ISSUE 30

# serlespeak

RAISING THE BAR IN CHANCERY & COMMERCIAL

## *International Trusts*







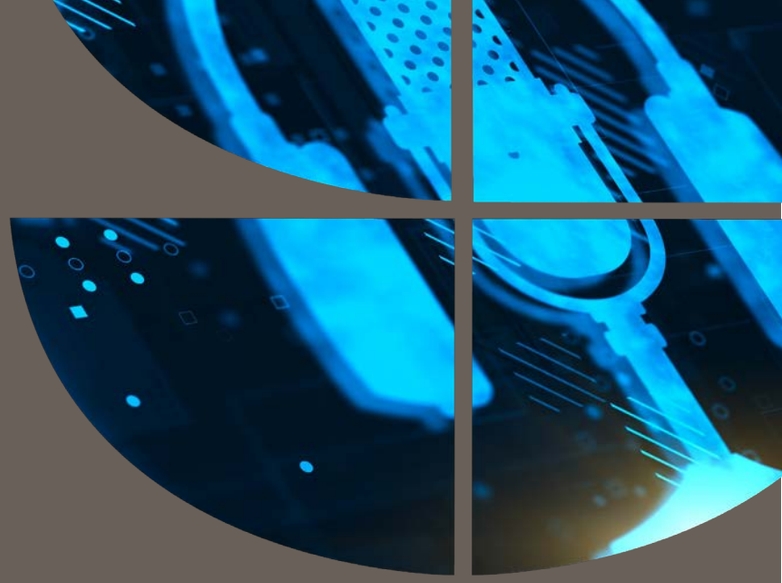
*"a definite go-to chambers for contentious trust work"*

**Chambers and Partners**

It is my pleasure to introduce the 30th edition of Serlespeak which focuses on International Trusts. In the first article, John Machell QC and Dan McCourt Fritz discuss an important decision on a Trustee's right to be heard in trust administration proceedings. Paul Adams then considers the difficulties that trustees will face on learning of facts which put them on notice of a potential third party claim to the trust assets, in an exploration of the Guardian Trust principle. Emma Hargreaves provides an update on recent cases following the decision of Birss J in Pugachev. Finally, Andrew Gurr's article anticipates the Privy Council's decision in the combined Z Trust and Investec appeals, considering the arguments run by the parties and the potential implications of this significant decision.

**Sophie Holcombe**
**Editor**

# Chambers News & Events



## People

We recently welcomed **Wilson Leung** as a new full-time member of Chambers. His arrival adds to Serle Court's already thriving commercial litigation and international disputes practices. Wilson was called to the Bar in Hong Kong in 2008 and will remain, albeit from London, a tenant of Temple Chambers. He has an established complex commercial litigation practice with particular emphasis in company, insolvency, contract, trusts, probate, and banking disputes. Recognised as a leading junior clients describe him as *"absolutely superb"*.

We also look forward to welcoming current pupils **Niamh Herrett** and **Stefano Theodoli-Braschi** who have accepted tenancy and will be joining Chambers as members on 1 October.

Congratulations to **Giles Richardson QC** on his appointment to Queen's Counsel this year. Giles specialises in trusts, probate, company and fiduciary obligations litigation, both in London and offshore, as well as associated professional negligence and fraud work. Recognised as a leader in his fields of practice, he is also praised for being *"very commercial"* and having *"a great way with clients"*.

**Kathryn Purkis** is now our Chambers Director. As a former member of chambers, Kathryn knows many of our clients already and is therefore uniquely positioned for the role with her intimate knowledge of Chambers, the workings of the Bar and the legal market more widely.

## Equality, Diversity & Inclusion

Chambers is committed to improving access and diversity in the legal profession and is participating in various initiatives including the **COMBAR (The Commercial Bar Association) inaugural mentoring scheme for under-represented groups at the Bar** recently launched.

Chambers sponsored ***Chambers Diversity & Inclusion: ENGAGE 2022: European D&I, Pro Bono and Sustainability Summit*** bringing together lawyers from across the profession. **Professor Suzanne Rab** spoke on *'Pro bono in a post crisis world: creating and maintaining European human rights and pro bono partnerships in the age of Brexit and Covid-19'.*

Our team took to the streets in June for the **London Legal Walk** to raise essential funds for The London Legal Support Trust and the provision of free legal services in London and the South East. Thank you to everyone who supported us.

