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    Lewin on Trusts (19th edition), by Lynton Tucker, Nicholas Le Poidevin and James Brightwell, assisted by Thomas Fletcher and Christopher Lloyd
The editors wish all readers a warm welcome to the first edition of the Trust Quarterly Review in 2015.

Despite their huge commercial significance – trillions of dollars worldwide are held in trusts – commercial counterparties often overlook the fact they may be dealing with a fiduciary with limited or restricted powers, rather than a company. Credit Suisse International v Stichting Vestia Groep is a sobering wake-up call for such counterparties, and a reminder that the ‘trust’ with which they are contracting is not a legal entity. This gives rise to questions of recourse, and counterparties who might think they have simply entered into a normal commercial transaction may be surprised to find out that, in many cases, their rights may be severely limited. Keith Wallace and Tim Prudhoe consider the difficult issues that arise on page 3.

Last year brought with it a wealth of diverse trust litigation, from conflicts of law issues to bribes and secret profits. Nicholas Le Poidevin and Toby Graham have provided a round-up of the year’s most interesting decisions on page 7.

People are living ever longer and that brings with it an increasing focus on questions of capacity. In particular, various jurisdictions throughout the world have differing – and, in some cases, surprisingly unclear – laws on attorneys, and the sorts of decisions they may be able to take on behalf of their principals. Richard Williams and Brian Herd consider the specific question of Australian attorneys – in various states and territories of Australia – making or revoking death benefit nominations in relation to superannuation funds (page 18). The lack of clarity is concerning, given the amount of wealth held in such funds, and the technical difficulties at play are likely to be relevant in a range of different contexts worldwide.

Private international law in relation to trusts has always given rise to difficulties, both in the context of conflicts between different jurisdictions and in the context of conflicts between civil-law and common-law jurisdictions. Nicholas Williams considers the Privy Council decision relating to exclusive jurisdiction clauses in Crociani v Crociani and the fundamental differences between contracts and trusts (page 30).

The decision of the Court of Appeal of England and Wales in Akers v Samba is of particular significance. Is it possible for common-law obligations of trusteeship to arise in relation to assets situated in a jurisdiction that does not recognise trusts? This opens the lid on a particularly different set of issues relating to multiple international obligations over individual asset classes – and the importance of the decision cannot be understated given the number and size of commercial trusts, the assets of which will include tangible and intangible property in civil-law jurisdictions. Matthew Watson discusses the difficult questions that can arise (page 39).

Finally, Edward Buckland reviews the latest edition of Lewin on Trusts, a work that needs no introduction to any of our readers (page 46).

We wish all of our readers the very best for 2015.
Power struggle
VIER, RECOURSE AND SUBSTANTIATION IN LIGHT OF CREDIT SUISSE INTERNATIONAL V STICHTING VESTIA GROEP
By Keith Wallace and Tim Prudhoe

ABSTRACT
• This article explores the probative hurdles facing those who deal with vires-restricted entities generally, in the light of the Vestia case.
• It suggests hitherto unidentified counterparty risks where a trusteeship is conducted by a vires-restricted party.

The recent decision of Credit Suisse International v Stichting Vestia Groep [2014] EWHC 3103 (Comm) provides a timely wake-up call for counterparties dealing with fiduciaries, where those fiduciaries have (or even could have) only limited powers.

The business background was this: Vestia was a Dutch housing association with the limited powers available to a stichting (foundation). Nevertheless, it owned and managed 90,000 houses, had 1,000 employees and had long-term borrowings of EUR5.4 billion. Its borrowings comprised 1,600 inward loans of up to 30 years’ maturity. Interest rates under these loans were fixed, floating or on other more complex formulae related to the prevailing yield curve. It had a dedicated officer, and office, charged with hedging its interest exposures, he having the Bloomberg system and, later, the SuperDerivatives pricing system. He dealt with 12 investment banks as counterparties and had with these some 400 derivative trades of a notional amount outstanding of EUR23 billion.

The counterparty for 11 of these derivative trades was Credit Suisse, the claimant, seeking EUR83 million as an early termination amount on Vestia’s default. Credit Suisse had been aware that stichtingen had limited powers and that transactions outside the ambit of these powers, being ultra vires, could or would be void. As emerged in the judgment, Credit Suisse should have assessed (and to an extent did) Vestia’s own articles (which were extremely unspecific); its own adopted financial regulations (financieel statuut) as changing from time to time; the Dutch Housing Act; the rules of the Waarborgfonds Sociale Woningbouw (WSW; a guarantee fund for social housing); the rules of the Centraal Fonds voor de Volkshuisvesting (CFV; the Central Fund for Social Housing); and decrees and memoranda issued by the Minister for Housing (some of which were no longer in force but were nevertheless considered relevant).

The derivative transactions with Credit Suisse were conducted under an umbrella ISDA (International Swaps and Derivatives
Association) master agreement and, in some cases, had maturities extending to 2056. On Vestia being compelled to institute a financial standstill, and accordingly unable to post collateral to meet its increasing exposure to Credit Suisse, the latter declared an early termination event and sued for its computed loss. Vestia countered by pleading that it lacked capacity to enter into the trades and that the officer concerned had not had authority. The question of capacity – *vires* – had to be decided under Dutch domestic law, and the consequence of any finding of lack of capacity was to be decided under the law of the contract, English, which would have held an *ultra vires* contract to be void.

Under English and Welsh litigation principles, the burden fell on Credit Suisse to demonstrate that Vestia duly had capacity. The list of what Credit Suisse could not rely on is rather sobering. Credit Suisse, the latter declared an early termination event and sued for its computed loss. Vestia countered by pleading that it lacked capacity to enter into the trades and that the officer concerned had not had authority. The question of capacity – *vires* – had to be decided under Dutch domestic law, and the consequence of any finding of lack of capacity was to be decided under the law of the contract, English, which would have held an *ultra vires* contract to be void.

Under English and Welsh litigation principles, the burden fell on Credit Suisse to demonstrate that Vestia duly had capacity. The list of what Credit Suisse could not rely on is rather sobering. Under English and Welsh litigation principles, the burden fell on Credit Suisse to demonstrate that Vestia duly had capacity. The list of what Credit Suisse could not rely on is rather sobering.

Under international accounting standards, ‘hedge accounting’ is allowed, by way of exception, where the hedging activity efficiently hedges 85–125 per cent of the relevant exposures. Vestia’s use, duly endorsed by its auditors, of hedge accounting did not demonstrate, the court held, that its derivative transactions were indeed within its available hedging powers.

Awareness of Vestia’s general interest-rate exposures did not suffice, it being held that Credit Suisse needed to assess the position contemporaneously with each trade. Management’s own view of the need for hedging, its intention and purpose did not suffice, nor could any board resolution adopting or approving transactions. Instead, the judge held, the question of whether a particular derivative transaction was *intra vires* had to be the subject of objective assessment by the forum deciding the issue.

**Outcome**

In the event, Credit Suisse as counterparty failed to show that six of the disputed transactions were *intra vires*. It was, however, economically ‘saved’ by the prior overarching contractual documentation (the ISDA master agreement), which contained warranties that later trades incepted thereunder would be within the *vires* and authority of the customer. This mechanism was found to ‘work’ – not to cloak the later disputed trades with *vires* or other

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1. See also *Haugesund* [2010] EWCA Civ 579 where Haugesund and Narvik Kommunes ‘borrowed’ substantially via zero coupon swaps and later pleaded absence of *vires* to avoid full repayment. Norwegian law governed the capacity issue, the consequences being those applied by the law of the contract, English.
5. Paragraph 268.
7. Paragraph 188.
Careful drafting of contractual arrangements should give rise to an estoppel against any defence to liability, or at least a claim in damages for breach of warranties.

contractual force but to confer a right to damages for the breach of that vires warranty.

