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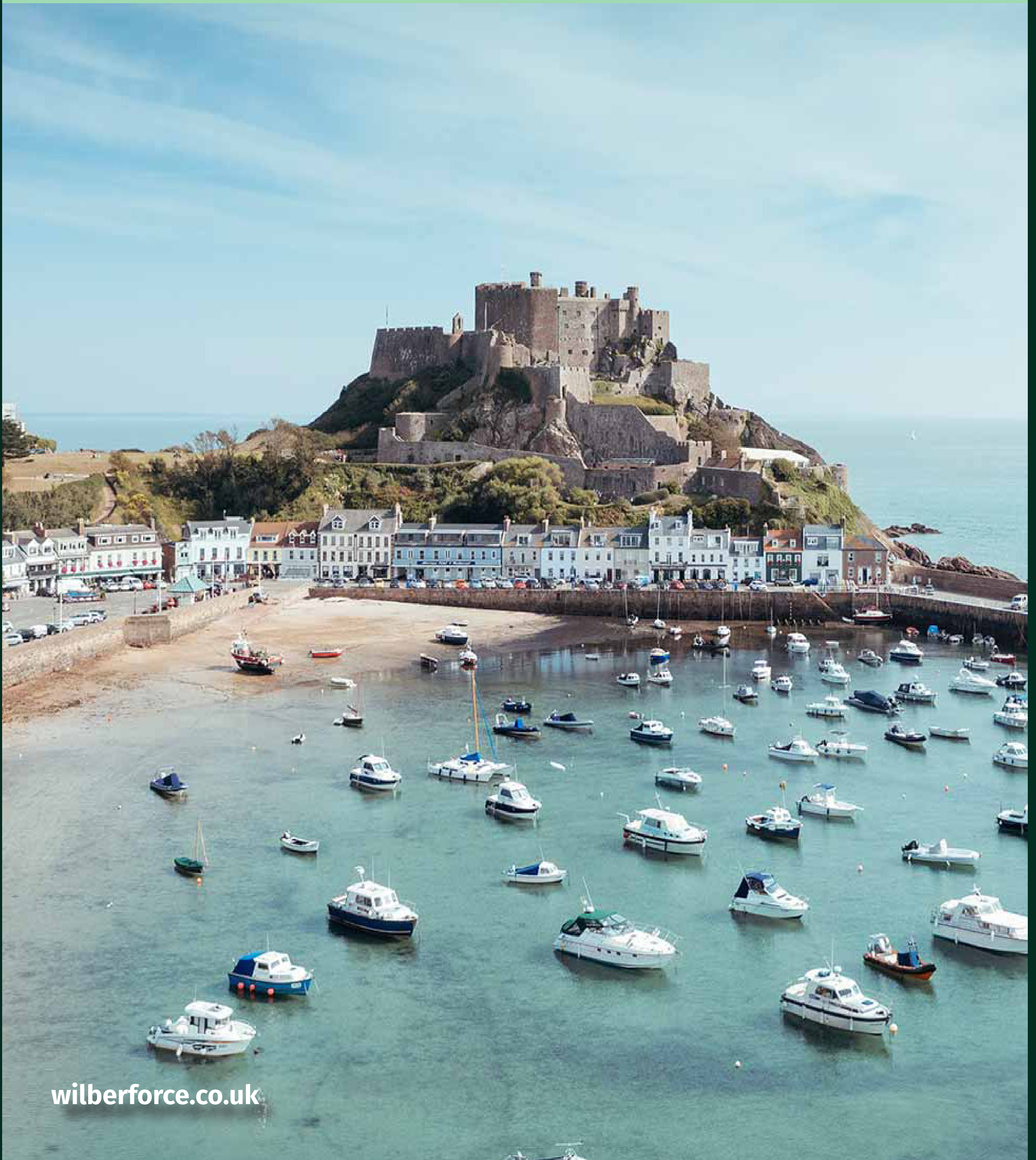

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Jersey Conference 2023

Talk papers

Wednesday 18th October 2023

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Speakers

Gilead Cooper KC
Gilead's practice has a strong international element. He has appeared in the courts of Hong Kong, the BVI, Bermuda, Cayman and Nevis, and has been involved in litigation in Jersey, Guernsey and Gibraltar. He provided expert advice in relation to the Panama Papers in Imran Khan's action against Nawaz Sharif in the Pakistan Supreme Court which led to Sharif being removed as prime minister. Gilead specialises in complex, high-value disputes, often involving allegations of fraud, breaches of trust and fiduciary duties, and professional negligence. The Legal 500 2023 describes Gilead as "*one of the top silks in the international trust and estate litigation world*". The guide adds that "*he has an incredibly quick mind, great intellectual powers, and at the same time a wonderful capacity for creative, strategic thinking*". Chambers & Partners 2023 praises Gilead for his "*rapier-like intellect*", which makes him "*one of the great lateral thinkers of the Chancery Bar*".

Jonathan Hilliard KC
Jonathan has a broad trusts and commercial practice. Much of his time is spent on private, pension and other commercial trust disputes and fraud disputes, both on and offshore. His litigation often takes him into other areas of law, and he has significant experience of cases with family, regulatory, insolvency and public law elements. He also has a significant advisory practice across this spectrum of work. He is consistently ranked in the directories for trusts (private and pension), matrimonial: trusts, offshore, civil fraud, traditional chancery and high-net-worth work (Chambers and Partners) and offshore, pensions and private client (The Legal 500). The Legal 500 2023 says that Jonathan is "*very much living up to the star reputation he earned. He is light years ahead intellectually but remains straightforward and approachable to work*". Jonathan is praised as *"one of the most impressive lawyers I have ever seen in operation"* in Chambers and Partners 2023. This directory describes him as *"calm under pressure, technically brilliant, attentive to detail and someone who understands the interplay between all the issues"*.

Thomas Robinson
Thomas has a strong commercial / chancery practice with particular emphasis on pensions, insolvency and commercial litigation and arbitration. His six-month placement with the commercial litigation department of a firm in Guernsey at the outset of his practice gave him experience of offshore litigation as well as direct exposure to a wide range of clients. Chambers & Partners 2023 says *"Tom is a highly experienced and capable senior junior. He's of agile mind and he often sees things from a different perspective, which is both refreshing and reassuring"*. The guide adds that *"his advocacy is convincing and persuasive."* The Legal 500 2023 praises Thomas as being *"incredibly bright"* and for having *"a quite exceptional recall of information."*

Tom Roscoe
Tom's practice spans commercial, trust and property disputes in the UK and abroad, frequently raising issues of fraud, insolvency and asset tracing. Tom regularly appears as sole counsel in a range of domestic and international courts and tribunals. He also undertakes a broad range of advisory and drafting work. Tom's practice has an increasingly international focus and he has recent experience on substantial disputes (litigation and arbitration) in the Channel Islands, Caribbean and DIFC. That experience builds upon secondments in Guernsey, Cayman and the BVI. He maintains a practicing certificate in the BVI and is a Registered Part II Legal Practitioner in the DIFC Courts. Chambers & Partners 2023 describes Tom as *"a superb junior and an excellent advocate with a very bright future"*. He is also praised for being *"very clever, extremely confident and very well prepared"*, as well as *"a pleasure to work with"* with *"no airs and graces"*.

Simon Atkinson
Simon is an experienced and in demand practitioner. He has a broad Chancery practice; the core of his work comprises trusts and estates, property and commercial litigation. Cases with an international element form a significant part of Simon's practice. Simon is frequently instructed in alternative dispute resolution processes such as mediations and expert determinations (in which he has acted variously as both advocate and expert). Simon is ranked in both Chambers and Partners and in The Legal 500. Chambers & Partners 2023 says that *"Simon's technical knowledge is superb. He is super responsive and crunches through the work."*

Michael Ashdown
Michael has a specialist practice focusing on trusts and estates, pensions, charities, and related tax and professional liability matters. His experience encompasses advising, drafting trust documents, and litigating, in relation to both domestic and offshore trusts, and cross-border estates, and he has recent offshore experience in Jersey, Guernsey, Bermuda, and BVI. Chambers & Partners 2023 describes Michael as *"an absolute superb barrister"* who is "*charming, hardworking and knowledgeable*". The Legal 500 2023 says the *"Michael's great strength is his intellect and deep knowledge of the law. He couples his intelligence with a confident and attractive advocate and makes the right strategic call too"*. The guide praises him for being *"a very clear and rigorous thinker"*.

Elizabeth Houghton
Elizabeth has a very broad commercial chancery practice. She frequently appears in Courts and tribunals at all levels. She is often instructed in complex trust, commercial, private client, insolvency and asset-tracing matters with an international element. Her work often involves foreign law issues and multi-jurisdictional challenges. Elizabeth is very comfortable with difficult cases and works easily with clients and experts, and in counsel and solicitor teams. The Legal 500 2023 describes Elizabeth as *"very knowledgeable and experienced for a junior"* and *"a very good all-around adviser"*. The guide praises her *"practical approach to problem solving"* and *"good quick grasp of the issues and facts; good ability to marshal large amounts of material to support preparation of clear and accurate draft evidence"*.

Benjamin Slingo
Since joining Chambers on completion of his pupillage in 2021, Ben has been developing a broad chancery practice which now includes a particular focus on trusts disputes. He has worked on substantial trusts disputes in both Jersey and Guernsey, led by Jonathan Hilliard KC in one case and Michael Ashdown in another. He has also worked on various offshore matters as sole English counsel, including a commercial trusts dispute spanning several jurisdictions and the impact of English land registration law on an offshore breach of trust claim. Before joining Wilberforce Ben received a double starred first in history from Cambridge (coming first in his year in the University) and a doctorate in the history of political philosophy. He was awarded a Distinction on the GDL and was graded Outstanding on the bar course.

Samuel Cathro
Sam is quickly developing a practice with an emphasis on trusts and private client work. His cases often have an offshore element, and he has been instructed on a number of trusts disputes in Jersey and Guernsey, as part of a team and in his own right. He is currently acting on a large contested restructuring proposal which has dimensions in both Jersey and Guernsey, led by Jonathan Hilliard KC. He is also acting in a hostile trusts dispute in Guernsey, led by Robert Ham KC and Michael Ashdown. Sam recently drafted proceedings in Guernsey in relation to a business dispute arising out of the sale of a trusts business. Sam also accepts instructions in non-contentious trusts matters, including drafting deeds of variation. More generally, Sam's practice spans all of Chambers' key areas, including trusts, commercial disputes, property, pensions, and insolvency. He regularly appears in both the High Court and the County Court on his own account. Before joining Wilberforce, Sam practised in New Zealand as a barrister, and as a solicitor in one of New Zealand's leading litigation firms.