## Awards & Rankings

Described as a *"powerhouse chancery set"*, Serle Court was delighted to win **Set of the Year at the Chambers HNW Awards 2022.**

**Dakis Hagen QC** was the winner of the **Citywealth Magic Circle Awards 2022 – Barrister of the Year Gold.** Dakis specialises in Chancery litigation, both commercial and traditional and is described as *"fabulous to work with... technically excellent"*.

Serle Court barristers have recently been recognised in two peer reviewed publications - the **Who's Who Legal UK Bar Report 2022** and **Best Lawyers in the UK 2023.** They are recommended in key areas of practice with praise from clients including *"outstanding"*, *"exceptional"* and *"brilliant"*. Our barristers have also been recommended as Global Leaders in the **Who's Who Legal Asset Recovery Guide 2022.**

Serle Court and individual members - silks and juniors - have been shortlisted for seven **Legal 500 Bar Awards 2022** across six categories including Chancery Set of the Year and Commercial Litigation Set of the Year. We are the only set to be nominated in both these key areas of Chambers' practice. The awards ceremony is on 5 October.

## Publications & Articles

The 20th edition of **Underhill and Hayton, Law of Trusts and Trustees** - widely recognised as one of the leading practitioner texts in the field - has been published. Serle Court barrister Prof. Jonathan Harris QC (Hon.) and associate member of chambers, Dr Sinéad Agnew are co-authors (along with HHJ Paul Matthews and Prof. Charles Mitchell).

**Lance Ashworth QC** and **Wilson Leung** co-authored an article - *'Liquidators: A duty to deal with trust assets?'* - in the recently published **CMI International Insolvency & Restructuring Report 2022/23**.

**Daniel Lightman QC** and **Max Marenbon** co-authored an article *'Quasi-Partnerships in Public Companies'* published in the **ThoughtLeaders 4 Disputes Magazine** Issue 5 'Companies and Shareholders in the Spotlight'.

**Hugh Norbury QC** and **Dan McCourt Fritz** contributed to the **ICC FraudNet Global Annual Report 2022 *'The Ever-Evolving Nature of Fraud and Financial Crime: International Insights and Solutions'.*** Their joint article provides insights on forgery in English Law.

# Chambers News & Events

**Events Programme**

The last quarter has been a busy period for events organised internally by Serle Court as well as externally. As a partner, we participate in a number of events organised by ThoughtLeaders4 and ICC FraudNet. A few highlights are included here.

**Serle Court Events**

Our members and clerks are enjoying meeting clients and contacts again in person as well as continuing to connect online with our ongoing programme of virtual seminars and talks.

We welcomed delegates back for our first in-person Property event since 2019. Our property experts presented a practical session for property litigators on 'Landowner Litigation'. Head of Chambers, **Elizabeth Jones QC** chaired the talks covering key issues and recent cases presented by **Andrew Francis, Andrew Bruce, Andrew Gurr** and **George Vare.**

Later this year, we are very much looking forward to returning to New York to host our ***5th International Trusts and Commercial Litigation Conference.*** The Conference will take place on Monday 14 November at the Rainbow Room in the Rockefeller Centre.

**International/Offshore Conferences**

At the end of May, Serle Court hosted a series of seminars in Dubai. Four of our barristers with significant Middle East experience - **Zoe O'Sullivan QC, Prof Jonathan Harris QC (Hon.), James Weale** and **Gregor Hogan** - presented on *'DIFC practice, procedure and recent developments'.* They were accompanied by Senior Clerk Dan Wheeler.

A team from Serle Court will be returning to Dubai in November for **Dubai Arbitration Week** and to participate in the ***ThoughtLeaders4 FIRE Middle East Conference 2022.***

Serle Court barristers **Richard Wilson QC** and **Matthew Morrison** joined lawyers from Mourant and other trusts experts in Jersey and Guernsey to discuss recent key developments and decisions at the ***Mourant Trusts Forum 2022.***

**Lance Ashworth QC, Andrew Moran QC, James Mather** and **Dan McCourt Fritz** all attended the ***34th ICC FraudNet Conference: Sanctions, Fraud and Asset Recovery in a Turbulent World*** in Limassol.