The strength of ISDA wording is obviously not standard in contractual dealings with fiduciaries, and extreme vigilance is needed to ensure strong warranties of authority and capacity. Careful drafting of contractual arrangements should give rise to an estoppel against any defence to liability, or at least a claim in damages for breach of warranties. Even the ISDA drafting for this was criticised as poor.8

In addition to the capacity/authority issues, the case is a useful reminder that, as a matter of private international law, principles governing issues of legal capacity are governed by the common law and are outside the Rome Convention,9 and the burden of proof lay with the bank to prove that the housing association had capacity. The position is different in respect of natural persons (i.e. humans) rather than legal persons (companies or foundations).

IMPLICATIONS: VIRES ALONE

The legal theory behind vires is that a ‘legal person’, not being a human, can only act within its powers, and that any activity outside those powers as conferred is a nullity and void. The rationale lies in the protection of the public from legal persons dissipating their assets in unauthorised activities. However, to address the converse Europe-wide risk – that innocent commercial counterparties needed protection from so potentially capricious a regime – the EU introduced legislation abrogating the doctrine.10 But the EU Directive is aimed at companies; it does not extend to non-company legal persons such as Dutch stichtingen (nor UK charitable companies).11 Other ‘legal persons’ still impacted by the ultra vires doctrine and not saved by the EU Directive include, for example, local municipalities. See Table 1 on the following page for an aide-memoire.

TRUST IMPLICATIONS: VIRES – RECOURSE

The implications of these issues in the context of trusteeship needs further thought. The legal truism is that counterparties do not contract ‘with’ a trust but with the party constituting the trustee. To satisfy their exposure under the contract, the trustee needs to have a ‘right of recourse’ to the trust fund. This right of recourse is lost through a number of factors, most usually that the activity itself is a breach of trust.12 The counterparty to such a contract nevertheless still has rights in personam against the trustee. Where, therefore, the counterparty is contracting with a sizeable, solvent organisation that conducts a trusteeship, it may be a matter of little consequence to it if the trustee should find itself denied a right of recourse – the counterparty is satisfied out of the trustees’ own funds.

8 Paragraph 315
9 Convention 80/934/EEC
11 Sections 39 and 40 Companies Act 2006
12 Keith Wallace, ‘Recourse revisited – what are the risks for trustees’ counterparties?’ in Trust Quarterly Review, volume 8, issue 1, 2010
**What is the position, though, of the legal person that – *intra vires* – assumes a trusteeship and, in that role, or purported role, enters into an irregular contract for the trust?**

It would, in a normal trusteeship case, be denied a right of recourse to its fund, leaving the counterparty with a personal claim on the trustee; the contract would stand but recourse would be lost. However, it cannot, one supposes, be within the *vires* of a (*vires*-restricted) legal person to enter into contracts for its trust that are a breach of trust.

In consequence, in this case, the contract is void: there can be no personal claim on the trustee, nor any direct (or any indirect) right of recourse to the trust fund.

The larger British municipalities have annual turnovers exceeding GBP1 billion and may conduct multiple trusteeships. Corporate charities have substantial operations. It has to be questioned whether the *ultra vires* rule should continue unmodified, where it is capable of inflicting such damage on, or requiring such impossibly detailed fact finding on the part of, counterparties.

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**TABLE 1: ULTRA VIRES?**

<table>
<thead>
<tr>
<th>LEGAL PERSON</th>
<th>IS VIRES AN ISSUE?</th>
<th>CONSEQUENCE/REMARKS</th>
</tr>
</thead>
<tbody>
<tr>
<td>EU COMPANY(^{13})</td>
<td>NO</td>
<td></td>
</tr>
<tr>
<td>EU MEMBER ENTITY TO WHICH VIRES PROTECTION IS EXTENDED BY DOMESTIC LAW</td>
<td>NO</td>
<td></td>
</tr>
<tr>
<td>UK COMPANY (NON-CHARITY)(^{14})</td>
<td>NO</td>
<td></td>
</tr>
<tr>
<td>EU/UK LEGAL PERSONS NOT SO COVERED</td>
<td>YES</td>
<td>CONTRACT VOID</td>
</tr>
<tr>
<td>UK MUNICIPAL COUNCIL</td>
<td>YES</td>
<td>CONTRACT VOID</td>
</tr>
<tr>
<td>UK CORPORATE (ROYAL CHARTER)(^{15})</td>
<td>NO</td>
<td></td>
</tr>
<tr>
<td>UK CORPORATE CHARITY</td>
<td>YES</td>
<td>LIMITED PROTECTION FOR INNOCENT THIRD PARTIES(^{16})</td>
</tr>
<tr>
<td>UK CHARITY OR TRUST WITH INDIVIDUAL TRUSTEES</td>
<td>NO</td>
<td>BUT TRUSTEE MAY LOSE RIGHT OF RECOURSE IF CONTRACT IRREGULAR</td>
</tr>
</tbody>
</table>

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\(^{13}\) First Council Directive 68/151/EEC  
\(^{14}\) Sections 39 and 40 Companies Act 2006  
\(^{15}\) Halsbury’s Laws, 5th edn, vol 24 at 431. But a municipal council which also possesses a royal charter is circumscribed by its statutory powers: Hazell v Hammersmith and Fulham London Borough Council [1991] 2 WLR 372  
\(^{16}\) Sections 39 and 40 Companies Act 2006  

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Developments in the courts from 2014

A REVIEW OF THE STAND-OUT CASES OF 2014

By Nicholas Le Poidevin and Toby Graham

ABSTRACT
A round-up of important developments in 2014, focusing on decisions in the courts in the areas of trusts, wills and estates. The following cases are considered:
- Williams v Central Bank of Nigeria
- Shergill v Khaira
- FHR European Ventures LLP v Cedar Capital Partners LLC
- AIB Group (UK) plc v Mark Redler & Co
- Marley v Rawlings
- Crociani v Crociani

Last year produced a plentiful harvest of trusts cases both in England and Wales, and in other common-law jurisdictions. There may be a few tares to cast in the fire but there is plenty of grain to chew over during the dark of the winter before spring brings a sparkle to the trust lawyer’s eye. The UK Supreme Court in particular, uninhibited by the absence in the court of any judge with experience of private client practice, has been fecund with trust law, giving decisions on limitation (Williams v Central Bank of Nigeria), justiciability (Shergill v Khaira), bribes and secret profits (FHR European Ventures LLP v Cedar Capital Partners LLC), remedies (AIB Group (UK) plc v Mark Redler & Co) and rectification of wills (Marley v Rawlings), followed by the Privy Council on jurisdiction clauses (Crociani v Crociani).

WHETHER AN ENFORCEABLE TRUST
The question whether there is an enforceable trust at all has occupied the courts in various guises.

1 2014] UKSC 10; [2014] AC 1189
2 [2014] UKSC 33; [2014] 3 WLR 1
3 [2014] UKSC 45; [2014] 3 WLR 535
4 [2014] UKSC 58; [2014] 3 WLR 1367
5 [2014] UKSC 2; [2014] 2 WLR 213
6 [2014] UKPC 40. This case is discussed in greater detail on page 30
Allegations of sham have remained popular but with unpredictable success. They were successfully deployed by the US authorities in their criminal action against Credit Suisse AG, leading to a well-publicised settlement in which Credit Suisse acknowledged its involvement in sham structures and paid a substantial fine. The Court of Appeal of New South Wales, in Lewis v Condon, held that there was no such thing as an emerging sham, i.e. a trust validly constituted which later become invalid through an arrangement to depart from its terms: that would be a breach of trust but it would not destroy the personal or the proprietary rights and obligations created on the constitution of the trust. In Zarbafi v Zarbafi, the Court of Appeal in England and Wales had only to decide whether summary judgment was appropriate but, in making its decision, was willing to assume that a settlor could assert his own shamming intent, though not once he had put forward the sham document as genuine, and that third parties could prove a document a sham unless complicit in some way.

Illegality did not prevent the enforcement of the trust in O’Kelly v Davies. The property had been placed into the sole name of the defendant to enable her to keep claiming benefits as a single woman living alone when in fact she was living with the claimant as an unmarried couple. The claimant was entitled to a share by way of a common-intention constructive trust and he did not need to rely on the illegal arrangement to make good that claim, so, in accordance with Tinsley v Milligan, the claim succeeded.

