disposition of property which is neither owned by the settlor nor the subject of a power of disposition vested in the settlor;
- (b) does not affect the recognition of the law of any other jurisdiction in determining whether the settlor is the owner of any property or the holder of any such power;
- (c) is subject to any express provision to the contrary in the terms of the trust or disposition;
- (d) does not, in determining the capacity of a corporation, affect the recognition of the law of its place of incorporation;
- (e) does not affect the recognition of the law of any other jurisdiction prescribing the formalities for the disposition of property;¹⁶³
- (f) does not validate any trust or disposition of immovable property situate in a jurisdiction other than Jersey which is invalid under the law of that jurisdiction; and
- (g) does not validate any testamentary disposition which is invalid under the law of the testator's domicile at the time of his death.

(3) The law of Jersey relating to *légitime* shall not apply to the determination of any question mentioned in paragraph (1) unless the settlor is domiciled in Jersey.

(3A) The law of Jersey relating to conflict of laws (other than this Article) shall not apply to the determination of any question mentioned in paragraph (1).

(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.

(5) The rule *donner et retenir ne vaut* shall not apply to any question concerning the validity, effect or administration of a trust, or a transfer or other disposition of property to a trust.

(6) In this Article –

'foreign' refers to any jurisdiction other than Jersey;

'heirship rights' means rights, claims or interests in, against or to property of a person arising or accruing in consequence of his or her death, other than rights, claims or interests created by will or other voluntary disposition by such person or resulting from an express limitation in the disposition of his or her property;

¹⁶³ Which is a question recognised to be subject to the *lex situs* of the asset concerned.

'*légitime*' and '*donner et retenir ne vaut*' have the meanings assigned to them by Jersey customary law;¹⁶⁴

'personal relationship' includes the situation where there exists, or has in the past existed, any of the following relationships –

- (a) any relationship between a person and the settlor or a beneficiary, by blood, marriage, civil partnership or adoption (whether or not the marriage, civil partnership or adoption is recognised by law);
- (b) any arrangement between a person and the settlor or a beneficiary such as to give rise in any jurisdiction to any rights, obligations or responsibilities analogous to those of parent and child, husband and wife or civil partners; or
- (c) any relationship between –
 - (i) a person who has a relationship mentioned in either of paragraphs (a) and (b) with the settlor or a beneficiary, and
 - (ii) a third person who does not have a relationship mentioned in either of paragraphs (a) and (b) with the settlor or a beneficiary.

(7) Despite Article 59, this Article applies to trusts whenever constituted or created.

In short, the practical effect of the so-called 'firewall' is that in respect of a Jersey trust¹⁶⁵ the Royal Court will not enforce or otherwise give effect to any order of a foreign court on an issue falling within Article 9(1) unless the foreign court has applied principles of Jersey law in determining its judgment on that issue. Article 9 therefore represents a major derogation to the customary law and statutory rules discussed above in relation to the enforcement and recognition of foreign judgments in Jersey. The 1960 Law has in effect been impliedly amended so as to include an additional basis on which to refuse recognition of a foreign judgment under Article 6(1); namely that the foreign judgment differs as to its substance to that which a Jersey court would have delivered.¹⁶⁶ It appears to have the effect that the Royal Court will deny recognition of a foreign judgment, even if the trustee submits to the jurisdiction of the foreign court. Article 9 does not prevent the Court giving effect to a letter of request sent to it from a foreign court, even where the information that is sought for foreign proceedings pursuant to the letter of request is information that the Court could be expected to refuse disclosure of were the application made to it, sitting in its supervisory capacity.¹⁶⁷

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The purpose of Article 9 is to afford Jersey trusts a measure of protection to withstand interference, variation or attack by foreign courts. This was a particular concern with regard to foreign court orders in the context of matrimonial proceedings, which purported to vary

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¹⁶⁴ *Légitime* is a doctrine of Jersey customary law that restricts testamentary freedom in relation to the testator's movable property and is relevant only to those domiciled in Jersey. It has been proposed to abolish the effect of *légitime* as it applies to dispositions into trust by Jersey domiciliaries by the 7th Amendment to the Trusts (Jersey) Law 1984. For the meaning of *donner et retenir ne vaut*, see *Abdel Rahman v Chase Bank (C.I.) Trust Co Ltd* [1991 JLR 103]; *In Re Esteem Settlement* [2003 JLR 188].

¹⁶⁵ Art 9 applies only to Jersey law trusts. See Trusts (Jersey) Law 1984, Art 6.

¹⁶⁶ It might alternatively be regarded as an extension of the scope of the public policy derogation in Art 6(1)(v) of the 1960 Law but such an interpretation would be to stretch this notion beyond that as traditionally understood; see Dicey & Morris (n 15) r 51.

¹⁶⁷ *J v K and Ors* [2016] JRC110.

Jersey law trusts.¹⁶⁸ However, the scope of the current version of Article 9 is not confined only to issues concerning the variation of Jersey trusts by the Family Division of the English High Court in ancillary relief proceedings.¹⁶⁹

A. The Position prior to the Enactment of the Trusts (Amendment No 5) (Jersey) Law 2012

- 15-76** The version of Article 9 that existed between 27 October 2009 and 2 November 2012 introduced for the first time into Jersey law a prohibition on the enforcement of a foreign judgment that had not applied Jersey law in its determination of any matter listed in Article 9(1).
- 15-77** Prior to the enactment of the current version of Article 9, the Royal Court regularly gave effect to orders of foreign courts that had the effect of varying a Jersey trust.¹⁷⁰ In doing so it has expressed the view that it regarded it an exorbitant assumption of jurisdiction for a foreign court to seek to pronounce, on the basis of its own law, upon whether a Jersey trust was a sham which the Royal Court would be very reluctant to give effect to or enforce.¹⁷¹ The Royal Court has also expressed a desire that English courts, particularly the Family Division of the English High Court, exercise restraint and refrain from using their statutory jurisdiction to vary Jersey trusts under the Matrimonial Causes Act 1973 and ride roughshod over the distinct supervisory jurisdiction of the Royal Court to give appropriate directions to the trustee, which in many cases invariably replicated the effect of an English order for variation.¹⁷²
- 15-78** Section 24 of the Matrimonial Causes Act 1973 confers a jurisdiction on an English court to make an order

varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage... and... extinguishing or reducing the interest of either of the parties to the marriage under any such settlement.¹⁷³

¹⁶⁸ eg Matrimonial Causes Act 1973, s 24(1)(c); *Charalambous v Charalambous* [2004] EWCA Civ 1030; *Minwalla v Minwalla* [2004] EWHC 2823 (Fam) (declaring a Jersey trust to be a sham); *Compass Trustees v McBarnett & Ors* (n 6); *C.I. Law Trustees Limited v Minwalla & Ors* (n 89); *In the Matter of the H Trust* (n 6); *In the Matter of the B Trust* (n 6).

¹⁶⁹ Only Art 9(1)(e) and (f) Trusts (Jersey) Law 1984 is concerned with 'the existence and extent of powers, conferred or retained, including powers of variation or revocation of the trust and powers of appointment and the validity of any exercise of such powers.'

¹⁷⁰ *In re B Trust* (n 6); *In re H Trust* (n 6); *In re Fountain Trust* (n 6); *In re Bald Eagle Trust* (n 6); *Compass Trustees Ltd v McBarnett* (n 6); *In re Turino Consolidated Ltd Retirement Trust* 2008 JLR N [27]; *In re IMK Family Trust* (n 6); *Hsu v Barclays Private Bank & Trust Ltd* 2010 JLR N [35]; Art 9 was first amended in 2006 with the enactment of the Trusts (Amendment No 4) (Jersey) Law 2006. Those provisions are considered in many of the reported decisions concerning the recognition and enforcement of orders against Jersey trusts made in foreign matrimonial proceedings.

¹⁷¹ *Compass Trustees v McBarnett & Ors* (n 6); *C.I. Law Trustees Limited v Minwalla & Ors* (n 89) at [14]–[18] and [27].

¹⁷² *In the Matter of the B Trust* (n 6).

¹⁷³ Matrimonial Causes Act 1973, s 24(1)(c).

Jersey law has no equivalent jurisdiction to that conferred by section 24(1)(c) of the Matrimonial Causes Act 1973. The Family Division of the Royal Court possesses a more limited statutory jurisdiction to vary a post-nuptial settlement under Article 27 of the Matrimonial Causes (Jersey) Law 1949.¹⁷⁴ It follows that there is no Jersey law counterpart (other than perhaps the jurisdiction under Article 47 of the Trusts (Jersey) Law 1984)¹⁷⁵ that could be applied by a foreign court so as to make the variation compliant with Article 9(1).

It is to be appreciated that the function of the foreign court in matrimonial proceedings and the Royal Court are different in the context of matrimonial disputes concerning a Jersey trust. The foreign court is concerned to do justice and achieve a fair allocation of assets between the spouses before it. In the exercise of that jurisdiction, the foreign court is not generally concerned to consider the other beneficiaries of the trust. The Royal Court, by contrast, is likely to be sitting its supervisory jurisdiction over the trust when the trustee returns to it for directions as to what it should do pursuant to the foreign matrimonial order. The primary consideration of the Royal Court will be to approve decisions that are in the interests of all the beneficiaries as a class, which may include one or both of the spouses.¹⁷⁶

A foreign judgment varying the terms of a Jersey trust under section 24 of the Matrimonial Causes Act 1973 is not a judgment to which the 1960 Law can apply.¹⁷⁷ In most cases, the trustee will not have submitted to the jurisdiction of the English court, with the result that that court would not be deemed by the Royal Court to have had jurisdiction for the purposes of the 1960 Law anyway.¹⁷⁸ If such a judgment falls outside the scope of the 1960 Law, does the Royal Court have a jurisdiction to recognise or give substantive effect to a foreign order purporting to vary a Jersey trust as a matter of customary law? It had been thought that the previous incarnation of Article 9, as the Court identified in *In the Matter of the B Trust*,¹⁷⁹ did not exclude the possibility that the Court may, as a matter of judicial comity, give effect to an order of a foreign court varying a Jersey trust.¹⁸⁰ The leading reported decision on the previous version of Article 9 suggests that the answer was yes (at least in so far as the foreign order effects a variation to a Jersey trust and not an alteration).¹⁸¹

The Court would consider whether the judgment of a foreign court that is sought to be enforced in Jersey has the effect of altering the trust or effecting a variation of the trust. An alteration to the trust is a direction to the trustee to do something it did not have power to do. A variation on the other hand was a direction to the trustee that did not depart from

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¹⁷⁴ See *J v M* [2002 JLR 330] for an understanding of post-nuptial settlements in Jersey law, which is narrower (and so are the Court's powers) than the meaning of that phrase and scope of the jurisdiction to vary under the Matrimonial Causes Act 1973, s 24(1)(c).

¹⁷⁵ Although note proposals in the draft Trusts (Amendment No 7) (Jersey) Law 20XX, which that would amend Art 47 to confer upon the Court a power to vary a trust regardless of whether that variation is supported or opposed by any one or more of the adult beneficiaries.

¹⁷⁶ *In the Matter of the H Trust* (n 6); *In the Matter of the B Trust* [2006 JLR 532].

¹⁷⁷ *In The Matter of the IMK Family Trust* (n 6) at 36.

¹⁷⁸ *ibid*, at [39]; *C.I. Law Trustees Limited v Minwalla & Ors* (n 89) at [10].

¹⁷⁹ [2006 JLR 532].

¹⁸⁰ *Lane v Lane (née Coverdale)* (n 6); *Compass Trustees v McBarnett & Ors* (n 6); *C.I. Law Trustees Limited v Minwalla & Ors* (n 89) (described in the latter case as 'an elastic concept'); *In the Matter of the H Trust* (n 6); *In the Matter of the B Trust* (n 6) (based upon Art 9 in its former and narrower incarnation under the Trusts (Amendment No 4) (Jersey) Law 2006, for criticism of which see Harris (n 8)).

¹⁸¹ *In the Matter of the IMK Family Trust* (n 6).

the terms of the trust and could be achieved by the exercise of the trustee's existing powers.¹⁸² In *IMK Trust* it was held that notwithstanding the prohibition on enforcement of a foreign order under Article 9(4), where the foreign order merely varied the trusts, the Royal Court could achieve the objectives of the foreign order, having regard to the interests of the beneficiaries as a class, under its discretionary supervisory jurisdiction.¹⁸³ The giving of directions in this way was not said to amount to the enforcement of the foreign judgment for the purposes of Article 9(4).¹⁸⁴ Conversely, a foreign order that amounted to an alteration could not be recognised or given effect to by the Royal Court as the Court does not have an unfettered power to rewrite the terms of a trust outside of its statutory jurisdiction in Article 47.¹⁸⁵ In giving effect to a foreign order varying a trust, the Royal Court was not exercising its jurisdiction under Jersey law to vary but is actually giving directions to the trustee pursuant to Article 51 of the Trusts (Jersey) Law 1984 concerning the administration of the trust and, in particular, whether and if so, to what extent, to give effect to the foreign court's order.¹⁸⁶

- 15-82** However, the Article 9(4) considered by the court in *IMK Trust* has since been amended to prohibit the Royal Court enforcing or giving effect to the order of a foreign court that is inconsistent with Article 9. Contrary to what was suggested in earlier authority¹⁸⁷ the Court does not retain an overarching residual power to give effect to judgments on the basis of comity in the teeth of the statute. However the decision in *IMK Trust* predates the enactment of the current version of Article 9¹⁸⁸ which has refined the statutory framework upon which the *IMK Trust* decision was based with the result that the Royal Court now has no power to enforce or otherwise give effect to a foreign order purporting to vary a Jersey trust that falls foul of the firewall.

B. The Position following the Trusts (Amendment No 5) (Jersey) Law 2012

- 15-83** Prior to the enactment of the current version of Article 9,¹⁸⁹ it had been thought that notwithstanding the prohibition on enforcement of a foreign judgment in Jersey that did not comply with Article 9, it was in effect still possible to circumvent the prohibition on direct enforcement of the foreign judgment by means of the Royal Court directing the trustee to

¹⁸² *ibid* at [57]–[60].

¹⁸³ *ibid* at [72]–[76].

¹⁸⁴ *In re H Trust* [2007 JLR 569]; *In the Matter of the IMK Family Trust* (n 6); *HSU v Barclays Private Bank And Trust Limited* [2010 JLR N 35].

¹⁸⁵ *In The Matter of the IMK Family Trust* (n 6) at [65]–[68], [78] and [80]; *Compass Trustees v McBarnett & Ors* (n 6) at [18]: ‘the court cannot do what the trustees cannot do’. As to Art 47 generally, see Ch 3. It is not thought the proposed 7th Amendment to the Trusts (Jersey) Law 1984, that proposes to extend the power in Art 47 to allow variation, will affect the conclusion in *IMK*; if exercised to give effect to a foreign order that was inconsistent with Art 9, then it would likely still fall foul of Art 9(4).

¹⁸⁶ *In the Matter of the B Trust* (n 6).

¹⁸⁷ *ibid* at [16]–[18].

¹⁸⁸ Taking effect from 2 November 2012 pursuant to the enactment of the Trusts (Amendment No 5) (Jersey) Law 2012.

¹⁸⁹ Taking effect from 2 November 2012 pursuant to the enactment of the Trusts (Amendment No 5) (Jersey) Law 2012.

vary the terms of the trust to administer the trust in a fashion so as to bring about the end sought in the foreign judgment.¹⁹⁰

Since Article 9 was extended to preclude the Royal Court giving effect to any judgment not in compliance with its terms, it is no longer even possible for the Royal Court to direct the trustees, acting within the powers that they have, in a way that would give substantial effect to such a judgment.¹⁹¹ The prohibition on the Royal Court giving effect to a foreign judgment that falls foul of Article 9 is not expressed to be limited in any way. The inclusion of the words 'given effect' as well as 'enforced' by the 2012 amendments suggests that any judgment that falls foul of Article 9 is to be given no effect in Jersey whatsoever, leading to the result that not only can a foreign judgment not be enforced in Jersey, it cannot even be recognised in Jersey as giving rise to a *chose jugée* so as to preclude the parties re-litigating the same issue again before the Royal Court. For the Royal Court to hold that a foreign judgment precludes the issue being re-litigated in Jersey is, in effect, to recognise that the foreign court's determination is final and conclusive as between the parties. It has not yet been decided whether Article 9(4) has this effect.

If this is the correct interpretation of Article 9(4) (and there is no reason to consider it does not mean what it says) it follows that parties to proceedings are able to have two bites of the same cherry; first, having opportunity to adduce evidence of Jersey law into the foreign proceedings and then (assuming the foreign judgment is not reached in accordance with Jersey law principles) coming before the Royal Court to re-litigate the same issue in fresh proceedings. It also means that if a foreign judgment is not to be given effect, it is not to be given effect for all purposes and so a party to foreign proceedings in whose favour the Jersey trust issues are determined positively (eg where an allegation that a Jersey trust is a sham is made in England and fails) is given no credit in Jersey for having defeated the allegation of sham abroad and would have to defend the allegation again on the merits in Jersey.

If this is not the correct interpretation to be given to Article 9, and the prohibition on the Royal Court giving effect to a judgment falling foul of Article 9 is that the issue as determined by the foreign court, even if Jersey law is not applied, is recognised as giving rise to a *chose jugée* in Jersey, then not only does the firewall serve to ring-fence the issues in Article 9(1) from interference by the foreign court but also the parties have only one opportunity to litigate the issue if they wish it to be enforced or given effect to in Jersey.

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C. The Efficacy of the Firewall

The practical efficacy of the firewall is very much dependent upon the location of the assets and of the trustee. Article 9 operates most effectively where the trustees and the trust assets are located behind the firewall, within the territorial jurisdiction of the Royal Court. Where the trust assets are located outside of Jersey and so beyond the jurisdiction of the Royal

¹⁹⁰ See earlier decisions. The Court has no inherent power to direct the trustee to do something they themselves had no power to do without the concurrence of all the adult beneficiaries; *In The Matter of the IMK Family Trust* (n 6).

¹⁹¹ *In The Matter of the R Trust* [2015] JRC267A.

Court to protect them,¹⁹² the efficacy of Article 9 is likely to be questionable, particularly if the assets are immovable or otherwise subject to the territorial jurisdiction of the court making the order in respect of them. While Article 9 appears to have the effect that the Royal Court will not enforce or give effect to a foreign judgment even where the trustee submits to the foreign court, where the trustee has submitted to or is otherwise within the jurisdiction of the foreign court making the order, it cannot realistically hope to raise Article 9, a rule of foreign law, as a compelling reason before that foreign court why that court should not make any order it has power to make in its own territory or as a defence as to why it has not complied with the foreign court's order.

- 15-88** In either of the latter circumstances, the trustee is likely to need to apply to the Royal Court for directions: first, as to whether it should submit the jurisdiction of the foreign court and, secondly, whether (if it has power to do so) it should give effect to the foreign order.

i. The Trustee's Decision whether or not to Submit to the Jurisdiction of a Foreign Court

- 15-89** It appears from the Jersey authorities that predate the current version of Article 9 that the willingness of the Royal Court to overcome its reluctance in enforcing and giving effect to a foreign judgment varying or otherwise interfering in the administration of a Jersey trust was heavily dependent upon whether the trustee submitted to the jurisdiction of the foreign court was likely to be a significant factor.¹⁹³

- 15-90** It has been suggested that it will not generally be in the interests of the beneficiaries (as a class) for the trustee to submit to the jurisdiction of a foreign court in matrimonial proceedings in which one or both of the spouses are beneficiaries under the trust.¹⁹⁴ To do so would, on orthodox conflict of laws principles, confer a jurisdiction on the foreign court to act to the detriment of the beneficiaries who are not before it. Not submitting to the jurisdiction of the foreign court will, at the very least, preserve the trustee's freedom of action when a foreign order is sought to be enforced, at which point it is likely the trustee will once again seek the Court's direction.

- 15-91** However, it is apparent from the current version of Article 9 that submission to the jurisdiction of the foreign court is no longer the touchstone for the enforcement of the foreign decision in Jersey for judgments falling within its scope.¹⁹⁵ Instead, the key question in respect of foreign judgments falling within the scope of Article 9 is whether the foreign court has applied Jersey law in its determination irrespective of whether the trustee has submitted. Of course, where the foreign order does satisfy the requirements of Article 9, the trustee, having voluntarily submitted to the jurisdiction of the foreign court, will not be able

¹⁹² It cannot be assumed that a foreign court will not regard a party's reliance on Art 9 as an attempt to exert an exorbitant jurisdiction that it (the foreign court) should disregard in reaching its determination.

¹⁹³ *C.I. Law Trustees Limited v Minwalla & Ors* (n 89) at [19]–[21].

¹⁹⁴ *In the Matter of the H Trust* (n 6).

¹⁹⁵ *ibid*, at [12]–[16]. The assumption appears to have been that submission makes it much more difficult for the trustee when the judgment was sought to be enforced in Jersey. Described as an unhappy state of affairs in *In the Matter of the B Trust* (n 6) at 13 but apparently vindicated as the logical outcome of the effect of Art 9(4) in *In The Matter Of The IMK Family Trust* (n 6).

to seek to argue that the order should not subsequently be given effect to in Jersey. This is a major derogation from the position at customary law discussed above.

Notwithstanding the foreign court's jurisdiction is no longer the central issue in respect of judgments falling within Article 9, the decision whether to submit to the jurisdiction is likely to be a momentous decision for which the trustee is usually well advised to obtain the direction of the Royal Court.¹⁹⁶

The presence of trust assets within the jurisdiction of the foreign court is likely to be the most significant factor in the trustee's decision whether or not to submit to its jurisdiction because without submission to the jurisdiction, the trustee cannot practically defend those assets from enforcement in accordance with its duties.¹⁹⁷ Whether it does or does not submit to the jurisdiction of the foreign court it has been recognised that the trustee should provide the foreign court (whether directly by its own submission or via such of the beneficiaries that do submit if the trustee does not itself submit) with the fullest financial information concerning the trust to ensure any determination or settlement is based upon the true position and not supposition.¹⁹⁸ Another factor is whether or not the trustee's decision not to submit to the foreign court's jurisdiction is likely to leave the trustee open to criticism and even a breach of trust claim by the beneficiaries if the trust comes to be varied by the foreign court to the prejudice of the beneficiaries who are not party to the matrimonial proceedings.¹⁹⁹

Where the location of the trust assets or the trustee means the trustee has limited options to protect the assets from the enforcement of an order of a foreign court the trustee is likely to need to make an application to the Royal Court under Article 51. The issue in the application is not that the trustee needs a direction from the Court as to whether it can satisfy the foreign judgment from the trust assets (the Court has no jurisdiction to give that sort of direction if the foreign judgment has been reached contrary to Article 9(4)). The object of such an application is instead to enable the trustee to seek the Court's protection from the possibility of a breach of trust action being brought against it from disgruntled beneficiaries as a result of the trustee having effectively lost trust assets in the event of enforcement being taken against them in the foreign jurisdiction.