**James Weale, Emma Hargreaves** and **Gregor Hogan** together with senior clerks, Nick Hockney and Dan Wheeler attended the ***Informa Connect Trusts in Litigation conference 2022*** in Seville. Gregor led the session *'The Debate: The future of the role of the protector'.* Serle Court was delighted to sponsor the River Cruise and enjoyed taking time out with delegates.

Serle Court also sponsored ***The Trust & Estates Litigation Forum 2022*** in Cologne. The Forum was directed by the Global Elite's leading Advisory Board chairs, **Dakis Hagen QC** and Nicholas Holland (McDermott Will & Emery). **Elizabeth Jones QC** and **Richard Wilson QC** joined the panel sessions and **James Weale** also attended the conference.

**Webinars**

From feedback received, we know clients still greatly value online training and events. As well as participating in external webinars, we host our own bespoke talks on a wide range of topics. These can all be accessed via the 'Virtual Hub' on our website. Registration is free.

**For the full listing of all events and webinars, visit our website: serlecourt.co.uk/news-and-events/events**

**Online Resources & Social**

**#SerleShare** is our online resource for clients sharing valuable insights and updates. Content focuses on all commercial chancery areas of expertise, case updates, landmark court judgments and expert analysis. Visit the SerleShare page of our website and follow #SerleShare on LinkedIn to access updates.

In addition to our main Serle Court LinkedIn page, we have **six designated discussion groups on LinkedIn** to enable members and clients to discuss topical issues and share views. These groups are:

- Contentious Trusts and Probate
- Fraud and Asset Tracing
- Intellectual Property
- Middle East and Arab Law
- Competition Law
- Partnership and LLP Law

Connect with us on LinkedIn and join our groups!

You can also follow us on Twitter @ Serle_Court

**For more information or to subscribe to event invites and news updates, contact newsletter@serlecourt.co.uk**

# Unnatural justice: the 'right to be heard' in trust administration proceedings

In the exercise of the court's supervisory jurisdiction over the administration of trusts, the paramount consideration is (or should be) the interests of the beneficiaries. It was therefore hard to understand on what basis the former trustee in *Re The Brockman Trust* [2021] CA (Bda) 20 Civ ("SJTC", in fact a former trustee de son tort) considered it appropriate to appeal against its removal in circumstances where (a) all the human beneficiaries had made clear their wish that SJTC should not be trustee, and (b) the Attorney-General (representing the charitable interest in the Trust) had expressed no view as to who should be trustee and had not indicated any support for SJTC.

SJTC contended that the order removing it should be set aside *ex debito justitiae* on the ground that it had been deprived of its right to be heard, in violation (it suggested) of a sacrosanct principle of natural justice. This contention failed on the facts: the Court of Appeal of Bermuda held that SJTC itself had *"effectively instituted"* the relevant trust administration proceedings and consequently *"was bound by the outcome"*, including the order removing it. [1]

This left undecided the questions of (1) whether SJTC had a right to be heard in relation to its removal, and (2) what the consequences should be where such a right is infringed in a trust administration context.

Smellie JA gave a tantalising hint as to how the court might have resolved the latter question at [14] of his judgment, saying: *"It appeared to this Court, that even if SJTC could establish that it had a right to be heard in the Administration Proceedings which was breached, the real question nonetheless for this Court ... would be whether it is in the paramount interests of the beneficiaries of the Trust, rather than those of SJTC itself, for the Orders to be set aside".*

The court thus seemed inclined to reject the argument that an order removing a trustee should be set aside automatically even if it could be demonstrated that the trustee had a right to be heard which had been infringed. In our view, this must be right as a matter of policy and principle. Where the removal of a trustee is obviously in the beneficiaries' interests – as it was in *Re The Brockman Trust,* SJTC being in a position of irreconcilable conflict – it would be perverse to reverse the removal on appeal (*ex hypothesi* contrary to the beneficiaries' interests) simply because the departing trustee was not heard on the subject. This is consistent with and supported by the approach in a public law context, where the infringement of a person's right to be heard is not necessarily enough to justify an impugned decision being set aside unless the complainant *"can show that if admitted to state his case he had a case of substance to make".*[2] In neither sphere should the court act in vain. In trust administration proceedings, whether a breach of natural justice should cause a decision to be set aside or varied surely should depend upon an evaluative assessment informed by the nature and purpose of the supervisory jurisdiction that the court is exercising.