There was likewise no formal trust instrument in Charity Commission for England and Wales v Framjee. The decision concerned a general charitable fund attracting donations from the public, when donors specified the particular destination of the money donated. The court held that there was a Quistclose trust of all the donations (though not a multitude of separate trusts), since the money donated was not at the free disposal of the trustees for general charitable purposes but had to be applied as the donors had directed. (It also held that, as there was a shortfall in the fund, it should be applied pari passu among the intended recipients.) A similar issue arose in connection with the will of the enormously rich Nina Wang, leaving all her property to the Chinachem Charitable Foundation Ltd. In Secretary for Justice v Joseph Lo Kin Ching, the Hong Kong Court of Appeal ruled as a matter of construction that the Foundation received the property on charitable trusts, rather than as absolute owner, and it was therefore bound to give effect to the charitable objects in Nina Wang’s will. The Quistclose trust was also analysed in detail in Hong Kong in Sanctuary Systems Ltd v Orient International Holdings Hong Kong Co Ltd. The recipient of funds paid for a purpose, said the court, need not have agreed to hold them for that purpose; it is enough if the recipient has notice of the purpose. If he acquires notice only after discharging part of them, the trust attaches only to the balance.

Under this head may be placed one of the cases in the Supreme Court, FHR European Ventures, where an agent for the purchaser of a hotel had agreed to take a fee of EUR10 million from the seller. The decision finally disposes of the long-running debate whether a bribe or other secret

7 United States v Credit Suisse AG (2013) US District Court; Easter District of Virginia, Alexandria Division, Criminal No:1: 14-CR-188; see Document 14 (filed 19 May 2014), in which Credit Suisse acknowledged ‘assisting clients in using sham entities as nominee beneficial owners of… undeclared accounts’, seeking ‘to create the appearance that the structures were legitimate entities operating independently of both Credit Suisse as well as the US person who owned the assets in the undeclared account’ and ‘soliciting IRS forms that falsely stated under penalties of perjury that the sham entities beneficially owned the assets in the accounts’.
8 [2013] NSWCA 204; (2014) 17 ITELR 185
9 [2014] EWCA Civ 1267; [2014] 1 WLR 4122
10 [2014] EWCA Civ 1606
11 [1994] 1 AC 340 (HL)
12 [2014] EWHC 2507 (Ch); (2014) 17 ITELR 271
13 Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567 (HL)
14 [2014] HKCA 170
15 [2014] HKCFI 243; (2014) 17 ITELR 49
profit paid to a fiduciary is held on constructive trust for the principal to whom the fiduciary duty is owed. The court held that it was, overruling or departing from earlier authority to the contrary in the Court of Appeal and the House of Lords. The decision is significant when the fiduciary becomes insolvent, since the proprietary right will give the principal an effective priority; and the proprietary right will also give the principal the ability to trace and follow the profit in equity. The profit has not necessarily been obtained by misuse of any property of the principal, as with a bribe, and the principal has never had a claim to payment of the profit but the court’s lightly reasoned judgment focused on the connection between the fee received by the agent and the purchaser’s property. Ultimately, policy considerations dictated the result.

**MISTAKE, RECTIFICATION AND CONSTRUCTION**

**Mistake**

*Pitt v Holt*, with its restatement of the rule in *Re Hastings-Bass*, and of the law of mistake, belongs to the previous year’s crop. But mistakes continue to occupy the courts, judges writing extra-judicially, and legislatures. In Jersey, the statutory enactment of rules on both points might have been, but in the event was not, considered in *Re Strathmullan Trust*, where the settlor had not been advised of the impact of the UK rules as to deemed domicile. The result was a disastrous exposure to inheritance tax and the settlor claimed to set aside the transfer of assets into trust on the ground of mistake. The transfer was indeed set aside but in reliance on article 11 of the *Trusts (Jersey) Law 1984*, because the whole trust had been established by mistake, rather than the new provisions.

**Rectification**

Jersey also has more than its share of applications for rectification but *Giles v RNIB* is an English decision. Successive deaths had left charities with an unnecessary bill for inheritance tax and a deed of variation was executed to redirect substantially the whole of the first estate. The deed as executed wholly failed to carry out the intention, since it was confined to the residue of the first estate. The court, decreeing rectification, held that the intention to redirect the first estate was clear; it was no objection that the purpose was to save

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*FHR European Ventures* finally disposes of the long-running debate whether a bribe or other secret profit paid to a fiduciary is held on constructive trust for the principal to whom the fiduciary duty is owed. The court held that it was, overruling or departing from earlier authority to the contrary in the Court of Appeal and the House of Lords. The decision is significant when the fiduciary becomes insolvent, since the proprietary right will give the principal an effective priority; and the proprietary right will also give the principal the ability to trace and follow the profit in equity. The profit has not necessarily been obtained by misuse of any property of the principal, as with a bribe, and the principal has never had a claim to payment of the profit but the court’s lightly reasoned judgment focused on the connection between the fee received by the agent and the purchaser’s property. Ultimately, policy considerations dictated the result.

16 See, e.g., at [37]: ‘Further, in terms of elementary economics, there must be a strong possibility that the bribe has disadvantaged the principal. Take the facts of this case: if the vendor was prepared to sell for €211.5m, on the basis that it was paying a secret commission of €10m, it must be quite likely that, in the absence of such commission, the vendor would have been prepared to sell for less than €211.5m, possibly €201.5m.’

17 [2013] UKSC 26; [2013] 2 AC 108

18 [1975] Ch 25 (CA)

19 See, e.g., Hon Anthony Smellie CJ, ‘Dealing with mistakes of trustees or settlors; the outlook from the offshore bench’, *Trusts & Trustees*, vol 20, no 10 December 2014), pp1101, taking issue with obiter comments of Lord Walker in *Pitt v Holt* to the effect that rectification and other equitable relief might be refused (on grounds of public policy) in cases of artificial tax avoidance

20 Bermuda’s *Trustee Amendment Act 2014*, which came into force on 29 July 2014, preserves the rule in *Re Hastings-Bass*, in a somewhat simpler form than the Jersey legislation

21 *Trusts (Jersey) Law 1984*, arts 47B-47J

22 [2014] JRC 056

23 (2014 rev)

24 [2014] EWHC 1373 (Ch); (2014) 17 ITELR 170
tax and it was also no objection that all parties consented to the application.

In Marley v Rawlings, the Supreme Court widened the statutory jurisdiction conferred by section 20 of the Administration of Justice Act 1982 to rectify wills. Husband and wife intended to make mirror wills. But the solicitor mistakenly gave each spouse the other's draft will, so the husband signed the one meant for his wife and vice versa. The Supreme Court reversed the High Court and the Court of Appeal (which considered that rectification was confined to wills satisfying the formal requirements of section 9 of the Wills Act 1837). The court held that there was nothing in section 20 to confine rectification to a will which is formally valid. Moreover, the court considered that the solicitor's mistake amounted to a 'clerical error' within section 20(1)(a); this is not (as had been thought) confined to drafting errors but extends to a mistake arising out of office work of a routine nature, such as preparing, filing, sending or organising the execution of a document.

**Construction**

The Supreme Court in Marley v Rawlings declined to decide whether the wills worked as a matter of construction without rectification but expressed the firm view that the modern principles of construction, laid down in such decisions as Rainy Sky SA v Kookmin Bank, should apply to wills as much as to other documents. Those dicta were followed by the Grand Court of the Cayman Islands in Re Shiu Pak Nin Discretionary Trust, which concerned the construction of the terms of fixed and discretionary trusts.

In the BVI, a more far-reaching question of construction arose in Yang Hsueh Chi Serena v Equity Trustee Ltd, which concerned the engagingly named Huge Surplus Trust. A standard draft in extremely prolix form of a very wide discretionary trust, intended to be completed for the individual settlement by supplying a small number of bespoke provisions, had been completed in such a way (the insertion of percentage shares against the names of beneficiaries) as to give rise to the contention that it took effect as a fixed-interest trust. The Eastern Caribbean Court of Appeal, also citing Marley v Rawlings, refused to adopt that construction, which would have rendered otiose most, if not all, of the remainder of the trust instrument.