Trustee Removal and its alternatives

Jonathan Hilliard KC and Simon Atkinson

The *Erinvale* litigation and lessons to learn from it

1. A particularly difficult situation for a trustee is where it wishes to take some important step in the administration of the trust but an important part of the beneficiary body contends that it should be removed.

2. *Erinvale* provides a good example of one important option in such a situation and the advantages if the circumstances are right to use it.

3. In that case, the trustee promptly brought an application to the Court for directions about whether to retire or not, which is a course that had earlier been used in – among others – the Bermudan case of *X Trusts* [2018] SC Bda 56 Civ.

4. In the *Erinvale* litigation the Jersey Royal Court had ruled – [2021] JRC 241 – that the welfare of the beneficiaries as a whole and the competent administration of the trust in their favour dictated that Erinvale should remain in office as trustee and that it would not be desirable for the directors of it to resign. When the question of costs came to be considered, the Court gave the following guidance – [2022] JRC 076 – for potential use in future cases:

   (1) Where the trustee is not sure whether it should remain in office as a result of beneficiary allegations, it is well advised to apply for directions;
   (2) It is particularly well advised to apply for such directions as soon as possible; and
   (3) If it does so, the Court is likely to be sympathetic on costs to the trustee (which it was on the facts of *Erinvale* itself).

5. The importance of the case is that it focuses attention on when the circumstances are right for such an application and equally – given the positive reception for such an option in *Erinvale* – when the circumstances are <u>not</u> right.

6. One can readily see the advantages of the option:

   (1) The trustee decisively grabs the bull by the horns after beneficiaries have tried to put pressure on it.
   (2) The trustee limits its costs risk, at least in the future, by going to Court quickly.
   (3) If the beneficiaries have not been willing to bring a removal claim, the beneficiaries will need to put up or shut up in respect of their allegations.

7. However, some care is needed about the range of circumstances in which this is the right course. In *Erinvale* itself, there was one particular event that had led to the removal request, namely the trustee's decision not to include a spouse within the beneficial class in the context of a divorce, which the Court ruled – [2020] JRC 213 – was a decision no reasonable trustee would make. Therefore, the Court was later able – on the trustee application for directions as to whether to retire – to decide whether or not it should stay in office without needing cross-examination or too lengthy a hearing.

8. In contrast, in many cases, the removal allegations will be more wide ranging and the sort that would ordinarily require a multi-day removal trial with live evidence, and seeking directions as to whether to remain in office may prompt further such allegations.

9. In such cases:

   (1) Seeking directions may not be such a quick option, and may require the exchange of significant witness evidence followed by live evidence at the hearing.
   (2) It may look far more like the trial of a removal claim.
   (3) Correspondingly, the trustee is at a greater cost risk in seeking such directions.

10. Therefore, care is needed to be sensitive to the context of the particular case in deciding how to proceed.

11. Another linked question which sometimes crops up in practice is how the Court deals with a removal claim where blessing proceedings are on foot. Often the immediate prompt for the removal claim or allegations of inappropriate trustee conduct may be the trustee proposing to make particular restructuring changes to the trust.

12. One such case was Re A Trust [2012] JRC 066. In that case, the blessing representation was started first and the Court heard it first and gave blessing. The Court concluded that someone would need to grapple with the questions facing the present trustee, the key one of which was what the settlor’s true wishes were.

13. The lesson from this is that, where there are two such proceedings running in parallel, this is not necessarily fatal to the blessing being heard first, but it will very much depend on the facts.

<u>Suspension of powers by Court order and how far it goes</u>

14. One sensible innovation that one often finds in practice in Jersey, and indeed Guernsey, is the suspension of trustee or protector powers while removal proceedings are being dealt with against them.

15. This is perfectly principled: the supervisory jurisdiction should allow, where in the interests of the trust, the suspension of powers as much as the permanent removal of the individual or entity in question.

16. One such example is to be found in the *Re M Settlement* case [2009] JRC 140. The Court was asked to consider how the trust assets should be distributed on a winding up of the settlement. The settlor who was a beneficiary and protector was in a position of conflict; his consent was required for any appointment out of assets. There was also concern over his health, apparent alcohol dependency and rationality. In the circumstances, the Court decided to exercise its inherent jurisdiction to suspend the powers of the protector until further order; the Court considered that, on a proper construction of his powers, these were not personal in nature but fiduciary. The suspension of the protector brought into play provisions of the settlement deed which were to the effect that references to the protector or his consent were to be omitted.

17. A further example is the SG Structure litigation in Jersey and Guernsey. This litigation concern a series of Jersey and Guernsey trusts of which SG Kleinwort Hambros Trust Company is the trustee. In Jersey proceedings, *B v Ward* – [2022] JRC 086 – the representors sought to remove the first responded as protector or enforcer of those trusts within the SG structure, as well as new trustees for each of the trusts. Similar removal proceedings were brought in Guernsey to have Mr Ward removed as protector of trusts known as the Mirafield Trusts and the removal of Mirafield as trustee. So far as the Jersey removal proceedings were concerned, the Court concluded that the representors had subjectively good reason for reaching their conclusions that they had lost trust and confidence in the protector. The views of the parties before the Court was that a restructuring of the trusts was desirable, but there were difference as to how that might be achieved. The protector put forward an open proposal that he should remain in office but with his powers effectively frozen pending the restructuring, that the trustees should also remain in office for the purposes of carrying out a restructuring and the Court could give directions for the preparation of restructuring proposals. The Court concluded that a restructuring of the trusts was necessary to improve family relations but that it was no part of the Court's function to settle any such proposals then. The proceedings were therefore adjourned for three months while proposals were formulated, during which time the first respondent's powers of protector were suspended.

18. One interesting question is how far this goes.

19. It is clear that it allows the barring of the exercise of powers for a particular period e.g. until further order in the context of a removal claim. Barring a particular person in this way holds the ring and is effectively injunctive relief against the fiduciary where there is a case for his removal.

20. Slightly more interesting is whether the suspension of protector powers allows the trustee to exercise unilaterally a power that would otherwise require protector consent. That is to an extent changing the way the trust operates.

Surrender of discretion and the *Womble Bond Dickinson* [2022] EWHC 43 (Ch) case

21. Another interesting question which arises in such difficult situations for trustees is whether a surrender of discretion is appropriate.

22. An interesting English case in this regard that is worth flagging up is the *Womble Bond Dickinson* case, reported at [2022] EWHC 43 (Ch), a decision of Master Brightwell, one of the editors of Lewin.

23. In that case, a trustee of an employee benefit trust for the benefit of employees of a defunct group of companies sought directions to how it should go about distributing the fund to the possible classes of beneficiary.

24. The trustee sought to surrender its discretion to the Court on the point and put forward various options for the Court to choose between.

25. The Court accepted the surrender- despite the absence of a conflict- on the following basis at [66]:

> *Ultimately, I have come to the view that in light of the difficulties experienced by the trustee, which is now having to deal with the administration of this trust without any contemporaneous knowledge of the PD Group companies and given the relatively modest size of the fund, there is only one sensible way for this trust to be administered, to which I will come below. While the court will usually not accept a surrender merely because a trustee is concerned about being sued for making a decision, that concern must be seen in the context of all the circumstances I have described, together with the fact that some clarity on the most appropriate way to proceed has emerged. It is also a relevant factor that trust corporations and professional trustees should not be discouraged from assuming the trusteeship of difficult trusts. I will accordingly accept the surrender of discretion.*

Other ways of dealing with the problem

26. This conveniently leads on the final question, which is whether there are other ways of trustees dealing with difficult situations where removal allegations are made.

27. What one can see from the above, drawing the threads together, is that the Courts will be innovative in applying the supervisory jurisdiction to cases where trustees find themselves in difficult situations.

28. The scenarios above are just examples of that.

29. Two other examples worth mentioning are as follows.

30. First, the Courts in Guernsey have spoken of the ability to have a dialogue between the trustee and Court on a blessing application where necessary to indicate to the trustees matters that the Court will not bless but might or would bless if modified in a particular respect: see the comments of Martin JA in the Court of Appeal in Guernsey in *Re F* (judgment 32/2013), [11].

31. Second, it is common for judges to find other ways of indicating views to parties in trust cases, to keep the case on the right track. There are a host of ways of doing so in practice, and one recent example is the giving of non-binding guidance to the parties: see *SG Kleinwort Hambros Trust Company (CI) Limited* [2023] JRC 054, part of the SG Structure litigation in Jersey. This case management decision was recently been upheld on appeal at [2023] JCA 088, albeit the Jersey Court of Appeal noted that if any when any non-binding guidance is given by the Royal Court in due course, there may be debate about whether such guidance falls within the scope of Article 51 of the Trusts (Jersey) Law 1984 and/or violates the non-intervention principle, albeit this could not be determined prospectively.

Representation in trusts proceedings

Tom Roscoe and Benjamin Slingo

I. Introduction

1. Which parties should be before the Court in trust proceedings, and why? In addressing these questions, we focus on the common and important case of a trustee's application to have a momentous decision blessed. Who does the Court need to hear from in determining whether to bless or not, and who does the trustee need to convene in order to insulate itself from future challenge? Which of those last two questions is, in fact, the key one—is representation in blessing proceedings primarily about making sure the Court is properly informed, or protecting the trustees?

2. This is terrain on which a large, strange object has recently landed, in the form of the English Court of Appeal's decision in *Denaxe v Cooper*.[1] Our paper offers guidance on how one should approach this object, and how one might get round it.

3. The paper is in three parts. First, we summarise what we thought we all knew and understood, before *Denaxe* was handed down. Second, we set out what *Denaxe* says, and the fairly drastic implications it might have for representation in blessing applications. Third, we suggest how *Denaxe* might be tamed. There are elements of the decision which point towards a more manageable way forward.