The more fundamental, logically prior, question is whether a trustee has an inherent right to be heard in relation to its removal (or any other matter of trust administration). We would argue against the existence of such a right. A beneficiary has no absolute right to be heard by a trustee in deciding how to exercise discretionary powers[3], even though they have a manifest interest in how such powers are exercised. Nor do beneficiaries have an inherent entitlement to be heard in relation to matters of trust administration.

It is difficult to see why a trustee – who has no interest in remaining trustee, or any personal interest in the trust *qua trustee*[4] – should have an absolute right that beneficiaries lack.

A trustee will (of course) usually be heard in trust administration proceedings if they wish to be (albeit that the appropriate course will often be for them to remain neutral), but we would suggest that the question of who should be heard is itself properly seen as an aspect of the court's discretionary supervisory role. If it is so analysed, a decision not to hear from a trustee could only be challenged on appeal if it were based on a mistake of law or a decision that no reasonable judge could have made. And even where an appellate court concluded that a trustee was deprived of a hearing that they should have been given, it would only set aside or vary the relevant substantive decision if satisfied that it would be in the beneficiaries' interests to do so.

Some 340 years ago, Lord Nottingham LC made the oft cited statement that he *"liked not that a man should be ambitious of a Trust, when he can get nothing but trouble by it".* [5] It remains pertinent. Save where a trustee considers that their removal is contrary to the beneficiaries' interests, they should go gentle into the night, irrespective of whether the court hears from them.

**John Machell QC &**
**Dan McCourt Fritz**

*John Machell QC and Dan McCourt Fritz acted for the Protector before the Court of Appeal of Bermuda*

1. See [39]-[41] of the judgment of the Acting President, Smellie JA, with who Gloster JA and Simmons JA agreed.

2. *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578 (a Scottish case) at 1595B per Lord Wilberforce. Malloch was relied on by Brandon LJ in *Cinnamond v British Airports Authority* [1980] 1 WLR 582 at 593F as authority for the proposition that *"no-one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing".*
3. *Scott v National Trust* [1998] 2 All ER 705 at 718E per Robert Walker J.
4. So that the court of Appeal might not have allowed SJTC's appeal to proceed *"as being only about SJTC's personal interests"* (per Smellie JA at [54]).
5. *Uvedale v Ettrick* (1682) 2 Ch Cas 130

# Running trusts in the face of possible third party claims: what counts as notice of a claim?

It is commonplace for offshore and international trusts to hold assets derived from historic business dealings of the settlor about which, despite a certain amount of due diligence, the trustees know relatively little. In such a case, if the settlor is subsequently accused or suspected of fraud or other serious wrongdoing in relation to the trust assets, the trustees may face a difficult issue: should they carry on as normal for the benefit of the beneficiaries, or should they freeze the trust fund in case it turns out that the settlor is a fraudster and the assets properly belong to his victims?

This issue is regulated by the principle of equity sometimes referred to as the Guardian Trust principle. In the foundational case of *Guardian Trust & Executors Co of New Zealand Ltd v Public Trustee* [1942] AC 115, Lord Romer stated that:

> *"... if a trustee or other person in a fiduciary capacity has received notice that a fund in his possession is, or may be, claimed by A, he will be liable to A if he deals with the fund in disregard of that notice should the claim subsequently prove to be well founded."*

From this we can derive two limbs of a test for liability on the part of a trustee who has dealt with a fund inconsistently with a third party proprietary claim to it: (1) the trustee must, at the time of his inconsistent dealing, have received notice that assets in his possession are or may be claimed by a third party ('the notice test'), and (2) the third party's claim must subsequently prove to be well founded. In addition, various cases indicate that a third limb may be added: (3) the third party's claim must, at the time of the trustee's inconsistent dealing, be prima facie a reasonably arguable one ('the arguability test'). The purpose of the arguability test is to avoid trusts being paralysed by specious claims with no arguable foundation.