**Justiciability**

Although a question as to the justiciability of an issue is a rare one, it is fundamental when it arises. Shergill v Khair was such a case. Trustees of three Sikh temples could be removed and new ones appointed by a particular individual, described as the First Holy Saint, ‘or his successor’. Someone recognised by some members of the sect as the third Saint purported to exercise the powers. Opponents said, among other things, that he was not in truth the successor because he had departed from the tenets of mainstream Sikhism and on grounds of character was unfit to be the successor. On the footing that as a matter of construction a series of successors was meant, and not a single successor only, the court had to decide whether it was possible for the court to resolve a dispute as to the religious tenets of the sect.

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26 (2014) FSD 43/2011
27 Unreported, 29 September 2014
The same point arose a century ago in General Assembly of the Free Church of Scotland v Overtoun, when a difference of view as to disestablishment caused a schism in the Free Church of Scotland; a small minority, the Wee Frees, were held by the House of Lords to have retained the true doctrine of the Free Church and to be entitled to all its property. The Supreme Court in Shergill, reversing the Court of Appeal, took the same approach: where title to property depended on a question of religious doctrine, the court would determine the question and there was nothing unjusticiable about it.

CONFLICT OF LAWS

Justiciability leads to points about forum. Crociani v Crociani is the first decision from the Privy Council on jurisdiction clauses in trust instruments. Trust instruments commonly specify a ‘forum of administration’ of the trust, usually in conjunction with a choice of proper law. The questions were whether such a clause was a jurisdiction clause at all and, if so, whether proceedings brought in a different forum should be stayed. Such clauses may identify a particular place as the forum or may identify its courts as the forum. In Crociani, the clause referred to the place and it was held, contrary to all previous authority, that it merely specified the geographical site where the administration of the trust was to be conducted and so was not a jurisdiction clause at all. That construction will seemingly not be available where the clause specifies a particular court as the forum of administration. The Privy Council also held that the test for invoking the court’s discretion not to enforce a jurisdiction clause in a trust instrument should be less demanding than that applicable to a contractual clause (‘strong grounds’).

Akers v Samba Financial Group was also in form an application for a stay, in favour of the courts of Saudi Arabia. But the claim, by liquidators, was that a transfer of assets was void under section 127 of the Insolvency Act 1986, because it was made after the commencement of the winding-up of the company, and, since such a claim would never be entertained in Saudi Arabia, the real question was whether the claim had any realistic prospect of success. That in turn depended on whether the transferor had held the assets (shares in Saudi companies) on trust for the company under various declarations of trust. The earlier declarations of trust contained what looked like an express choice of Saudi law; the later ones did not. Needless to say, Saudi law did not recognise trusts. The Court of Appeal held that, if, as the liquidators submitted, at least the later declarations of trust had Cayman law as their proper law, then the trusts would or could be valid. Article 4 of the Hague Convention, given effect in the Recognition of Trusts Act 1987, provided for Saudi law as the lex situs to determine whether the shares were alienable at all (a ‘preliminary issue’) but the validity and effect of the trusts would be governed by Cayman law. Hence the claim in England ought to proceed. The decision is important because, as the court pointed out, there must be large numbers of trusts established under the laws of common-law jurisdictions, onshore or offshore, that comprise shares in civil-law countries among their assets.

Identifying the proper law of a contract rather than that of a trust was in issue in Stiftung Salle Modulable v Butterfield Trust (Bermuda) Ltd. The Bermuda court decided that the proper law of the contract in which Butterfield agreed to donate CHF120 million was Swiss, as that was the system of law with which the transaction objectively had its closest and most real
connection, in particular as being the place where the moneys were to be paid and applied in the construction of an opera house. The proper law was critical, as the court found there to be a binding ‘donation contract’ under Swiss law when, by Bermuda law, the absence of consideration would have been fatal. Trustees evidently need to be careful before making promises.

ADMINISTRATION OF TRUSTS
Information
A constant problem for trustees in administering trusts is the extent to which they can or should provide beneficiaries with information. Certain beneficiaries are entitled to be informed of the existence of their interests by the trustees. The class so entitled is not fully identified in the authorities but it was held in New South Wales, in *Segelov v Ernst & Young Services Pty Ltd*, that an object of a wide discretionary trust – in that case for the spouses, widows and issue of partners of Ernst & Young, among others – had no such automatic entitlement. Next door, in Victoria, the Court of Appeal, in *Mandie v Memart Nominees Pty Ltd*, rejected an attempt by a beneficiary to compel disclosure of the trustee’s reasons for deciding whether or not to make distributions. The attempt was thinly disguised by dressing it up as a demand for the information available to the trustee for the purpose of making a decision but the court rejected the distinction between the reasoning and the information as illusory.

A former beneficiary sought information in *Re the Y Trust*, and the Jersey court gave its blessing to a trustee’s decision to refuse disclosure about the trust. It was clear that the former beneficiary sought the information for a collateral purpose (matrimonial proceedings in England) unrelated to holding the trustee to account for the period during which she was a beneficiary. Legitimacy of purpose was also considered, along with standing, by the Bermuda Court of Appeal in *Trustee 1 v Attorney-General*, where the trusts were purpose trusts owning valuable companies operating in Asia. Disclosure was sought by an heir of one of the two settlors. After the death of his father, the heir contended that the purpose trusts were invalid (lacking certainty or being improperly constituted because the settlor had not consented or consent was procured by undue influence or breach of fiduciary duty) and so the trust assets were held on resulting trusts for the settlors and their successors in title. The trustees sought *Beddoe* directions, to which the heir was convened. The heir sought disclosure of a privileged document concerning the trust structure but the trustees declined. The court considered that the heir lacked standing (confined to those falling within section 12B(1) of the *Trusts (Special Provisions) Act 1989*) and because disclosure was sought for the purpose of the heir’s challenge to the validity of the purpose trusts rather than enforcing them.

A rather different point as to information was decided by the Guernsey Court of Appeal in *Re R and RA Trusts*. The court decided that it had jurisdiction to order a beneficiary to provide disclosure to assist a trustee in its decision-making and to do so at the instance of another beneficiary rather than the trustee. That result was held to be authorised by section 69 of the *Trusts (Guernsey) Law 2007*, which authorises the court to ‘make an order in respect of... the execution, administration or enforcement of a trust’. It is hard to think that the decision would be followed in England, where the liability of a trustee to provide *Schmidt*-based disclosure is surely an adjunct of his fiduciary duty, a duty not owed by a beneficiary.

33 [2014] NSWSC 283
34 [2014] VSCA 181
35 [2014] JRC 027
36 [2014] CA (Bda) 3 Civ
37 Namely any enforcer, settlor, trustee and ‘any other person whom the court considers has sufficient interest in the enforcement of the trust’
38 Unreported, 21 May 2014
39 *Trusts (Jersey) Law* (2014 rev), art 51 is materially indistinguishable
Remuneration
Lay trustees cannot in general charge remuneration for acting unless the trust instrument so provides and ignorance of the rule led in *Brudenell-Bruce v Moore* to an order against the trustee to restore all the remuneration he had received. The fact that the trusteeship had involved far more work than had been expected did not induce the court to grant a retrospective allowance. By contrast, the trustee in *Pullan v Wilson* was a professional, entitled to charge under the express terms of most of the ten family settlements of which he was trustee and under section 29 of the *Trustee Act 2000* as to the remainder. A challenge to the hourly rate charged largely failed but the court emphasised that the hourly rates to be charged by a professional and his assistants ought to be identified to the other trustees, and to the principal beneficiaries, before the trustee accepted office.