II: The status quo ante

4. We start with the basics, since in some respects *Denaxe* is hard to reconcile even with those. An obvious jumping-off point is the legislation governing trustees' applications, and the statutory rules of court that set out the relevant procedure.

II.1. The legislation and the procedural rules

5. In Jersey, the relevant statutory provision is Article 51 of the Trusts Law (Jersey) 1984 (as amendment), which says, at Art. 51(1), that "*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*". It adds, at Art. 51(2), that "*The court may, if it thinks fit … make an order*

[1] [2023] EWCA 752.

concerning – (i) the execution or the administration of any trust, [or] (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".

6. Rule 4/5 of the Royal Court Rules says the following about such applications:

   "*(1) Proceedings may be brought by or against trustees, executors or administrators in their capacity as such* *__without joining any of the persons having a beneficial interest in the trust or estate as the case may be__*; *and any judgment or order given or made in those proceedings* *__shall be binding on those persons unless the Court in the same or other proceedings otherwise orders on the ground that the trustees, executors or administrators, as the case may be, could not or did not in fact represent the interests of those persons in the first mentioned proceedings__*.

   "*(2) Paragraph (1) is without prejudice to the power of the Court to order any person having such an interest as aforesaid to be made a party to the proceedings or to make an order under Rule 4/4 [i.e. a representation order].*" (Emphasis added.)

7. An application for the blessing of a trustee decision under the principles of *__Public Trustee v Cooper__*[2] falls under Art. 51 and is governed for by r. 4/5.

8. The position in Guernsey is the same for our purposes. The relevant statutory provision is Article 69 of the Trusts (Guernsey) Law 2007 (as amended). It says, at Art. 69(1):

   "*On the application of any person mentioned in subsection (2), the Royal Court may - (a) make an order in respect of - (i) the execution, administration or enforcement of a trust, (ii) a trustee, including an order as to the exercise by a trustee of his functions, the removal of a trustee (if, for example, he refuses or is unfit to act, or he is incapable of acting or is bankrupt, or his property becomes liable to arrest, saisie, or similar process of law), the appointment, remuneration or conduct of a trustee, the keeping and submission of accounts, and the making of payments, whether into court or otherwise.*"

9. Rule 35 of the Royal Court Rules then says the following about such applications:

   "*(1) An action may be brought by or against trustees, executors or administrators*

[2] __[2001] WTLR 901__.

in that capacity without adding as parties any persons who have a beneficial interest in the trust or estate ('the beneficiaries').
(2) *Any judgment or order given or made in the action is binding on the beneficiaries unless the Court orders otherwise in the same or other proceedings.*"
(Emphasis added.)

10. Given that *Denaxe* is an English case, it is worth pointing out that the rules in England and Wales are also the same for our purposes. Rule 19.10 of the Civil Procedure Rules says:

    "*(1) A claim may be brought by or against trustees, executors or administrators in that capacity without adding as parties any persons who have a beneficial interest in the trust or estate ('the beneficiaries').*
    "(2) Any judgment or order given or made in the claim is binding on the beneficiaries unless the court orders otherwise in the same or other proceedings."

11. CPR Part 64 supplements these provisions. Rule 64.2 explains that "*[t]his Section of this Part applies to claims – (a) for the court to determine any question arising in – (i) the administration of the estate of a deceased person; or (ii) the execution of a trust.*" I.e., the Section covers blessing applications. Rule 64.4 then says:

    "*(1) In a claim to which this Section applies, other than an application under section 48 of the Administration of Justice Act 1985 – (a) all the trustees must be parties; (b) if the claim is made by trustees, any of them who does not consent to being a claimant must be made a defendant; and (c) the claimant **may** make parties to the claim any persons with an interest in or claim against the estate, or an interest under the trust, who it is appropriate to make parties having regard to the nature of the order sought.*
    "*(2) In addition, in a claim under the Variation of Trusts Act 1958, unless the court directs otherwise any person who – (a) created the trust; or (b) provided property for the purposes of the trust, must, if still alive, be made a party to the claim.*
    "*(The court **may**, under rule 19.2, order additional persons to be made parties to a claim.)*" (Emphasis added.)

12. For completeness, Part 64 is in turn supplemented by Practice Direction 64B on "*Applications to the Court for directions by trustees in relation to the administration of the trust*"—a category into which blessing application fall squarely. Para 4.1 of PD64B says: "*Rule 64.4(1)(c) deals with the joining of beneficiaries as defendants. Often, especially in the case of a private trust, it will be clear that some, and which, beneficiaries need to be joined as defendants. Sometimes, if there are only two views of the appropriate course, and one is advocated by one beneficiary who will be joined, it may not be necessary for other beneficiaries to be joined since the trustees may be able to present the other arguments. Equally, in the case of pension trust, it may not be necessary for a member of every possible different class of beneficiaries to be joined.*" (Emphasis added.)

13. The position in each jurisdiction thus seems clear. When applying for blessing, a trustee is not required to join all the beneficiaries. When the Court grants blessing, its decision binds all those beneficiaries whether they were joined or not—unless the Court orders otherwise in the same or different proceedings. As the Jersey rules specify, the Court may order otherwise if the interests of the relevant beneficiary were not properly represented. As the English rules indicate, this is the key principle underlying the position: different interests, and the arguments on their behalf, must be made heard in some form or other.

II.2. The legal effect of blessing

14. In this respect, it has seemed clear that blessing protected the trustees from any allegation that they had made blessed decision in breach of trust. In Jersey, the Court of Appeal made this point in Kan v HSBC International Trustee Ltd: "*[T]he result of the court giving its approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust, or to set it aside as flawed.*"[3] In England, Millett J (as he then was) said the following in *Richard v Mackay*:

    "*Where, however, the transaction is proposed to be carried out by the trustees in the exercise of their own discretion, entirely out of court, the trustees retaining their discretion and merely seeking the authorisation of the court for their own protection … It must be borne in mind that one consequence of authorising the trustees to exercise a power is to deprive the beneficiaries of any opportunity of alleging that it constitutes a breach of trust and seeking compensation for any loss which may flow from that wrong.*"[4]

15. These authorities refer specifically to protection against claims for breach of trust, and we will have to come back to that point later. Nevertheless, it has generally been understood that the protection extends to all claims which those interested under the trust might bring against the trustees. That position was set out expressly and authoritatively in Guernsey by the Court of Appeal in *Re F*, per Martin JA:

    "*In the second type of application [i.e. a blessing application], however, the court is not exercising a discretion. What it is doing is in effect making a declaration that the trustees' proposed exercise of the power is lawful; in other words, that the proposed exercise is within the proper ambit of the power, that the trustees are acting honestly, and that in reaching their decision the trustees have taken into account all relevant matters, have taken into account no irrelevant matters, and have not reached a decision that no reasonable body of trustees could have*

[3] [2015] JCA109, §19

[4] [2008] WTLR 1667, 1671 (a 1987 decision reported rather belatedly).

reached. <u>The effect is to protect the trustees from any challenge to their decision by persons interested in the trust, and to make clear that the trustees are entitled to indemnity from the trust assets in respect of the costs or other financial consequences of their decision.</u> It is immaterial that the court, had it been exercising a discretion of its own, would have exercised it in a way different from that proposed by the trustees." (Emphasis added.)

16. Given this general understanding, it has not always been necessary to state distinctly which potential claims are ruled out by Court blessing. <u>*Lewin on Trusts*</u>, at §39-092, simply says: "*On an application for approval without the surrender of the trustees' discretion, the effect of approval if given is that no beneficiary may thereafter complain that the exercise of the power so approved was a breach of duty on the part of the trustees.*" What exactly is covered by breach of *duty*, the authors do not say.

<u>II.3. The rationale for the orthodox position</u>

17. To summarise where we have reached, a trustee has historically been able to insulate itself from all future challenges to a blessed decision, without having to make all the beneficiaries party to the application. Why? What has been the rationale for the position?

18. It is not necessarily an intuitive one. Note that blessing has been characterised as a kind of declaratory relief. See the very first sentence of <u>*Public Trustee v Cooper,*</u>[5] the leading case: "*This is an application by the claimants primarily for a declaration that they may properly accept the offer to purchase the claimants' shares in Mansfield Brewery plc ('the company'), which was made on 25th October this year, by Wolverhampton & Dudley Breweries plc ('W&D').*" See also a sentence from the above-quoted passage from <u>*Re F*</u> in Guernsey on the Court's role: "*What it is doing is in effect making a declaration that the trustees' proposed exercise of the power is lawful*". In ordinary litigation, of course, declarations only bind the parties.

19. The key to the answer is that the Court, on a blessing application, exercises its supervisory jurisdiction over the administration of the trusts. That jurisdiction was originally inherent, but is now enshrined in statute—see Arts. 51 and 69, set out above. The exercise of the supervisory jurisdiction puts a decision to bless in a different category from a decision in standard-issue *inter partes* litigation.

[5] [2001] WTLR 901, §1.

20. To see why, consider the relationship between two distinct but analogous scenarios. The first is blessing, where the Court considers whether the trustee's decision meets the test in *PT v Cooper*. The second is a surrender of discretion by the trustee, where the Court makes its own decision as to how the trust should be administered.

21. In both cases the trustees are "*seeking directions*" from the Court. Hart J made this clear in *PT v Cooper* itself. He said: "*Mr. Herbert submitted … that the act of seeking directions necessarily involved the trustee in such a surrender of discretion. I do not agree. Applications for directions by trustees are a commonplace phenomenon. The ability of trustees to make such applications derives from the peculiar relationship of trusts to the court of Chancery and is no doubt founded in* ***the jurisdiction of this court in an appropriate case itself to execute a trust****.*" [6] The passage underlined here applies equally to surrenders of discretion and the blessing applications—as does, for instance, PD64B in England.

22. In each scenario, then, the Court is exercising its supervisory jurisdiction as to how the trust should be administered—either by taking a decision itself, or by approving the trustee's decision. Since the Court has a jurisdiction over the trust, it makes sense that those interested under the trusts are bound by how it chooses to exercise that jurisdiction. It would not make any sense to say that certain causes of action remained open to a disappointed beneficiary after the Court had exercised a discretion the trustee had surrendered;[7] though the process the Court undertakes on a blessing application is different, the imprimatur it gives is the same. The logic here has nothing to do with *res judicata* or abuse of process (as to which concepts we will have more to say shortly). The Court is not deciding issues between parties on an adversarial or quasi-adversarial footing, but supervising how the trust is administered.