While Article 9 does not permit the Court to direct the trustee to effect a variation in the trusts so as to give effect to a foreign judgment, the Royal Court retains jurisdiction to bless a trustee's own decision (which is likely to be a momentous decision) to give effect to a foreign judgment. The approval of a momentous decision already taken by the trustees themselves is not an order enforcing or giving effect to a foreign judgment.²⁰⁰ When deciding whether or not to bless a momentous decision, the Court is not exercising its own discretion but is instead making a declaration that the trustee's proposed exercise of the power is lawful and reasonable. The consideration is whether the decision falls within the range of decisions that a trustee, properly exercising its power, is entitled to make (even if the Court would balance the factors differently and might have reached a different

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¹⁹⁶ *In re S Settlement* 2001 JLR N [37].

¹⁹⁷ *In re A & B Trusts* [2007] JLR 444.

¹⁹⁸ *In the Matter of the H Trust* (n 6) at [17]; *C Trust Co Ltd v Temple* 2009 JLR N [13].

¹⁹⁹ *C.I. Law Trustees Limited v Minwalla & Ors* (n 89) at [29].

²⁰⁰ *Otto Poon* [2011] JRC 167; *Otto Poon* [2014] JRC 254A.

decision). The Court will be reluctant to provide a general sanction to a trustee in respect of its past conduct.²⁰¹

- 15-96 The only circumstances in which the Court itself would make the decision would be where the trustee (for valid reasons) surrenders its discretion to the Court. The Royal Court has not yet determined whether a decision that the Royal Court itself reaches on behalf of the trustee amounts to the Court giving effect to a foreign judgment. Such an exercise of the Court's discretion is not qualitatively different from a direction that the trustee affects a variation to the way the trust is administered so as to give effect to a foreign order which, since 2012, the Royal Court has no power to do.
- 15-97 Notwithstanding that the trustee has submitted to the jurisdiction of the foreign court, and that all relevant parties (including the trustee) were before it, that trust assets were within its jurisdiction and where the foreign court delivers a carefully considered judgment designed to do justice between the parties, the Royal Court is still required to refuse to give effect to it. This was described in the *In re B Trust*²⁰² as an unhappy state of affairs which lead the Royal Court to conclude that the then Article 9(4) could not possibly mean what it purports on its face to say. However, the decision in *IMK Trust*, the subsequent amendments to Article 9(4) and *Otto Poon* decisions appear to make clear that the statute does in fact appear to mean exactly that.
- 15-98 There has yet to be a decision providing guidance as to what a trustee should do where a foreign court has subjected the trust to an order effecting a variation, there are assets that are vulnerable to enforcement within the jurisdiction of the foreign court but the trustee has no power to give effect to the foreign order and so cannot seek the Court's blessing of its own decision to give effect to the foreign judgment.

²⁰¹ *C Trust Company Limited v Temple* (n 197).

²⁰² [2006 JLR 562].

16

Prescription of Actions

I. Introduction: Prescription or Limitation?

In Jersey law, the rules applicable to the barring of claims by the effluxion of time, known as prescription, remain largely a creature of the island's customary law.¹ While there has been piecemeal codification in some areas, including in relation to trust disputes, there is, as yet, no overarching consolidating statute containing the full panoply of relevant prescription periods applicable to causes of action across all areas of Jersey law. Somewhat confusingly, the language of the law uses both the terms 'limitation' and 'prescription' interchangeably in respect of different causes of action² although the use of the term 'prescription' is considered to have a far more established pedigree in the island. This use of different terminology is attributable, at least in part, to Jersey's status as customary law jurisdiction, with a mixed civil law, based upon the *ius commune*, and common law heritage. While prescription and limitation appear to be used interchangeably in a number of the authorities, the fundamental conceptual distinction between the two appears to depend on whether the plaintiff's right to bring an action has been barred or if the substantive rights in the object of the proceedings have been altered by the passage of time.³ Limitation is a procedural defence, which focuses on the action or claim.⁴ Prescription refers to the impact of the effluxion of time on the underlying right to ownership. Despite their different conceptual underpinnings practically, both terms lead to similar ends, the possible extinction of a claim or a right. Prescription is a concept first found in Roman law and can trace its pedigree in Jersey back through Norman customary law. It is either 'acquisitive' in that a person is allowed to acquire title to an object or property after a specified period of time or 'extinctive' in that it extinguishes the right of the previous owner or possessor. In this chapter, we are concerned with the use of prescription in this extinctive sense.⁵ The concept of limitation works differently, focusing on the action or claim rather than the underlying substantive right. At the

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¹ *CMC Holdings Ltd & Anor v Forster, RBC Trust Company (International) Limited & Ors* [2016] JRC 149 at [47].

² eg Trusts (Jersey) Law, Art 57 is headed 'Limitation of actions or prescription'; Law Reform (Miscellaneous Provisions) (Jersey) Law 1960, Art 2, in relation to actions founded on tort uses the term 'prescription'; the terms 'prescription' and 'limitation' appear to be used interchangeable in *Nolan v Minerva Trust Company Limited & Ors* [2014 (2) JLR 117]; *Walker v Hawksford Trust Company Jersey Limited* [2014 (1) JLR 182] and *Alhamrani v Alhamrani* 2007 JLR 44.

³ Jersey Law Commission Consultation Paper No 1/2008/CP.

⁴ *Pell Frischmann Engr Ltd v Bow Valley Iran Ltd* [2007 JLR N38].

⁵ B Nicholas, *An Introduction to Roman Law* (Oxford, Clarendon, 1962) at 121.

end of the prescribed period, a failure to bring the action before the Court will procedurally bar the plaintiff from asserting the right, if it has not already been effectively barred through the operation of the doctrines of laches or acquiescence.⁶ Assuming the action is barred does not necessarily mean that the substantive right has been extinguished, although for all practical purposes, an inability to bring the claim to court for a remedy may amount to the same thing. The result is that the claim is unenforceable or ‘imperfect’ but limitation does not render it void.⁷

II. Article 57(1) of the Trusts (Jersey) Law 1984—Actions to Recover Trust Property from the Trustee and Frauds to which the Trustee Was a Party or Privy

- 16-2** Prescription in relation to trust disputes before the Royal Court has, to a significant degree, been the subject of (at least partial) statutory codification but in certain instances the Royal Court has had to apply time limits by analogy with other causes of action.⁸ Claims for an action founded on a breach of trust are covered by the Trusts (Jersey) Law 1984.⁹ There, there is a three-year time limit for bringing an action for breach of trust before the Royal Court. However, Article 57 is not to be regarded as a wholly self-contained code governing how prescription operates in relation to trust disputes. The legislation is at best a framework that is buttressed by and interacts with applicable prescription rules (some of which are uncodified) applicable to other kinds of jural relationships.¹⁰ It should be noted that Article 57 of the Trusts (Jersey) Law 1984 does not apply to a trust whose proper law is not that of Jersey, suggesting that the Royal Court will apply the equivalent prescription or limitation period applicable under the proper law of the trust.¹¹ While a breach of trust claim is usually prescribed after three years from the date of breach, the policy of the 1984 Law is to accord special treatment, in terms of prescription, to claims falling with Article 57(1), which provides:

57 Limitation of actions or prescription¹²

- (1) No period of limitation or prescription shall apply to an action brought against a trustee—
 (a) in respect of any fraud to which the trustee was a party or to which the trustee was privy; or

⁶ CS Le Gros, *Traité du Droit Coutumier de l'Ile de Jersey* (Jersey, Les Chroniques de Jersey, 1943) at 230 describes prescription, by reference to the Ancien Coutumier as ‘une preclusion de réponse procréée de temps précédent ou eschéu’ [estopped from requiring an answer or response by time or the happening of events] combining elements of acquisitive prescription (in the sense of things caused by time being passed) and extinctive (in the sense of avoiding a reply or response to what is being asserted).

⁷ Nicholas, *An Introduction to Roman Law* (n 5) 120.

⁸ *Nolan & Ors v Minerva Trust Company Limited and Ors* (n 2).

⁹ Trusts (Jersey) Law 1984, Art 57.

¹⁰ *Bagus Invs Ltd v Kastening* [2010 JLR 355] (knowing recipients); *Nolan & Ors v Minerva Trust Company Limited and Ors* (n 2) (dishonest assistants); *Alhamrani v Alhamrani* (n 2) (company directors).

¹¹ Trusts (Jersey) Law 1984, Art 57(4); see Hague Trust Convention, Art 8(f) whereby the proper law of the trust shall govern ‘the personal liability of the trustees to the beneficiaries’, which must be taken to include the applicable rules governing when such personal liability will end by reason of the effluxion of time.

¹² Art 57(1) is based upon s 21(1)(a)-(b) of the Limitation Act 1980; *Bagus Invs Ltd v Kastening* (n 10). Art 57(1) does not apply to claims for knowing receipt of dishonest assistance; see *Bagus* (above); *Nolan v Minerva Trust Co*

- (b) to recover from the trustee trust property –
 - (i) in the trustee's possession,
 - (ii) under the trustee's control, or
 - (iii) previously received by the trustee and converted to the trustee's use.

The indefinite prescription period in respect of actions falling within Article 57(1) is not solely to reflect any especial degree of opprobrium in which a trustee who commits a fraudulent breach of trust or retains trust property is to be held.¹³ The perpetual liability of a trustee under Article 57(1)(b) is rationalised on the basis that a trustee is deemed to be incapable of acquiring a beneficial interest in the trust property simply by reason of its possession or control of the trust assets.¹⁴ While it is possible to analyse the appropriation of trust assets to the trustee for his own use as giving rise to a constructive trust and a proprietary claim in the beneficiaries to see the assets returned, the trust that arises over the assets is but an extension of the trusts to which the assets are already subject.¹⁵

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A. Locus

The article does not provide for who may bring the action against the trustee. It can be presumed that the person with locus can be either a beneficiary or a trustee on their behalf. An object of a fiduciary power had locus to bring proceedings for breach of trust and seek relief, including the reconstitution of the trust fund if loss had been caused to it by a trustee's breach of trust.¹⁶ An action by the Attorney General, who has locus to enforce a charitable trust, is subject to no statutory time limits.¹⁷

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B. 'Trustee'

'Trust' and 'trustees' extend to constructive trusts and constructive trustees¹⁸ respectively, although the inclusion of constructive trustees does not extend to all persons who may be made liable under that description.¹⁹ A person who officially intermeddles in a trust

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Ltd & Ors (n 2); *Williams v Central Bank of Nigeria* [2014] AC 1189, cited with approval in *CMC Holdings Ltd & Anor v Forster, RBC Trust Company International Ltd & Regent Trust Company Ltd & Anor* (n 1) (on an application for a preliminary issue on prescription); *Taylor v Davies* [1920] AC 636.

¹³ *West v Lazard Brothers & Ors* [1993] JLR 165.

¹⁴ *Halton International Inc v Guernsey Ltd* [2006] EWCA Civ 801 at [22].

¹⁵ See Ch 6.

¹⁶ *Freeman v Ansbacher Trustees (Jersey) Limited* [2009] JLR 1.

¹⁷ Although outside Art 57(1) an enforcer of a non-charitable purpose trust is subject to a 3-year limitation period within which an action founded on breach of trust may be brought against a trustee.

¹⁸ *United Capital Corp Ltd v Bender* [2006] JCA 094 (restricted). In the sense in which that term refers to a person who actually holds property subject to a trust in his hands. A person termed a constructive trustee who in reality is only obliged to account as such is not a trustee for these purposes. See *Bagus Investments Ltd v Kastening* (n 10).

¹⁹ See *Bagus Investments Ltd v Kastening* (n 10), citing with approval the categorisations of constructive trusteeship in *Paragon Fin plc v D.B. Thackeray & Co* [1999] 1 All ER 400, per Millett LJ.

and/or purports to act as trustee, sometimes called a trustee de son tort, is also included.²⁰ As a matter of common sense, the subsection must be taken as extending to a former trustee; were it otherwise a trustee who commits a fraudulent breach of trust so as to in effect ‘empty’ the trust fund and purport to end it would be able to walk away and thereby drive a coach and horses through the purpose of the provision. Persons who assume fiduciary obligations, such as company directors, but without any express trust are treated in the same way as express trustees and no limitation period applies to their fraudulent breaches of trust.²¹ A director of a company is treated as a trustee of property of the company coming under his control.²² Even a de facto director of a company who received the company’s property without the company’s authority has been held to be within the equivalent provision in the English Limitation Act 1980.²³ Outwith the scope of the term ‘trustee’ in Article 57 is a ‘category two’ constructive trustee, such as a dishonest assistant or a knowing recipient no longer holding trust assets.²⁴

C. Article 57(1)(a)—a Fraud to which the Trustee was a Party or Privy

- 16-6** The Jersey courts, like the English courts have been reluctant to lay down an all-encompassing proposition of what constitutes a fraud, making fraud something of an elephant test. Fraud in this context connotes an intention on the part of the trustee to pursue a particular course of action, either intending that it is contrary to the interests of the beneficiaries or being recklessly indifferent whether it is contrary to their interests.²⁵ It is not necessary for the plaintiff to prove a motive for personal gain on behalf of the trustee.²⁶ Fraud in this context is therefore wider than the criminal offence of fraud at customary law which criminalises deliberate conduct intended to cause actual prejudice to someone and actual benefit to the fraudster.²⁷ Fraud, as used in Article 57(1), encompasses also the concept of civil or

²⁰ *Bagus Investments Limited v Kastening* (n 10).

²¹ *Peconic Industrial Development Limited v Lau Kwokfai* 11 ITEL R 844, per Lord Hoffmann, cited *CMC Holdings Ltd & Anor v Forster, RBC Trust Company (International) Limited & Ors* (n 1) as authority for the position that a fraudulent breach of trust by a director of a company falls within the Trusts (Jersey) Law 1984, Art 57(1).

²² *In re Esteem Settlement* [2002] JLR 53; *Re Land Allotments Co* [1894] 1 Ch 616 at 631–32, 638–39; *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 405c–f; *J.J. Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467 at [25]–[26], [29], [39]; *Gwembe Valley Development Co. Ltd v Koshy* [2003] EWCA Civ 1478 at [82] (although the prescription period applicable to claim against a director for breach of their duties is still a matter of controversy in Jersey).

²³ *Tintin Exploration Syndicate Ltd v Sandys* (1947) 177 LT 412. See also *Re Sale Hotel and Botanical Gardens Co Ltd* (1897) 77 LT 681 (company promoter), reversed on the facts (1898) 78 LT 368, CA.

²⁴ See *Bagus Investments Limited v Kastening* (n 10) citing with approval the categorisations of constructive trusteeship in *Paragon Fin plc v D.B. Thackerar & Co* (n 19) per Millett LJ. See also *CMC Holdings Ltd & Anor v Forster, RBC Trust Company (International) Limited & Ors* (n 1).

²⁵ *Derry v Peek* 14 App Cas at 374; *Armitage v Nurse* [1998] Ch 241 at 251 and 260, CA, followed in *Gwembe Valley Development Ltd v Koshy* (n 22), [2004] WTLR 97 at [131]; *Newgate Stud Co v Penfold* [2004] EWHC 2993 (Ch); [2004] All ER (D) 376 (May) at [249]. See also *Kitchen v Royal Air Force Assn* [1958] 2 All ER at 249, per Lord Evershed.

²⁶ *Armitage v Nurse* (n 25).

²⁷ *Foster v AG* [1992] JLR 6; *West v Lazard Bros* (n 13); *Midland Bank Trust Company (Jersey) Limited, v Federated Pension Services* [1994] JLR 276.

equitable fraud, the equivalent Jersey customary law principle of ‘dol’.²⁸ That there appears to be no distinction in the requirements imposed upon parties when pleading allegations of fraud as opposed to dishonesty, acts of dishonesty by a trustee are also likely to fall within Article 57(1).²⁹ By reference to a now repealed incarnation of what is currently section 21(1)(a)–(b) of the Limitation Act 1980, Lord Evershed said: ‘I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other’.

A trustee or other fiduciary who deliberately conceals a material interest of his own in a transaction which he knows he ought to disclose commits a fraud within the meaning of Article 57(1).³⁰ A trustee may be liable for the fraud of his co-trustee if he comes within Article 30(5), that is to say where the trustee becomes aware or ought reasonably to have become aware of the commission of a fraudulent breach of trust or of the intention of his or her co-trustee to commit a fraudulent breach of trust; and the trustee actively conceals such breach or such intention or fails within a reasonable time to take proper steps to protect or restore the trust property or prevent such breach.

A plaintiff beneficiary (or trustee on the beneficiary’s behalf) does not have to plead a charge of fraud in the first instance and can wait to see whether the defendant trustee raises a limitation defence. Where Article 57(1) is relied upon the plaintiff must plead fraud in reply and prove it, if he wishes to defeat a limitation defence. The burden is not on the defendant trustee to disprove fraud to establish that the claim is statute barred.

D. Article 57(1)(b)—Possession, Control or Converted to the Trustee’s Use

In order to come within Article 57(1)(b) the trust assets must ordinarily still be in the trustee’s possession, control or have been converted to its use. A breach of the rule against the trustee self-dealing with the trust assets will attract the operation of Article 57(1)(b). Article 57(1)(b) does not apply against a knowing recipient.³¹ A trustee is not treated as having

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²⁸ Pothier in 1 *Traité des Obligations* (1827 edn) at 20 and cited by the Royal Court in *AG v Foster*: ‘On appelle dol, toute espèce d’artifice dont quelqu’un se sert pour en tromper un autre: Labeo definit dolum, omnem calliditatem, fallaciam, machinationem, ad circumveniendum, fallendum, decipiendum alterum, adhibatam’ [‘we call fraud any species of artifice used to deceive another: a trick, concealment, false or misleading language, cunning, a deceit, a manipulation, a deception’], cited with approval in *Foster v AG* (n 27). See also Maitre Houard in his *Dictionnaire Analytique, Historique, Étymologique, Critique et Interpréatif de la Coutume de Normandie* (1780) at 549: ‘Le dol est l’acte par lequel on paraît faire une chose, tandis qu’on en fait réellement une toute contraire’. [‘Fraud is the act by which it seems to do one thing, while actually doing something wholly different’], cited with approval in *West v Lazard Bros* (n 13) at 301 as a surer guide to Jersey law than the later French writers on dol.

²⁹ See *Three Rivers DC v Bank of England* (No 3) [2003] 2 AC 1, [184]–[186] set out in A, K, L v H [2016] JRC 116; *Williams v Central Bank of Nigeria* (n 12) at [34], per Lord Sumption at 94, per Lord Neuberger, affirmed in *CMC Holdings Ltd & Anor v Forster, RBC Trust Company (International) Limited & Ors* (n 1).

³⁰ *Newgate Stud Co v Penfold* (n 25) at [250]–[251]. This would appear to cover a fiduciary agent or trustee who accepts an undisclosed bribe or secret commission from a third party. The receipt of a bribe or secret commission by a fiduciary gives rise to the possibility of a proprietary claim, which would also be a claim to recover trust property; see *In re Rex Trust* [2013] (2) JLR 444; *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45.

³¹ *Bagus Investments Ltd v Kastening* (n 10); and *Nolan & Ors v Minerva Trust Company Limited and Ors* (n 2).

converted trust property to his use merely because it is so dealt with after the breach of trust as to benefit the trustee in some indirect way, for instance where trust money advanced in breach of trust is used by the borrower to pay off his overdraft and one of his bankers happens to be a trustee.³² If the trustee paid himself fees out of the trust property in the absence of an appropriate charging clause that would be a conversion within Article 57(1) (b). So too, if a trustee uses trust money to confer a benefit on a company which he controls³³ or a director of a company helps himself to property belonging to the company.³⁴

E. Laches

- 16-10** Article 57(1) is in similar, though not identical terms to section 21(1) of the Limitation Act 1980.³⁵ Section 21(1) provides, not that claims within it are incapable of being barred by the lapse of time at all, but only that no period of limitation prescribed by the 1980 Act is to apply. Recent English cases suggesting³⁶ that claims within section 21(1) cannot be barred by the doctrine of laches have been disapproved.³⁷ Article 57(1) is wider in that it does not confine itself to stating that no period of limitation prescribed by the 1984 Law is to apply, providing only that no period of limitation or prescription shall apply to an action *at all*. While the point has not been the subject of judicial consideration, in our view, an action brought against a trustee for fraud or retention of trust property under Jersey law cannot be time barred by a defence of laches. The modern English approach is to ask whether the plaintiff's actions have been such as to make it unconscionable for him to be permitted to assert a claim.³⁸ Whether a beneficiary has been guilty of delay so as to give rise to a defence of laches one must consider the length of delay and the nature of the acts done during the interval (such as a change of position or loss of evidence by the trustee) which might affect either party and give rise to an injustice in allowing or not allowing a remedy.³⁹ It should be stressed that the Royal Court has not definitively determined whether the doctrine of laches forms part of the law of Jersey and in respect of which causes of action it may be deployed.⁴⁰

³² *Re Gurney* [1893] 1 Ch 590.

³³ *Re Pantone 485 Ltd* [2002] 1 BCLC 266.

³⁴ *Re Westminster Property Management Ltd* [2002] EWHC 520 (Ch) at [50]; *J.J. Harrison (Properties) Ltd v Harrison* (n 22). See also *Newgate Stud Co v Penfold* (n 25) (breach of self-dealing rule by director).

³⁵ *Bagus Investments Ltd v Kastening* (n 10); such distinctions were not of assistance in the disposal of the arguments.

³⁶ *Gwembe Valley Development Co Ltd v Koshy* (n 22) at [140]; [2004] WTLR.

³⁷ at [132]; *Re Loftus* [2005] EWHC 406 (Ch) at [161]–[163].

³⁸ *Green v Gaul* [2006] EWCA Civ 1124; sub nom *Re Loftus* [2007] 1 WLR 591 at [34]–[41], drawing attention to *Patel v Shah* [2005] EWCA Civ 157 at [22]. See too *Cattley v Pollard* [2006] EWHC 3130 (Ch) at [153] and *Williams v Central Bank of Nigeria* (n 12) at [12].

³⁹ *Frawley v Neill* [2000] CP Reports 20, The Times, 5 April 1999, CA (defendant a bare trustee for claimant; no laches after some 20 years); *Schulman v Hewson* [2002] EWHC 855 (Ch) at [44] *et seq*; *Green v Gaul* (n 37) at [42]; *Cattley v Pollard* [2006] EWHC 3130 (Ch); [2007] 3 WLR 317 at [154] *et seq*.

⁴⁰ *Lindsay Petroleum Oil Co v Hurd* (1874) LR 5 PC 221 at 239, approved by Lord Blackburn in *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 at 1279, and applied in *Re Sharp* [1906] 1 Ch 793.

⁴¹ *Gamlestaden Fastigheter AB v Baltic Partners Limited & Ors* [2005] JLR 57; *Pell Frischmann Engineering Limited v Bow Valley Iran Limited & Ors* [2007] JRC105A at [423(vi)], holding that laches or its Jersey equivalent was a bar to a claim for an account of profits.

III. Article 57(2) of the Trusts (Jersey) Law 1984—Actions Founded on a Breach of Trust

If the claim is not of either kind described in Article 57(1) of the Trusts (Jersey) Law 1984, a three-year prescription period applies to a claim for breach of trust. Article 57(2) provides:

(2) Where paragraph (1) does not apply, the period within which an action founded on breach of trust may be brought against a trustee by a beneficiary is 3 years from –

- (a) the date of delivery of the final accounts to the beneficiary; or
- (b) the date on which the beneficiary first has knowledge of the breach of trust,

whichever is earlier.

[...]