Personal liability
Another element in administering trusts is the trustee’s personal obligation to meet liabilities incurred in doing so. It is commonplace that the trustee’s liability is not generally confined by the amount of the trust assets. In both Jersey and Guernsey, however, legislative provisions do limit the trustee’s liability to a third party where the third party is aware that the trustee is acting as such. Their scope became important for the former trustees in *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd*, as they found themselves faced with a contractual claim for some GBP182 million, with at best a claim against inadequate assets in the hands of the current trustees. A difficulty was that the trust had a Jersey proper law but the litigation was in Guernsey, the Guernsey provision being limited to a trust with a Guernsey proper law. In two judgments, the Guernsey Court of Appeal held, among other points, that the former trustees were entitled to rely on the Jersey provision even in Guernsey litigation and that, where it applied, the third party’s claim was against the trust assets alone, so that the trustee had no personal liability at all.

Application for approval
Less controversial are most applications for the court’s approval to a given course of action. *Re MF Global UK Ltd* is an instance. In the winding-up of an investment business, proprietary claims to client money, coupled with personal claims for breach of trust, were asserted against the general estate of the company and the court approved a compromise between those interested.

There was opposition, however, in *Cotton v Brudenell-Bruce*, which concerned the sale of Savernake House, Wiltshire. The trustees applied for approval of a proposed sale, since the house was decaying and there were insufficient

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40 [2014] EWHC 3679 (Ch)
41 [2014] EWHC 126 (Ch)
42 *Trusts (Jersey) Law 1984* (2014 rev), art 32; *Trusts (Guernsey) Law, 2007*, section 42
43 Unreported, 27 June 2014 and 29 October 2014
44 [2014] EWHC 2222 (Ch)
45 [2014] EWCA Civ 1312
A trustee, said the Guernsey court, is perfectly entitled to appeal if convinced that the decision of the court is not in the best interests of the beneficiaries, and he would be deprived of costs only if he had behaved unreasonably.

In the context of Beddoe applications, a difficulty can arise when the litigating party is not the trustee but a trust-owned company. A trustee may seek approval for a decision to procure the company to litigate, or not to litigate; but, in Highmax Overseas Ltd v Chau Kar Hon Quinton, the Hong Kong Court of Appeal expressed scepticism whether trustees ought to be dictating to the directors of even a wholly owned company. That is not a view universally accepted and, given the prevalence of trust-owned holding companies, the point is important.

Appeals
It has sometimes been said that in administrative proceedings a trustee, being fully protected by a decision at first instance, ought not to appeal: if there is to be an appeal, it should be brought by a beneficiary. In Re R and RA Trusts, however, the Court of Appeal of Guernsey dissented from that view. A trustee, said Birt JA, is perfectly entitled to appeal if convinced that the decision of the court is not in the best interests of the beneficiaries and he would be deprived of costs only if he had behaved unreasonably. If adopted elsewhere, that rule will mark an important change of practice. In Hong Kong, as mentioned above, the Court of Appeal decided in Secretary for Justice v Joseph Lo Kin Ching that Nina Wang’s will imposed charitable trusts and then had to deal with costs. The decision at first instance had been to the same effect and the appeal against it had been brought by the recipient of the gift, now held to be a trustee. The court, though it did not cite Re R and RA Trusts, took a similar view: it was a proper case for the parties to seek further clarification from the court and in that sense the guidance provided by the court was of benefit to the estate. Hence the trustee was awarded its costs out of the estate.

BREACH OF TRUST

Limitation
With claims for breach of trust we move into fully contentious litigation. The limitation periods applicable to accessory liability have been controversial for years but in Williams v Central Bank of Nigeria the Supreme Court laid the controversy to rest. The claimant alleged that the bank was party to a fraud on him to the tune of some USD6 million 18 years earlier. Section 21 of the Limitation Act 1980 is not conspicuously well drafted but the court has now determined that the exclusion in section 21(1) of the general six-year period in case of fraud or retention of trust property applies only to express trustees and to real fiduciaries and does not apply in cases either

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46 [2014] HKCA 248
47 Re Poyiadji [2004] WTLR 1169 (IoM)
48 Re Londonderry’s Settlement [1965] Ch 918 (CA)
49 Unreported, 21 May 2014
of knowing receipt or dishonest assistance where the defendant was not a fiduciary before the wrong complained of. In other words, an accessory alleged to be liable on either basis may plead the six-year period.

The very different limitation provisions in Jersey and Guernsey, the which turn in part on the date when the beneficiary first had knowledge of the breach of trust, were considered by the Guernsey court in Broadhead v Spread Trustee Company Ltd. It was held that the level of knowledge required was knowledge making it reasonable for the beneficiary to begin to investigate whether there had been a breach of trust of the kind ultimately relied on, including knowledge that loss had apparently been suffered and that there was a real possibility (not a mere suspicion) that the loss had been caused by the negligent acts or omissions of the defendant trustee. Knowing enough to formulate a full particularised claim was not required, nor was knowledge that there was a cause of action.

Where the current trustee sues a former trustee, however, time in Jersey usually runs from the date on which the former trustee ceased to hold office. In Walker v Egerton-Vernon, the plaintiffs brought claims against former trustees for losses caused by allegedly negligent investment of trust property. A private trust company incorporated after the allegedly negligent decisions was a successor to the former trustees and sought to join with the plaintiffs against them. Two of the former trustees successfully resisted joinder on the grounds that they had retired some years earlier and time had expired. The plaintiffs sought to rely on the customary law doctrine of empêchement d’agir, which stopped limitation from running where it was practically impossible for a plaintiff to commence proceedings. The court held that the doctrine did not apply to the private trust company since it did not exist when the statutory three-year period had expired and so could not have faced a practical impossibility; and, in any case, there was no impossibility because the beneficiaries could have sought the appointment of a new trustee to sue.

**Discretionary relief**

In Santander UK plc v RA Legal Solicitors, the bank appealed against a decision of the High Court to relieve the solicitors from liability to the bank for breach of trust in paying funds to another (dishonest) solicitor as part of a conveyancing fraud. The power to grant relief from liability in section 61 of the Trustee Act 1925 applies only where the trustee has acted honestly and reasonably and ought fairly to be excused. The High Court considered that the solicitors genuinely believed the transaction to be legitimate and the bank's loss had ultimately been caused by a fraudulent third party. The Court of Appeal reversed the decision, holding that the solicitors had no authority to transfer the trust money to any solicitor other than the true representative of the vendor and they were therefore in breach of trust. The solicitors had departed so far from best practice in handling the sale that relief was not appropriate.

**Quantum**

The Supreme Court also had to deal with the quantum of compensation for breach of trust in AIB Group (UK) plc v Mark Redler & Co, which arose out of a lending transaction. The solicitors, put in funds by the lenders, failed by mistake to discharge an existing mortgage and overpaid the borrowers by GBP300,000. The borrowers defaulted and after the market had dropped the house was sold at a price which left a shortfall of GBP2.5 million. Were the solicitors liable for the full GBP2.5 million or only for GBP300,000? This
ground had been travelled in Target Holdings Ltd v Redferns, but in Target the release of funds had merely been premature and the lender ended up with the intended security; in AIB the lender never got a first charge. There was a respectable technical argument that, as trustee, the solicitors were liable for all the loss. Nonetheless, the court held the solicitors liable for GBP300,000 only, so refusing to make them guarantors against the risk of a drop in the market which the lender had intended to assume.

In Guernsey, Jefcoate v Spread Trustee Co Ltd, affords another instance of the distaste felt by courts for allowing a trustee to shelter behind the rule against recovery of reflective loss. The loss, caused by a sale at an undervalue, was suffered by a company held indirectly by the trustee but the court held the trustee liable. Points as to the measure of compensation were discussed in England in Roadchef (Employee Benefits Trustees) Ltd v Hill, and in Brudenell-Bruce v Moore, and in Queensland, in Themis Holdings Pty Ltd v Canehire Pty Ltd, it was held that an award of compound interest was appropriate not only where a trustee had employed funds for its own commercial benefit but also in other circumstances, such as fraud, gross breach of trust or serious misconduct.