II.4. The basis for deciding who is convened

23. We can now consider who should be convened in blessing proceedings, on the orthodox view. We have seen already that beneficiaries do not have a right to be convened, and that a trustee need not convene all of them to ensure the Court's decision binds them. The real test, instead, is whether the Court considers that convening a party will help it decide whether to grant blessing. It is thus the Court that decides, and the Court's own requirements that it primarily considers.

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[6] *Public Trustee*, §34, emphasis added.

[7] If the Court has made a decision on inadequate information as a result of inadequate disclosure by the trustee, a beneficiary has a recourse, but that is a separate matter.

24. The Jersey Royal Court set this position out clearly in *Re the E, R, O and L Trusts*.[8] It first said: "*When the Court sits in its supervisory capacity to consider directions or rulings it should give in relation to a trust, it has to consider in each case who should be convened to the hearing.*"[9] It then added:

> "*The question is whether it is necessary that a party be convened in order properly to determine the trustee's application If that test is satisfied, the Court has a discretion to convene the relevant party. It seems to us that the underlying rationale for convening a beneficiary is essentially two-fold:- (i) It is likely that a beneficiary will have something material which the Court ought to be aware of before deciding what directions to give. Thus the view of a beneficiary on whether it would be right to take a particular course of action is clearly something relevant for the Court to know. (ii) It may also be thought unfair for the Court to make a decision which would affect the trust (and therefore the interests of a beneficiary) without giving that beneficiary an opportunity of putting his observations to the Court.*"

25. While fairness to a beneficiary is thus something the Court would take into account, it was (i) apparently secondary to the purpose of ensuring the Court was well informed, and (ii) a matter for the Court's discretion. As the Jersey Royal Court put it another case, *In the matter of H*,[10] "*It is ultimately a discretionary decision as to how best to ensure that the Court receives all relevant assistance in relation to the decisions which it has to take concerning the Trust.*"

26. Consistent with this position, the Court will sometimes convene parties who are not beneficiaries. That too was emphasised in *Re the E, R, O and L Trusts*.[11]

III. The position according to the English Court of Appeal in *Denaxe*

27. We start with a brief account of what *Denaxe* was about. The facts had little in common with any case involving a private family trust—a point we will come back to.

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[8] [2008] JRC 058.

[9] §21.

[10] [2011] JRC 070.

[11] §23: "*As well as beneficiaries, the Court may think it appropriate to hear from others who have a close connection with the trust even if they are not beneficiaries. For example there may be a protector whose views would be material; and sometimes the nature of the issue before the Court may mean that is appropriate to hear from the settlor even if he is not a beneficiary. But again, whether this is appropriate will depend upon the circumstances.*"

28. Denaxe was the majority owner of the shares in Blackpool Football Club Limited, and owned Blackpool's stadium. It was in turn owned and controlled by a Mr Oyston. A dispute between Denaxe and Mr Oyston (on the one hand) and the minority owner of the club on the other led to an unfair prejudice petition, which culminated in a buy-out order requiring Denaxe and Mr Oyston to buy out the minority owner.

29. By way of enforcement of that buy-out order, the minority order successfully applied for the appointment of receivers by way of equitable execution over assets of Mr Oyston and Denaxe. The receivers' powers were subject to the proviso that they could only sell Mr Oyston's shares in Denaxe *"on terms subject to the further approval of the court following the reaching of an agreement in principle with a proposed purchaser or purchasers"*.

30. The receivers came to the view that it was appropriate to sell Denaxe's interests in the club *together with* the minority shareholder's interests in the club as a single transaction. That would, they thought, maximise value.

31. The receivers made a "Sanction Application" for the approval of the terms of a proposed sale. The minority shareholder and Mr Oysten were represented at the hearing. Denaxe was not.

32. Marcus Smith J approved the proposed sale. Whilst noting that the proviso in the buy-out order did not apply (because it was not Mr Oyston's shares in Denaxe that were to be sold), he nevertheless was prepared to entertain the application because *"I regard the sale of the Club as a matter requiring court scrutiny"*.

33. The test Marcus Smith J applied in deciding to approve the transaction (following *Re Nortel Networks UK limited*)[12] was to ask whether: (i) the exercise of the power by the receivers was a lawful one, within the scope of the powers granted; (ii) the receivers have acted as ordinary, prudent and reasonable receivers; (iii) (without second-guessing the receivers) the transaction is a proper one in the circumstances; and (iv) the receivers genuinely hold the view that the transaction is a proper one which should be entered into.

34. Denaxe thereafter sued the receivers alleging a breach of their duties and the sale of Denaxe's assets at an undervalue. The receivers applied to strike out that claim, including on the ground that the effect of Marcus Smith J's decision was to grant them *"immunity"*. At first instance, that ground succeeded. The result was not upset

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[12] [2016] EWHC 2769 (Ch), [2017] Bus LR 590.

on appeal; but the Court of Appeal's analysis importantly differed from that at first instance.

III.1. The basic principle from Denaxe

35. The key statement of principle in *Denaxe* is that blessing can only insulate a trustee from challenge by virtue of two principles of law. One is *res judicata* and the other is abuse of process, as defined in English law in the line of cases issuing from *Henderson v Henderson*.[13] These are general principles which protect diverse kinds of litigant in diverse kinds of case; per *Denaxe*, there are no more particular principles of trusts law which grant special protection to trustees. As Snowden LJ (with whom Falk LJ and Asplin LJ agreed) put it:[14]

    "*Although, following the lead of the parties, the Judge treated 'immunity' as a discrete concept, there is in fact no separate doctrine of English business or property law called 'immunity', and none was identified in the Judgment. As such, to claim 'immunity', it seems to me that trustees or other officer-holders would have to be able to invoke some other established legal principle to prevent the subsequent claim from being pursued. In my view, although the parties and the Judge treated them as separate and distinct, the only two candidates to provide content to the notion of 'immunity' are the doctrines of res judicata and abuse of process.*"

36. As explained by Lord Sumption in *Virgin Atlantic Airways v Zodiac Seats UK*[15] at §17, *res judicata* is a "*portmanteau term*" for a number of principles. Of those, it is the fourth and fifth that are relevant for present purposes: issue estoppel, and the principle in *Henderson* (i.e. that a party may be prevented from raising in subsequent proceedings matters which were not, but could and should have been, raised in earlier proceedings).

37. When considering the overlap of considerations of issue estoppel, *Henderson v Henderson* and abuse of process, Snowden LJ went on to record (at §125):

    "*Whatever the precise boundaries or overlap of these principles, it is readily apparent that in each of the relevant categories of issue estoppel* [including *Henderson v Henderson* for these purposes] *and abuse of process there is a focus on the issues that were determined (or which could and should have been raised*

[13] (1843) 3 Hare 100.

[14] §117.

[15] [2014] AC 160

for determination), by the first court. For each of the doctrines, a comparison is then made with the issues that the claimant asks the court to decide in the subsequent claim."

38. Accordingly, whilst the formulation of "immunity" was wrong, Snowden LJ thought that the first instance judge was "*substantially the right track when he observed, at [80] of his Judgment, that the "immunity" which flows from an approval decision derives in principle from the nature of the review conducted by the approving court, and whether "immunity" extends to a subsequent claim depends upon the allegations made or necessarily involved in that second claim.*"

39. Snowden LJ also explained how the Court's decision on a blessing application triggered these principles. As to issue estoppel, "*if the judge hearing the approval application determines a particular issue as a step in deciding to give his approval, that will operate as a bar to a party to the application (or one of their privies) seeking to relitigate that issue in subsequent proceedings against the trustees or office-holder*".[16] As to abuse of process, if a party ought to raise an issue in the blessing proceedings but fails to do so, that will preclude him from suing in respect of it later.

III.2. Why Denaxe veers away from the orthodox approach

40. In finding that only *res judicata* and the principle from *Henderson* can protect a trustee, the English Court of Appeal arguably ignored a whole dimension of the prior case law on blessings. That is, Snowden LJ declined to analyse blessing in terms of the Court's supervisory jurisdiction over the administration of a trust. (The phrase "*supervisory jurisdiction*" appears just once in the judgment, and then in quotation from *Cotton v Brudenell-Bruce*.[17])

41. As we set out earlier, it was the concept of the supervisory jurisdiction, which was ultimately a jurisdiction to execute the trust itself, that enabled the Court to bind the beneficiaries without their being joined as parties, and to give an all-round blessing that went beyond the determination of specific issues that might ground specific claims against the trustee. Without that concept to hand, the Court of Appeal in *Denaxe* had to analyse what happens on a blessing application in a rather artificial way. As Snowden LJ put it: "*Although it is not entirely apposite to speak in terms of the applicant trustees or office-holders having a 'cause of action' when making an approval application, the essence of the point is that if the judge hearing the approval application determines a particular issue as a step in deciding to give his approval, that will operate as a bar to a party to the application (or one of their*

[16] §127.

[17] [2014] EWCA Civ 1312. We will come back to this case below.

privies) seeking to relitigate that issue in subsequent proceedings against the trustees or office-holder."

III.3. The implications of Denaxe for blessings

42. Three main consequences flow from *Denaxe*, to the extent that it is followed. One concerns parties, another issues, and the third procedure.

43. The consequence as to parties is straightforward, but very disruptive to the orthodox position set out above. Issue estoppel and the rule in *Henderson* only reliably bar someone from bringing a claim if that person was a party to the original proceedings.[18] As a matter of logic, a trustee must therefore join all beneficiaries as parties in order to ensure the Court's decision binds them.

44. In England and Wales, this implication seems to conflict with both the clear words and the underlying logic of r. 19.10, r. 64.4, and para 4.1 of PD64B. It would likewise conflict with the equivalent provisions in Jersey and Guernsey. Whereas the rules indicate that all separate interests must be represented and all arguments put, *Denaxe* holds that all relevant persons must be parties.

45. The position in *Denaxe* also conflicts with the traditional approach to deciding which parties are convened. If a trustee must join all beneficiaries to ensure they are bound, the trustee's interest will be paramount in deciding who is a party, and the need to bind beneficiaries will be the criterion used. This is all very different from saying that the Court has a discretion, which it should exercise to ensure it has the help it needs to determine application.