(3A) Where paragraph (1) does not apply, the period within which an action founded on breach of trust may be brought against a trustee by an enforcer is 3 years from –

- (a) the date of delivery of the final accounts to the enforcer; or
- (b) the date on which the enforcer first has knowledge of the breach of trust,

whichever is earlier.

(3B) Where paragraph(1) does not apply, the period within which an action founded on breach of trust may be brought against a former trustee by a trustee is 3 years from the date on which the former trustee ceased to be a trustee.

(3C) Where paragraph (1) does not apply, no action founded on breach of trust may in any event be brought against a trustee by any person after the expiry of the period of 21 years following the occurrence of the breach.

An action is brought for these purposes when originating process is served on the prospective defendant.⁴¹

A. Actions Founded on a Breach of Trust

In the authors' view the scope of Article 57(2) comprises a claim for a breach of trust including a claim against the trustee to recover trust property wrongly disposed of by the trustee to a third party in breach of trust.⁴²

i. *Claim for Breach of Trust*

The three-year period of limitation will apply to any action based upon a breach of trust that does not fall within Article 57(1), ie any action that is not based upon a fraudulent breach of trust or a retention by the trustee of the trust property. A breach of trust must form the foundation for any action to which Article 57(2) applies. A beneficiary is entitled to require an account in common form from their trustee at any point without limit of

⁴¹ See Ch 1.

⁴² As discussed in Ch 13, the beneficiaries' personal claim for breach of trust is usually secured by a lien on the misappropriated funds unless and until those misappropriated funds cease to be traceable in the hands of a third party.

time and without proof of a breach of trust.⁴³ An account on the basis of wilful default (which entails an allegation of impropriety and is thereby analogous to a claim based upon a breach of trust) would fall within Article 57(2).⁴⁴ Therefore, a claim to remove or replace a trustee, if the action to remove, is founded on a breach of trust and will come within Article 57(2).⁴⁵ A claim based on breach of the self-dealing rule (that a purchase of trust property by the trustee should be set aside at the instance of any beneficiary) or the fair-dealing rule (that a purchase of a beneficial interest by the trustee will be set aside unless scrupulously fair) are claims based upon a breach of trust. Somewhat confusingly, claims for secondary liability, that is to say claims for knowing receipt and dishonest assistance (category two constructive trustees),⁴⁶ though both 'founded' on a breach of trust, are outwith the scope of Article 57(2),⁴⁷ although a claim against the original trustee who has acted in breach of trust would be.⁴⁸

ii. Claim to Recover Trust Property

- 16-14** In light of Article 57(1)(b), a proprietary claim against a trustee to recover misapplied trust property, or a personal claim (secured by lien on the traceable proceeds of the misappropriation) to restore the value of the assets is imprescriptible.⁴⁹ Article 57(2) is concerned with causes of action that are 'internal' to the trustee beneficiary relationship and so does not extend to recovering trust property from non-trustees, eg persons to whom the trustees have wrongly transferred trust property, perhaps under a misapprehension as to the construction or validity of provisions of the trust instrument, or by way of gift out of trust property which the trustees have misappropriated. In such circumstances, the proprietary claim will subsist for as long as there are traceable assets not in the hands of a bona fides purchaser for value without actual notice of the prior beneficial interest in the assets.⁵⁰ However, provided the misdirection of trust property was not fraudulent, the claim against the trustee is subject to the three-year prescription period. Such circumstances may also give rise to a personal claim in unjust enrichment⁵¹ which is not a cause of action to which Article 57(2) applies. While there is no authority on the point, the authors' view is that such a personal action is analogous to a claim for knowing receipt, which is prescribed after three

⁴³ *Dowse v Gorton* [1891] AC 190 at 204; *Partington v Reynolds* (1858) 4 Drew 253 at 255–56, 62 ER 98 ('it is sufficient that the Defendant holds the office').

⁴⁴ *Butler v Axco Trustees Ltd* [1997] JLR N-17a].

⁴⁵ However, the jurisdiction to remove and/or replace a trustee is a facet of the Court's inherent supervisory jurisdiction and may be applied for by way of Representation at any time if there are appropriate grounds to do so; see *Letterstedt v Broers* (1884) 9 App Cas 371; *In re E Trust* [2008] JLR 360]; *Trilogy Management v YT & Ors* [2014 (2) JLR N 31]. A beneficiary who knows of a breach of trust and sits on his rights for more than 3 years may have difficulty satisfying the Court that it is the breach of trust (or loss of confidence arising from said breach) that is prejudicial to the good administration of the trust.

⁴⁶ *Paragon Finance plc v DB Thakerar & Co* (n 19) at 408–14.

⁴⁷ *Bagus Investments Ltd v Kastening* (n 10); *Nolan & Ors v Minerva Trust Company Limited and Ors* (n 2) although arguably it should do. The point was not taken before the Royal Court which was presented with a choice between a 3-year period as being analogous with a claim in tort and a 10-year period applying to all personal claim that were not otherwise already prescribed under another provision of Jersey law.

⁴⁸ *United Capital Corp Ltd v Bender* [2010] JLR 355] at [45].

⁴⁹ Proprietary claims are considered in Ch 13.

⁵⁰ As to which see Ch 13.

⁵¹ *Federal Republic of Brazil v Durant Intl Corp* [2012 (2) JLR 356].

years (albeit that an action in unjust enrichment in Jersey may arise without any fault on the part of the party enriched).⁵²

If the transfer was made in fraudulent breach of trust, does Article 57(1)(a) (by which the claim against the trustee is imprescriptible) exclude the possibility of a recipient of property raising a limitation defence against a plaintiff beneficiary or trustee (given that that provision refers to a claim ‘in respect of’ any fraud, even if the recipient himself has not been fraudulent? Our view is that a proprietary claim in such circumstances (in common with any available personal claim) is outside Article 57(1)(a) and that is so even if the recipient is a party to the fraud.⁵³ Where the breach is not fraudulent, the three-year time limit will clearly apply.

Frequently the transfer will have been made under a misapprehension or mistake on the part of the trustees. While such a transfer is capable of being set aside without proof of fault on the part of the trustee⁵⁴ a disposition of trust property on such a basis is nevertheless a breach of trust and, if not fraudulent, subject to a prescription period of three years. However, unlike under the Limitation Act 1980⁵⁵ the 1984 Law makes no specific provision for the postponement of limitation for an action seeking relief from the consequences of a mistake. It has yet to be determined whether Jersey’s statutory approximation⁵⁶ of the erstwhile common law jurisdiction of the court to reverse a transaction on grounds of mistake or under the related doctrine known as the rule in *Re Hastings Bass* has a prescription period attached to it. Article 47J is said to be without prejudice to any personal action for breach of trust against a trustee notwithstanding the power of the Court to reverse a transaction coming within the scope of Articles 47D to 47J. Given that a trustee will still be personally liable for breach of trust for any loss to the trust caused by the disposition, it is very likely that an application to court will be made well in advance of the three-year period expiring.⁵⁷ This is particularly the case where the Court cannot make an order to restore property that has been transferred in breach of trust that would prejudice a bona fides purchaser for value without notice.⁵⁸

B. The Accrual Date—From which Point Does Time Begin to Run?

Jersey does not operate the rule in English law that in a claim for breach of trust, time only begins to run against a beneficiary with an interest in possession.⁵⁹ The rationale upon

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⁵² *Bagus Investments Limited v Kastening* (n 10); strictly, the decision is authority for the proposition that a claim for knowing receipt is not within the scope of Art 57(1), not that such claims fall within Art 57(2).

⁵³ See knowing recipients and innocent volunteers. The reason, being that a constructive trustee who is liable as such only because of the very transaction which is impugned is not really a trustee and so is not within Art 57(1) *et seq.* A recipient liable for knowing receipt is such a constructive trustee. A recipient liable under a *Diplock* claim is not a constructive trustee at all but the case for treating him outside s 21(1)(a) is still stronger.

⁵⁴ *In re Howe Family No 1 Trust* [2007] JLR 660; Trusts (Jersey) Law 1984, Art 47H(4).

⁵⁵ s 32(1)(c).

⁵⁶ Trusts (Jersey) Law 1984, Arts 47D– 47J.

⁵⁷ *Sieff v Fox* [2005] 1 WLR 3811 at [79] and [81], per Lloyd LJ cited with approval in *In The Matter of the A Trust* [2009] JLR 447].

⁵⁸ Trusts (Jersey) Law 1984, Art 47I(4).

⁵⁹ Codified in the Limitation Act 1980, s 21(3).

which section 21(3) is based, as articulated by Millett LJ in *Armitage v Nurse*,⁶⁰ is not that a beneficiary with a future interest has no means of discovery of a breach of trust, but that the beneficiary should not be compelled to litigation (at considerable personal expense) in respect of an injury to an interest which he may never live to enjoy, does not apply to Jersey.⁶¹ A discretionary trust does not fall even within the terms of section 21(3) because an object of a discretionary power is not a 'beneficiary entitled to a future interest in the trust property'. Such an object has only the *hope* of acquiring an absolute or limited interest in the trust property. The consequence of the rationale above is that a trustee of a discretionary trust cannot rule out a claim for breach of trust by a discretionary beneficiary until such a beneficiary has taken (either by the effluxion of time by taking a share in the residual trust fund at the end of the trust period or by a specific appointment) some part of the trust fund.⁶² A very great number of Jersey law trusts are fully flexible discretionary trusts, with wide powers as to the appointment of income and capital as well as the flexibility to widen or narrow the class of discretionary objects.

- 16-18** It is for this reason that the 1984 Law provides the date of accrual to be the earlier of either (1) the date of delivery of the final accounts to the beneficiary; or (2) the date on which the beneficiary first has knowledge of the breach of trust. Without these statutory provisions, the trustee's liability would be open-ended for decades following a breach of trust even if there were only one discretionary beneficiary who had not received anything from the trust. The trustee's potential open-ended liability has been cut down further by Article 57(3C), which provides for a longstop prescription date of 21 years for breach of trust claims from the date of breach regardless of the beneficiary's knowledge.

i. Delivery of the Final Accounts

- 16-19** The premise that underpins the rationale for the delivery of the final trusts accounts as the moment from which time starts to run for the purposes of limitation, is that the accounts should disclose and explain, to a reasonable degree of accuracy, the financial position of the structure and the transactions undertaken. It follows that where the rationale for the delivery of accounts is not satisfied, because such accounts that are provided are inadequate to understand what transactions have taken place, then there is likely to be scope for argument that limitation should begin to run from a later date.
- 16-20** The Jersey Financial Services Commission's Codes of Practice for Trust Company Business require a registered person (which all professional trustees must be in Jersey) to keep, or satisfy itself that someone else is keeping, accounting records that are sufficient to show and explain every individual transaction.⁶³ The trustees may also provide a financial statement which should ordinarily include, in addition to the transactions entered into, a profit and

⁶⁰ *Armitage v Nurse* (n 25) at 261.

⁶¹ *Freeman v Ansbacher Trustees (Jersey) Ltd* (n 16).

⁶² Since the Trusts (Amendment No 4) (Jersey) Law 2006 Jersey law has permitted a private trust of perpetual duration. The trustee of such trust, in the absence of legislative provision to the contrary, would be liable to any beneficiary who did not receive an appointment from the trust fund in perpetuity.

⁶³ JFSC, Codes of Practice for Trust Company Business (2008) para 3.2.3.1.5. See also the Financial Services (Trust Company and Investment Business (Accounts, Audits and Reports)) (Jersey) Order 2007, Art 4.

loss or income and expenditure account, a balance sheet and, depending upon its complexity, a capital account summarising capital distributions and additionally settled funds. There is no legal requirement in Jersey for trusts to prepare a financial statement or, where a financial statement is prepared, for it to be in compliance with an industry benchmark such as GAAP. There is also no mandatory statement of law providing for the frequency by which trust accounts should be rendered. In practice, the detail, format and overall quality of the financial records provided by trustees to beneficiaries of Jersey trusts can vary wildly across the industry, reflecting the nature of the entity in question. The absence of mandatory standards in the content and frequency of trust accounting is likely to be self-correcting in that the longer the interval between which accounts are rendered, and the more Spartan they are when provided, the greater the scope for argument that Article 57(2)(a) has not been complied with. An additional complicating factor is that there is also wide variation as to whom the trust accounts are routinely provided.⁶⁴ While trust accounts are within the class of documents of which the Court will routinely order disclosure upon the beneficiaries' request, where it is the practice of the trustee to provide the accounts only to a select number of named beneficiaries, time will not begin to run against those beneficiaries to whom accounts are not provided unless those beneficiaries come, by some other means, to have knowledge of the breach of trust.

ii. Date of Knowledge

The reference to knowledge in Article 57(2)(b) is to 'knowledge that ... would have led a reasonable man to the inevitable conclusion that a breach of trust had actually occurred'.⁶⁵ The statute does not expressly require it to be objectively reasonable for the plaintiff not to have obtained the necessary knowledge sooner. It appears therefore that Article 57(2)(b) is more generous to plaintiffs than the customary law position applying to the doctrine of *empêchement de fait*, as the statute places no burden on the plaintiff to make reasonable inquiries once on notice of the possibility of a claim. It suspends time from running until the plaintiff *had* sufficient knowledge for a reasonable man to conclude that a breach had occurred, rather than only until he *ought* to have had that knowledge had he been reasonably diligent. If this distinction does exist, it could be crucial in some cases.

16-21

C. Claims by Co-trustees or New Trustees for Breach of Trust

In circumstances where a trustee is un-conflicted in bringing a claim against a co-trustee or a former trustee, the trustee and not the beneficiary is the proper plaintiff to an action for breach of trust.⁶⁶ However, the claim cannot be said to be subject to an operative *empêchement* as the beneficiaries are still able to bring a claim, either in their own names or in the name of the trustee with leave to bring a derivative claim.⁶⁷ Article 57(3B) is

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⁶⁴ As to the principles that underpin the disclosure and withholding of trust documents, including trust accounts, see Ch 5.

⁶⁵ *West v Lazard Bros & Co (Jersey) Ltd* (n 13) at 293.

⁶⁶ *Barclays Wealth Trustees (Jersey) Ltd v Equity Trust (Jersey) Ltd* [2014 (1) JLR 517].

⁶⁷ *Walker & Delarose Trustee Limited v Egerton-Vernon & Ors* [2014 (1) JLR 182].

self-explanatory save that there is still some controversy, which is considered elsewhere, as to whether the doctrine of *empêchement de fait* applies to Article 57(3B) so as to postpone the commencement of the prescription period in a manner similar to that where the claim is brought by beneficiaries, to either the earlier of a date of the trustee's knowledge or the delivery of the final accounts.⁶⁸

i. Claims for Contribution between Trustees

- 16-23** There is a curious gap in Jersey's law as to whether, first, a trustee who has compensated his beneficiaries for a breach of trust, can recover a contribution from his co-trustees and secondly, what (if any) prescription period applies to such a claim. Article 3 of the Law Reform (Miscellaneous Provisions) (Jersey) Law 1960 is confined to contributions between jointly and severally liable tortfeasors. In other words, under the 1960 Law both D1 and D2 must each be liable to P, in tort, in order that D1 may seek contribution from D2. While two or more trustees may be made jointly and severally liable for the same breach of trust,⁶⁹ a breach of trust or a breach of fiduciary duty is not a tort. The narrow jurisdiction of the 1960 Law was confirmed in *Jersey Electricity v Brocken & Fitzpatrick*:⁷⁰

In England, the equivalent statutory provision was Section 6 Law Reform (Married Women and Tortfeasors) Act 1935. The report of the Law Commission (Law Comm No 79) in 1977 recommended that the statutory right to obtain a contribution should be widened to cover the situation where one or other of the parties (or both) was not a tortfeasor but was liable to the plaintiff for breach of contract, breach of trust or other breach of duty. That was achieved by the passing the Civil Liability (Contribution) Act 1978. But in Jersey the position remains unaltered. It follows that the defendant may only seek a contribution from the third party if the third party could be liable in tort to the plaintiff, if sued, in respect of the damage which is the subject of the claim in the Order of Justice.

- 16-24** In a claim against trustees, tortious and equitable duties may overlap.⁷¹ While a claim for contribution for breach of an equitable duty would not come within the 1960 Law, where it is possible to frame the claims made against the jointly and severally liable trustees as tortious, ie *a failure to act with the reasonable skill care and diligence*, and seek the usual tortious remedy of unliquidated damages, then those claims could arguably come within the scope of the 1960 Law. In our view, so far as contribution is possible, the prescription period in respect of a contribution claim only begins to run from the time of judgment entered against a defendant.⁷² Judgment in our view must include the award on quantum. Unlike under section 10 of the Limitation Act 1980,⁷³ Jersey law has not specifically provided a

⁶⁸ An outgoing trustee is obliged to cooperate with an incoming trustee in rendering all trust documents (including the trust accounts); *In re Ogier Trustee (Jersey) Ltd* [2006 JLR N [35]].

⁶⁹ Trusts (Jersey) Law 1984, Art 30(8).

⁷⁰ [2004 JLR 289] at [8].

⁷¹ *Bristol and West Building Society v Mothew* [1998] Ch 1, 17C–E, [1996] 4 All ER 698.

⁷² *Bell v Heating & Ventilating Engr Co Ltd* [1985–86 JLR 241].

⁷³ Where the trustee seeking a contribution has been held liable by a judgment in civil proceedings or by an award made on an arbitration, he has 2 years from the date of the judgment or the award in which to launch a claim. If liability is established before quantum is fixed, the 2 years run from the date of the award on quantum and not the earlier date of the judgment on liability.

time limit by which one trustee, who has compensated his beneficiaries for a breach of trust, can recover a contribution from his co-trustee if the latter is liable in respect of the same damage.

D. Laches Not Applicable⁷⁴

Laches, in the sense of delay coupled with circumstances where it would be practically unjust to give a remedy either because (1) the party has by his conduct done that which might fairly be regarded as equivalent to a waiver or (2) where by his conduct and neglect he has though perhaps not waiving that remedy, put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards asserted,⁷⁵ does not apply to breaches of trust falling outside Article 57(1).⁷⁶ The rationale for this rule appears to be that as an express statutory period of limitation applies to non-fraudulent breaches of trust it is inconsistent not to allow a plaintiff the full benefit of that period by subjecting them to the doctrine of laches.⁷⁷ Acquiescence, in the sense of conduct tantamount to a release or capable of giving rise to an estoppel, remains a defence even before the expiry of the three-year period. Neither a bare trustee nor a nominee nor a charitable trust for the public benefit may ever plead laches against his beneficiary.⁷⁸

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IV. Constructive Trusts and Similar Liabilities

'Trust' and 'trustees' extend to constructive trusts and constructive trustees⁷⁹ respectively, although the inclusion of constructive trustees within Article 57(1) does not extend to all persons who may be made liable under that description.⁸⁰ In Jersey law, there are two categories of constructive trusts.⁸¹ The first category comprises those cases in which a defendant has assumed the duties of a trustee or fiduciary, doing so by a transaction which was

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⁷⁴ In *Pell Frischmann Engineering Limited v Bow Valley Iran Limited* (n 40) it was submitted that there was no discernible indication of any Jersey court ever having applied the doctrine of laches, from which the Court did not demur but holding that: 'Whether it goes by the name of laches or something else, the idea that in certain circumstances, a plaintiff may be refused some particular form of relief notwithstanding that his claim is not time-barred appears to us, if nothing else, to be entirely compatible with a modern notions of justice.'

⁷⁵ *Lindsay Petroleum Co v Hurd* (n 39) at 239–40.

⁷⁶ *Re Pauling's Settlement Trusts* [1962] 1 WLR 86 at [115], [1964] Ch 303 at 353, CA; *Green v Gaul* (n 37) at [37]. It is not altogether clear what was understood to be meant by laches in *Re Pauling's Settlement Trusts*; see *Green v Gaul* at [33], [35], [37].

⁷⁷ *Re Pauling's Settlement Trusts* (n 75) at [115].

⁷⁸ *Joyce v Joyce* [1978] 1 WLR 1170; *Frawley v Neill* (n 38); *Mills v Drewitt* (1855) 20 Beav 632 at 638, *Sinclair v Sinclair* [2009] EWHC 926 (Ch) at 64.

⁷⁹ *UCC v Bender* [2006 JLR N 7], but only in the sense in which that term refers to a person who actually holds property subject to a trust in his hands. A person termed a constructive trustee who in reality is only obliged to account as such is not a trustee for these purposes; see *Bagus Investments Limited v Kastening* (n 10).

⁸⁰ See *Bagus Investments Ltd v Kastening* (n 10) (ie excluding category 2 trustees, per *Bagus Investments Ltd v Kastening* (n 10)).

⁸¹ *Paragon Finance plc v D.B. Thakerar & Co* (n 19) at 408; *Nolan & Ors v Minerva Trust Company Limited and Ors* (n 2); *Bagus Investments Limited v Kastening* (n 10).

independent of and preceded the breach of trust complained of (a ‘category 1’ constructive trustee). The second category, comprises those cases in which the so-called trust obligation arises as a direct consequence of an unlawful transaction which the plaintiff impugns and in which the defendant is no more than a wrongdoer, eg where the defendant obtains property from the plaintiff by fraudulent misrepresentation (a ‘category 2’ constructive trustee). Category 1s are true trusts; category 2s are not true trusts and are described as such merely as ‘a formula for equitable relief’. Importantly, category two constructive trustees may plead limitation as a defence even in cases of fraud and retention or conversion of trust property notwithstanding Article 57(1), which is confined to category 1 constructive trustees only.

A. Claims against Trustees de son tort

- 16-27** A person who voluntarily intermeddles in a trust and acts as a trustee, sometimes known as a ‘trustee de son tort’,⁸² is a paradigm example of a category 1 constructive trustee, falling within Article 57(1). Accordingly, a trustee de son tort cannot raise a defence of limitation in the cases mentioned in Article 57(1) though is otherwise free to do so against claims falling outside that provision.

B. Inconsistent Dealing with Trust Property

- 16-28** A person who is not an express trustee may lawfully receive property knowing that it belongs to a subsisting trust. Such recipients are nonetheless treated as constructive trustees, if they retain the trust property for themselves or otherwise misuse it, and they can be made liable as such. Since they do not assert a title adverse to the trust on taking possession, they are treated as a category 1 constructive trustee for the purposes of limitation.⁸³ Like a trustee de son tort an inconsistent dealer of trust property cannot raise a defence of limitation in the cases mentioned in Article 57(1) though is otherwise free to do so against claims falling outside that provision.

C. Knowing Recipients

- 16-29** A knowing recipient of trust property is a person who receives trust property, for his own benefit, transferred to him in breach of trust. A knowing recipient is treated as a

⁸² L Tucker, N Le Poidevin and J Brightwell, *Lewin on Trusts*, 19th edn (London, Sweet and Maxwell, 2014) at 42-101: ‘If a person by mistake or otherwise assumes the character of trustee when it does not really belong to him, he becomes a trustee de son tort and he may be called to account by the beneficiaries for the money he has received under the colour of the trust. A trustee de son tort closely resembles an express trustee. The principle is that a person who assumes an office ought not to be in a better position than if he were what he pretends; he is accountable as if he had the authority which he has assumed. While it is essential, if a person is to become a trustee de son tort, that he consciously takes the office of trustee, it does not matter whether he knows all the trusts or the extent of his powers’.