In a case where the relevant third party has actually asserted a proprietary claim against the trust fund, it is fairly easy to see how the three limbs of the test are supposed to fit together. The notice test is satisfied simply by reason of the third party's assertion of the claim. If the claim also passes the arguability test, the trustee cannot ignore it. If the third party brings proceedings, the trustee should await their outcome. If the third party sits on his hands, the trustee can apply to its supervisory court for directions and the court may direct that unless the third party brings proceedings within a certain time the trustee shall be at liberty to administer the trust without regard to the claim (e.g. *Representation of BNP Paribas Jersey Trust Corp Ltd* [2010] JRC 199).

It may be, however, that no third party claim against the trust fund has been articulated. For instance, the settlor may have been sued for fraud by claimants who know nothing of the trust. Or the trustee may have become aware that the settlor is subject to a criminal investigation. Or the trustee may simply have noticed something in an email from the settlor which makes it suspect the possibility of a proprietary claim. In such cases, the application of the three-limb test set out above is more difficult. In particular, the arguability test is almost impossible to apply to an unarticulated claim. Yet there must be some merits filter because it obviously cannot be the case that the administration of a trust is paralysed whenever a trustee can think of any conceivable third party proprietary claim.

In principle, the solution to this conundrum appears to be that, in a case where no third party claim has been articulated, the notice test itself is sensitive to the apparent likelihood of the third party having a good claim. This would work in a similar way to the test of notice in the context of the bona fide purchaser defence, or the test of knowledge in the context of knowing receipt. On this basis, it may be that a trustee faced with an unarticulated potential proprietary claim against the trust fund only risks liability under the Guardian Trust principle if, at minimum, it (a) knows facts which indicate that a third party proprietary right probably exists, or (b) fails to make inquiries which it ought to make and which would reveal the probable existence of such a right. This approach would be consistent with decisions of the BVI and Bahamian courts in *Moss v Integro Trust* (BVI) Ltd (1997/8) 1 OFLR 417 (BVI) and *C v M* (2001) 4 ITELR 548.

Interestingly, the editors of Lewin on Trusts take a more stringent position, concluding that:

> *"... trustees will not be able to distribute safely on their own authority once they have notice of a claim, or of circumstances which could give rise to a claim, unless they are able to take the view that the claim is almost indisputably a bad one."*

That formulation seems broadly correct in the case of an articulated third party proprietary claim. However, it may require qualification in a case where no claim against the trust fund has been articulated. In such a case, a more nuanced analysis of the apparent merits of the potential claim and of the case for making inquiries would appear to be called for.

**Paul Adams**

# The "true effect" of a trust: case update

The decision of Birss J in *JSC Mezdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch), namely that the true effect of an (apparently) discretionary trust deed may be a bare trust for the settlor, and its implicit endorsement in *Webb v Webb* [2020] WTLR 1461, will be well-known to trust practitioners. Two more recent cases are worthy of note.

Kawaley J in the Grand Court of Cayman Islands had cause to consider the "true effect" approach in the case of *In the Matter of a Settlement made by deed dated 27 December 2017*, FSD Cause No 83 of 2020 (reasons delivered 27 July 2021). The issue arose in the context of an application by the trustee of a STAR trust for Beddoe relief and directions in respect of proceedings on foot in England in which the claimants had intimated by draft amendments that they would allege that, on a true construction of the STAR trust, the settlor in fact retained beneficial ownership, inter alia because his son as protector was conferred with *"extraordinary powers"* (see para 7(a)).

In addition to Beddoe relief, the trustee sought permission to issue local proceedings in order that the "true effect" of the STAR trust could be determined by the Grand Court. Kawaley J granted that permission and in the course of his judgment notably observed that the "true effect" claim was *"barely arguable in any event"* (para 26) and *"the threatened claim appears to me not to be seriously arguable at all on a straightforward reading of section 14 of the [Trust Act (as revised)]"* (para 29). Section 14 of the Trust Act provides that the fact that certain powers (including e.g. powers to revoke, vary or amend the trust instrument) are reserved by the settlor or conferred on a protector *"shall not invalidate the trust"*. Kawaley J described that section as an *"important sui generis rule"* which distinguishes Cayman Islands trust law from that under English law. The case accordingly represents a strong indication from an offshore jurisdiction with reserved powers legislation that the "true effect" approach will not be adopted by its courts.