46. Snowden LJ appears to have overlooked both the rules' provision that not all beneficiaries need always be joined, and the Court's primary role in deciding whom it needs to hear. Instead, he said: "*As I have indicated, it is an essential requirement of issue estoppel that the claimant in the second set of proceedings should also have been a party (or a privy of a party) to the earlier decision. This is the underlying reason why, for example, trustees seeking approval to a proposed transaction will join all potentially interested beneficiaries.*"[19]

47. The second consequence of *Denaxe* concerns the issues the Court will decide. It seems that the matter before the Court on a blessing application is not whether the

[18] There are exceptions to this rule in the case of abuse of process, but they are rare. See §124 of *Denaxe*, which stresses that the exceptional "*category is … very limited*".

[19] *Denaxe*, §133.

Court should approve the trustee's decision as such or in the round, but which specific future claims it should close off by determining specific issues. To take the relevant point in dispute from *Denaxe* itself, the Court should decide whether the trustee has been negligent, as well as whether, by acting honestly and rationally, he has avoided a breach of trust. It follows that the trustee, in bringing an application for blessing, should specifically invite the court to resolve a list of issues, and the beneficiaries should have the opportunity to address those issues.

48. The solution is not so simple as drawing up a long enough list, however, for the third consequence of *Denaxe* concerns the blessing procedure itself. The point of a trustee representation, as with the equivalent Part 8 claim in England, is to obtain a resolution swiftly without the need for full-scale documentary disclosure, oral evidence, and so on. That is how blessing is ordinarily obtained. Yet one of the reasons why Snowden LJ held that a blessing only protected the trustees in respect of the issues the Court had actually determined was that he felt serious discomfort about complex, fact-sensitive issues being decided via the "*quick and accessible*"[20] procedure followed in a Part 8 claim or representation.

49. Snowden LJ considered that deciding whether a trustee had acted honestly and rationally was feasible under this procedure, but that, for instance establishing whether the trustee had in fact obtained the best possible price in a specific transaction might not be. He said:

> "*[I]f, for example, the issue which the court was to ask itself on an approval application was whether the trustees were acting honestly and rationally in deciding to enter into a transaction, then the trustees would be protected by the court's approval against a subsequent claim to set aside the transaction and for any consequential relief on the basis that they were not exercising their powers honestly or rationally in the best interests of the beneficiaries ... At the other end of the spectrum, if, for example, the issue which the court was asked to determine was whether trustees had reached a decision to sell an asset in accordance with their equitable duty of care, then one might well expect the court to be even more cautious about determining that issue. The precise procedure to be adopted would be a matter for the court, but if the matter was contested, one might ordinarily expect a judge to be very wary of determining that issue, at least in the absence of disclosure, production of expert evidence and/or cross-examination.*"[21]

[20] *Cotton*, §78, quoted at *Denaxe*, §111.

[21] §131.

50. What is striking here is how the court in *Denaxe* turned upside down principles trustees have traditionally relied on to ease their path to blessing. The notion that the blessing procedure should be "*quick and accessible*" is one trustees usually cite to argue that the Court should not pick too many holes in their decisions. In the passage just quoted, Snowden LJ used it to say that the Court should not bless decisions involving complicated matters of detail at all.

51. In the same vein, trustees often cite the principle that, as the Jersey Royal Court has put it, "*the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries*".[22] Yet Snowden LJ used this principle to suggest that the court should be slow to immunise these better-placed decision-makers, especially on a summary procedure. Quoting the recent decision of Miles J in *Re Sova Capital Ltd*, he said: "*Administrators are professionals who fulfil a commercial role in conducting the business and affairs of the company in administration. They are generally required to make their own commercial decisions and cannot expect to rely on the approval of the court in those respects.*"[23] While this comment applied in the first instance to office-holders in an insolvency context, Snowden LJ considered it relevant to professional trustees.[24]

52. If the courts follow this strand of reasoning in *Denaxe*, they may simply refuse to bless, in respect of all possible claims, complex decisions put before them by way of representations.

IV: Dealing with *Denaxe*

53. All those implications are discomfiting. Looked at from the vantage point we have now reached, *Denaxe*—if it is followed—threatens to make it difficult for trustees to secure the kind of protection they are accustomed to seeking via blessing. Fortunately for them and their advisers, there are features of the Court of Appeal's decision that can perhaps be exploited to limit its impact.

IV.1. Representation orders

54. While *Denaxe* entails that a trustee has to join all the beneficiaries in order to be sure of binding them, the Court of Appeal did envisage using representation orders

[22] *Re S Settlement* [2001] JRC 154.

[23] [2023] EWHC 452 (Ch), §184, quoted in *Denaxe*, §139.

[24] See *Denaxe*, §129: "*The cases to which I have referred above illustrate that the court's willingness to entertain a particular application for approval and the issues that it may be prepared to determine will vary from case to case. They may, for example, depend on the identity of the applicant (e.g. are they a professional trustee or office-holder, or an unpaid family trustee?)*"

to make this easier. As Snowden LJ said: "*It is an essential requirement of issue estoppel that the claimant in the second set of proceedings should also have been a party (or a privy of a party) to the earlier decision. This is the underlying reason why, for example, trustees seeking approval to a proposed transaction will join all potentially interested beneficiaries, or, if that is not practical, seek the appointment of representative respondent beneficiaries. That regularly occurs, for example, in cases involving pension funds: see e.g. Re Merchant Navy Ratings Pension Fund [2015] EWHC 448 (Ch) at [9]-[14].*"

55. One could read the Court of Appeal as suggesting that representation orders should be used more often, outside the pensions context. While there was no private trusts specialist on the panel, there was a pensions specialist—Asplin LJ, who had been the judge in *Merchant Navy*.

56. If this reading of *Denaxe* is right, one solution for trustees will be to formalise the representation of different interests in the blessing proceedings by obtaining representation orders that cover all relevant parties. While this approach would add a layer of procedural complexity, it would conflict much less with the orthodox position than *Denaxe* does in other respects.

57. As we explained earlier, and as rule 4/5 of the Jersey rules nicely illustrates, the basis for the orthodox position is that all interests will be represented and all arguments will be put. The pre-*Denaxe* option of convening some beneficiaries but not otherwise, without sacrificing anything in terms of the range of interest and arguments represented, was a less regimented way of achieving this outcome; as was said in *Re the E, R, O and L Trusts*, "*It is not invariably the case that all the beneficiaries need to be heard. Many of them may have an identical interest.*"[25] Moreover, the procedural rules do not seem to discourage obtaining representation orders in a wide range of cases. Rule 4/5 is expressly said to be without prejudice to the Court's power to make such an order, and rule 35 in Guernsey also directly follows the rule providing for such orders.

58. Meanwhile, nothing in *Denaxe* precludes the convening of parties who do not "need" to be convened for the purposes of binding them, but whose contribution would nonetheless assist the Court.

[25] §21.

IV.2. Notice

59. Second, the law on abuse of process is such that actually convening a beneficiary will not always be necessary to protect a trustee—even if it is always the safest option. As Snowden LJ said: "*[I]if trustees or office-holders advertise their intention to seek approval for a momentous decision, so that beneficiaries or creditors have the opportunity to attend and be heard … then the trustees or office-holders will undoubtedly have a better prospect of persuading a court that a subsequent claim by a beneficiary or creditor would be an abuse of process. In such a situation it would plainly be relevant to ask whether the claimant in those subsequent proceedings had knowledge of the earlier proceedings and had a proper opportunity to participate in them.*"[26]

60. In other words, take a beneficiary who was properly notified of the blessing proceedings, but made no effort to be convened. If he tried to challenge the blessed decision later, he might be "*misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before*".[27] It could have been raised by him, that is, had he taken the opportunity to participate in the blessing.

IV.3. The difference between family and commercial contexts

61. The two strategies above may protect a trustee from a wider range of claimants. They do not necessarily protect him from a wider range of claims. There is still the problem that, following *Denaxe*, blessing only covers specified issues, and that the Court may be loath to grant immunity where the issue in question is fact-heavy and complex. In this regard, *Denaxe* offers some scope for treating trustees of private trusts less stringently than office-holders in a commercial insolvency context. *Denaxe* itself, of course, was concerned with just that latter context.

62. Snowden LJ refused to provide a "*bomb shelter*"[28] for receivers and administrators, whose primary job is to make commercial decisions about disposing of assets and who are ordinarily subject only to commercial pressures. One might think a different approach makes sense in the case of trustees—even professional trustees—of private family trusts. Such trustees, though professionals, may lack, in respect of a given decision to be blessed, the special expertise that insolvency practitioners have in their field. After all, they tend to be faced with a much wider range of challenges.

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[26] *Denaxe*, §135.

[27] *Johnson v Gore-Wood* [2002] 2 AC 1, 31, quoted in *Denaxe*, §122. Per Lord Bingham in *Johnson*, whether a party is so misusing or abusing the process of court in this manner is "*the crucial question*".

[28] *Denaxe*, §139.

Such trustees may also have to manage very difficult interpersonal dynamics, as well as the commercial implications of the relevant decision.

63. There is some support for this common sense in the Court of Appeal's decision. In particular, Snowden LJ approved the following passage from Sova Capital: "*There may ... be differences between trustees of private trusts and office-holders appointed under the insolvency legislation. Office-holders are required routinely to take momentous commercial decisions and to weigh up the risks and rewards of competing courses.*"[29] As Asplin LJ added in more general terms, "*one size does not fit all*".[30]

64. In effect, there is scope in *Denaxe* for the courts, in a private client context, reaching a decision on the widest range of potential 'issues' and so immunising trustees in much the same way as was envisaged in *Re F*. It would simply be a question of the Trustees seeking such wide-ranging immunity more explicitly, and the Court giving it more explicitly—if the context pointed to that outcome.

IV.4. The freedom of action of the Court seised of a particular blessing

65. As the previous point suggests, the Court hearing a particular blessing application will have to use its judgement on the facts before it. In one scenario it may be reluctant to approve a complex decision on a summary procedure; in another it may be more willing. It follows that, even under *Denaxe*, any given tribunal, in any given jurisdiction, would have a relatively free hand in deciding how to proceed. The English Court of Appeal was evidently wary, at least in a commercial insolvency context. Another courts elsewhere might be less so, and open the arguments in that direction.