⁸³ *Coxwell v Franklinski* (1864) 11 LT 153; *Lee v Sankey* (1873) LR 15 Eq 204 (as commented on in *Soar v Ashwell* [1893] 2 QB 390 at 396–97, CA (though see *ibid*, at 403)); *Wassell v Leggatt* [1896] 1 Ch 554; *Re Dixon* [1900] 2 Ch 561, CA; *Reid-Newfoundland Co v Anglo-American Telegraph Co Ltd* [1912] AC 555, PC; *Re Eyre-Williams* [1923] 2 Ch 533. See too *Young v Harris* (1891) 65 LT 45.

constructive trustee if at the time of receipt or later he had notice that the property was trust property and that the transfer to him was a breach of trust. A knowing recipient is a category 2 constructive trustee, his trusteeship arising only out of the very transaction which the plaintiff beneficiary seeks to impugn. The critical distinction between a knowing recipient and a person liable for inconsistent dealing is that the knowing recipient does but the latter does not claim the trust property adversely to the trust. Because he is a constructive trustee of the second kind he is entitled to plead limitation to cases within Article 57(1). The prescription period for a claim in knowing receipt is not provided for within the 1984 Law and has never been definitively determined by the Royal Court.⁸⁴

D. Dishonest Assistants

A person who dishonestly assists a trustee to commit a breach of trust is himself liable as a constructive trustee.⁸⁵ The liability is based on the dishonesty of the accessory and the honesty or dishonesty of the trustee is irrelevant; it therefore follows that a claim for dishonest assistance can arise from a non-fraudulent breach of trust.⁸⁶ An accessory liable for dishonest assistance is a category 2 constructive trustee and is able to raise a limitation defence even though the breach of trust in which he has dishonestly assisted falls within Article 57(1).⁸⁷ The Royal Court also took the opportunity to state that a claim for dishonest assistance is not a claim 'in respect of any fraud to which the trustee was a party or to which the trustee was privy' within the meaning of Article 57(1)(a). It follows that a dishonest assistant can plead limitation to any other claim falling within the rest of Article 57. The result of *Nolan*, and the UK Supreme Court case of *Williams v Bank of Nigeria*⁸⁸ that preceded it, is that the interpretation of Article 57(1) and section 21(1) are now aligned.⁸⁹ The Royal Court in *Nolan* also considered what the appropriate period of prescription for a dishonest assistance claim was, as like with knowing receipt, the answer is not obvious from the text of Article 57. The result, while helpful in clearing up what had hitherto been ambiguous, is not entirely satisfactory in terms of principle. In *Esteem*,⁹⁰ it had been said:

The Jersey law of prescription is, by and large, based upon judicial precedent and it is hard to find a consistent theme or principle which underlies the various prescriptive periods. But where there is no precedent, it is helpful to have regard to the nature of the action⁹¹

[...]

We think that the time has come to hold that the 10-year period referred to by Le Geyt is a general period which should be taken to apply to all personal actions and all actions concerning movables,

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⁸⁴ In *Bagus Investments Limited v Kastening* (n 10) the alternative period posited as an alternative to the 3-year period under Art 57(2) was 10 years, as an action *personnelles mobilières*, applying *In re Esteem Settlement* (n 22) at 257.

⁸⁵ *Nolan & Ors v Minerva Trust Company Limited and Ors* (n 2).

⁸⁶ *Bagus Investments Ltd v Kastening* (n 10) at [45].

⁸⁷ *Nolan & Ors v Minerva Trust Company Limited and Ors* (n 2) at [498].

⁸⁸ [2014] UKSC 10.

⁸⁹ *Nolan & Ors v Minerva Trust Company Limited and Ors* (n 2) at [497].

⁹⁰ [2002 JLR 53].

⁹¹ *ibid*, at [252].

save to the extent that they have already been held to be subject to a different period, eg tort, actions concerning estates etc., or that some other period is, by analogy, clearly more applicable.⁹²

- 16-31** The Court was presented with a choice; that of the prescription period being 10 years on the basis that there was no other prescriptive period in Jersey law which could be applied by analogy or three years on the basis that a claim in dishonest assistance was analogous to an economic tort.⁹³ The Court chose three years following a somewhat contorted line of reasoning that incorporated dicta from cases from England and Hong Kong. In summary, the nature of a dishonest assistance claim was held to be so close to that of accessory liability in the context of economic torts that it was considered perverse to attempt to shoehorn the cause of action for dishonest assistance into the existing canons of Jersey customary law. It is deeply curious why recourse was made to such a contorted path in order to reach an analogous cause of action when the foundation for a dishonest assistance claim is a breach of trust and Article 57(2) already provides that the limitation period for an action 'founded on breach of trust' is three years.
- 16-32** We do not understand the Royal Court to mean that dishonest assistance is a tort in Jersey law.⁹⁴ The two causes of action are clearly constituted of different elements, with different points of accrual and with different respective remedies. The prominence given to the idea that a dishonest assistant is an interloper in the relationship between the trustee and beneficiaries⁹⁵ is also curious. Clearly, in cases of knowingly procuring a breach of contract liability derives from the outsider's interference in the relationship between the contractual parties, however in a case of dishonest assistance, the relationship between the beneficiaries has already been soured by the trustee's own breach of trust to which the assistant is only an accessory rather than the main protagonist. The Court in *Nolan* rejected the argument that there can only be an analogy in terms of the applicable limitation period if two causes of action are based on the same facts and give rise to concurrent remedies. The Court was clear that what has to be analogous is the period, not the cause of action.⁹⁶ With respect, it is the authors' view that that statement appears to sheer whatever tenuous analogy that might be made between the two cause of action, of any real meaning.

E. Claims against Innocent Volunteers who Receive Trust Property

- 16-33** Where trust property comes into the hands of a person not entitled to it and who has no notice of the trust, he will be liable as a volunteer. To the extent that he is to be regarded as a trustee at all, he is clearly a category 2 constructive trustee, since he has never assumed the duties of a trustee or fiduciary. Where the trust property can be traced into the recipient's hands under the proprietary remedy discussed in Chapter 13, the action to do so is generally barred by three years' delay. Such an action is not to recover trust property from

⁹² *ibid*, at [257].

⁹³ The Law Reform (Miscellaneous Provisions) (Jersey) Law 1960, Art 2(1) provides that claims in tort are prescribed after three years from the date on which the cause of action accrued.

⁹⁴ Which would be relevant, in reference to the earlier discussion as to the availability of a contribution claim as between two or more dishonest assistants.

⁹⁵ *Nolan* (n 2) at [500].

⁹⁶ *ibid*, at [501].

a trustee under Article 57(1)(b) but is likely to be considered an action 'founded on breach of trust' by the trustee in disposing of property to a volunteer. It is to be noted that Article 57 does not incorporate the wording found in section 21(3) of the Limitation Act 1980 of 'an action by a beneficiary to recover trust property'. To the extent that the alternative personal remedy against an innocent volunteer can still be brought,⁹⁷ the action would also be an action founded on breach of trust. How the trust property comes to be in the hands of an innocent volunteer does not affect the categorisation of the remedy for the purposes of limitation. To the extent that the disposal of trust property is the result of a fraudulent breach of trust, a defendant who has neither knowledge of the trust nor paid value for the property is entitled to raise limitation as a defence even under Article 57(1). If there has been a fraudulent breach of trust, this may form the basis for a case of concealment of relevant facts for the purposes of postponing the accrual of the cause of action under the doctrine of *empêchement de fait*.⁹⁸ The cause of action on the personal claim against an innocent volunteer would presumably accrue on the making of the wrongful payment,⁹⁹ but the proprietary claim only accrues on the plaintiff becoming aware of his rights.¹⁰⁰

F. Claims for Breach of the No-Profit Rule

A fiduciary who makes a profit from his trust is a category 1 constructive trustee in relation to such property. A claim seeking recovery of a secret profit is a claim to recover property properly belonging to the beneficiary¹⁰¹ within Article 57(1)(b) of the 1984 Law and there is no prescription period applicable to such an action. This conclusion can be justified on the grounds that the fiduciary relationship predates the acquisition of the new property (the profit) by the fiduciary and the imposition of the constructive trust depends on the trustee's pre-existing fiduciary responsibility for the property held within the trust, before acquisition by the trustee. Under English law, a fiduciary duty which prevents a person who owes it from acquiring property which is the subject of that duty, will only make him a category 1 constructive trustee if he breaches that duty, if the fiduciary had a power of disposition over the property.¹⁰² An exception is a director of a company. Though the company's property is not vested in him, the director of a company will be treated as a category 1 trustee for the company if he makes himself liable for procuring a transfer of the company's property in his own favour.¹⁰³ But if a director earns an unauthorised profit which does not depend on any pre-existing responsibility of his for the property of the company, it has been held that he is only a category 2 constructive trustee.¹⁰⁴ Other fiduciary duties may be owed even though there is no pre-existing property at all, for example a fiduciary who takes advantage

16-34

⁹⁷ See Ch 9 for claims against recipients.

⁹⁸ See *Nolan* (n 2) at [502]–[515]. However, it seems that a fraudulent breach of trust does not need to give rise to an *empêchement* in order to prevent time from running.

⁹⁹ See *Re Robinson* [1911] 1 Ch 502; *Re Mason* [1928] Ch. 395, [1929] 1 Ch 1; *Re Blake* [1932] 1 Ch 54.

¹⁰⁰ *Baker v Courage & Co* [1910] 1 KB 56.

¹⁰¹ *In re Rex Trust* (n 30); *FHR European Ventures LLP v Cedar Capital Partners LLC* (n 30).

¹⁰² Although he will be a category 2 constructive trustee; see Ch 6.

¹⁰³ *J.J. Harrison (Properties) Ltd v Harrison* (n 22). Cf *Bank of Credit and Commerce International SA v Saadi* [2005] EWHC 2256 (QB) (employee with control of accounts misappropriating moneys in them).

¹⁰⁴ *Gwembe Valley Development Co Ltd v Koshy* (n 22) at [119], [2004] WTLR 97 at [119].

for his own benefit of information which came to him in that capacity¹⁰⁵ or by a fiduciary who accepts a bribe.¹⁰⁶ Where a breach of fiduciary duty gives rise to a category 2 constructive trust claim, there is English Supreme Court authority on the equivalent of Art 57 to suggest that such claims fall outside Article 57(1)(b) and Article 57(1)(a)¹⁰⁷ The distinction drawn in *Paragon Finance*¹⁰⁸ is between two different kinds of trustees, those who actually have accepted the duties of a trustee or (as in the case of a trustee de son tort or a director) their equivalent, and those who are merely made liable as if they had done so. Only category 1 constructive trustees are the target of Article 57(1). The distinction does not depend on the mental state accompanying the breach.

G Claims for Breach of the Self-dealing and Fair-dealing Rules

- 16-35** A trustee or other fiduciary who purchases trust property may have that transaction set aside by any beneficiary, however fair the transaction. This is known as ‘the (prohibition from) self-dealing rule’. If a trustee or other fiduciary purchases a beneficial interest the beneficiary may have the sale set aside unless the trustee shows that the transaction was scrupulously fair. This is known as ‘the fair-dealing rule’. Breaching either of these rules is a breach of the fiduciary duty of loyalty.¹⁰⁹ Article 57 of the Law does apply to breaches of the self-dealing and fair-dealing rules by trustees.¹¹⁰ An express trustee acquiring trust property in breach of the self-dealing rule is not in fact actually a constructive trustee at all but remains an express trustee of the property; Article 57(1)(b) clearly prevents him from raising a defence of limitation.¹¹¹ A director who purchases from his company has been held to be a category 1 constructive trustee and so is similarly unable to plead limitation as a defence.¹¹² However, the existence of a fiduciary duty in respect of the property before the acquisition will not alone bring the trustee within category 1; he must in addition have had a power of disposition over the property. In the absence of such a power he will be a category 2 constructive trustee and able to rely on the three-year statutory time limit.¹¹³
- 16-36** Where a trustee engages the fair-dealing rule by purchasing a beneficial interest, it is not clear that Article 57(1)(b) has any application; the beneficial interest was not itself held on trust and hence a claim to set aside the transaction is not a claim to recover ‘trust property’. If Article 57(1)(b) does not apply, there is no distinction between an express trustee and a constructive trustee of either the first or second category, and all of them could raise

¹⁰⁵ *Boardman v Phipps* [1967] 2 AC 46, HL.

¹⁰⁶ *In re Rex Trust* (n 30); *FHR European Ventures LLP v Cedar Capital Partners LLC* (n 30); *AG for Hong Kong v Reid* [1994] 1 AC 324, PC.

¹⁰⁷ *Williams v Central Bank of Nigeria* (n 12); *Gwembe Valley Development Co Ltd v Koshy* (n 22) at 120.

¹⁰⁸ *Paragon Finance plc v DB Thakerar & Co* (n 19).

¹⁰⁹ *Gwembe Valley Development Co Ltd v Koshy* (n 22); [2004] WTLR 97.

¹¹⁰ *Gwembe* (n 22) at [104]–[109]. See, earlier, *J.J. Harrison (Properties) Ltd v Harrison* (n 22) at [32]–[33], followed in *Newgate Stud Co v Penfold* (n 25) at [248] (citing *Gwembe* but not on this point).

¹¹¹ (He may, however, be able to invoke the doctrine of laches.)

¹¹² *J.J. Harrison (Properties) Ltd v Harrison* (n 22); *Newgate Stud Co v Penfold* (n 25).

¹¹³ *Taylor v Davies* (n 12).

a defence of limitation (unless fraud were alleged). In the authors' view, Article 57(1)(b) ought to apply, on the ground that the objection to the transaction by the beneficiary is substantially the same as to a case of self-dealing. On that footing, an express trustee could never raise the defence and only a category 2 constructive trustee could do so. But even if Article 57(1)(b) has no application to a breach of the fair-dealing rule, a charge of fraud would engage Article 57(1)(a), so that again only a category 2 constructive trustee could plead limitation as a defence.

V. Extension and Postponement of the Prescription Period

There is no direct Jersey equivalent of section 32 of the Limitation Act 1980 so as to suspend limitation running in any action based upon the fraud of the defendant or his agent or of any person through whom he claims or where any fact relevant to the plaintiff's rights of action has been deliberately concealed from him by any such person or the action is for relief from the consequences of a mistake (where the mistake was part of or an element of the cause of action). Instead, Jersey has made specific statutory provision to suspend or postpone the accrual date for the commencement of prescription in specific circumstances, such as where the plaintiff is under a legal disability. Recourse may also be made to the Jersey customary law principle of '*empêchement d'agir*' under which the Court has an inherent flexibility to determine whether or not a litigant suffered from a practical impossibility in pursuing his/her claims.

16-37

A. Statutory Suspension of Prescription for Breach of Trust Claims

The commencement of the prescription period of three years in Article 57(2) is suspended in cases of disability. Article 57(3) provides:

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(3) Where paragraph (1) does not apply but, when the breach occurs the beneficiary –

- (a) is a minor;
- (b) is an interdict; or
- (c) is under any other legal disability,

the period to which paragraph (2) refers shall not begin to run before the beneficiary ceases to be a minor or interdict or under that other legal disability (as the case may be), or sooner dies.

The word 'interdict' is defined in Article 1 of the 1984 Law to mean

16-39

a person, other than a minor, who under the law of Jersey or under the law of the person's domicile is legally incapable of managing and administering his or her own property and affairs by reason of mental disorder or of addiction.

Article 1 of the Trusts (Jersey) Law 1984 similarly defines a minor as 'a person who under the law of Jersey or under the law of the person's domicile who has not reached the age of legal capacity'. It is to be noted that a person may be a minor or an interdict under the law of a territory that is neither the law of the forum (Jersey) nor the proper law of the trust.

i. Age

- 16-40** The drafting of Article 57(3) gives rise to an uncertainty. Jersey's age of majority is 18.¹¹⁴ Where a person is deemed still to be a minor in their place of domicile but would be treated as being of age in Jersey, when does time begin to run? The same issue arises in the converse position where a person would be of majority in their country of domicile (say 16) but remain a minor in Jersey. The drafting of Article 1(1) in relation to age would be much improved by the addition of 'whichever is the later'. In the authors' view, the only sensible way to read Article 1(1) is that a person will be a minor if they are a minor under either the law of Jersey or the law of their domicile. A person is therefore given the benefit of a longer period of minority if one is available to them. Were it otherwise, the consequences of uncertainty with regard to age could be particularly acute when considering the limitation period for a non-fraudulent breach of trust is only three years. A beneficiary may be of age in Jersey but not of age in their country of domicile until they are 21. The three-year limitation period would expire on the date they were first able to bring an action under the law of their domicile. Where there is a body of discretionary objects, all of different ages and the trustee has power to appoint the whole trust fund to one or more of them, time will not begin to run until the youngest of the objects ceases to be a minor.

B. *Empêchement*

- 16-41** In addition to the statutory provisions that suspend prescription running against minors, interdicts and those under any other legal disability, recourse may also be had to the customary law principle of '*empêchement d'agir*'¹¹⁵ which provides that prescription will not run against a person who is subject to an impediment which prevents him from bringing a claim or otherwise acting in the prosecution or defence of his rights. There are two¹¹⁶ types of relevant impediment: (1) an *empêchement de fait*; and (2) an *empêchement de droit*. A plaintiff subject to an *empêchement d'agir* is described as being *empêche* until the *empêchement* is lifted.

i. Empêchement de droit

- 16-42** An *empêchement de droit* is a legal impediment disability. For example, where a party is a minor, time will not run unless the minor has a *tuteur*.¹¹⁷ A minor for whom a *tuteur* has been appointed will however have a right of action against the *tuteur* in cases of negligence.¹¹⁸ Similarly, where a person lacks mental capacity in circumstances where a curator has not yet been appointed, time will not run against the incapacitated person. Time will run against a mentally incapacitated person who has a curator.¹¹⁹ The Trusts (Amendment No 5) (Jersey)

¹¹⁴ Age of Majority (Jersey) Law 1999.

¹¹⁵ Literally 'impediment to action'.

¹¹⁶ *Public Services Committee v Maynard* [1996] JLR 343] at 351.

¹¹⁷ *Letto v Stone* (1890) 48H 473: 'prescription ne court pas contre un mineur dépourvu de tuteur'.

¹¹⁸ *Le Geyt, Privileges, Loix & Coutumes de l'Isle de Jersey* (Jersey, 1953) Arts 13 and 14 at 65. At customary law, the prescriptive period for such an action was a year and a day but presumably this will now fall within the 3-year (statutory) tort period.

¹¹⁹ *Public Services Committee v Maynard* (n 116) at 351.

Law 2012 extended the statutory suspension of prescription beyond minors to interdicts and others under disability with the effect that Article 57(3) now appears to be co-extensive with the customary law principle of *empêchement de droit*.

ii. Empêchement de fait

An *empêchement de fait* refers to a factual impediment which gives rise to a practical impossibility of commencing or continuing legal proceedings.¹²⁰ The plaintiff bears the burden of proof that they were subject to an operative *empêchement*. As long as the *empêchement* is operative, prescription does not run against a plaintiff.¹²¹ The principle that is said to underpin the principle of *empêchement de fait* is the practical impossibility of the plaintiff being able to exercise his rights.¹²² The threshold is not whether it is impossible for a plaintiff to bring a claim but whether it is *practically* impossible for the plaintiff to do so.¹²³ This provides a degree of flexibility and latitude to a plaintiff on the particular facts in each case. A person is assumed to be reasonably diligent in inquiring after his own situation; his own negligence in doing so is not capable of giving rise to an *empêchement*.¹²⁴ Where a plaintiff is ignorant of the facts giving rise to the cause of action and such ignorance is objectively reasonable, such ignorance is capable of amounting to an *empêchement de fait*.¹²⁵ Ignorance per se is insufficient to stop prescription running and will not prevent the accrual of a cause of action.¹²⁶ The Court will have regard to all the circumstances of the case, in particular, of what was the plaintiff ignorant, why was the plaintiff ignorant, the relationship of the unknown factor to the plaintiff's claim and its importance as an ingredient in the cause of action. The test is whether ignorance is reasonable in all the circumstances: the reasonableness of not knowing both the facts giving rise to the cause of action and that a cause of action arises on the basis of such facts.¹²⁷ In a claim which makes an allegation of dishonesty, the basis for that allegation must be fully particularised.¹²⁸ In *Boyd*, Beloff JA said (at 291):

In my view, the epithet 'practical' deployed in Maynard softens rather than strengthens the concept of impossibility. It requires a consideration of what is in fact, not in theory, possible. While ignorance of a cause of action does not per se trigger a suspension of the limitation period, it may, in appropriate circumstances, constitute or create a relevant impediment. The issue before us is of what those circumstances may consist.

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¹²⁰ *Maynard v Public Servs Cttee* [1995 JLR 65]; *Jersey Fin Servs Commn v A.P. Black (Jersey) Ltd* [2002 JLR 294]; *Nolan v Minerva Trust Co Ltd* (n 2); *Walker v Egerton-Vernon* [2014 (1) JLR 182].

¹²¹ *ibid.*

¹²² *Public Services Committee v Maynard* (n 116).

¹²³ *Boyd Pickersgill & Le Cornu* [1999 JLR 284].

¹²⁴ J Poingdestre, *Les Lois et Coutumes de l'Île de Jersey* (1928) at 50–55; *Eves v Le Main* [1999 JLR 44]; *Boyd v Pickersgill & Le Cornu* (n 123).

¹²⁵ Per Beloff JA in *Boyd v Pickersgill & Le Cornu* (n 123) at 291; Southwell and Sumption JA at 295, although Sumption JA made clear that once there was knowledge of the facts giving rise to the cause of action, ignorance that a cause of action arose in such circumstances was not enough.

¹²⁶ *Boyd Pickersgill & Le Cornu* (n 123). The longstop provision in Art 57(3C) is to the effect that provided a plaintiff beneficiary (or trustee) can be kept in ignorance of their cause of action for at least 21 years from the non-fraudulent breach of trust, the defendant trustee can raise a limitation defence.

¹²⁷ *ibid.*

¹²⁸ *Three Rivers DC v Bank of England* (No 3) (n 29).

The test, as it seems to me, is whether ignorance of the cause of action is reasonable in all the circumstances, reasonable, that is, both in respect of the facts giving rise to the cause of action and that a cause of action arises in such circumstances.

Sumption JA added (at 295):

What ignorance the law regards as reasonable is a matter of legal policy, the precise limits of which will need to be explored from case to case. I am satisfied that the law regards ignorance as reasonable as a matter of legal policy where there was no means by which the particular plaintiff could reasonably have been expected to discover the facts on which her cause of action was based.

a. Fraud and Concealment

16-44 It is often a feature of dishonesty and fraud cases that the fraudster will conceal his fraud for as long as possible. Concealment of relevant facts is treated as a species of the principle stated above; that ignorance of the existence of the plaintiff's right of action can amount to an *empêchement de fait*. Prescription will be suspended for so long as the plaintiff remains ignorant of the fraud perpetrated against him¹²⁹ and such ignorance was caused by the defendant's concealment so that the plaintiff could not have discovered the fraud against him or his right of action in respect of it, with reasonable diligence.¹³⁰ In *Nolan v Minerva Trust*, the Royal Court considered the impact of concealment of relevant facts on the ability of a plaintiff to properly plead its case. The Court held that any pleading of dishonesty or fraud must be properly particularised in accordance with the principles set out by Lord Millett in *Three Rivers District Council v Bank of England*,¹³¹ endorsed by the Royal Court in *Cunningham v Cunningham*:¹³²

184. It is well established that fraud or dishonesty (and the same must go for the present tort) must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence: see *Kerr on Fraud and Mistake* 7th ed (1952), p 644; *Davy v Garrett* (1878) 7 Ch D 473, 489; *Bullivant v Attorney General for Victoria* [1901] AC 196; *Armitage v Nurse* [1998] Ch 241, 256. This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.