DIVORCE
The impact of divorce on trusts continues to attract the attention of the courts and not only in England. Kan Lai Kwan v Poon Lok To Otto is one of the few ‘big money’ ancillary relief cases to reach Hong Kong’s Court of Final Appeal. The court allowed the wife’s appeal and, following Charman v Charman, held that the full value of the assets of a discretionary trust established by the husband (and valued at more than HKD1.5 billion) should be attributed to him as a ‘financial resource’ under the relevant matrimonial legislation, similar to section 25 of the English Matrimonial Causes Act 1973. The court adopted the test of asking whether, if the husband were to request the trustee to advance the whole or part of the capital or income of the trust to him, the trustee would, on the balance of probabilities, be likely to do so. Answering ‘yes’, it determined that the wife was entitled to a share of the matrimonial resources to a total value of some HKD840 million (or approximately USD107 million).

PUBLIC AND PRIVATE HEARINGS
In any of the foregoing cases, and in others involving trusts, the question may arise whether the hearing is to be public or in private and whether any other steps are to be taken to preserve privacy. The question was considered in two decisions in 2014, V v T and Re Delphi Trust both assert the general principle that hearings should be in public and require any exception to be justified by reasons and supported by evidence.
(ECHR) imposes a general requirement for a public hearing, though with qualifications, where civil rights and obligations are being determined. Many trust cases, such as an application under *Public Trustee v Cooper*, do not determine rights or obligations but the court pointed out in *V v T* that the requirement for a public hearing was also a principle of the common law, not dependent on the scope of article 6.

*V v T* was an application under the *Variation of Trusts Act 1958*. The court required the hearing to be in public but accepted that the well-being of the children involved justified imposing reporting restrictions and anonymising the judgment. *Re Delphi Trust* is to the same effect and contains a lengthy compendium of common-law authority. Again, the court required a public hearing even though the application was only for the assistance of the court. But the court accepted that there was good reason for retaining some element of privacy; it directed that at the hearing terms defined in a ‘confidential key’ should be used, with no reference by name to the settlor, the trust or the major beneficiary (a charity), and that no one should have access to the court file or to recordings without the permission of the court – the last two being points often overlooked.

If 2015 proves to be as prolific of decisions as 2014, it will be an interesting year.

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AN ENDURING QUESTION

TO WHAT EXTENT CAN THOSE APPOINTED UNDER AN ENDURING POWER OF ATTORNEY IN AUSTRALIA MAKE, REVOKE, ALTER OR CONFIRM A SUPERANNUATION DEATH BENEFIT NOMINATION?

By Richard Williams and Brian Herd

ABSTRACT

• In Australia, significant amounts of personal wealth are held in superannuation.
• There is uncertainty as to the extent to which a person appointed as attorney of a member of a superannuation fund, under an enduring power of attorney, is able to make a death benefit nomination, or to revoke, alter or confirm one that has been made by their principal.
• The scope of an attorney’s authority varies between the various Australian states and territories, under the applicable powers of attorney legislation.
• Further complications are posed by the overlay of superannuation legislation and fiduciary duties.
• Statutory reform would be desirable, to resolve various uncertainties in this area.

The most recent superannuation statistics issued by the Australian Prudential Regulation Authority (APRA) indicate that, in Australia, superannuation assets total more than AUD1.62 trillion. Some AUD970 billion is held by APRA-regulated superannuation entities. Self-managed superannuation funds (SMSFs), of which there are more than 500,000, regulated by the Australian Taxation Office, hold AUD506 billion of assets, and exempt public-sector superannuation schemes AUD142.9 billion.

For many Australians, superannuation forms a significant proportion of their personal wealth, and accordingly requires careful consideration as part of their overall estate-planning strategy.

In this context, one crucial question that arises is the extent to which a person appointed as attorney of a member of a superannuation fund, under an enduring power of attorney (EPOA), is able to make a death benefit nomination, or to revoke, alter or confirm one that has been made by their principal. Anecdotal evidence suggests that, among lawyers, accountants and others engaged in providing estate-planning advice, there exists a divergence of opinion. For example, some practitioners express the view that an attorney is able to confirm (renew) a lapsing benefit nomination.

1 Annual Superannuation Bulletin, APRA (June 2013; revised February 2014)
2 An attorney might also seek to perform other acts in relation to their principals superannuation, such as making a contribution, withdrawing a benefit, transferring a benefit to another fund, commencing or ceasing a pension, varying pension payments or selecting investment options. Those matters are outside the scope of this article.
nomination, but that the attorney’s authority does not extend as far as the making, revocation or alteration of a nomination. Others suggest that the issue can effectively be sidestepped by the inclusion, in the terms of the EPOA, of a clause that expressly states that an attorney has authority to provide instructions in respect of superannuation, including by way of the provision of a nomination, or the revocation, alteration or confirmation of a nomination. It has also been suggested that a member who intends that their attorney should be free to ‘deal’ with nominations however they think fit should include in the EPOA wording that states that such steps are within the attorney’s authority. Each of these views is, however, open to some doubt, for the reasons explored below.

The basic question requires examination from three distinct angles:

- From the perspective of the attorney, what is the source and scope of the attorney’s authority, and to what extent can the scope of authority in respect of superannuation be clarified through an express clause in the EPOA (sometimes referred to as a ‘special condition’)?
- From the perspective of superannuation trustees, to what extent are the trustees of a fund authorised or required to accept an instruction from an attorney?
- Are there any relevant provisions of superannuation legislation, or case law, that assist in resolving these issues?

**SOURCE AND SCOPE OF THE ATTORNEY’S AUTHORITY**

The legal basis of an attorney’s authority is grounded in the principles of agency, supplemented by statute. In the leading Australian text on POA, Dal Pont explains this as follows:

‘...the power of attorney involves a unique species of agency in view of statutes dedicated to its formation, consequences and regulation. These set a framework that steps beyond the general law of agency, especially as regards the purely statutory creation of the enduring power of attorney.’

Dal Pont expands further on this:

‘One further important feature of the law on powers of attorney that serves to differentiate it from the general law of agency is the statutory recognition of the enduring power of attorney. Following basic agency law, which treats an agency as terminated upon the mental incapacity of the principal, the general law refused to countenance the validity of a power of attorney once the principal became mentally incapable, irrespective of its terms. This led to statutory intervention, whereby in all Australian jurisdictions, in tandem with other comparable common-law countries, statute validates powers of attorney expressed to endure the mental incapacity in the principal (in the Northern Territory, under the guise of an ‘advance personal plan’ as from 17 March 2014). No equivalent provision is found in general agency legislation. As regards enduring powers in particular, the relevant legislation has impacted on the scope of an attorney’s authority...’

He also notes that the powers of attorney legislation in each state and territory is not consistent, and that:

‘Due to the statutory infiltration into the general law of powers of attorney, it is necessary to be familiar with the terminology adopted by the relevant statutes, as well as to ascertain the relationship between the general law and statutory provisions. These two inquiries overlap in some ways, but the latter in particular must be viewed against the backdrop of the principle of statutory interpretation that statute is not presumed to alter or oust the general law unless it does so expressly or by necessary implication.’

It is clear from this that the scope of an attorney’s authority under an EPOA can only extend as far as acts that are permitted, expressly or by necessary implication, by the particular

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3 H Gray, ‘Enduring powers of attorney – issues for trustees’ in Australian Superannuation Law Bulletin (November 2012), page 93
4 GE Dal Pont, Powers of Attorney, 2nd edn (LexisNexis Butterworths Australia, 2015) at [1.12]
5 At [5.4]
6 At [1.35]
statute in the respective state or territory. Each of the statutes requires separate examination.

**Australian Capital Territory**

Section 13(2) Powers of Attorney Act 2006 (ACT) provides:

‘By an enduring power of attorney, an adult (the principal) may also appoint one or more people to do anything in relation to one or more property matters, personal care matters or health care matters for the principal that the principal could lawfully do by an attorney if the principal had decision-making capacity for the matter when the power to do the thing is exercised.’

The permitted scope of authority is, therefore, limited to ‘property matters’, ‘personal care matters’ and ‘health care matters’. Those terms are defined in sections 10 to 12. In s10, ‘property matter’ is defined as ‘a matter relating to the principal’s property’, and a non-exhaustive list of examples appears at the end of that section. Section 10 does not contain any reference to superannuation. ‘Property’ is defined in the dictionary as including ‘money and financial assets’. The approved form of EPOA contains no reference to superannuation.