66. In this connection, Snowden LJ's handling of Vos LJ's judgment in *Cotton* is significant. *Cotton*, like *Denaxe*, was about the trustees' sale of a substantial asset. At §114 of *Denaxe*, Snowden LJ said that *Cotton* "*was unusual in that the court was prepared to review a considerable amount of expert evidence in some detail*" on the ordinary blessing procedure without oral evidence, and seemingly to protect the trustee against a breach of duties of care as well as breach of trust. Snowden LJ appears to have thought that few other tribunals were likely to take Vos LJ's approach; but that expectation might well be confounded.

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[29] *Denaxe*, §139, quoting *Sova Capital*, §184(b).

[30] *Denaxe*, §171.

67. In other words, the new principles from _Denaxe_ may be of less practical importance than the Court of Appeal's temperamental disposition, i.e. its reluctance to give sweeping immunity across all potential issues in the face of complex facts. Other Court's might adopt a more robust attitude, especially if they are long accustomed to dealing with trustee blessing applications in a private-client context.

IV.5. The availability of an abuse of process defence even where the issues are not listed in the blessing proceedings

68. Even if there is a distinction between a commercial insolvency practitioner and the trustee of a family trust, or if a Jersey or Guernsey Court took a more robust stance in practice than the English Court of Appeal, there would seem to be a further problem. If protection is issue-based, does the trustee have to identify in advance, and list for the Court, all the issues in respect of which it seeks blessing? If so, this might be burdensome, and there would always be the risk of overlooking something .

69. Here again _Denaxe_ offers some solace. As noted above, the defendant receivers ultimately won, despite the Court's finding that they had not sought or obtained blessing in respect of the negligence issue at the heart of the fresh claim. The reason they won is that the _claimant_ had not raised the relevant issue in the earlier blessing proceedings.[31] Even though the receivers had not listed out the issues in those proceedings, the claimant had had the opportunity to raise them. Since he had passed it up, his subsequent claim was an abuse of process.

70. It follows that the burden of identifying the future claims that might be brought does not fall entirely on the trustee seeking blessing.

V. Conclusion

71. Professional trustees and their experienced advisors are well used to taking care to ensure that all interested parties' interests are represented on blessing applications. Judges experienced in such hearings are also very alive to the need for that representation.

72. To the extent that _Denaxe_ is followed in the Channel Islands, it is—for the most part—likely to be by way of evolution rather than revolution of practice. There will likely need to be, for example, additional precision and process in drawing up representation orders and spelling out precisely what issues the Court is being asked to determine—but the essential aim of the exercise is unchanged.

[31] _Denaxe_, §155.

73. What is less clear, however, is how the Court's supervisory jurisdiction in the surrender cases, and its jurisdiction to make orders in an appropriate case in the absence of any defendants or respondents can usefully operate (if at all) if *Denaxe* is viewed as a correct statement of the law. The two approaches are difficult to reconcile.

Fiduciary duties in a commercial context

Elizabeth Houghton

What is the essence of a fiduciary relationship?

Many commentators have identified the distinguishing feature of fiduciary relationships to be loyalty.[32] That is relatively uncontroversial,[33] but the description needs to be given more substance for it to be helpful. Mason J in *Hospital Products v Unites States Surgical Corporation* said:

> *The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense.*[34]

Similarly, Professor Finn in his seminal work on fiduciary obligations has said:

> *For a person to be a fiduciary he must first and foremost have bound himself in some way to protect and/or to advance the interests of another. This is perhaps the most obvious of the characteristics of the fiduciary office for Equity will only oblige a person to act in what he believes to be another's interests if he himself has assumed a position which requires him to act for or on behalf of that other in some particular way.*[35]

Breaking down the concept of loyalty, it can be seen that there are two essential and related components at work. First, the principal entrusts the management or concern of some aspect of their affairs to the fiduciary. And second, the fiduciary 'assumes a position'[36] in which he is required to subordinate his own interests in deference to the principal's as regards those affairs.

This shift in autonomy, and loss of control, makes the principal vulnerable to possible abuses of power by the fiduciary. The principal's ability to supervise the fiduciary is

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[32] Eg, M Conaglen *Fiduciary Loyalty* (Hart, 2010)
[33] L Smith 'Fiduciary relationships: ensuring the loyal exercise of judgement on behalf of another' (2014) 130 LQR 608, 609 'Although they may disagree about many things in relation to fiduciary obligations, courts and commentators agree that the law of fiduciary obligations is about ensuring loyalty'. Penner has registered his disagreement with that statement: J E Penner 'Distinguishing fiduciary, trust and accounting relationships' (2014) 8(3) Journal of Equity 202
[34] [1984] HCA 64, (1984) 156 CLR 41, 96-97
[35] P D Finn *Fiduciary Obligations* (Law Book Co, 1977) 9
[36] Ibid.

impaired once they place trust in them. If this were the end of the story, there would be a problematic asymmetry in that the fiduciary would hold power without sufficient protection for the principal against abuses of that power. For that reason, there must be a requirement that the fiduciary subordinate their own interests while carrying out their fiduciary duties and exercising powers. This requirement works to mitigate, although not perfectly, the principal's exposure to fiduciary disloyalty.

Who is a fiduciary?

There are a number of well-established categories of relationship which the law accepts are fiduciary[37] eg. (1) trustee and beneficiary, (2) company director and the company, (3) solicitor and client, (4) agent and principal (5) partners in a partnership (6) (sometimes) protectors of trusts and beneficiaries, where protectors have fiduciary powers.

Outside of the established categories, fiduciary duties can arise on an ad hoc basis. The concept is flexible and open. The most common commercial example is in cases falling short of a formal partnership where parties are engaged in a joint venture together (and often but not always without any written agreement governing the boundaries of the relationship).

A number of important cases have considered when fiduciary duties will arise between joint venturers.[38] In short, a relationship is more likely to be fiduciary where:

1. There is an imbalance of power;
2. There is an imbalance of expertise;
3. There is an imbalance of control;
4. Vulnerability on behalf of one party; and/or
5. The relationship is properly described as one of "trust and confidence".

What duties do fiduciaries owe?

The two core fiduciary duties are expressed as the "no profit" and the "no conflict" rule.

There are numerous cases describing the ambit of these two rules.[39] In essence, the profit rule prohibits a fiduciary from making a benefit or gain in his fiduciary capacity. The

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[37] See the list in Snell's Equity (34th ed) [7-004]

[38] See eg: *Murad v Al-Saraj [2004] EWHC 1235 (Ch); Ross River Ltd v Waveley Commercial Ltd [2012] EWHC 81 (Ch); Ross River Ltd v Waveley Commercial Ltd [2013] EWCA Civ 910; Baturina v Chistyakov* [2017] EWHC 1049 (Comm)*; Al Nehayan v Kent* [2018] EWHC 333 (Comm).

[39] See, eg. *Chan v Zacharia* (1984) 154 CLR 178, 198-199 (Deane J). *Bristol & West Building Society v Mothew* [1998] Ch 1, 18 (Millett LJ).

conflict rule provides that a fiduciary must not place himself in a position in which there is a conflict between his own interest and that of his principal, or, where a fiduciary acts for two principals, a conflict between his duties to each. Combined, the rules operate to ring-fence the exercise of fiduciary power from the principal's self- interest.

The list of fiduciary duties is not closed. Other duties are sometimes, but not consistently, treated as fiduciary duties.

Company directors and trustees also owe fiduciary duties to act in the best interests of their principal (the company, and beneficiaries respectively). They also owe duties to act in good faith; which is sometimes said to be a fiduciary duty, sometimes it is merely described as an equitable duty.

Expansion of the law relating to fiduciaries

Fiduciary duties are often the subject of legal activism, by which I mean calls to recognise or introduce new fiduciary duties. It seems that there are a number of reasons why fiduciary duties are considered fertile ground for expansion:

1. Fiduciary relationships are flexible and open;
2. There is strict liability for breaches of fiduciary duty;
3. Fiduciary remedies are easier to establish than common law remedies, and usually much more advantageous to claimants; and
4. Fiduciary duties act as a strong motivator to discourage undesirable 'disloyal' conduct.

Some examples of recent expansions, or proposed expansions in the field of fiduciary duties are listed below:

1. **Duties to creditors in situations involving insolvency**. Directors duties to "the company" are now accepted to include duties, in insolvency or where insolvency is likely, to creditors: see *BTI 2014 LLC v Sequana SA* [2022] UKSC 25; *Hunt v Singh* [2023] EWHC 1784; *Carlyle Capital Corporation Limited (in Liquidation) v Conway* [2017] Civil Action No. 1510 (Guernsey). The same analysis applies to trustees of an insolvent trust: see eg. *Adams & Others v FS Capital* [2023] EWHC 1649 (Ch) (English case concerning Jersey law EBTs – concluded in a situation of insolvency or probable insolvency a trustee should primarily exercise their fiduciary powers and duties in the interests of the creditors).

2. **Cryptocurrency?** *Tulip Trading Limited v Bitcoin Association for BSV* [2023] EWCA Civ 83. In short: cryptocurrency software developers may owe fiduciary duties to cryptocurrency users.

3. **ESG?** The UN Environment Programme, Finance Initiative report *Fiduciary duties in the 21st Century*[40] stated that: "*Investors that fail to incorporate ESG issues are failing their fiduciary duties*" and urged countries to fill the gaps to ensure ESG considerations were factored into investment decision making. This is relevant to company directors and trustees in their fiduciary roles. See *ClientEarth v Shell plc* [2023] EWHC 1897 (Ch); *McGaughey v Universities Superannuation Scheme Limited* [2023] EWCA Civ 873.

4. **AI?** There are at least two possibilities candidates for the development of fiduciary duties in the AI context: (a) Those developing AI technology owe fiduciary duties to those using the technology, similar to what has been argued in relation to cryptocurrency and (b) Can AI applications take on fiduciary roles? Eg. as a company director: see *Thaler v Comptroller General* [2021] EWCA CIV 1374 concerning whether AI applications can be "a person" for the purpose of the Patents Act 1977 (and the decision of the Supreme Court which will be handed down imminently).[41]

[40] https://www.unepfi.org/wordpress/wp-content/uploads/2019/10/Fiduciary-duty-21st-century-final-report.pdf.