[...]

186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At

¹²⁹ *Eves v Le Main* (n 124); G Terrien, 10 *Commentaires du Droit Civil*, 1578 edn, at 321; Poingdestre, *Les Lois & Coutumes de l'Île de Jersey* (n 124) at 51–52.

¹³⁰ *Eves v Le Main* (n 124); cf *Boyd v Pickersgill & Le Cornu* (n 123).

¹³¹ [2003] 2 AC 1 at 184 and 186; see also *A, K, L v H* (n 29); and *CMC Holdings Ltd & Anor v Forster, RBC Trust Company (International) Limited & Ors* (n 1).

¹³² [2009] JLR 227] at [39]–[40].

trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved.

This approach was said to be supported by the Code of Conduct of the English Bar¹³³ and reflected in the decision of the House of Lords in *Medcalf v Mardell*,¹³⁴ the headnote to which reads:

the Code of Conduct of the Bar did not require that counsel should, when making allegations of fraud in pleadings and other documents, have before him ‘reasonably credible material’ in the form of evidence which was admissible in court to support the allegations; but that, at the preparatory stage, it was sufficient if the material before counsel was of such a character as to lead responsible counsel exercising an objective professional judgment to conclude that serious allegations could properly be based upon it.

While The Law Society of Jersey’s Code of Conduct had no equivalent of paragraph 704 the Court took the view that no Jersey advocate could have drafted an Order of Justice alleging dishonest assistance unless and until he had had a sight of reasonably credible material establishing a *prima facie* case of fraud. It follows that even where there is a suspicion of fraud, a plaintiff will be under an *empêchement* where the claim requires an allegation of fraud or dishonesty on the part of the defendant but the plaintiff is not in possession of facts sufficient to safely plead fraud, ie within the parameters laid down in *Three Rivers*.¹³⁵

b. *Empêchement de fait* and Article 57(3B) of the Trusts (Jersey) Law 1984

It is to be noted that while time does not begin to run against claims falling outside Article 57(1) of the Trusts (Jersey) Law 1984 that are brought by beneficiaries or enforcers against trustees while the plaintiff remains *empêche*,¹³⁶ where a claim is brought by trustee against a co-trustee or former trustee, the express wording of the statute appears not to afford a plaintiff trustee any such protection. What, if anything, turns on the omission of an equivalent to Article 57(2)(a)–(b) from Article 57(3A)? Read literally, the three-year prescription period appears to be absolute and begins to run from the date of the trustee’s appointment irrespective of the trustee’s state of knowledge, whether it has been provided with accounts or whether the trustee was *empêche* for some other reason.

The Royal Court has considered the relationship between *empêchement* and Article 57(3B) in the context of an application to amend pleadings. In *Walker & Delarose Trustee Limited v Egerton-Vernon & Ors*,¹³⁷ it was accepted by all parties, and the Court proceeded on the basis, that it was at least arguable that the doctrine of *empêchement de fait* was capable of

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¹³³ Para 704: ‘A barrister must not ... draft any statement of case, witness statement, affidavit, notice of appeal or other document containing: [...] (c) any allegation of fraud unless he has clear instructions to make such allegation and has before him reasonably credible material which as it stands establishes a *prima facie* case of fraud.’

¹³⁴ [2003] 1 AC 120, [2002] UKHL 27.

¹³⁵ *Nolan v Minerva Trust Co Ltd* (n 2).

¹³⁶ Trusts (Jersey) Law 1984, Art 57(2) and 57(3A).

¹³⁷ [2014] (1) JLR 182].

applying to claims subject to Article 57(3B)¹³⁸ even though on the facts in that case the trustee's argument on *empêchement* failed. In *Walker*, the plaintiff beneficiaries brought proceedings against the first three defendants for breach of trust. The first defendant (Egerton-Vernon) had been a trustee of the settlement from 1987 to 2009; the second defendant (Walker Representatives Ltd, 'Walker') had been a trustee from 1997 to December 2012; and the third defendant (Chown) had been a trustee from 2001 to 2007. Walker had been incorporated by the fourth defendant (Hawksford Trust Company Jersey Ltd, 'Hawksford'), a trust company of which Egerton-Vernon was also an employee. Egerton-Vernon and Chown were directors of Walker. Delarose Trustee Limited (Delarose) had been incorporated in December 2012 and appointed trustee. It had been joined to the proceedings brought by the plaintiff beneficiaries against the first to third defendants by consent in 2013 but only in respect of claims against Hawksford. Delarose applied for leave to re-re-amend the Order of Justice so as to allow it to make claims against the first, second and third defendants, the claims already made against them by the other plaintiffs. Egerton-Vernon and Chown opposed the application, on the basis that it was prescribed under Article 57(3B). Delarose sought to rely on the doctrine of *empêchement d'agir*, which it claimed had accrued to the 'office of the trustee' prior to its own incorporation in December 2012.

- 16-49** Delarose's application was allowed as against Walker but not as against Egerton-Vernon and Chown. Delarose's claims against them were subject to the three-year prescription period in Article 57(3B) and were therefore prescribed. While both Egerton-Vernon and Chown accepted that it was at least arguable that the doctrine of *empêchement* could apply to trust claims such as those which Delarose wished to make, Delarose could not, on the facts, rely on the doctrine of *empêchement d'agir* to defeat Egerton-Vernon's and Chown's prescription defence. Delarose had not been incorporated until December 2012, was therefore incapable of being *empêche* prior its own existence, by which time the prescription period had expired in respect of both Egerton-Vernon and Chown. It was not arguable that the 'office of the trustee' of the settlement had been *empêche*, and so the benefit of such *empêchement* did not accrue for the benefit of Delarose once incorporated and appointed as trustee.
- 16-50** It should also be noted that the Jersey Law Commission, in its 2008 consultation paper on prescription,¹³⁹ suggested that the result of the difference in drafting in Article 57 was that the doctrine of *empêchement d'agir* did not apply to claims for breach of trust by beneficiaries (owing to the provisions concerning knowledge and the provision of accounts) but might apply to claims for breach of trust other than by a beneficiary (ie a trustee), where the provisions as to when time would begin to run were not set out with such particularity on the basis that the 1984 Law was not to be construed as a codifying statute¹⁴⁰ and as such the principle of *empêchement d'agir* could still have an application. Indeed, the Commission was of the view that *empêchement* could, on the right facts, also apply to claims brought by beneficiaries notwithstanding Article 57(2)(a)–(b).¹⁴¹

¹³⁸ *ibid*, at 11.

¹³⁹ Jersey Law Commission, Prescription And Limitation (Consultation Paper No 1/2008/CP) at para 5.7.

¹⁴⁰ Trusts (Jersey) Law 1984, Art 1(2).

¹⁴¹ Citing G Dawes, *Laws of Guernsey* (Oxford, Hart, 2003) at 405 in relation to comparable provisions found in the now repealed Trusts (Guernsey) Law 1989. See the current provision in the Trusts (Guernsey) Law 2007, s 76, which makes no distinction between claims brought by beneficiaries and claims brought by trustees.

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While there is no authority directly on point, the authors consider there to be an argument that notwithstanding that Article 57(3B) does not expressly provide that time will begin to run until either the earlier of knowledge or the provision of accounts (which are not the only basis for there being a practical impediment in bringing a claim) equally Article 57(3B) does not expressly preclude the possibility of *empêchement* applying to a claim for breach of trust brought by trustees against a former or co-trustee. The decision in *Walker* leaves open the possibility of an *empêchement*, and the case is only authority for the proposition that a newly appointed trustee could not be said to be practically impeded from bringing a claim prior to the start of its own existence. Where, for example, a former or co-trustee has concealed a breach of trust so well as to ensure it remains undiscovered by an incoming trustee for more than three years, it would seem an unjust result, in the absence of any negligence on the part of the incoming trustee, to effectively reward such a defaulting trustee with a prescription defence. However, as was made clear in *Walker*, for *empêchement* to be engaged, it must be practically impossible to take action. If other remedies are available (in the hands of the beneficiaries) then that will tend to exclude the rationale for an *empêchement* affecting the trustee. In *Walker*, the plaintiff beneficiaries, or a trust company engaged by them, could have brought proceedings seeking the dismissal of the second defendant and the appointment of a new trustee with a view to bringing proceedings against the first and/or third defendants within the prescription period. It does not amount to a practical impossibility, which is the threshold to establish an *empêchement*, if the beneficiaries chose not to do until it is too late.

iii. The Longstop—Article 57(3C) of the Trusts (Jersey) Law 1984

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The doctrine of *empêchement de fait* operates to postpone the commencement of the prescription period while the *empêchement* remains operative and the plaintiff remains practically impeded from bringing a claim. At customary law, there is no temporal limit to the application of the doctrine with the potential for the plaintiff to remain *empêche* indefinitely. The Trusts (Amendment No 5) (Jersey) Law 2012 introduced what amounts to a temporal limit on the doctrine of *empêchement de fait*. Where a claim for breach of trust does not fall within Article 57(1) and subject to the provisions in Article 57(3), a beneficiary's claim against their trustee will be prescribed, irrespective of the operation of any *empêchement de fait*, after 21 years from the breach. For example, a person born into a class of beneficiaries, with locus to bring a claim for breach of trust who is born on the same day on which their trustee commits a negligent breach of trust and who remains ignorant of that breach of trust is potentially at liberty to bring a claim at any point within the next 39 years.¹⁴² It has been held, albeit obiter, that a fiduciary, such as a company director, who is not an express trustee but falls to be treated as one for the purposes of liability, is also to be treated as one for the purposes of prescription, including (where the breach of fiduciary duty is not fraudulent or dishonest) the application of Article 57(3C).¹⁴³ The longstop is only applicable to claims against 'category 1' express trustees and has no application to

¹⁴² Being the aggregate of the next 18 years while the minor remains under disability under Art 57(3) plus up to a further 21 years from the date the beneficiary ceases to be a minor.

¹⁴³ *CMC Holdings Ltd & Anor v Forster, RBC Trust Company (International) Limited & Ors* (n 1).

claims against dishonest assistants or knowing recipients, who are not trustees for the purposes of the 1984 Law.¹⁴⁴

C. Suspension of Prescription by Service of Proceedings

- 16-53** Effective service of originating process either within the jurisdiction or outside the jurisdiction (when leave is given to serve out) will suspend prescription from running.¹⁴⁵ While an application for leave is still to be determined, prescription will continue to run. Where the plaintiff fails to table his action it is deemed discontinued, prescription will begin to run again, and the plaintiff will have to serve a fresh form of originating process.¹⁴⁶ It is to be remembered that it is the actual point at which proceedings are served on the prospective defendant that prescription is halted. Where service depends upon the Viscount, prescription does not cease upon the Viscount's receipt of the proceedings that are required to be served.¹⁴⁷ Where a prescription deadline is imminent this should be notified to the Viscount in advance. The making of an application for substituted service will suspend prescription from running.¹⁴⁸ However, the Court is not permitted to order substituted service merely to defeat the imminent operation of prescription and may only consider those matters which are relevant to determining whether 'it is impracticable for any reason' to serve the documents personally on any person. Such matters include, eg whether that person's address is known, whether the documents can be served at his premises and whether they are likely to come to his notice.¹⁴⁹

D. Extension of the Prescription Period—Stand-still Agreements

- 16-54** While it appears to be possible for the parties to agree to extend or waive the three-year prescription period, such an agreement must be clear and unambiguous in its terms that that is in fact what has been agreed. Jersey does recognise the principle that a defendant may be estopped from pleading limitation as a defence in circumstances where he has given an undertaking to the plaintiff to so do in without prejudice negotiations (and not withdrawn such an undertaking with reasonable notice). However, care should be taken as regards the premises upon which such an undertaking is given. In *Racz v Perrier & Labesse*,¹⁵⁰ the plaintiff alleged professional negligence against the defendant. The prescription period expired on 31 May 1978. The parties began negotiations by correspondence, during which the

¹⁴⁴ *Bagus Investments Limited v Kastening* (n 10); *Peconic Industrial Development Limited v Lau Kwokfai* (n 21); *CMC Holdings Ltd & Anor v Forster, RBC Trust Company (International) Limited & Ors* (n 1).

¹⁴⁵ RCR 2004, r 6/4.

¹⁴⁶ *ibid*, r 6/4(2); *Racz v Perrier Labesse* 1979 JJ 158; *Virani v Virani* [2000] JLR 203].

¹⁴⁷ However, an *empêchement de fait* may arise in circumstances where the Viscount has been warned of an impending prescription date and the Viscount's department fails to serve the proceedings prior to its expiration. As personal service is required, within Jersey, to be effected by the Viscount, the plaintiff is practically impeded from ensuring service is effected any more quickly.

¹⁴⁸ RCR 2004, r 6/4(1); Service of Process Rules 1994, pt 4.

¹⁴⁹ *Harman v Higgins and Medeva Pharma Ltd* [1999] JLR N-5a]; *Paragon Group Ltd v Burnell* [1991] Ch 498, followed; *Jackson (née Jackson) v Jackson (née Hurst)* 1966 JJ 579 followed.

¹⁵⁰ 1979 JJ 151.

defendant indicated that it would not plead any point of prescription prior to 30 September 1978. The negotiations broke down during May and the plaintiff served its Order of Justice but omitted to table the action which resulted in the action being discontinued. Prescription had expired by the time fresh proceedings would have been brought. The Court determined that the defendant's undertaking was premised on negotiations proceeding beyond the end of May which did not occur.

VI. Prescription Periods in Miscellaneous Claims

A. Claims against Directors

Any proper consideration of prescription in Jersey trust litigation should include claims against company directors. Owing to the complexity of many modern trust structures and with long-established authority supporting the proposition that beneficiaries, generally, have no direct cause of action against the directors of a corporate trustee (or any company whose shares are held as assets of a trustee),¹⁵¹ it is not uncommon for claims to combine actions based upon trust law principles as well as claims existing at the corporate level.¹⁵² The appropriate prescription period applicable to claims against directors has vexed the Jersey Royal Court for some time and the present state of the law is unsatisfactory in terms of its certainty but also its coherence with the regime applicable to breach of trust claims discussed above. The source of the difficulty appears to be attributable to the composite nature of directors' duties,¹⁵³ the wildly disparate prescription periods applying to conceptually distinct but superficially similar *personal causes of action*¹⁵⁴ and a number of court decisions where the point has not been definitively determined but has been given obiter consideration.¹⁵⁵

In *Esteem*, it was held that the 10-year prescription period referred to by Le Geyt¹⁵⁶ was a general default prescription period at customary law which should be taken to apply to all personal actions and all actions concerning movables, save to the extent that they have already been held to be subject to a different period, either at customary law or by statute,

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¹⁵¹ *Alhamrani v Alhamrani* (n 2). We have discussed the difficulties of so-called 'dog-leg' claim in Jersey in Ch 12. Article 56 of the Trusts (Jersey) Law 1984 was repealed by the Trusts (Amendment No 4) (Jersey) Law 2006.

¹⁵² Claims in knowing receipt and dishonest assistance can arise from a breach of fiduciary duty other than a breach of trust; eg, primary liability may arise from a breach of a director's duties. The parameters of the doctrine of reflective loss in Jersey is uncertain; see *Freeman v Ansbacher Trustees (Jersey) Ltd* (n 16).

¹⁵³ Companies (Jersey) Law 1991, Art 47.

¹⁵⁴ Not ameliorated by piecemeal statutory interventions such as Article 57 of the Trusts (Jersey) Law 1984 creating self-contained statutory 'islands' in a sea of otherwise uncodified customary law principles applicable to the broadly defined '*actions personnelles mobiliere*': 'It is hard to find a consistent theme or principle which underlies the various prescriptive periods. But where there is no precedent, it is helpful to have regard to the nature of the action'; *In re Esteem Settlement* (n 22), per Bird DB at 252 and 257; however, such an approach would, on a basic dispute concerning a breach of an implied term of care and skill in a contract, yields the possibility of a 3-year period (tort) or a 10-year period (contract) on what is essentially the same factual matrix.

¹⁵⁵ *In the Matter of Northwind Yachts Limited* [2005] JLR 137; *Alhamrani v Alhamrani* (n 2).

¹⁵⁶ Le Geyt, *Priviléges, Loix et Coutumes de L'Isle de Jersey* (n 118) vol 3, titre 10, Art 9 at 64.

or that some other period is, by analogy, clearly more applicable.¹⁵⁷ A claim against a company director in Jersey law is an action *action personelle mobilière*.¹⁵⁸ The presumption in respect of claims against directors then is that a 10-year prescription period is the starting point, unless some other period is by analogy clearly more applicable.¹⁵⁹ It has been held that where a director fraudulently appropriates company property to himself, the property is fixed with a constructive trust in favour of the company that is entitled to trace funds to recover its proprietary interest in the misappropriated property.¹⁶⁰ Such a proprietary claim is not subject to the prescription period applicable to personal actions against a director. The prescription period for personal claims against directors of a company for breach of their fiduciary duties is not provided for under the Companies (Jersey) Law 1991 or the Trusts (Jersey) Law 1984. The directors of a Jersey company owe the following duties:

74 Duties of directors

- (1) A director, in exercising the director's powers and discharging the director's duties, shall—
 - (a) act honestly and in good faith with a view to the best interests of the company; and
 - (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

- 16-57** While the relationship between a director and his company is recognised as a fiduciary relationship (and therefore superficially being analogous with the duties of trustees),¹⁶¹ the expression 'fiduciary duty' is properly confined only to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties.¹⁶² Only Article 74(1)(a) of the Companies (Jersey) Law 1991 encompasses the director's fiduciary duties to the company. Put another way, while a director has fiduciary duties, not all the duties of a director are of a fiduciary character. The duty of a director under Article 74(1)(b) is to use proper skill and care in the discharge of his office. This is not a fiduciary duty and is more akin to a common law or tortious duty of care.¹⁶³ By statute, the prescription period applicable to tortious claims, including claims for breach of a duty of care and skill (ie negligence), is three years.¹⁶⁴ While a trustee's duties, like a director's, also include both fiduciary and non-fiduciary duties,¹⁶⁵ the distinction is not relevant for the purposes of prescription because the period for all claims against a trustee for breach of those duties is three years.
- 16-58** There is a collection of leading decisions on the principles governing prescription and directors' duties. Unfortunately two of the decisions seem actually to talk past one another in that *Alhamrani*¹⁶⁶ provides an answer to the question that was not in issue on the facts

¹⁵⁷ *In re Esteem Settlement* (n 22) at 257.

¹⁵⁸ *Alhamrani v Alhamrani* (n 2).

¹⁵⁹ *ibid* at [257].

¹⁶⁰ [2004] 1 BCCLC 131 at [82]; *In re Esteem Settlement* (n 22).

¹⁶¹ *Bristol & West Bldg Socy v Mothew* (n 71); *CMC Holdings Ltd & Anor v Forster, RBC Trust Company (International) Limited & Ors* (n 1).

¹⁶² *Bristol and West Building Society v Mothew* (n 71).

¹⁶³ *MacFirbhisigh (Ching) & Ors v C. I. Trustees and Executors Limited & Ors* [2015] JRC233, applying *Bristol & West Building Society v Mothew* (n 71), per Millett LJ at 710–15.

¹⁶⁴ Law Reform (Miscellaneous Provisions) (Jersey) Law 1960, Art 2.

¹⁶⁵ Trusts (Jersey) Law 1984, Art 21.

¹⁶⁶ [2007] JLR 44].

of the case: what prescription period applies to a breach of fiduciary duty; whereas *Northwinds*¹⁶⁷ provides an answer to the question of what prescription period applies to a breach of the duty of care and skill but concludes at a prescription period that is inconsistent with the statutory prescription period applying to tort claims.

Alhamrani was concerned with a breach of director's duty care, diligence and skill under Article 74(1)(b). The directors' fiduciary duties to act honestly and in good faith with a view to the best interests of the company under Article 74(1)(a) were not in issue. *Northwinds Yachts* concerned an allegation based upon a breach of loyalty that was held to be axiomatic with the duties of a fiduciary.¹⁶⁸ The Court held that the prescription period applying to a breach of trust by a trustee could not be lifted either directly or by analogy from Article 57 to apply to a breach of a director's fiduciary duty. The Court in *Northwinds Yachts* appeared mindful that were it to hold prescription to be analogous to Article 57 that would give rise to practical difficulties if the director owed contractual duties,¹⁶⁹ for which the prevailing prescription period is 10 years.¹⁷⁰ No consideration appears to have been given to making an analogy with the directors' tortious duties of care. However, the Court concluded the point was arguable and its comments in respect of prescription are acknowledged to have been obiter as the case was disposed of on an alternative basis to the breach of duty claims. The Royal Court in *Alhamrani*¹⁷¹ rejected the submission that the prescription period for actions based upon breach of a directors' statutory duty of care, diligence and skill was three years and concluded (obiter) that claims for breach of directors' duty, whether fiduciary (in the *Mothew*¹⁷² sense) or of care and skill, were *probably* prescribed after 10 years. This was on the basis that 10 years was the default prescription period for all personal actions (which included breaches of fiduciary duty) under Jersey customary law.¹⁷³ In the earlier decision of *Northwinds*, the Royal Court had rejected a submission that a director's duty of care, diligence and skill was a fiduciary duty in the special sense described in *Mothew* and therefore Article 57 of the Trusts (Jersey) Law 1984 (prescribing three years) was not analogous. On the basis that no other prescription period could be applied for breach of fiduciary duty by analogy, the issue fell to be determined in accordance with the default period identified in *Esteem*.¹⁷⁴ However, the decision in *Alhamrani* in respect of prescription is also expressly obiter. As *Alhamrani* is the later decision, it is often cited as the leading authority for the proposition that breaches of a directors' duties are prescribed after 10 years.

However, it has since been held by the Master that a claim for breach of duty by a director, which was identified as a breach of fiduciary duty in the special sense, as a ground for alleging an assumption of responsibility for the purposes of a negligent misstatement claim, was analogous to a breach of tortious duty of care, with the applicable prescription period

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¹⁶⁷ [2005 JLR 137].

¹⁶⁸ *Bristol & West Building Society v Mothew* (n 71). The passage at 715(iii) was approved in *MacFirbhisigh (Ching) & Ors v C. I. Trustees and Executors Limited & Ors* (n 163).

¹⁶⁹ This primarily being a concern for professional directors.

¹⁷⁰ *Boyd v Pickersgill & Le Cornu* (n 123) at 287; *Pickersgill v Riley* [2002 JLR 459] at 473.

¹⁷¹ [2007 JLR 44], affirming the earlier decision in *In the Matter of Northwind Yachts Limited* (n 155).

¹⁷² *Bristol & West Building Society v Mothew* [1996] All ER 698, per Millett LJ at 710–15.

¹⁷³ *In the Matter of Northwind Yachts Limited* (n 155), affirming *Re Esteem Settlement* (n 22) at [257].