The "true effect" approach appears, however, to have been followed in the English family courts, according to the recent judgment of Peel J in *Hohenburg-Bailey v Bailey* [2022] EWFC 5. The decision concerned an application to commit the husband for (amongst other things) breaches of a financial remedy order made by HHJ Gibbons on 23 April 2021.

One of the matters addressed by the financial remedy order was the proper approach to a Cypriot trust settled by the husband, which held a Portuguese property worth over 4 million euros. Under the terms of the trust, the husband's reserved powers included a power to change the proper law of the trust and powers *"to annul or amend any terms of the trust, to distribute or assign any trust property to a beneficiary, to direct the trustee in binding terms as to true property, to appoint or remove a trustee, to terminate the trust, and (combined with clause 18.3) to add or remove any beneficiary"* (para 34). The judgment records that the husband was not barred from being a beneficiary or a trustee. The reserved powers were, therefore, extremely wide and led to a finding that the husband *"has complete control over the trust in the sense that he has the power to direct it as he pleases, including exclusively for his own benefit, as if the trust property is his own"* (para 35).

The terms of the financial remedy order are worthy of particular note (para 33). The order recorded that the Portuguese property was beneficially owned by the husband (i.e. the "true effect" approach) but went on to record in the alternative, that if there was a valid Cypriot trust, the husband as settlor had wide-ranging powers. The husband was ordered to execute *"a written instrument referable to his Cypriot trust powers to enable the Portuguese property to be sold"* and further ordered to *"execute all other documents as may be required to carry into effect his instructions to the trust"*.

The sale proceeds were then to be used to discharge lump sum orders in favour of the wife. Thus, although the "true effect" approach appears to have found favour, the court made in *personam* mandatory injunctions against the husband requiring him to exercise his reserved powers so as to bring about the desired result (an approach akin to the appointment of a receiver over such powers as in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank & Trust Co* (Cayman) Ltd [2021] 1 WLR 1721).

The husband failed to execute the written instrument as ordered. It was said on his behalf by the Cypriot trustee that the English court had no jurisdiction over the trust. This was given short shrift by Peel J who pointed out that the order was in *personam* against the husband and that *"it is in his gift to alter the proper law to England such that giving effect to the alterations contained in the written instrument would be lawful"* (para 51). The breach, along with a number of other breaches of the financial remedy order, resulted in a sanction of 4 months imprisonment (para 65 ii)).

**Emma Hargreaves**

# Insolvent trust funds in the Privy Council: case preview

Apparently simple practical questions in trust practice frequently uncover deep theoretical problems. In offshore systems in particular, modern developments have created novel problems requiring courts to work out previously underarticulated principles.

This is well illustrated by the conjoined appeals in *Re Z Trust and ITG Ltd and others v Fort Trustees and another* (on appeal from the Court of Appeal of Jersey and Guernsey respectively, but each concerning Jersey law), heard by a 7-judge Privy Council in June 2021. The decisions should be anticipated by practitioners and academics with interest.

Both appeals concern the proper approach to distributing 'insolvent' trust funds, i.e. situations where the 'trust' liabilities, being those that may properly be met out of or claimed against the trust assets, exceed the realisable value of the trust assets. The trust, not having legal personality, cannot itself be insolvent.

In each appeal, a substantial portion of the relevant liabilities are the former trustees' legal costs incurred in proceedings connected with the trust. The main question is whether the earlier trustees' claims in respect of these costs have priority over the claims of later trustees to their costs and for other expenses, or whether the claims should rank for *pari passu* distribution (or, if neither, what other scheme of distribution should apply). The Court of Appeal of Jersey and Guernsey held in favour of the former trustees, on the basis that a trustee has an equitable proprietary right in the trust assets in support of its indemnity, arising on the date of a trustee's appointment and subject to the first-in-time principle.

The answer depends on the precise nature of a trustees' rights of indemnity, and their relationship with other forms of equitable proprietary interests.