[41] See also "The Fiduciary Duty Dilemma: Exploring the Legality of AI-Assisted Decision Making by Directors" https://chambers.com/articles/the-fiduciary-duty-dilemma-exploring-the-legality-of-ai-assisted-decision-making-by-directors

Shareholder agreements and joint venture agreements: giving effect to the "vibe" of relational contracts

Thomas Robinson

INTRODUCTION

1. This talk seeks to consider a point that lies behind many commercial disputes – one side saying to the other that although they have not breached a specific provision of the agreement between them, they have not given effect to a common understanding or shared purpose. They have breached "the vibe of the thing".[42]

2. Now that is a point particularly relevant to the category of contracts that are sometimes called "relational", in the sense that they are concerned with more than a particular transaction or transactions and instead concern a long-term relationship between the contracting parties. Examples are shareholder agreements and JVAs. Indeed the idea for this talk came from a case I did concerning a JVA governed by Guernsey law where the parties had fallen out and made allegations of breach of the JVA and the common understanding underlying it.

3. There is a detailed discussion of the meaning of the term "relational contract" in Lewison, The Interpretation of Contracts, at paragraphs 6.143 to 6.149. Among the cases there cited is ***Al Nehayan v Kent*** **[2018] EWHC 333 (Comm)**, in which Leggatt LJ described the category of "relational contracts" as:

   "a category of contract in which the parties are committed to collaborating with each other, typically on a long-term basis, in ways which respect the spirit and objectives of their venture but which they have not tried to specify, and which it may be impossible to specify, exhaustively in a written contract."

4. Often this label is used as the springboard for an argument that an obligation of good faith should be implied into the contract.

5. That is a whole other topic, and it is clear that not every "relational contract" involves an obligation of good faith (e.g. ***UTB LLC v Sheffield United Ltd*** **[2019] EWHC 2322 (Ch)**:

[42] With thanks to the Australian film "The Castle".

"There is a great range of different types of contract that involve the parties in long-term relationships of varying types, with different terms and varying degrees of detail and use of language, and to characterise them all as 'relational contracts' may be in one sense accurate and yet in other ways liable to mislead. It is self-evidently not all long-term contracts that involve an enduring but undefined, cooperative relationship between the parties that will, as a matter of law, involve an obligation of good faith." (UTB v Sheffield Utd [2019] EWHC 2322*).*

6. Leaving aside the "good faith" issue, it seems to me that the concept of a "relational contract" may be helpful in identifying the circumstances where "the vibe of the agreement" is important. It's precisely a relational contract such as a JVA where there will be shared aims, common intentions, and one party may be able to talk about a "vibe" of the agreement.

7. That applies whether the contract in question runs to thousands of pages or is entirely oral. An example of a relational contract in the former category was found in ***Amey Birmingham Highways Ltd v Birmingham City Council* [2018] EWCA Civ 264**. In that case the parties had entered into a 25-year PFI contract for the maintenance, management and operation of a road network. It ran to over 5,000 pages. Jackson LJ said that such a contract could be classified as a relational contract:

   "Any relational contract of this character is likely to be of massive length, containing many infelicities and oddities. Both parties should adopt a reasonable approach in accordance with what is obviously the long-term purpose of the contract."

8. The Court of Appeal held there was a long-term, very complex relationship between the parties that could only work if they were prepared to cooperate with one another to achieve its objectives. As such, and particularly given the long-term nature of the relationship, it was inevitable that Amey's precise contractual obligations would evolve over time. So don't be put off by length and complexity from running these arguments. Indeed they may help.

9. By contrast, there is the common scenario of a too-short relational contract that leaves many aspects of the parties' relationship and/or operations unaddressed. This is particularly the case for JV contracts or shareholders' agreements governing family businesses or family business operations. In such cases, there is a very real risk of a dispute arising between the parties to the JV contract or between JV company members, for one or more of the following reasons:

   a. Different desires between the parties for the future – e.g. on the issue of whether to declare dividends or retain the money for reinvestment;
   b. Different views of how and when to exit;
   c. Agreements made orally, and on a handshake;

d. The relationship being one where family members or friends reassure each other over contractual issues, leading to arguments of misrepresentation and / or waiver of rights;
e. Limited record keeping.

10. Whatever the level of detail in the relational contract in question, if it doesn't cover the action the client complains of then how does one give effect to the argument that the other party has breached a common understanding, a shared intention, or "the vibe" of the parties' agreement?

WHAT OBLIGATIONS ARE OWED (AND TO WHOM)?

Contractual obligations

11. The source of contractual obligations owed by parties to a JV depends on the vehicle used for the JV.

12. Where the JV relationship is purely contractual, the source of such obligations will generally be the JV contract. All the usual rules of contractual interpretation apply.

13. Where JV partners have incorporated a JV company, the sources of such obligations will generally be the shareholders' agreement and the company's articles of association, it being unusual for there to be a separate, additional JV contract if there is a substantive shareholders' agreement.

14. The shareholders' agreement is an ordinary contract. Ordinary contractual principles of interpretation and enforcement apply. The JV company may or may not be a party. Clauses to be alive to are those which require the parties to act in furtherance of the objects of the business, as well as express obligations of good faith. These types of clauses are discussed further below.

15. There is often an express provision in the shareholders' agreement stating that it overrides the articles in the event of inconsistency. However, it is often forgotten that a court will generally strive to preserve the contractual bargain between the parties and so will be reluctant to find that clauses in the two documents conflict if they can sensibly be read together. An example is ***Dear v Jackson* [2013] EWCA Civ 89** in which the Court of Appeal reconciled allegedly conflicting terms in a shareholders' agreement and the articles. As such, it is unwise simply to ignore the contractually subordinated document, as it may nonetheless form an important part of the context in which the court interprets a particular provision.

16. The articles operate as a statutory contract, between the members and the company, and between the members amongst themselves: s.20(3) Companies (Guernsey) Law 2008; Article 10(1) Companies (Jersey) Law 1991. Importantly, articles of association are subject to different principles of construction from ordinary contracts. Most

significantly, they are not construed against the background known to the parties at the time they were put in place, but rather only by reference to publicly available facts: ***Re Euro Accessories Ltd* [2021] EWHC 47**, at [27] – [36].

17. The articles, as a statutory contract, are therefore enforceable as a contract as between the members, and as between the members and the company, and they are enforced by means of the usual personal remedies arising from a breach of contract: e.g. damages, final injunctions and specific performance.

Equitable considerations in JV companies

18. In the context of a JV company, there is a prospect of the JV partners, as JV members, seeking relief in the event of a fall out by way of an unfair prejudice petition or through just and equitable winding up of the JV company. In those contexts, equitable understandings are another source of obligations that can operate in the absence of, or occasionally in addition to, a shareholders' agreement setting out the express contractual arrangements between members: ***Re Coroin Ltd (No 2)* [2012] EWHC 2343 (Ch)** at [635]; ***Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14**, 19A-H; ***Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360**. Such an equitable understanding could be, for example, that the JV company will distribute a substantial proportion of its available profits (irrespective of any rights by the members to prevent this in the company's articles or the shareholders' agreement). Equitable considerations arise almost invariably where the company is a quasi-partnership built on personal relationships of trust and confidence between the JV members. As such, actionable equitable understandings are a realistic possibility in a family company where there is little paperwork, and much less likely, albeit still possible, in a JV company incorporated by sophisticated parties that is governed by a complex shareholders' agreement, negotiated by solicitors: see ***Re Coroin Ltd (No 2)* [2012] EWHC 2343 (Ch)** at [636]; and ***Re a Company (No 002015 of 1996)* [1997] 2 BCLC 1, 18E-F**. There is far less room for equity to operate in the latter scenario.

Directors' duties in JV companies

19. The final, and crucial, source of obligations in the context of a JV company is the duties owed by its directors, who are generally nominees of the JV partner members. The duties the directors owe to the JV company provide a key means by which the conduct of the affairs of the JV company can be regulated by the JV members – whether by way of an unfair prejudice petition or derivative action. Moreover, if a director acts impermissibly, he may not only be personally liable (subject to insurance and/or indemnities provided by his appointor), his prospective or actual breach of duty may well also be capable of being linked to his appointing JV member, either as a breach of an obligation of good faith or some such similar provision in the shareholders' agreement, or by reason of secondary, accessory liability, such as dishonest assistance.

20. If the JV member appointing the JV company director is itself a company, the nominee director may well also owe separate fiduciary duties to their appointor, as a director or employee or that appointor company. That situation could give rise to a conflict in respect of the nominee director's exercise of his various duties.

21. It is therefore important to consider the extent to which it is open to JV members to contract out of their directors' duties. For example, can they agree between them that the nominee directors will owe duties only to their appointors and <u>not</u> the JV company?

22. The traditional view was that directors' duties cannot be diluted in any sense. See, for example, the Privy Council case of ***Kuwait Asia Bank v National Mutual Life*** **[1991] 1 AC 187**, in which Lord Lowry (at 222D, giving the judgment of the Court) held that nominee directors were *"<u>bound to</u> ignore the interests and wishes of their employer [as their appointor and a beneficial owner of the company]"* [emphasis added].

23. However, by contrast, in New Zealand and Australia the concept of attenuating directors' duties by agreement so that a director may take into account or follow his appointor's instructions has long been recognised: see, for example: ***Levin v Clark*** **[1962] NSWR 686**, where directors nominated to the board of a mortgagee were held to be entitled to act primarily in the interests of the mortgagee after default by the mortgagor company; and ***Japan Abrasive Materials Pty Ltd v Australian Fused Materials Pty Ltd*** **[1998] WASC 60**, in which it was held that *"It is always open to shareholders by unanimous agreement to attenuate the fiduciary duties which the directors of their company would otherwise owe to it."*

24. Judicial thinking in the UK has recently started evolving. In ***Re Southern Counties Fresh Foods Ltd*** **[2008] EWHC 2810 (Ch)**, a case concerning a JV company jointly owned by two families, which, rather gruesomely, operated an abattoir, Victor Joffe QC, lead author of a seminal practitioners' book in the area, *Minority Shareholders: Law, Practice and Procedure*, argued, and Warren J agreed, that nominee directors' duties were capable of being qualified. Warren J, citing ***Levin*** and ***Japan Abrasive Materials***, also concluded that such a relaxation of obligations would require unanimous consent of shareholders. However, he qualified his view by stating that *"perhaps"* directors could not be permitted to abandon certain core duties, it being *"doubtful whether, as a matter of English law, it is possible to release a director from his general duty to act in the best interests of the company"* (at [67(d)&(e)]). The only firm conclusion the Judge was comfortable reaching was that a nominee director could be released by unanimous shareholder agreement from his fiduciary duty to give his best independent judgment to the JV company in circumstances where he was charged with negotiating on behalf of his appointor an agreement with the company and the interests of his appointor and the company were opposed (at [67(f)]). However, in such a situation, the Judge said that even then it might be expected that the director concerned would be precluded from the discussions of

the JV company board relating to the negotiations, and certainly from voting on the agreement between the JV company and the appointor.