¹⁷⁴ *Re Esteem Settlement* (n 22) at [258] and paragraphs quoted above.

therefore being three years.¹⁷⁵ Having made a ready distinction between a director's tortious duties and fiduciary duties, the decision in *Ching* further salami slices the duties of a director whereby some breaches of fiduciary duty fall to be considered as tortious.

- 16-61** An alternative way to consider a breach of directors' duties, having regard to the provenance of French customary law in Jersey's law of obligations, is as a species of délit, which in French law is similar to the common law concept of a tort though differing from an English tort in many substantive ways. *Délit* also has a different meaning in Jersey from the term in modern French law.¹⁷⁶ It has been held that, any civil action in Jersey, other than in contract and property, in which liability arose from a wrong committed by a person against whom relief was sought, was to be regarded as action founded on tort.¹⁷⁷ While the Royal Court and Court of Appeal has indicated that it is unsafe to assume that English tort law can be imported and applied wholesale into Jersey law,¹⁷⁸ if a breach of directors' duty is to be regarded as a species of tort, then it will be subject to a statutory prescription period of three years from the date of loss, subject to an *empêchement*.¹⁷⁹ If the quest is for some consistency between trustees and directors (which are the archetypal examples of fiduciaries in Jersey law), the result is not wildly different from the position that applies to trustees under Article 57(2) of the Trusts (Jersey) Law 1984 where the statutory prescription period is three years subject to a later date of knowledge or the production of the final trust accounts. What then where the breach of directors' duty is fraudulent? In respect of a fraudulent breach of trust, Article 57(1) ensures the cause of action is imprescriptible. However, despite earlier authority to the contrary,¹⁸⁰ the Jersey Law Commission has suggested that fraud per se does not stop time from running unless it also results in an *empêchement de fait*.¹⁸¹ If a fraudulent breach of directors' duty is only imprescriptible for fraud where the fraud is operative so as to result in a practical impediment to bringing a claim (such as concealment) then there is an inconsistency with the position of trustees that is not easy to justify as a matter of basic principle.
- 16-62** In the absence of a statutory regime rationalising the prescription period applicable to breaches of directors' duties, Jersey law currently appears to allow for different prescription periods depending on the nature of the particular duty breached. Where the duty that has been breached is for want of proper care and skill, the most appropriate prescription period is that for tortious claims, for which the applicable limitation period is three years.¹⁸² However, that is as the result of specific statutory intervention which the Court has held could not be read across as applying by analogy to breaches of fiduciary duty by a director because of the particular definition of various terms in the 1984 Law.¹⁸³ Where a director has breached his fiduciary duties the prescription period appears to be that applicable to

¹⁷⁵ *MacFirbhisigh (Ching) & Ors v C. I. Trustees and Executors Limited & Ors* (n 163).

¹⁷⁶ *JFSC v Black* (n 121).

¹⁷⁷ *ibid*, at [34]–[35].

¹⁷⁸ *Gale v Rockhampton Apartments Limited* [2007 JLR 27], [2007 JLR 332]; *JFSC v Black* (n 121).

¹⁷⁹ Law Reform (Miscellaneous Provisions) (Jersey) Law 1960, Art 2(1).

¹⁸⁰ *Perot v le Breton* (1891) 11 CR 29.

¹⁸¹ Jersey Law Commission, Prescription And Limitation (Consultation Paper No 1/2008/CP) at 5.11(e).

¹⁸² Trusts (Jersey) Law 1984, Art 57(2).

¹⁸³ *In the Matter of Northwind Yachts Limited* (n 155), namely the Trusts (Jersey) Law 1984, Art 2, which defines 'trustee'. The Court also declined to express a decision as it had not heard full argument and it was not necessary for its decision.

any other *action personnelle mobilière*, namely 10 years. However, 10 years has been settled on because at the time of *Northwind Yachts*, there was no analogous prescription period and so there is currently no reliable, properly rationalised statement as to what prescription period applies to a claim against a director for breach of fiduciary duty. It has recently been held that claims against a company director for breach of fiduciary duty are analogous to claims against an express trustee for breach of trust not falling within Article 57(1) of the Trusts (Jersey) Law 1984 and are therefore subject to the longstop limitation period in Article 57(3C) of the Trusts (Jersey) Law 1984.¹⁸⁴ This is certainly consistent with the earlier decision in *Bagus Invs Ltd v Kastening*,¹⁸⁵ which appears to supersede *Northwind Yachts* as to whether the term ‘trustee’ in Article 57(1) could be used consistent to cover all category 1 trustees (including company directors).

At the time of going to press, the latest word from Jersey on this issue is that of Master Thompson in *CMC Holdings Ltd & Anor v RBC Trust Company (International) Limited & Ors.*¹⁸⁶ In the course of a judgment on whether a preliminary issue should be heard on questions of limitation, the Master considered some of the arguments which it was contended should be decided at such a hearing. The plaintiffs were Kenyan companies of which the first defendant had been a director. It was alleged that he had breached his fiduciary duties to the companies, causing loss to the companies, by participating in a fraudulent scheme going back to the 1970s to divert monies from the companies to bank accounts in Jersey. The claim was pleaded both as breach of fiduciary duty and as breach of trust, by the director as constructive trustee. It was suggested on behalf of the director that claims against him would be subject to the 21-year longstop period in Article 57(3C). The second and third defendants, accused with dishonestly assisting in such breaches, contended that they should be in a better position than the first defendant from a limitation standpoint.

The Master adopted the approach that a claim against a company director for breach of fiduciary duty is a claim against a ‘category 1’ constructive trustee¹⁸⁷ and that therefore, as a matter of Jersey law, the provisions of Article 57 apply. The Court concluded that the claims against the director were imprescriptible, as they alleged fraud; and that the claims against the alleged dishonest assisters were prescribed after three years from the date when the plaintiffs had sufficient information for it to be proper to plead the dishonesty claim, following *Nolan v Minerva*. The Court rejected the suggestion that there was a distinction between dishonesty and fraud for the purposes of Article 57(1).

This conclusion is obiter. The Court was not required to reach a concluded view on these matters in deciding whether or not to order the trial of a preliminary issue. Yet it is the first time that the Royal Court has expressly applied the *Peconic* treatment of fiduciaries as trustees to Article 57 of the Trusts (Jersey) Law 1984, so as to conclude that the limitation

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¹⁸⁴ *CMC Holdings Ltd & Anor v Forster, RBC Trust Company (International) Limited & Ors* (n 1), although this part of the decision should be regarded as being *per incuriam*.

¹⁸⁵ [2010] JLR 355].

¹⁸⁶ [2016] JRC 149.

¹⁸⁷ *Bagus Invs Ltd v Kastening* (n 10), approving Lord Hoffmann’s description in *Peconic Ind Dev Ltd v Lau Kwok Fai* (n 21) at [19]–[23]: ‘persons who, without any express trust, have assumed fiduciary obligations in relation to the trust property; for example as purchaser on behalf of another, trustee de son tort, company director or agent holding the property for a trustee. I shall call them fiduciaries. They are treated in the same way as express trustees’.

period for breach of fiduciary duty claims against company directors and other ‘category 1’ constructive trustees is governed by Article 57 rather than by the customary law.

- 16-66** In the theoretically conceivable situation in which the fiduciary was not said to be dishonest but those who assisted him were, both would be able to rely on a three-year period but slightly different approaches would probably be taken to the impact of the plaintiffs’ knowledge, as the fiduciary would be able to rely on Article 57(2)(b) which refers purely to date of knowledge, while the dishonest assistants could rely on customary law *empêchement* which is arguably less favourable to plaintiffs as it imposes an objective test as to the inquiries the plaintiffs should reasonably have made in order to gain sufficient knowledge to bring a claim. Thus the assisters may still be in a slightly better position than the trustee, even though they are accused of dishonesty and the trustee/fiduciary is not.
- 16-67** In the authors’ view the conclusion reached by the Royal Court in *Alhamrani* that breaches of directors’ duty, whatever their character, are prescribed after 10 years, cannot safely be regarded as a definitive statement of the law. The position is likely to be more nuanced. There is recent, albeit obiter, authority that breaches of a director’s duties that are non-fiduciary in character are to be regarded as analogous to a tort and prescribed at three years and that breaches of fiduciary duty are to be regarded as analogous to the duties of a trustee and fall to be treated in an analogous fashion to a trustee under Article 57. It has been a consistent theme in the authorities that it is undesirable for reasons of practicality, for there to be more than one prescription period applicable to breaches of directors’ duty, particularly where the two alternatives (three years or 10 years) are so far apart. Such a divergence is recognised to have an unwelcome distorting effect on the way claims against directors are pleaded. The clear temptation in cases where more than three years has expired since the breach is to characterise every breach of duty of care as a breach of fiduciary duty or to cast duties of care and skill as implied contractual terms. The current state of uncertainty in the law, and the absence of statutory intervention, gives rise to a strong policy imperative for the Royal Court, where it can, to revisit the statements of the law in *Northwinds* and *Alhamrani*. There is a perception that a prescription period of 10 years for breaches of directors’ duty may be too long. Putting aside the issue of a prescription period applicable to a director’s breach of duty of care and skill, it is difficult to rationalise why, as a matter of principle, breaches of a trustee’s fiduciary duties should be prescribed seven years sooner than if the same acts or omissions were committed by a director. Were the Royal Court to find that breaches of directors’ fiduciary duties are analogous with those of a trustee, as was done in *CMC Holdings*, that would also align with the prevailing statutory prescription period for breach of tortious duties of care and skill and obviate the undesirable and impractical distortion of having divergent prescription periods. In the authors’ view, the three years applicable to breaches of a trustee’s duties are clearly more analogous.

B. Testamentary Dispositions into Trust

- 16-68** An action to set aside an *inter vivos* or testamentary disposition of movable property¹⁸⁸ into trust contrary to Jersey’s rules of forced heirship may be commenced within a year and a

¹⁸⁸ Including an action by an heir or surviving spouse to have a will reduced *ad legitimum modum* where the testator has exceeded their testamentary power.

day of the gift or death of the deceased respectively.¹⁸⁹ In exceptional circumstances this period may be extended.¹⁹⁰ That case predates the later authorities of *Boyd* and *Maynard* and, in the authors' view, the test to obtain an extension of time is likely to be similar, if not identical to that for *empêchment de fait*.

¹⁸⁹ *Robertson (née Cowan) v Lazard Trustee Co (C.I.) Ltd* [1994] JLR 103] at 111; Le Geyt (n 118) Titre VII, Des Testamens, Art 5 at 57. There is some divergence of opinion as to whether a *légitime* claim is prescribed after a year and day from the later date of the grant of probate and, in practice, distributions of the movable estate are usually postponed until a year and a day has passed since probate is granted.

¹⁹⁰ *Robertson (née Cowan) v Lazard Trustee Co (C.I.) Ltd* (n 189).

Appendix I

IN THE ROYAL COURT OF JERSEY
(SAMEDI DIVISION)

20[XX]/[XX]

BETWEEN

[]

Plaintiff(s)

and

[]

Defendant(s)

BILLET

Actioning the Defendant to:

Appear before the Royal Court sitting at The Royal Court House, Royal Square, St Helier, Jersey, on [day] [date] [month] 20[XX] at [time] to witness confirmation of the terms of the Order of Justice which is annexed hereto.

Service upon the Defendant *

On [day] [date] [month] 20[XX] at [time], The Viscount's Department personally served a copy of the Order of Justice dated [XX], together with a Summons to appear before the Royal Court, Royal Square, St Helier on [day] [date] [month] 20[XX] at [time] on [name of defendant] at [defendant's address for service].

AND/OR (to be included in cases where the has been an order granting leave to effect service out of the jurisdiction or substituted service)

Service upon the Defendant

On [day] [date] [month] 20[XX] at [time] [name of process server] served a copy of the Order of Justice dated [XX], together with a Summons to witness confirmation of the Order of Justice before the Royal Court, Royal Square, St Helier on [day] [date] [month] 20[XX] at [time] on [name of defendant] by:

- (1) [e.g. email to [address@email.com] timed [XX:XX] and by post to [postal address]]
- (2) [e.g. by delivering those documents to the said named defendant personally at [time and date]**]

Pursuant to the Act of Court dated [XX] granting [*substituted service*] and/or [*leave to serve out of the jurisdiction*] on [*name of defendant*] by those means.

..... (*signed*)

[*name*]

Advocate for the Plaintiffs

Dated the day of 20

[**Plaintiff's address for service**]

Notes:

* the Billet must contain a statement for each and every defendant sought to be convened to the proceedings as to how, where, when and by whom they were served. Where the Viscount has affected service, the Viscount's record of service should be enclosed with the Billet when it is lodged with the Judicial Greffe.

** Consult rules 5/7 and 5/8 RCR 2004 for how to effect personal service on an individual and a corporate entity respectively (practically relevant only where service is to be effected out of the jurisdiction by someone other than the Viscount).

Appendix II

IN THE ROYAL COURT OF JERSEY
(SAMEDI DIVISON)

201X/XX

BETWEEN

[]

Plaintiff(s)/Representor(s)

[Plaintiff's advocates]

[]

Defendant(s)/Respondent(s)

[Defendant's advocates]

[IN THE MATTER OF ...]

[IN THE MATTER OF ARTICLE ... TRUSTS (JERSEY) LAW 1984]

[PLAINTIFF/ DEFENDANT'S BILL OF COSTS]

Pursuant to order(s) dated:

- (1) DD/MM/YY (*judge*)
- (2) DD/MM/YY (*judge*) etc

FEE EARNERS: FACTOR A RATES

		Reference	Hourly Rate
[PARTNER - ADVOCATE]	[NAME]	[A]	[HOURLY RATE]
[SENIOR ASSOCIATE – QUALIFIED?]	[NAME]	[B]	[HOURLY RATE]
[ASSOCIATE - QUALIFIED?]	[NAME]	[C]	[HOURLY RATE]
[LEGAL ASSISTANT] etc.	[NAME]	[D]	[HOURLY RATE]

FACTOR B UPLIFT

ITEM 1 (INTERLOCUTORY ATTENDANCES)	XX%	
ITEM 2 (CONFERENCES)	XX%	<i>See paragraphs 1-135 for guidance on the appropriate Factor B uplifts</i>
ITEM 3 (ATTENDANCE AT TRIAL OR HEARING)	XX%	
ITEM 4 (PREPARATION)	XX%	
ITEM 5 (TAXATION)	XX%	

No	Date	Work Narrative	Time	Fee Earner	Hourly rate (£)	Factor B (%)	Factor B (£)	(Factor A + Factor B)	Capped Costs
1	DD-MM-YY	Initial consultation with client.	00:00:00	A	£XX	XX%	£XX	£XX	£XX
2	DD-MM-YY	Initial consultation with client <i>etc.</i>	00:00:00	A	£XX	XX%	£XX	£XX	£XX
			Total Time					Total costs	Total capped costs *
			00:00:00					£XX	£XX

	Grade & Name of fee earner	00:00:00	A	XX%	**
	Grade & Name of fee earner <i>etc.</i>	00:00:00	B	XX%	

Disbursements (itemised)	
Counsel (name, rank and chambers) <i>etc</i>	£XX
Total Disbursements	£XX

Less taxed off	£
Taxing Fee ***	£
Total allowable sum****	£

I certify that:-

- (1) the bill has been checked by Advocate [NAME];
- (2) The bill of costs is complete
- (3) To the best of my knowledge and belief the bill of costs is accurate; and
- (4) in relation to each and every item that the bill covers, the costs claimed herein do not exceed the costs which the receiving party are required to pay my firm;

[NAME OF ADVOCATE]

..... (signed) (dated)

* Total costs cannot exceed the total capped costs in accordance with the indemnity principle.

** This section is not mandatory but may be beneficial to include to show the actual distribution of work across what may otherwise appear from the bill of costs to be a large number of fee earners.

*** The Judicial Greffier's time to tax the bill of costs is currently fixed at £60 per half hour by Schedule 1 Stamp Duties & Fees (Jersey) Law 1998.

**** Being the total capped costs (or total costs if lower) *plus* the total disbursements *less* the sum taxed off *plus* the Greffier's taxing fee.

Appendix III

IN THE ROYAL COURT OF JERSEY
(SAMEDI DIVISON)

201X/XX

BETWEEN

[]

Plaintiff(s)/Representor(s)

[Plaintiff's advocates]

[]

Defendant(s)/Respondent(s)

[Defendant's advocates]

[IN THE MATTER OF ...]

[IN THE MATTER OF ARTICLE ... TRUSTS (JERSEY) LAW 1984]

[PLAINTIFF/ DEFENDANT'S] BILL OF COSTS

Pursuant to order(s) dated:

- (1) DD/MM/YY (*judge*)
- (2) DD/MM/YY (*judge*) etc

FEE EARNERS: FACTOR A RATES

		Initials	Hourly Rate
[PARTNER—ADVOCATE]	[NAME]	[AB]	[HOURLY RATE]
[SENIOR ASSOCIATE—QUALIFIED?]	[NAME]	[BC]	[HOURLY RATE]
[ASSOCIATE—QUALIFIED?]	[NAME]	[DE]	[HOURLY RATE]
[LEGAL ASSISTANT] etc.	[NAME]	[FG]	[HOURLY RATE]

FACTOR B UPLIFT

ITEM 1 (INTERLOCUTORY ATTENDANCES)	XX%	
ITEM 2 (CONFERENCES)	XX%	<i>See paragraphs 1–135</i>
ITEM 3 (ATTENDANCE AT TRIAL OR HEARING)	XX%	<i>for guidance on the</i>
ITEM 4 (PREPARATION)	XX%	<i>appropriate Factor B uplifts**</i>
ITEM 5 (TAXATION)	XX%	

No		Disbursements	Costs	Taxed Off
3(1) Interlocutory Attendance				
1	(i) Attendance(s) before [particularise] [Grade & initials of fee earner(s), time spent]			
2	(ii) Care & Conduct (X%)		£	£
3	(iii) Travelling and waiting time [Grade & initials of fee earner(s), time spent]		£	£
4	(iv) Court Stamps [particularise]	£		
5	(v) Other Disbursements e.g. counsel's fees [name, rank and chambers) etc]	£		£
Total Interlocutory Attendance Costs		£	£	£

3(2) Conferences				
6	(i) Attendance(s) in conference [particularise] [Grade & initials of fee earner(s), time spent]		£	£
7	(ii) Care & Conduct (X%)		£	£
8	(iii) Travelling and waiting time [Grade & initials of fee earner(s), time spent]		£	£
Total Conference Costs		£	£	£

3(3) Attendance at Trial or Hearing				
9	(i) Attendance(s) before [particularise] [Grade & initials of fee earner(s), time spent]		£	£
10	(ii) Care & Conduct (X%)		£	£
11	(iii) Travelling and waiting time [Grade & initials of fee earner(s), time spent]		£	£
12	(iv) Court Stamps [particularise]	£		
	Total Attendance At Trial/Hearing Costs	£	£	£

3(4) Preparation				
	Part A—Work done***			
14	(i) Attendances upon and correspondence with client [taking instructions to sue, defend, counterclaim, petition, cross-petition, appeal or oppose etc., attending upon and corresponding with Client; taking and preparing proofs of evidence] [Grade & initials of fee earner(s), time spent] [Telephone attendances] [Letters/email out]		£	£
15	(ii) Attendances upon witnesses [interviewing and corresponding with witnesses and potential witnesses, taking and preparing proofs of evidence and, where appropriate, arranging attendance at Court] [Grade & initials of fee earner(s), time spent] [Telephone attendances] [Letters/email out]		£	£

16	(iii) Attendances upon expert witnesses [obtaining and considering reports or advice from experts and plans, photographs and models; where appropriate arranging their attendance at Court]			
	[Grade & initials of fee earner(s), time spent]		£	£
	[Telephone attendances]		£	£
	[Letters/email out]		£	£
17	(iv) Attendance upon the Judicial Greffe			
	[Grade & initials of fee earner(s), time spent]		£	£
	[Telephone attendances]		£	£
	[Letters/email out]		£	£
18	(v) Attendance upon other parties [particularise]			
	[Grade & initials of fee earner(s), time spent]		£	£
	[Telephone attendances]		£	£
	[Letters/email out]		£	£
19	(vi) Discovery [perusing, considering or collating documents for affidavit or list of documents; attending to inspect or produce for inspection any documents required to be produced or inspected by order of the Court; considering and collating documents in response to questionnaires for further disclosure]			
	[Grade & initials of fee earner(s), time spent]		£	£
20	(vii) Documents [e.g. considering correspondence, pleadings, reports; preparing pleadings, affidavits, summons etc.]			
	[Grade & initials of fee earner(s), time spent]		£	£
21	(viii) Authorities [research, consideration and preparation of relevant cases, statutes, textbook extracts and others authorities]			
	[Grade & initials of fee earner(s), time spent]		£	£

22	(ix) Court Bundles [preparation, photocopying, paginating and compiling court bundles or other documents] [Grade & initials of fee earner(s), time spent]			
23	(x) Preparation for hearing(s) [particularised, review of authorities, skeleton arguments etc] [Grade & initials of fee earner(s), time spent]			
24	(xi) Negotiations [work done in connection with negotiations with a view to settlement;] [Grade & initials of fee earner(s), time spent]			
25	(xii) Disbursements e.g. counsel's fees [name, rank and chambers etc]	£		£
	Part A—Preparation Costs—Total	£	£	£
26	Part B—Care & Conduct		£	£
27	Part C—Travelling & Waiting Time [Grade & initials of fee earner(s), time spent]	£	£	£
	Total Preparation Costs	£	£	£

3(5) Taxation				
28	(i) Preparing bill of costs and responding to written objections			
	[Grade & initials of fee earner(s), time spent]		£	£
	[Costs draftsman's time]	£	£	£
29	(ii) Care & Conduct (%)		£	£
30	(iii) Travelling and waiting time		£	£
	[Grade & Name of fee earner(s), time spent]		£	£
			£	£
	Total Taxation Costs	£	£	£

Summary		
Total Interlocutory Attendance	£	
Total Conference Attendance	£	
Total Attendance at Trial/Hearing	£	
Total Preparation	£	
Total Taxation Costs	£	

Total Costs	£
Total Disbursements	£
Sub-Total	£
Costs taxed off	£
Sub-Total less costs taxed off	£
Taxing Fee **	£
Total allowable sum	£

I certify that:-

- (1) the bill has been checked by Advocate [NAME];
- (2) The bill of costs is complete
- (3) To the best of my knowledge and belief the bill of costs is accurate; and
- (4) in relation to each and every item that the bill covers, the costs claimed herein do not exceed the costs which the receiving party are required to pay my firm;

[NAME OF ADVOCATE]

..... (signed) (dated)

* Only proceedings commenced by Representation will have a title in this format.

** The basis for the Factor B uplift for care and conduct should be set out in writing, appended to the bill of costs.

***Detail of the work done and the dates undertaken should be set out in separate paragraphs for items of preparation.

**** The Judicial Greffier's time to tax the bill of costs is currently fixed at £60 per half hour by Schedule 1 Stamp Duties & Fees (Jersey) Law 1998.

This template for a bill of costs is put forward as an example and is not intended as a definitive or exhaustive statement of what a bill of costs should contain. This example should be read in conjunction with the Taxation Practice, Practice Directions and Rules pertaining to costs.