In light of these particular statutory definitions, it is unclear whether the making, revocation, alteration or confirmation of a death benefit nomination can be regarded as within the definition of ‘property matter’.

**New South Wales**

An EPOA may be created under Part 4, division 2 of the Powers of Attorney Act 2003 (NSW), and will constitute a ‘prescribed power of attorney’. Section 9 provides:

‘Powers conferred by prescribed power of attorney

(1) Subject to this Act, a prescribed power of attorney confers on the attorney the authority to do on behalf of the principal anything that the principal may lawfully authorise an attorney to do.

(2) A prescribed power of attorney has effect subject to compliance with any conditions or limitations specified in the instrument creating the power.’

The prescribed form of EPOA contains no reference to superannuation. While the permitted scope of authority under s9 is widely framed, there is no express reference to superannuation. The key question in New South Wales is, therefore, whether a principal ‘may lawfully authorise an attorney’ under an EPOA to make, revoke, alter or confirm a death benefit nomination. There is no clear answer to this at the present time. Some doubt arises because of the way in which the formal requirements for the provision of a valid notice under regulation 6.17A of the Superannuation Industry (Supervision) Regulations 1994 (Cth) (the SIS Regulations) are framed. That regulation is examined further below.

**Northern Territory**

The Advance Personal Planning Act 2013 (NT), which commenced on 17 March 2014, contains the concept of a ‘decision maker’. Section 8 provides:

‘Adult may make advance personal plan

(1) An adult who has planning capacity may, by making an ‘advance personal plan’, do one or more of the following:

(a) …

(b) set out the adult’s views, wishes and beliefs as the basis on which he or she wants anyone to act if they make decisions for him or her (advance care statements);

(c) appoint one or more persons to make decisions for the adult if he or she loses decision-making capacity (decision makers).

(2) The decisions mentioned in subsection (1)(b) and (c) may be about all or any aspect of the adult’s care and welfare (including health care) and property and financial affairs.

A decision maker may, therefore, be appointed to make decisions, *inter alia*, about the adult’s

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7 Accessible at www.publicadvocate.act.gov.au
8 Accessible at www.lpi.nsw.gov.au
9 For a power created by an instrument executed prior to that date, see the Powers of Attorney Act (NT), s13
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‘property and financial affairs’. Those terms are not defined, but s16 does contain a list of examples of matters for which a decision maker may be appointed. The list includes, in particular, ‘management of assets’ and ‘legal matters’, but there is no reference to superannuation.

Section 20 then provides:

‘Authority of decision maker
(1) A decision maker for a matter has authority to do anything in relation to the matter that the represented adult could lawfully do if he or she had full legal capacity.
(2) However, the decision maker may exercise that authority only when the represented adult has impaired decision-making capacity for the matter.
(3) The decision maker’s authority is subject to this Act and the terms of the advance personal plan by which the decision maker was appointed.’

The prescribed form of advance personal plan contains no reference to superannuation.

The key question in the Northern Territory appears to be whether an adult’s superannuation falls within the term ‘the adult’s… property and financial affairs’, but the answer is unclear.

Queensland
Section 32(1) Powers of Attorney Act 1998 (Qld) provides:

‘Enduring powers of attorney
(1) By an enduring power of attorney, an adult (principal) may –
(a) authorise one or more other persons who are eligible attorneys (attorneys) to do anything in relation to one or more financial matters or personal matters for the principal that the principal could lawfully do by an attorney if the adult had capacity for the matter when the power is exercised; and
(b) provide terms or information about exercising the power.’

The terms ‘financial matter’ and ‘personal matter’ are defined in schedule 2, at sections 1 and 2. A ‘financial matter’ is ‘a matter relating to the principal’s financial or property matters, including, for example, a matter relating to one or more of the following...’ There then follows a non-exhaustive list, which does not contain any reference to superannuation. One of the items in that list – ‘a legal matter relating to the principal’s financial or property matters’ – appears at first sight to assist, but ‘legal matter’ is restrictively defined in s18 of schedule 3. A ‘personal matter’ is ‘a matter, other than a special personal matter or special health matter, relating to the principal’s care, including the principal’s health care, or welfare, including, for example, a matter relating to one or more of the following...’ Again, the definition includes a non-exhaustive list. The approved forms of EPOA contain no reference to superannuation.

Section 77 states:

‘Attorney has maximum power if not otherwise stated
To the extent an enduring document does not state otherwise, an attorney is taken to have the maximum power that could be given to the attorney by the enduring document.’

However, it has been held that that provision ‘does no more than ensure that an enduring power of attorney will be as wide as [the legislation] would allow in the absence of terms within the power restricting its scope’.12

The key question in Queensland is, therefore, whether the making, revocation, alteration or confirmation of a death benefit nomination can be regarded as ‘a matter relating to the principal’s financial or property matters’. Accordingly, the position is (as in the Australian Capital Territory and the Northern Territory) uncertain.

South Australia
Section 6 Powers of Attorney and Agency Act 1984 (SA) enables an EPOA to be created by a deed expressed to be made in pursuance of that section, or that contains words indicating an

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10 Accessible at www.nt.gov.au/justice
11 Forms 2 and 3, accessible at www.justice.qld.gov.au
12 Orix Australia Corporation Ltd v McCormick [2005] FCA 1032; (2005) 145 FCR 244 at [76] per Graham J
intention that the authority conferred is to be exercised notwithstanding (or in the event of) the donor’s subsequent legal incapacity. Section 6(3) provides:
‘An act done by the donee of an enduring power of attorney in pursuance of the power during a period of legal incapacity of the donor of the power is as effective as if the donor were competent and not incapacitated.’

The Act does not contain any further specification of the scope of an attorney’s authority, or any reference to superannuation. The scope of authority is wide.

It appears arguable that the making, revocation, alteration or confirmation of a death benefit nomination should be within the permitted scope of authority, as those are acts that could be done by the donor if competent and not incapacitated.

**Tasmania**

Tasmania is the only Australian jurisdiction in which the issue of the exercise of powers in respect of superannuation has been expressly addressed in the applicable powers of attorney legislation. Section 31(2) Powers of Attorney Act 2000 (Tas) provides:

‘Where an instrument is expressed to confer general authority on the attorney, it operates to confer, subject to any conditions or restrictions specified in the instrument, authority to do on behalf of the donor any act which the donor can lawfully do by an attorney.’

The following s31(2A) was introduced as part of a general update of the Act by the Powers of Attorney Amendment Act 2013 (Tas):

‘In addition to any acts or powers expressly authorised in, or expressed to be included in, an enduring power of attorney, but subject to any conditions or restrictions of a power specified in the enduring power of attorney, the acts which the attorney may do on behalf of a donor under an enduring power of attorney include, but are not limited to including...’

The section then lists 21 such matters, including: ‘(i) exercise any power of the donor in respect of any superannuation of the donor...’

The prescribed forms of EPOA contain no express reference to superannuation, but it is clear, because of s31(2A)(i), that the attorney’s permitted authority may extend to the making, revocation, alteration or confirmation of a death benefit nomination.

**Victoria**

In Victoria, EPOAs are provided for by Part XIA of the Instruments Act 1958 (Vic). Section 115 states:
‘What is an enduring power of attorney?
(1) By an enduring power of attorney, an adult person (donor) may –
(a) authorise one or more persons (attorneys) to do anything on behalf of the donor that the donor can lawfully authorise an attorney to do; and
(b) provide conditions and limitations on, and instructions about, the exercise of the power.
(2) Despite any rule of law to the contrary, an enduring power of attorney is not revoked by the subsequent legal incapacity of the donor or the power.’

The approved forms of EPOA contain no reference to superannuation.}

14 Accessible at www.publicadvocate.vic.gov.au
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Until there is sufficient case law to clarify the meaning of the key terms such as 'property matters', 'property and financial affairs' and 'a matter relating to the principal’s financial or property matters', the limits of the scope of authority are not fully clear.