25. Shortly after ***Southern Counties***, the Court of Appeal acknowledged that the general duties of directors in JV companies may be diluted by unanimous shareholder consent: ***Re Neath Rugby Ltd* [2009] EWCA Civ 291**, at [36], [44].

26. One notable point to draw from these cases is that they rely on the principle set out in ***Re Duomatic Ltd* [1969] 2 Ch 365** that where all the shareholders in a company give their informed consent to a matter which could be carried into effect at a general meeting of the company, that assent is as binding as a general meeting resolution. As it is possible to give such unanimous informed consent informally instead of in writing, one can envisage a situation where the parties believe they have reached a common understanding that permits a relaxation of certain conflict duties that is not contained in the shareholders' agreement, but which can nonetheless be relied upon.

Fiduciary duties <u>between</u> JV partners?

27. In rare cases, it may be that equitable fiduciary duties arise <u>between</u> JV partners – both in a purely contractual context and in the context of a JV company. These may well not be expressly referred to in the JV contract or the shareholders' agreement, but they could nonetheless govern relations between the parties.

28. Where the JV is purely contractual, it is unlikely that fiduciary duties will exist between the JV partners. This is because the touchstones of a fiduciary relationship are that the fiduciary subordinates its interests to that of its principal, while assuming responsibility for the principal's affairs – and such conduct between commercial contractual counterparties is unusual.

29. However, whether fiduciary duties should be imposed is a fact-specific question and it is not impossible for such duties to be found between JV partners in a purely contractual JV. For example, in ***Ross River v Waverley* [2013] EWCA Civ 910**, the Court of Appeal held that the first instance judge had been correct to find that in the context of a property development JV between two commercial companies, one of them owed a fiduciary duty to the other not to do anything in relation to the handling of JV revenues which favoured themselves to the other party's disadvantage.

30. In the context of a JV company, a fiduciary relationship may, on exceptional facts, be found to exist between the JV members. In ***Murad v Al-Saraj* [2004] EWHC 1235 (Ch)** a member of a JV company that had been incorporated to purchase a property was held to owe fiduciary duties to other members not to profit at their expense from the JV because those other members were peculiarly dependent on him for advice, and entrusted him with extensive discretion to act in relation to matters affecting

their interests, such that a classic fiduciary relationship of trust and confidence arose (see [328] and [332]).

31. The takeaway is not to discount the possibility of a fiduciary 'vibe' between JV partners whose interactions are governed by relational contracts, whether in the context of a purely contractual JV or a JV company – but the factual circumstances in which a fiduciary relationship will arise are specific and rare.

SPECIFIC CLAUSES OF THE AGREEMENT

32. I want to come back to the contract as the source of obligations. I want to look at two particular types of clause that are commonly found in JVAs and see how far one can push them to give effect to the "vibe":

33. a "purpose" clause at the beginning of the agreement and / or a "further assurance" clause at the end.

Further assurance clauses

34. Further assurance clauses are clauses that the courts have interpreted as focused on giving effect to the object or aim of the relevant agreement. That sounds promising to give effect to the vibe of an agreement. In ***Millen v Karen Millen* [2016] EWHC 2104 Ch,** at 221-225, the court interpreted a further assurance clause[43] by identifying "*what would be the "full effect" of the SPA*", and stating in answer to that question "*One object of the SPA, looking at it practically rather than formalistically, was to put the purchasers in control of the KAREN MILLEN business and, as key assets of it, in ongoing control of the KAREN MILLEN name and goodwill.*"

35. So here, the clause was a way of giving effect to the SPA, which meant looking practically at what it was trying to achieve. How does one identify that object?

36. The answer comes from the Court of Appeal in ***Re Coroin* [2014] BCC 14**, at [52]-[53]. It considered a clause in a shareholders' agreement providing *"Each of the Shareholders agrees that: ... each of them will do all things* [necessary] *or desirable to give effect to the spirit and intention of this Agreement*".

[43] "*Each party shall, from time to time on being reasonably required to so by any other party, now or at any time in the future, do or procure the doing of all such acts and/or execute or procure the execution of all such documents as may reasonably be necessary to give full effect to this Agreement.*" (*ibid*. at [139]).

37. Arden LJ (as she then was) said:

> *"this clause prescribes no basis for determining the "spirit and intention". The "spirit" is by implication an animating principle, which, like the smile on the Cheshire cat … may exist in a state that is detached from the express terms of the shareholders' agreement.*
>
> [from Alice in Wonderland. you're spared a picture of a cat, slowly disappearing so only the smile remains] but the point is important. because the smile exists even when the rest of the cat does not. So the "spirit" exists separately from the express terms of the contract. That all sounds promising for my search for giving effect to the "vibe". But Arden LJ went on:
>
> *"In my judgment, the only way in which the court can give effect to the obligation in cl.8.5.4 is to treat the reference to the "spirit and intention" of the shareholders' agreement as a reference to the shared aims of the parties in entering into the agreement. Those aims would have to be ascertained in the way in which the court ascertains the background to an agreement as part of the process of interpretation. On this basis, cl.8.5.4 has content, but it is merely a mirror image of the process of interpreting an agreement or implying terms into it."*

38. In construing an agreement the court has always been able to look at evidence of the objective factual background known to the parties, including the purpose of the contract or its shared aims.

39. Where a clause like this may help is to impose a separate obligation to further those shared aims, assuming that you can't bring them in through the process of interpreting other contractual obligations.

40. So this does have content, and adds to the express terms. But will very much be shaped by the express terms in order to find the shared aims. So in practice, not adding much.

41. And it's worse if the clause is framed along the lines of ensuring the other provisions of the agreement are given full force and effect. That was the position in ***Garnet Commerce Ltd v VRFB Holdings Ltd*** **[2022] EWHC 481 (Ch**). The relevant clause read:

> *"Each party shall, to the extent that it is able to do so, exercise all its voting rights and other powers in relation to [the JV company that the relevant JV parties owned] to procure the provisions of this agreement are properly and promptly observed and given full force and effect according to the spirit and intention of the parties"*

42. Here the clause only applies where there are other provisions of the agreement that must be given effect. Other express obligations. In our case re raising money for the JV.

43. Does it matter then if the JVA says that those express obligations must be given effect according to a spirit and intention. Could you not stop the clause after "effect"?

44. The court said no:

In my judgment, the answer to this question is that the words do have some function. They remind the reader of the JVA that, what is to qualify as proper and prompt observation of the provisions of the agreement and their being given full force and effect, is to be found in the shared aims of the parties identified through the process of interpretation of the JVA. Thus, insofar as the nine words add at all to what has gone before, it is to provide a description which, depending on the particular provisions of the JVA under consideration, may assist in arriving at a view as to what is prompt and full observation and effect."

45. All quite tentative, but consistent with Karen Millen and Coroin in the sense that to give "full effect" to a clause means to further the shared aims of the parties in entering the agreement. But you might have reached that destination anyway by interpreting the underlying obligation against the background of the agreement…

46. ***Garnet Commerce*** also considered a clause providing for the "purpose" of the JV company that was the subject of the agreement in in question. The clause provided:

"*Each party shall use its reasonable endeavours to promote and develop the Business to the best advantage of [the company and its parent, which was owned by the contracting parties]*".

47. You might think this was much less promising. The first part of this clause sounds like an ambition and says nothing about how to further it. very vague.
"Further, by its nature the objective is one which will never be completely achieved, as further promotion or development of the Business will theoretically always be possible."

48. This inherent vagueness did not stop the clause having meaning, and even operating in areas where other clauses of the JVA made specific provision. The Court held:

*"I regard clause 2.2 as setting out the parties' ambition for their joint venture though the joint venture company. The very fact that the clause is expressed with such generality, leaving quite at large what in practice anyone is to do to achieve the desired objective, one of great generality in itself (that is the promotion and development of the Business), suggests that the clause is **designed to inform the parties' conduct and approach towards their venture concerning the Business**."*

49. The upshot of this interpretation was that the clause was wide-ranging in its application, and could constrain how a party complied with an obligation under the

contract (or more generally), even though the rest of the contract was silent on that point:

> *"**where a party has various possible ways open to it of performing some required task, and alights upon one way which will obviously disadvantage the Business, the party's taking that way may very well involve a failure, contrary to clause 2.2**, to use reasonable endeavours to promote and develop the Business. In this regard, it matters not that the JVA requires, for example by clause 7 of the JVA as regards the provision of funding, the performance of the particular task. **If the task can reasonably be performed without harming the Business, it should be and should not be performed in a way which does."***

50. At one level that is no more than stating the obvious. At another it is striking – a clause described as setting out the purpose of the company, with some pretty generic wording that aims not at a defined outcome but just an ambition that will never be met, is effective to cut down the width of the rest of the contract. And it does so by giving effect to a stated purpose of the JV company. So perhaps at last we have found a route to give effect to the vibe – though on our facts we did not succeed.

CONCLUSION

51. So we think there are a number of potential routes to consider when the client asks what can be done about a breach of something unwritten / unspoken in the agreement:
    a. Contractual provisions – perhaps a further assurance clause / purpose clause
    b. Articles of Association
    c. Equitable considerations
    d. Directors' duties
    e. Fiduciary duties between JV partners.

52. None of these are straightforward, and all are vulnerable to arguments that the express terms of the contract take precedence in the event of inconsistency.

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