Appendix IV

IN THE ROYAL COURT OF JERSEY
(Samedi Division)

File No. 20[XX]/[XX]

Between

[]

and

Plaintiff(s)/Reprensator(s)

[]

Defendant(s)/Respondent(s)

[IN THE MATTER OF [XX]]

IN THE MATTER OF ARTICLE XX TRUSTS (JERSEY) LAW 1984]*

SUMMONS

TAKE NOTICE that [NAME OF PLAINTIFF(s) or REPRESENTOR(s)] of [address] has commenced proceedings *[against you NAME OF DEFENDANT]* OR *[to which you, NAME OF RESPONDENT, have been convened]* in the Royal Court of Jersey by process whereof a copy is annexed and that you are required to appear in the Royal Court of Jersey on [DATE IN WORDS] 20[XX] at [time]*** *[to defend the said proceedings]*; and in default of your so doing the said [Plaintiff(s)] or [Representor(s)] may proceed therein and judgment may be given in your absence.

You may appear personally or by an Advocate of the Royal Court of Jersey

..... (signed)

[name]

Advocate for the Plaintiff(s)/Representor(s)

Dated the day of 20

[Plaintiff/Respondent's address for service]

Notes:

- * The proceedings will only have a formal title if they are commenced by Representation, see paragraph 3-51
- ** Proceedings commenced by Representation may not strictly be against anyone (see Chapter 3). In non-hostile proceedings the alternative underlined formulation may be used.
- ***The return date for a summons pursuant to an order for leave to serve out is invariably the 2.30pm Friday sitting of the Samedi Division.

INDEX

- account *see* actions for an account; conflicts of interest, account of profits
actions for an account
 beneficiaries' entitlement 7-7
 claims for an account 7-3
 consequential relief 7-15
 court-ordered account 7-4–7-5
 documentation 7-10
 falsification 7-10
 income of trust 7-11–7-12
 misapplication of assets 7-14
 outgoings from trust 7-13
 proceedings in common form 7-6
 rescission of transactions 7-21
 settled accounts 7-8
 surcharges 7-9–7-10
 taking the account 7-9–7-15
 wilful default basis 7-16–7-20
 as breach of trust 7-18
 and common form 7-16, 7-19
 evidence for 7-17
 surcharge for 7-20
after the event (ATE) insurance
 advantages/disadvantages 1-156
 meaning/role 1-155
 premium recovery 1-100
ambiguity *see under* construction of trust documents
anti-terrorism finance offences *see* proceeds of crime, terrorist finance offences
anti-tipping off *see* proceeds of crime, disclosure/
 non-disclosure, restrictions on disclosure
applications for directions *see* directions,
 applications for
applications for variation of a trust *see* variation
 of a trust, applications for

backwards/reverse tracing *see under*
 proprietary remedies
Bailiff 1-15
bankers' book evidence, disclosure *see under*
 disclosure of information and documents, foreign
 proceedings, disclosure in support of
Beddoe proceedings *see under* directions,
 applications for
beneficiaries, derivative claims by
 action to be brought, dispute 12-80
 administrative action 12-77
 cause of action assignment 12-72
 circumstances 12-74
 derivative action 12-78

dog-leg claim 12-76
joinder of trustees, need for 12-81
other beneficiaries, need to be joined 12-82
 special circumstances 12-79
bill of costs *see under* taxation of costs
bona fides purchaser for value without notice defence
 see under proprietary remedies
breach of confidence *see under* constructive trusts
breach of contract, procuring as economic tort 12-71
breach of trust, personal accountability/liability
 account *see* actions for an account
 concurrence and release defences
 effect of 7-55–7-56
 estoppel 7-52
 key issues 7-51
 valid release requirements 7-53–7-54
 exculpatory provisions
 abridged duties 7-59
 anti-Bartlett clauses 7-60–7-64
 enlarging powers of trustees 7-58
 irreducible core of obligations 7-65
 key issues 7-57
 exemption clauses
 basic provisions 7-66
 fraud 7-69–7-70
 gross negligence 7-74
 interpretation of 7-71–7-74
 limiting words 7-72
 restrictive construction 7-71
 scope of 7-67–7-70
 third party liabilities 7-75–7-76
 wilful default/misconduct 7-67–7-68,
 7-72–7-73
 honest and reasonable acts *see* relieving trustee from personal liability *below*
personal liability *see* personal liability of trustee
procedure and parties
 commencement by Order of Justice 7-36
 joinder of beneficiaries 7-37–7-42
 locus standi 7-43–7-45
 trustees' claims 7-46
procurement as economic tort 12-72, 12-73
relieving trustee from personal liability
 discretionary power 7-79, 7-85–7-87
 honest and reasonable acts 7-80–7-84
 in practice 7-88
 reasonable conduct 7-83–7-84
 statutory jurisdiction 7-77
 unreasonable conduct 7-81–7-82

- remuneration of trustee 8-57
- statutory duties of trustees 7-1
- trustees' failures/omissions 7-2
- bribes *see under* constructive trusts
- Buckton categories *see under* directions, applications for, costs; removal of trustee, costs
- burden of proof *see* standard and burden of proof
- capacity issues *see under* Hague Trust Convention
- case management
 - directions *see under* directions, applications for efficient, timely, cost-effective objectives 1-91
 - court's powers 1-90
 - proceedings once served, applications to amend 1-94
- champerty *see* maintenance and champerty
- choice of laws *see* conflict of laws
- choose jugée* *see under* foreign judgments, recognition and enforcement
- civil procedure rules
 - common law features 1-23
 - litigation procedures 1-24
 - Royal Court Rules 2004 1-25
 - Rules of the Supreme Court 1999 1-26
- civil recovery of criminal property *see under* proceeds of crime
- comity principle *see under* foreign judgments, recognition and enforcement
- commencing proceedings 1-27
 - exchange of pleadings, timings for 1-89
 - Order of Justice *see* Order of Justice
 - pre-action conduct/pre-action disclosure 1-56
 - Representation *see* Representation
 - service *see* service of process
 - summons *see* summons
 - wrong form of process 1-55
 - see also* costs
- common cost orders 1-103
- compensation for loss *see under* conflicts of interest
- confidence *see* constructive trusts, breach of confidence
- confiscation orders *see under* proceeds of crime
- conflicts of duties
 - key issues 8-26
 - leading authority 8-27-8-32
 - meaning 8-25
 - potential conflicts 8-33-8-35
- conflicts of interest
 - account of profits
 - avoidance 8-75
 - burden of fiduciary 8-74
 - key issues 8-69
 - simple/complex cases 8-70-8-71
 - skill and effort 8-72-8-73
 - authorisation by
 - court 8-51
 - trust instrument 8-49
 - bribes and secret commissions 8-21, 8-23
 - compensation for loss
 - burden of proof 8-82
 - equitable compensation 8-80-8-81
- interest award 8-85
- quantum of award 8-84
- reflective loss 8-83
- concurrence of beneficiaries 8-50
- corporate entities 8-2
- defences 8-49-8-51
- disgorgement of profits 8-22
- dispositive powers 8-40-8-48
- exercise of powers
 - administrative powers 8-38-8-39
 - dispositive powers 8-40-8-48
 - fraud 8-37
 - key issues 8-36
- fair-dealing 8-15-8-16
- forfeiture 8-94-8-95
- local circumstances 8-6
- no-conflict rule 8-1, 8-7-8-12
 - exceptions 8-11
 - prophylactic quality 8-9-8-10
 - realistic approach 8-8
 - reasonable person test 8-7
 - trustee's obligations 8-12
- no-profit rule 8-1, 8-7, 8-17-8-18
- own benefit of trustee, use of property 8-24
- proprietary remedies
 - beneficiaries' rights 8-79
 - bribe/secret commission 8-76-8-77
 - stripping of right to charge 8-78
- regulated trust company businesses 8-3-8-4
- remedies 8-65-8-68
- removal 8-96
- remuneration *see* remuneration of trustee
- renewal of leases 8-20
- reported decisions 8-5
- rescission of transaction
 - entitlement to seek 8-86-8-89
 - directors of Jersey company, transactions entered into by 8-92-8-93
 - restitutio in integrum* 8-90, 8-91
 - scope 8-80
- bribes and secret commissions 8-21
- self-dealing 8-12, 8-13-8-14, 8-16
- unauthorised profits 8-17, 8-19
- conflict of laws
 - governing law
 - international mandatory rules of the forum 2-126-2-127
 - public policy 2-128
 - and mandatory rules 2-120
 - related areas of law, and mandatory rules 2-121-2-125
 - scope of 2-108-2-118
 - limits 2-119-2-128
 - jurisdiction* *see* jurisdiction
 - jurisdiction clauses* *see* jurisdiction clauses
 - key issues 2-2-2-3
 - meaning 2-1
 - proper law
 - choice of law
 - absence 2-105-2-106
 - implied 2-102-2-104

- determination 2-98–2-101
key issues 2-98
renvoi doctrine 2-107
proper law clause 2-100
trust convention *see* Hague Trust Convention
see also foreign judgments, recognition and enforcement
conspiracy, as an economic tort 12-70
construction of documents
 admissible evidence in interpretation 4-54–4-56
 ambiguity 4-52, 4-57–4-60
 applicable principles 4-52–4-53
 matrix of fact 4-55
 nature of deed/purpose of power 4-53
 objective meaning 4-54
 patent/latent ambiguities, tools for interpreting 4-57–4-60
 proceedings 4-51
testator's intention, extrinsic evidence 4-56
see also rectification of document
constructive trusts
 breach of confidence 6-17–6-21
 bribes and secret commissions 6-22
 categories 6-4–6-5
 corporate opportunities taken 6-21
 definitions/meaning 6-2–6-3
 fiduciary relationships 6-6–6-8
 fraudulent misrepresentation 6-28
 Hague Trust Convention 2-86–2-89
 key issues 6-1
 liability to account 6-24–6-27
 personal remedies 6-9
 prescription *see under* prescription
 proceeds' accounting 6-15–6-16
 property transferred to third party in breach of trust 6-23
 proprietary remedies 6-9–6-11, 13-10
 secret commissions 6-22
 theft of property 6-29
 true or institutional trustees 6-12–6-13
‘Type-1’ constructive trustees 6-5, 6-12–6-23
‘Type-2’ constructive 6-5, 6-24–6-30
unauthorised gains by fiduciary 6-14
unjust enrichment 6-30
 see also resulting trusts
contracts *see under* indemnity of trustee
corporate trustee director, liability
 claim against directors by beneficiaries 12-67
 current position 12-66
 dog-leg action 12-68
 key issues 12-63
 negligence claims by directors 12-69
 statutory provisions 12-64–12-65
costs
 after the event (ATE) insurance premium, recovery 1-100
 bill of costs *see under* taxation of costs
 cost orders 1-103
 directions
 proceedings for accounts/provision of information/distribution of fund (Buckton category 3) 3-60, 3-69
administration/execution of trust (Buckton category 2) 3-60, 3-68
Beddoe proceedings 3-48
beneficiaries' costs (Buckton category 1) 3-60, 3-62
 categories of proceedings 3-59–3-75
 key issues 3-56
 pre-emptive cost orders for beneficiaries 3-73–3-75
 production of accounts/information 3-70
 reasonably incurred 3-58
 relief from no-conflict/no-profit rules
 consequences proceedings 3-71
 removal of trustees, proceedings 3-72
 statutory provisions 3-57
 trustee neutrality 3-63–3-67
disclosure *see under* disclosure of information and documents
discretion of Court 1-101–102
fairness/reasonableness 1-107
foreign lawyers, recovering cost 1-99
funding *see* funding of litigation
incidental to proceedings 1-98–1-100
indemnity of trustee *see under* indemnity of trustee
key issues/provisions 1-95–96
non-party cost orders *see* non-party cost orders
privacy orders, leave to use material 3-152
proceedings against trust/trust property *see under* indemnity of trustee
 proportionality 1-97
rectification of documents 4-50
removal of trustee *see under* removal of trustee
rescission for mistake rules 4-50
taxation *see* taxation of costs
variation of a trust, applications for 3-112
 see also commencing proceedings
criminal conduct *see under* proceeds of crime
criminal property *see under* proceeds of crime
customary law 1-4–1-5

data protection law *see under* disclosure of information and documents *see on* demand
derivative claims by beneficiaries *see* beneficiaries, derivative claims by
désastre declaration, effect 11-50
directions, applications for
 administration/trustee orders 3-12–3-13, 3-17
 Beddoe proceedings
 applications 3-11, 3-41
 co- or former/successor trustee 3-43
 company owned by trust 3-42
 costs 3-48
 court hearing 3-47
 indemnity of trustee 11-31, 11-32
 outcome 3-49
 parties concerned 3-45–3-46
 principle 3-39–3-40
 procedure 3-44
 beneficiaries/persons having connection with trust 3-14–3-15
 case management 1-92–1-93
 classification of applications 3-9

- commencing proceedings 3-50–3-51
 construction declarations 3-8
 construction disputes and questions of law 3-16
 costs *see* costs, directions
 distributions
 creditors/trustee's indemnity, prejudice
 to 3-36–3-38
 declaratory relief 3-34
 from trust fund 3-33
 indemnity right 3-32
 evidence 3-54
 exercise/determination of powers 3-19–3-21
 inherent/mandatory jurisdiction 3-6–3-7
 key issues 3-5
 locus to make application/seek order 3-11
 momentous decision
 meaning 3-22
 surrender of discretion 3-23–3-27
 parties 3-5 *see*
 power after the event, challenges to
 exercise 3-30–3-31
 private hearings 3-4, 3-10
 procedure 3-50–3-55
 representation orders 3-53
 supervisory jurisdiction 3-6–3-10
 surrender of discretion
 by trustee 3-28–3-29
 momentous decision 3-23–3-27
 taxation of costs *see* taxation of costs, directions
 transactions approval 3-18
 trust disputes 3-1–3-4
 directors, claims against *see under* prescription
 disclosure of information and documents
 applicable principles 5-11–5-17
 applications procedure 5-68
 categories of documents 5-18
 charges/fees/remuneration 5-30
 company documents 5-51–5-58
 context of request/demand 5-9
 costs
 of demand 5-73–74
 foreign proceedings, disclosure in
 support of 5-128
 data protection law 5-69
 deliberations of trustees 5-32–5-35
 direction of Court 5-10
 discretionary beneficiaries 5-59–5-61
 foreign proceedings, disclosure in support of
 bankers' book evidence 5-130
 compellability of witnesses 5-120
 completion of testimony 5-126
 contents of request 5-106–5-107
 costs 5-128
 Court's power to render international
 assistance 5-131–5-134
 disclosable documents 5-112
 examination proceedings 5-118
 exclusion of witnesses 5-117
 foreign counsel's eligibility to examine 5-119
 form/execution of request 5-109
 issuing request to the Court 5-105
 key issues 5-102
 the Service of Process and Taking of Evidence
 (Jersey) Law 1960
 and Convention obligations 5-103
 requirements 5-104
 the Bankers' Books Evidence (Jersey) Law
 1986 5-130
 objections to answering questions 5-121
 open/closed proceedings 5-115
 order of witnesses 5-117
 presiding officer 5-116
 privacy/gagging orders 5-125
 proceedings at examination 5-118
 record of service 5-114
 recording/transcribing evidence 5-123–5-124
 representation of witness 5-122
 signing/transmission of deposition 5-127
 summoning the witness 5-113
 types/extent of request 5-110–5-111
 witnesses' allowances/expenses 5-129
 foreign revenue authorities
 challenges to notices 5-88–5-90
 information requests 5-84–5-86
 notices from comptroller 5-87
 scope of TIEA 5-82–5-83
 Tax Information Exchange Agreements
 (TIEAs) 5-81
 former beneficiaries 5-66–5-67
 hostile proceedings
 Art 51 proceedings 5-101
 course of proceedings, discovery
 during 5-97–5-98
 Court's inherent supervisory jurisdiction 5-99
 former trustees and non-parties, discovery
 against 5-100
 key issues 5-91
Norwich Pharmacal order
 considerations 5-94
 jurisdiction observations 5-95
 procedure to obtain 5-96
 pre-action discovery 5-92
 internal trust correspondence/records 5-36
 judicial discretion 5-11, 5-14
 key issues 5-1–5-2
 legal advice/communications 5-46–5-49
 hostile proceedings context 5-50
 letters/memoranda of wishes 5-37–5-45
 locus to demand 5-59–5-67
 minor beneficiaries 5-65
 outgoing trustees 5-80
 procedure in applications 5-68
 proper law 5-72
 remote expectations, beneficiaries with 5-62
 remote fixed interest, beneficiaries with 5-63–5-64
 restrictions in trust instrument 5-70–5-71
 settlors/protectors 5-75–5-79
 statutory provision 5-13, 5-15–5-16
 trust accounts 5-20–5-24
 entitlements 5-23–5-24
 fundamental duty 5-20
 non-disclosure reasons 5-21–5-22

- trust instruments 5-25–5-29
redaction issues 5-26–5-29
scope of discretion 5-25
unascertained beneficiaries 5-62
voluntary disclosure
basic issues 5-3
discretionary beneficiaries 5-5–5-7
legal proceedings 5-4
entitlement to disclosure as of right 5-8
disclosure/non-disclosure *see under* proceeds of crime
dishonest assistance
attribution of wrongdoing as defence 12-57
basic requirements 12-13–12-14
breach of trust requirement
key issues 12-18
trust exoneration/exemption clauses 12-21
types of breach 12-19–12-20
contribution claim 12-58–12-59
defences 12-56
distributions to non-entitled
beneficiaries 12-42–12-46
doubtful transactions 12-32–12-37
ignorance of the law 12-47–12-48
ignorance of the trust 12-49
illegality defence 12-57
improper/unauthorised investments 12-38–12-41
inducement/assistance requirement 12-22–12-24
locus for claim 12-16
measure of liability
key issues 12-53
protection of agent by application to
Court 12-54
vicarious liability of partners 12-55
objective test for dishonesty 12-25–12-26
pleading dishonesty 12-50
prescription *see under* prescription, constructive
trusts
protection of agent by application to Court 12-54
proving dishonesty 12-51–12-52
subjective/objective elements 12-27–12-31
trust requirement 12-17
vicarious liability of partners 12-55
documents *see* disclosure of information and
documents; rectification of document
- economic torts
breach of contract, procuring 12-71
breach of trust/dishonest assistance
procurement 12-72, 12-73
conspiracy 12-70
unlawful means/intimidation, causing
loss by 12-173
- empêchement* *see under* prescription
equity 1-10–12
exchange of pleadings, timings for 1-89
- fair-dealing *see under* conflicts of interest;
prescription, constructive trusts
firewall *see under* foreign judgments, recognition and
enforcement
forced heirship *see under* Hague Trust Convention
- foreign judgments, recognition and enforcement
action by Order of Justice 15-10
chose jugée 15-28–15-30
comity principle 15-6–15-8
customary law 15-6–15-10
debt/definite sum of money, judgment for 15-13
defences at customary law 15-35–15-38
distinction between recognition and
enforcement 15-4–15-5
final and conclusive judgment
requirement 15-14–15-16, 15-47, 15-50
firewall
efficacy 15-87–15-88
matrimonial proceedings *see* matrimonial
proceedings *below*
post-2012 position 15-83–15-86
practical effect 15-74–15-75
pre-2012 position 15-76–15-82
statutory provision 15-73–15-75
foreign court treated as having jurisdiction
agreement to submit to
jurisdiction 15-25–15-27
bases for 15-17–15-18
challenges to jurisdiction of foreign
court 15-23–15-24
entering appearance in proceedings 15-22
presence *see* presence in foreign jurisdiction
below
geographical applications 15-48
in personam judgments
chose jugée 15-28–15-30
customary law 15-9
enforcement 15-11
key issues 15-12
purposes other than enforcement
15-28–15-33
in rem judgments at customary law 15-39–15-43
jurisdictions
statutory provisions 15-51–15-60
submission to, trustee's decision 15-89–15-98
key issues 15-1–15-3
matrimonial proceedings 15-72, 15-75
pre-2012 position 15-77–15-80
submission to foreign jurisdiction, trustee's
decision 15-90, 15-93
presence in foreign jurisdiction 15-19–15-21
corporations 15-20–15-21

- foreign revenue authorities *see under* disclosure of information and documents
forfeiture *see under* conflicts of interest
forum conveniens/non-conveniens see under jurisdiction
frauds, recovery of property *see under* prescription
fraudulent misrepresentation *see under* constructive trusts
funding of litigation 1-145
lawyer funding arrangements 1-148
maintenance *see* maintenance and champerty
non-party costs *see* non-party cost orders
third parties *see* third party litigation funding
- governing law *see under* conflict of laws
Greffier 1-19-1-21
- Hague Trust Convention
beneficiary's capacity 2-93
capacity issues 2-91-2-93
constructive trusts 2-86-2-89
customary law 2-72
effect in states not recognising trusts 2-74
evidenced in writing 2-83
explanatory report 2-67
forced heirship 2-96-2-97
incorporation into domestic law 2-69-2-71
preliminary matters excluded 2-90-2-97
recognition of trusts 2-73
resulting trusts 2-85
settlor's capacity 2-91
signatories/ratification 2-65-2-66
temporal application 2-75
trustee's capacity 2-92
types of trust 2-76-2-82
vesting property in trustee 2-94-2-95
voluntarily created trusts 2-84-2-89
see also conflict of laws
- hostile proceedings *see under* disclosure of information and documents
- impounding a beneficial interest/trust interest
see under indemnity of trustee
in personam judgments *see under* foreign judgments, recognition and enforcement
indemnity basis *see under* taxation of costs
indemnity of trustee
beneficiaries' indemnity 11-8
constructive trustees 11-7
contracts
analogous to a company 11-18
construction of 11-19
key issues 11-17
costs 11-23
trust proceedings 11-24
fiscal liabilities 11-21
former trustee 11-4
general principles 11-3-11-5
impounding a beneficial interest
basic provision 12-2-12-3, 12-6
beneficiaries' knowledge 12-7
- co-trustee also a beneficiary 12-12
difficulties 12-4
discretion of Court 12-8
subrogation analogy 12-5
impounding a trust interest 12-9-12-11
circumstances 12-9, 12-11
principle 12-10
incoming trustees' costs 11-22
insolvency
corporate trustee's winding up 11-51
costs and expenses 11-60
désastre declaration, effect 11-50
key issues 11-47
test for 11-49
trust property and administration of trust,
effect on 11-61-11-64
trustee insolvency 11-48
trusteeship and trust fund, effect on
11-52-11-59
- insolvent trusts
effect on indemnity 11-73
key issues 11-65
office holder 11-71-11-72
test for 11-66-11-68
third party claims against beneficiaries
11-75-11-76
unsecured creditors, priority between 11-74
winding up 11-69-11-70
- key issues 11-1
limited liability of Jersey trustees
Art 32 meaning and effect
(1) and (2), relationship 11-16
(1)(a) 11-13-11-14
(1)(b) 11-15
basic position 11-10-11-12
mechanism for satisfaction
entitlements 11-41
equitable lien 11-40, 11-42
omission of 'properly' 11-3
proceedings against trust/trust property, costs
11-25-11-32
Beddoe application 11-31, 11-32
circumstances 11-25
effect 11-26
key principle 11-27
neutrality of trustee 11-28-11-29
outside funding 11-30
proprietary claim 11-32
reason for 11-5
- third parties
involved in administration 11-9
liability to 11-2
third party creditors
exhausting of trust fund as possibility 11-44
rights 11-43
trustee liability limited 11-45
trustee without limited liability 11-46
- third party proceedings, costs
Art 32 and costs 11-39
key issues 11-33
role of trustee 11-34-11-35