The Jersey Appellants argued that Jersey customary law prohibits non-possessory security rights over movable property. If the trustee's rights of indemnity are secured by a lien over the trust assets (as it is often described), that survives the retirement of the trustee, the argument runs that it cannot exist in Jersey law unless created by statute. It follows that a trustee who has parted with possession can only make personal claims against the trustee in possession of the trust assets from time to time (or, as canvassed in oral submissions, by being subrogated to the current trustee's possessory rights). If that is correct, there is no clear legal basis for one trustee enjoying priority over another.

The Guernsey Appellants adopted this argument (not unproblematically given that the Guernsey Respondents argued that they had in law retained possession), and went further. Even if the interest of a former trustee is an equitable property right, it does not follow that it has priority based on the order of appointment of trustees. First-in-time was said to operate arbitrarily and to have adverse policy consequences. *Pari passu* distribution was said to be fairer, consistent with insolvency legislation, and to promote a co-operative approach to trust administration.

In seeking to uphold the decisions under appeal, the Jersey and Guernsey Respondents relied on a line of recent Australian authority (elaborating on 19th-century English cases such as *Worrall v Harford* and *Re Exhall Coal Company* and culminating in the High Court's decision in *Carter Holt Harvey Woodproducts v Commonwealth of Australia)*, which have conceptualised the rights of indemnity as conferring a *"preferred beneficial interest"* in the trust assets.

On this view, the trustees' rights of indemnity are not 'security' rights, but instead a right analogous and prior to the interests of the beneficiaries. Whilst in possession of assets, trustees are free to deal with them consistently with the trust, *which includes* discharging their properly and reasonably incurred liabilities. On leaving office that interest persists, engrafted onto and inseparable from any new trustee's title to the assets and fluctuating in value with the relevant liabilities. The later trustee is also free to deal with the assets subject to the trust, and is now subject to a duty not to damage or diminish them so as to jeopardise the former trustee's indemnity.

So far as policy is concerned, trusteeships are voluntary positions. It is open to successor trustees to carry out due diligence or insure against contingent liabilities, but a predecessor (who may have been replaced innocently) cannot control what liabilities are

later incurred that may dilute its claims.

Aside from academic interest, the main question is of practical importance for professional trustees and their advisers in managing changes of trustees. If the Appellants succeed in arguing that claims should rank *pari passu*, it can be expected that (at least in Jersey) more trustees will seek to retain some or all of the trust assets on retiring or being removed (Guernsey law expressly provides a statutory non-possessory lien).

A further problem, unique to trust laws such as that of Jersey that exclude a trustee's personal liability to trust creditors who have notice of the trust (Article 32(1)(a) of the Trusts (Jersey) Law 1984), is that a trustee may be solvent where the fund is 'insolvent'.

This creates the potential for competing claims by the trustee and its 'trust' creditors against the trust assets. 'Trust' creditors have limited rights to bring claims directly against the trust assets where the trustee is unwilling or unable to meet the trust liabilities. These rights arise by way of subrogation to the trustee's rights of indemnity (and are contingent on this right remaining enforceable). That much was confirmed by the Privy Council in 2018. Precisely how this form of subrogation operates, or should be conceptualised, is an underexplored question.

It is not easy to see how a trustee's creditors could have priority in circumstances where their claim against the trust assets is necessarily parasitic on that of the trustee. Where subrogation occurs in other legal contexts, the original holder of the right to which the claimant seeks to be subrogated typically drops out of the picture. Analogies with other forms of subrogation may not provide clear guidance. It may be that the rights of trust creditors under Jersey law have been impliedly replaced by Article 32(1)(a), but the legislation says nothing about how those rights should rank as against the trustee.

A further question is how the rights of 'trust' creditors should rank *inter se*. If the rights do depend on subrogation, and if the indemnity arises on the trustee taking office, all are equal in time. A discretionary approach might (by analogy with cases of distributing mixed funds) suggest a broadly *pari passu* scheme, and (subject to a liberty in affected creditors to apply to vary) such a pragmatic approach was adopted at first instance in the Guernsey case.

These further questions may not be central to the appeal, and the extent to which the Board will be willing to grapple with them remains to be seen. In any event, the decisions are likely to be a landmark in the law of trusts, and to repay reading by anyone interested in it.

**Andrew Gurr**

*(with thanks to James Brightwell for his comments) .*

*James Brightwell (assisted by Andrew Gurr) appeared on behalf of the Guernsey Respondents.*

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