- trustee and beneficiaries, position
 between 11-38
- trustee and third party, position between
 11-36–11-37
- tortious liabilities 11-20
- void/voidable trusts 11-7
- information *see* disclosure of information and documents
- innocent contributors *see under* proprietary remedies
- innocent volunteers *see under* prescription, constructive trusts
- insolvency/insolvent trusts *see under* indemnity of trustee
- interdicts *see under* minors and interdicts
- interlocutory summonses *see under* summons
- intimidation, causing loss by as economic tort 12-173
- Jersey
- crown dependency 1-2
 - history of jurisdiction 1-1
 - international/EU law 1-3
- Judicial Greffier *see* Greffier
- Jurats 1-16
- jurisdiction
- contest jurisdiction, applications
 grounds for 2-39
 time limits 2-40
 - forum conveniens*
 as evaluation exercise 2-29
 and jurisdictional gateways 2-30–2-31
 key issue 2-26
 relevant principles 2-27–2-29
 - forum non-conveniens*
 foreign jurisdiction availability 2-43
 grounds for stay application 2-41
 parallel proceedings, as basis for stay (*lis alibi pendens*) 2-46
 prima facie case for stay, rebuttal 2-44–2-45
 stay applications 2-41–2-45
 - gateways 2-8
 - proof *see* standard and burden of proof
 - service out of jurisdiction
 account or other relief, claim for 2-15–2-18
 affidavit in support of application to 2-34–2-35
 - constructive trustees, liability and claims 2-14–2-18
 - constructive trusts 2-12–2-13
 - disputes under trust 2-37
 - gateways 2-8
 - injunctive relief 2-9
 - jurisdiction clauses 2-60
 - limitation defence, loss of 2-38
 - money had and received, claim for 2-14
 - necessary/proper parties 2-10
 - procedure for applications to 2-32–2-33, 2-36
 - processes 2-7
 - trusts 2-11–2-13
 - service within jurisdiction
 automatic jurisdiction 2-4
- conferred by other means 2-5
- submission to foreign court, consequences 2-6
- stay applications *see under* *forum non-conveniens above*
- submission to *see under* foreign judgments, recognition and enforcement
- jurisdiction clauses
- changing judicial forum, powers in trust instrument 2-64
 - claims against trust, relevance 2-63
 - construction/formulation 2-48–2-50
 - exclusive clauses
 contractual agreements, distinctions 2-55–2-59
 - non-exclusive clauses, distinctions 2-51
 - forum of/for administration 2-49–2-50, 2-52–2-54
 - key issues 2-47
 - scope of 2-52–2-54
 - serve-out applications, relevance 2-60–2-62
- knowing receipt *see under* wrongful receipt; prescription, constructive trusts
- knowledge and notice *see under* wrongful receipt
- laches *see under* prescription
- Law Officers 1-22
- lawyer funding arrangements 1-148
- leases' renewal *see* conflicts of interest, renewal of leases 8-20
- legal profession 1-6
- legal system
- Bailiff 1-15
 - civil procedure *see* civil procedure rules
 - customary law 1-4–1-5
 - equity 1-10–1-12
 - Greffier 1-19–21
 - Jurats 1-16
 - Law Officers 1-22
 - legal profession 1-6
 - precedent 1-7–1-9
 - Royal Court of Jersey 1-13–1-14
 - Viscount 1-17–1-18
- limitation concept *see under* prescription
- limited liability of Jersey trustees *see under* indemnity of trustee
- litigation costs *see* costs
- maintenance and champerty 1-146–1-147
- champertous arrangement's consequences 1-154
- mandatory rules *see under* conflict of laws, governing law
- matrimonial proceedings *see under* foreign judgments, recognition and enforcement
- minor beneficiaries *see under* disclosure of information and documents
- minors and interdicts *see under* prescription; variation of a trust, applications for
- miscellaneous claims against third parties 12-1
- mistake *see* rectification of document; rescission for mistake
- mistake rules

- mixed substitutions *see under* proprietary remedies
 momentous decision *see under* directions,
 applications for
- non-party cost orders
 ancillary orders 1-164–1-165
 applications to trial judge 1-162
 effect of order 1-168
 joinder applications 1-166, 1-167
 points to be considered 1-166–1-167
 principles 1-159, 1-160
 procedure for seeking 1-161
 provisions 1-157–1-158
 summary procedure 1-163
see also funding of litigation
- Norwich Pharmacal* order *see under* disclosure of information and documents, hostile proceedings
- Order of Justice
 customary rule 1-29
 failure to table 1-36
 function 1-28
 tabling the action 1-34–1-35
 timing of commencement 1-31–1-33
 types of proceedings 1-30
- personal liability of trustee
 for asset managers/agents/companies 7-50
 basic rule 7-22
 causation and loss 7-24–7-26
 co-trustees
 contribution assessment 7-49
 liability 7-47–7-48
 companies in which trust has an interest, reflective loss 7-29
 compound interest 7-34
 interest awards 7-30–7-33
 protectors' personal liability 7-35
 recoverable loss 7-23
 setting off losses against gains 7-28
 valuation of loss 7-27
see also breach of trust, personal accountability/liability
- power after the event *see under* directions,
 applications for
- precedent 1-7–1-9
- prescription
 accrual date 16-17–16-18
 age of majority 16-40
 basic concept 16-1
 breach of trust provision 16-11
 claims for 16-12–16-13
 co-trustees' claims 16-22
 constructive trusts
 categories 16-26
 dishonest assistants/assistance 12-60–12-62,
 16-30–16-32
 fair-dealing rules, breaches 16-35–16-36
 inconsistent dealing with property 16-28
 innocent volunteers 16-33
 knowing recipients/receipt 16-29
- no-profit rules, breaches 16-34
 self-dealing rules, breaches 16-35–16-36
 trustees de son tort 16-27
- contribution between trustees 16-23–16-24
 directors, claims against 16-55–16-67
 composite nature of duties and disparate
 prescription periods 16-55, 16-62,
 16-67
 current position 16-63–16-65
délit concept 16-61
 dishonest assistance 16-66
 fiduciary duty 16-57–16-60
 10 year period 16-56
 disability cases 16-38
empêchement d'agir 16-41
empêchement de droit 16-42
empêchement de fait 16-43
 amend proceedings, application to
 16-47–16-51
 fraud and concealment 16-44–16-46
 longstop provision 16-52
 extension 16-37
 stand-still agreements 16-54
 final accounts' delivery 16-19–16-20
 frauds, recovery of property
 fraud, meanings 16-6–16-8
 key issues 16-2–16-3
 laches 16-10
 locus 16-4
 possession/control/conversion 16-9
 trustees 16-5
 interdict 16-38, 16-39
 knowledge date 16-21
 laches
 applicability 16-25
 frauds, recovery of property 16-10
 limitation concept 16-1
 minor and interdicts 16-38, 16-39–40
 new trustees' claims 16-22
 postponement 16-37
 recovery of property 16-14–16-16
 stand-still agreements 16-54
 suspension
 by service of proceedings 16-53
 statutory provision 16-38–16-39
 testamentary dispositions into trust 16-68
- privacy orders
 burden to obtain 3-115
 consequences 3-121–3-123
 contested applications 3-120
 contribution to justice 3-117
 disclosure duty 3-118
 ECHR compatibility 3-119
 exclusions from Court 3-114
 factors to be considered 3-116–3-120
 implied undertaking, material protected
 3-124–3-127
 key issues 3-113
 leave to use material
 costs 3-152
 factors for Court 3-151

- key issues 3-140–3-141
material able to be released 3-146–3-150
procedure 3-142–3-145
principled basis 3-116
principles of privacy 3-114–3-115
privileged material
‘in whose hand’ 3-137
joint and common interest privilege
3-130–3-136
key issues 3-128
nature of material 3-129
use outside private proceedings 3-139
waiver of privilege 3-138
privileged material *see under* privacy orders
proceedings against trust/trust property, costs
see under indemnity of trustee
proceeds of crime
acquisition/use/control/possession 14-6
adequate consideration defence 14-14
arrangements that facilitate acquisition/use/
control/possession 14-15
prohibited arrangements 14-16–14-17
civil recovery of criminal property
Civil Asset Recovery Fund 14-70
compelling to give evidence 14-62
external civil asset recovery order 14-63,
14-65–14-69
legislative regime 14-59
property restraint order 14-63–14-64
tainted property 14-63
taking of evidence/disclosure of documents
14-60–14-61
confiscation orders 14-41–14-42
criminal conduct 14-8–14-13
criminal property 14-7
disclosure/non-disclosure
duties of disclosure 14-36–14-38
key issues 14-35
restrictions on disclosure 14-39–14-40
guidance from JFSC 14-4
key issues 14-1
knowledge or suspicion 14-12–14-13
money-laundering offences
criminal legislation 14-5
defences 14-20–14-21
informal freeze 14-22
terms of offence 14-18–14-19
primary legislation 14-2
prohibited arrangements 14-16–14-17
saisie judiciaire
basis for granting 14-47–14-48
consequences/duration 14-49
discharge/variation 14-55–14-58
and discretionary trusts 14-50–14-54
effect 14-43
human rights 14-54
locus to seek 14-45
realisable property 14-46
statutory regime 14-44
secondary legislation 14-3
tax-related offences 14-9–14-11
- terrorist finance offences
basic provisions 14-29
dealing with terrorist property 14-33
definition of terrorism 14-24–14-25
key issues 14-23
necessary precautions 14-34
proscribed organisations 14-28
providing property/financial services
for 14-32
reasonable suspicion 14-31
terrorist entity 14-27
terrorist property 14-26
use/possession of property for 14-30
proof *see* standard and burden of proof
proper law
disclosure of information and documents 5-72
sham trusts 4-19
see also under conflict of laws
proprietary remedies
backwards/reverse tracing
basic concept 13-86–13-87
debt/loan repayment 13-92–13-93
lowest intermediate balance 13-88
overdrawn account, payments into
13-89–13-90
subjective/objective intention 13-91
bona fides purchaser for value without notice
defence
basic provision 13-94–13-96
doubtful claims on property,
notice of 13-100
good faith/bona fides, purchase in 13-98
governing law 13-105
multiple trusts, notice of 13-101–13-102
purchasers without notice etc 13-104
time of transfer of legal estate, no notice at
13-103
value, purchase for 13-97
without notice issues 13-99–13-104
breach of trust 13-9
conflicts of interest *see under* conflicts of interest
constructive trusts, proprietary 13-10
equity’s darling *see* bona fides purchaser for value
without notice defence *above*
evidence, and trustee 13-11–13-12
following assets 13-2, 13-3
forms of relief 13-24
improvements to traceable assets
analogy to mixed substitution in bank
account 13-73
assets in another trust 13-76–13-79
forms of expenditure 13-69
increase in value 13-70
innocent recipient’s land/chattels 13-75
key issues 13-68
tracing as exercise 13-72
trustee/wrongdoer’s own assets 13-74
unjust enrichment 13-71
innocent contributors
and no-profit rule 13-34
remedy between 13-31–13-33

- mixed substitutions, acquired assets, tracing into dissipation
 by trustee 13-61–13-62
 cherry-picking to maximise recovery 13-63–13-66
 key issues 13-60
 innocent contributors/*Diplock* recipient, proportionate share claim 13-67
 money withdrawn from mixed bank account 13-54–13-58
 proportionate share of assets 13-59
 purchase with credit secured on asset 13-51
 scenarios 13-49–13-50
 trust money used to discharge credit 13-52–13-53
 mixed substitutions in bank account circumstances 13-37–13-38
 first-in, first-out rule 13-41 unfairness modified 13-43–13-44
 innocent contributors/donees/recipients, claims between 13-48
 key issues 13-35–13-36
 lowest immediate balance 3-45–13-7
 running account 13-40 trustee/other wrongdoer, claim against 13-43–13-44
 simple case 13-39
 original trust asset, claims against 13-17
 preconditions 13-7
 purchase without notice 13-3
 purchasers with notice and volunteers 13-26–13-29
 reinstatement of misappropriated funds 13-25
 shares in companies, mixtures and identification 13-80–13-81
 terminology 13-2–13-6
 tracing assets acquired assets *see* mixed substitutions, acquired assets, tracing into *above* backwards/reverse tracing *see* backwards/reverse tracing *above* bank accounts 13-15 clean substitution 13-6, 13-18 improvements *see* improvements to traceable assets *above* income/interest derived from asset 13-22 into Jersey land 13-13 in Jersey 13-1 locus standi 13-23 misappropriated money, loan between donee and company 13-30 mixed substitution 13-6, 13-19–13-20 subordination of trustee's interest 13-21 recovery 13-5 terminology 13-4 trust to which property is subject 13-8 trustees, remedies against 13-16–13-25 untraceable assets backwards/reverse tracing *see* backwards/reverse tracing *above* credit facility assistance in purchase 13-85 key issues 13-82 overdrawn bank accounts 13-83–13-84 protectors' personal liability *see under* personal liability of trustee Quistclose trust *see under* resulting trusts rectification of document bars to 4-46 basis of remedy 4-37–4-38 costs 4-50 delay as bar 4-48–4-49 locus to apply 4-43 operative mistake 4-45 practical considerations in applications for 4-50 relevant intention 4-39 requirements 4-41 rescission overlap 4-36 specific intention 4-40 standard of proof 4-44 type of mistake 4-42 *see also* construction of documents; rescission for mistake rules reflective loss claims, and companies in which trust has interest beneficiaries and companies' loss 12-93 cause of action issues 12-85 companies and loss 12-83–12-84 conclusions 12-99 different treatment circumstances 12-92 importance of principle 12-91 measure of loss 12-87 rule in *Foss v Harbottle* 12-86 and shareholder claims 12-88–12-90 twin rationales 12-94–12-98 remedies against accessories 12-1 removal *see under* conflicts of interest removal of trustee automatic removal 10-4 balancing factors 10-19 basic test 10-12 breach of trust 10-13 conflicts of interest 10-18, 10-32–10-34 costs 10-31–10-39 asymmetric cost risk 10-35 *Buckton* categories 10-36 enforcers' removal 10-23–10-25 *ex-officio* trustees 10-5 express power to 10-2–10-6, 10-39 fiduciary/limited power 10-2–10-3 friction/hostility 10-14–10-15 grounds for 10-9–10-10, 10-37 guiding principle 10-12 inherent jurisdiction of Court 10-7 insolvent/incapable trustees 10-6 key issues 10-1 locus to seek 10-8 loss of trust/confidence 10-16–10-17 procedure for 10-20 protectors' removal 10-22, 10-26–10-30 replacement by Court 10-21

- reputational risk 10-38
transition period
 contingent liabilities 10-50–10-53
 independent advice 10-55–10-56
key issues 10-40
negotiations 10-42–10-43, 10-48
outgoing trustee 10-41
proactive outgoing actions 10-46–10-47
reasonable security
 retention of trust fund as 10-54
 suggested procedure for
 securing 10-57–10-61
security interest 10-44
successor actions 10-48–10-49
trust records' provision 10-45–10-49
welfare of beneficiaries' 10-11
- remuneration of trustee
 basic entitlement 8-52
 breach of trust, effect 8-57
 challenging trustee's charges 8-58–8-59
 director of corporate trustee 8-53
 duration of entitlement 8-64
 entitlement 8-54
 order of Court authorisation 8-60–8-62
 reimbursement/indeemnifying 8-55
 remuneration provisions 8-54–8-56
 on retirement 8-56
 skill/labour allowance 8-63
- renewal of leases *see under* conflicts of interest
- renvoi* doctrine *see under* conflict of laws, proper law
- Representation
 commencement of proceedings 1-41
 contents 1-38
 originating process 1-37, 1-39
 representor's role 1-40
- rescission for mistake rules
 bars to rescission 4-47
 costs 4-50
 key issues 4-20–4-21
 meaning of mistake 4-22–4-23
 practical considerations 4-50
 rule in *Re Hastings Bass*
 at common law 4-34–4-35
 effect of qualifying mistake 4-32–4-33
 legislative provisions 4-27–4-28
 no-fault approach 4-26
 restatement 4-24
 scope of rule 4-25
 statutory remedies 4-30–4-31
 subjective intention, focus 4-20
 see also rectification of document
- rescission of transaction *see under* conflicts of interest
- resulting trusts
 circumstances 6-31
Hague Trust Convention 2-85
presumption of 6-32
purchase money 6-33
Quistclose trust 6-37–6-38
settlor's beneficial interest, failure to exhaust 6-34–6-36
- to whom the property results 6-39
see also constructive trusts
- Royal Court of Jersey 1-13–1-14
- saisie judiciaire* *see under* proceeds of crime
- secret commissions *see under*
 constructive trusts
- self-dealing *see under* conflicts of interest;
 prescription, constructive trusts
- service out of jurisdiction *see under* jurisdiction
- service of process
 commencement rules 1-57
 on corporate bodies 1-66–1-67
 deemed dates for documents 1-70
 email service 1-65
 failure to serve in authorised manner 1-88
 fax service 1-64
 foreign law, company registered under 1-68
 'leaving it at proper address' 1-62
 ordinary service 1-58–1-73
 on party's advocate/solicitor 1-69
 personal service
 as commencement 1-74
 on corporation 1-76
 effecting by/through Viscount 1-78–1-179
 on individual 1-75
 mandatory circumstances 1-77
 out of jurisdiction 1-80
 proving of 1-81
 post service 1-63
 proceedings once served, applications to
 amend 1-94
 proper address 1-60–1-61
 proving ordinary service 1-73
 public holidays 1-71–1-72
 substituted service
 application for 1-83
 circumstances 1-82
 method of 1-84
 orders for 1-85
 out of jurisdiction 1-86
 proving of 1-87
- service within jurisdiction *see under* jurisdiction
- settlor's capacity *see under* Hague Trust
- Convention
- sham trusts
 challenges 4-6
 definition of sham 4-3
 effect of finding sham 4-14
 features/forms 4-4–4-5, 4-7
 intention issues 4-8–4-11
 legacy structures 4-9
 non-parties' reliance 4-16
 original trustee's position 4-12
 proper law 4-19
 settlor reserved powers/interests/control 4-17–4-18
 settlor/trustee reliance 4-15
 subsequent/new trustee's appointment 4-13
 tax haven perceptions 4-7
- stand-still agreements *see under* prescription

- standard and burden of proof in service out of jurisdiction applications
 Canadian Trust gloss 2-22
 'good arguable case' 2-21–2-23
 key issues 2-19–2-20
 serious issue to be tried 2-24–2-25
- submission to jurisdictions *see under* foreign judgments, recognition and enforcement summons
 abridgement of time procedure 1-54
 date-fix procedure 1-50–1-53
 interlocutory summonses
 counter-signature 1-48
 formal tabling 1-49
 jurisdiction 1-44
 listing officers 1-47
 purposes 1-43
 signature requirements 1-45–1-46
 originating process 1-42
- tax-related offences *see under* proceeds of crime taxation of costs
 appealing costs decisions 1-144
 basic provision 1-104
 bill of costs
 communications' costs 1-131
 copying of documents 1-132
 correspondence 1-126
 foreign lawyers, bills of costs 1-129
 format 1-118
 form 1 1-119–1-123
 form 2 1-124–1-125
 statement of accounts 1-128
 table of work to be included 1-117
 time sheets 1-127
 travelling expenses 1-130
- commencement 1-112
 costs of taxation 1-143
 determination of amount 1-111
 directions 3-76
 basis 3-79–3-81
 beneficiaries' costs 3-81
 guidance 3-77
 incidence 3-76
 neutrality 3-78
 trustees' costs 3-80
- discretion of Court 1-109
 documents in support 1-134
 Factor B determination 1-136–1-138
 factors in fixing 1-114–1-116
 indemnity basis
 basic principles 1-106
 fairness/reasonableness 1-107
 principles 1-106
 procedure 1-139
- interim payment of costs on account, orders 1-110
- interlocutory applications
 disposed of by consent 1-142
 summary assessment 1-140–1-142
- recoverable costs 1-117
- rules of Court 1-113
 standard basis 1-105–1-138
 trustee's costs 1-108–1-109
see also costs
- terrorist finance offences *see under* proceeds of crime testamentary dispositions into trust *see under* prescription
- theft of property *see under* constructive trusts
- third parties
 liability *see under* wrongful receipt
 miscellaneous claims against 12-1
see also under indemnity of trustee
- third party litigation funding
 ATE insurance *see after* the event (ATE) insurance
 champertous arrangement's consequences 1-154
 factors in upholding 1-153
 key issues 1-149–1-150
 non-party costs *see* non-party cost orders
 types of arrangement 1-151–1-152
- tortious liabilities *see under* indemnity of trustee
- tracing assets *see under* proprietary remedies
- transition period *see under* removal of trustee
- trustees de son tort *see under* wrongful receipt
- unauthorised profits *see under* conflicts of interest
- unjust enrichment *see under* constructive trusts; *under* wrongful receipt
- unlawful means/intimidation, causing loss by as economic torts 12-173
- untraceable assets *see under* proprietary remedies
- validity issues 4-1–4-2
see also construction of trust documents;
 rectification of document; rescission for mistake
 rules; sham trusts
- variation of a trust, applications for
 act of court 3-111
 arrangement 3-84–3-91
 benefit issues 3-96
 classes of person listed 3-85
 costs 3-112
 discretionary power 3-91
 effect of order 3-98
 foreign powers of attorney 3-87
 fraud 3-94
 hearing issues 3-110
 matrimonial proceedings 3-97
 minors and interdicts 3-86–3-91
 indirect interests 3-88–3-91
 parties to be joined 3-103–3-104
 power of Court 3-100–3-101
 privacy orders *see* privacy orders, leave to use material
 procedure 3-102–3-112
 public policy 3-94
 representation 3-105
 representor's evidence 3-107
 responses and evidence 3-109–3-110
 scope of Court's powers 3-92–3-94
 separate representation 3-106
 statutory basis 3-82–3-83

- substratum of trust 3-93
trustees
 powers 3-95
 role 3-98
unascertained persons 3-89
unborn persons 3-90
vesting property in trustee *see under* Hague Trust Convention
Viscount 1-17–1-18
void/voidable trusts *see under* indemnity of trustee

wilful default basis *see under* actions for an account
wrongful receipt, claims for
 key issues 9-1
 knowing receipt
 agents/nominees' receipts 9-18–9-19
 breach of trust transfer 9-12–9-13
 companies/fiduciary agents/directors 9-9
 defendant's own benefit 9-20
 dishonest assistance 9-3
 knowledge requirement categories 9-21–9-27
 liability requirements 9-6–9-7
 locus 9-5
 ministerial receipt 9-18–9-19
 property received by defendant 9-16–9-17
 property subject to trust 9-8
 resulting/constructive trusts 9-10
 third party liability 9-4
 transfer of trust property 9-11
knowledge and notice
 companies' knowledge 9-30–9-39
 imputing knowledge to principal 9-29
key issues 9-28
non-bona fides purchaser without notice 9-42
pleading knowledge 9-40
proof of knowledge 9-37–9-39
retaining/dealing with such knowledge 9-41
mistake, funds paid away by 9-2
third party liability 9-4
trustees de son tort
 confirmation/ratification of acts 9-48–9-49
 conscious knowledge 9-44
 definition/meaning 9-43
 liability 9-45
 validity of acts by 9-46–9-47
unjust enrichment 9-51–9-52