It appears that the position in Victoria is similar to that in New South Wales: while the permitted scope of authority is widely framed, there is no express reference to superannuation, and the key question is whether a principal ‘may lawfully authorise an attorney’ under an EPOA to make, revoke, alter or confirm a death benefit nomination. That question in turn requires a consideration of regulation 6.17A of the SIS Regulations, examined below.

When the Powers of Attorney Act 2014 (Vic) commences, the position will be similar, in that s22(1) states: ‘by an enduring power of attorney a person may authorise an eligible attorney to do anything on behalf of the person that a person can lawfully do by an attorney’. Various matters for which power cannot be given under an EPOA are stated in s26, but none relates to superannuation. Pursuant to s22(2), an attorney’s authority will also extend to ‘personal matters’ and ‘financial matters’. The definition of ‘financial matters’ in s3(1) includes, among other things, ‘any matter relating to the principal’s financial or property affairs’.

Western Australia
Part 9 of the Guardianship and Administration Act 1990 (WA) enables the making of an EPOA. Section 105 provides:

'Enduring power of attorney survives incapacity
(1) Notwithstanding any rule of law to the contrary or anything in this Act, an enduring power of attorney that is in force is not affected by the subsequent legal incapacity of the donor of the power.
(2) An act done under an enduring power of attorney that is in force by the donee of the power during a period of legal incapacity of the donor is as effective as if the donor were of full legal capacity.'

The Act does not contain any further specification of the scope of an attorney’s authority. The approved form of EPOA contains no reference to superannuation.15

The position appears to be similar to that in South Australia: the scope of permitted authority is wide and it appears arguable that the making, revocation, alteration or confirmation of a death benefit nomination should be within that scope, as those are acts that may be done by a donor who has full legal capacity.

Summary
The position in each of the jurisdictions, as regards the scope of authority under the powers of attorney legislation,16 can therefore be summarised as in the table on the following page.

Wider scope, by special condition?
Once the maximum breadth of an attorney’s permitted scope of authority under an EPOA is ascertained, it is clear that the inclusion of a special condition purporting to permit an attorney to carry out acts that fall beyond such scope must be ineffective. This poses a practical difficulty, at the present time, in the Australian Capital Territory, the Northern Territory and Queensland, because the scope of authority in those jurisdictions is circumscribed by the statutory definitions. Until there is sufficient case law to clarify the meaning of the key terms such as ‘property

15 Accessible at www.publicadvocate.wa.gov.au
16 In each case, further consideration of regulation 6.17A of the SIS Regulations is required before a conclusion can be drawn; see below
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matters’ (ACT), ‘property and financial affairs’ (NT) and ‘a matter relating to the principal’s financial or property matters’ (Queensland), the limits of the scope of authority are not fully clear. Accordingly, when drafting an EPOA, particular care should be taken regarding the extent to which a special condition may validly be included to the effect that:

• the attorney’s authority extends as far as the making, revocation, alteration or confirmation of a death benefit nomination; or
• the principal expressly confers on the attorney the power to specify what is to constitute a ‘property matter’ (or equivalent, depending on the particular terminology used in the legislation), for the purposes of the authority conferred on them by the EPOA.

The effectiveness of special conditions of this kind is currently a matter of debate, in the absence of relevant case law.

Narrower scope and other restrictions

The actual scope of authority of an attorney under an EPOA may, in any particular case, be narrower than the permitted maximum scope, or be subject to restrictions that affect the extent to which the attorney is able to exercise authority in respect of the principal’s superannuation:

• The EPOA may contain one or more special conditions that expressly prohibit certain acts.
• The manner in which an attorney is able to exercise their powers is, in every case, subject to an overlay of fiduciary duties. These duties are, in some of the Australian jurisdictions, expressed in comprehensive terms in the powers of attorney legislation. For example, chapter 5 of the Powers of Attorney Act 1998 (Qld) outlines various fundamental duties, such as the duty to act honestly and with reasonable diligence, and the duty to avoid conflict transactions. That chapter also provides, at s76, that an attorney who performs a function or exercises a power under an EPOA must comply with the general principles stated in

Similarly, when the Powers of Attorney Act 2014 (Vic) commences, an attorney will be required to act in accordance with the general principles stated in s21.
It should be borne in mind that, if the terms of an enduring power of attorney contain any ambiguity, the court is likely to adopt a strict approach to construction for the principal may exercise power only to the extent authorised by the tribunal.19

- Statutory restrictions other than those found in the powers of attorney legislation may impact on an attorney’s ability to carry out certain acts on behalf of their principal, even though such acts would otherwise be within the scope of the attorney’s authority. In the context of an attorney’s ability to provide a notice to a superannuation trustee, regulation 6.17A of the SIS Regulations requires careful consideration. This is examined below.
- It should also be borne in mind that, if the terms of an EPOA contain any ambiguity, the court is likely to adopt a strict approach to construction.20

THE SUPERANNUATION TRUSTEES’ PERSPECTIVE

The extent to which the trustees of a superannuation fund are authorised or required to accept a notice from an attorney of a member is a matter that is governed principally by the rules of the fund, together with the relevant provisions of superannuation legislation that are examined below.

Given the uncertainty, in most of the Australian jurisdictions, as to the scope of an attorney’s authority in relation to matters concerning their principal’s superannuation, it is entirely understandable that trustees may be reluctant

18 Dal Pont, footnote 4 above, at [8.22]
19 See also the Guardianship and Administration Act 2000 (Qld), sections 22 and 23. The consideration of whether a guardian or administrator (or equivalent, in other jurisdictions) may validly provide directions in respect of superannuation is outside the scope of this article
20 Construction of powers of attorney is considered in detail by Dal Pont, at [6.25] to [6.66]
If the fund rules are silent, the trustees may be placed in a particularly difficult position if they receive a notice that would clearly result in a breach of the attorney’s duties if it were to be implemented.

to countenance the possibility of fund rules that expressly permit the provision of any notices by an attorney.

If the fund rules are silent, the trustees may be placed in a particularly difficult position if they receive a notice that would clearly result in a breach of the attorney’s duties if it were to be implemented. The obvious example is a notice containing a nomination that is in favour of the attorney. In such circumstances, the trustee may potentially be required to accept the notice and be bound by it, notwithstanding that the result of that will be that there is a breach by the attorney of their duties, which might in turn lead to a compensation claim against the attorney.  

SUPERANNUATION LEGISLATION AND CASE LAW

Legislation

Certain legislative restrictions apply to the making of a binding death benefit nomination. These include s59 Superannuation Industry Supervision Act 1993 (Cth) (the SIS Act) and regulation 6.17A of the SIS Regulations. Subregulation (2) states that ‘the governing rules of a fund may permit a member of the fund to require the trustee to provide any benefits of the member, on or after the death of the member, to the legal personal representative or a dependant of the

member...’ Subregulation 4 provides for a notice given to the trustee by a member to have binding effect following the death of the member, if:

• the person, or each of the persons, mentioned in the notice is the legal personal representative or a dependant of the member; or
• the proportion of the benefit that will be paid to that person, or to each of those persons, is certain or readily ascertainable from the notice; and
• the notice is in accordance with subregulation (6); and
• the notice is in effect.

The requirements of subregulation (6) are that the notice:

• must be in writing; and
• must be signed, and dated, by the member in the presence of two witnesses, being persons:
  o each of whom has turned 18; and
  o neither of whom is a person mentioned in the notice; and
• must contain a declaration signed and dated by the witnesses, stating that the notice was signed by the member in their presence.

A member who gives notice may, under subregulation (5):

• confirm the notice by giving to the trustee a written notice, signed and dated by the member, to that effect; or
• amend, or revoke, the notice by giving to the trustee notice, in accordance with subregulation (6), of the amendment or revocation.

Under subregulation (7), a notice may lapse: ‘Unless sooner revoked by the member, a notice under subregulation (4) ceases to have effect:

• at the end of the period of three years after the day it was first signed, or last confirmed or amended, by the member; or

21 For example, s106 Powers of Attorney Act 1998 (Qld) enables the court to order that an attorney compensate the principal’s estate for a loss caused by the attorney’s failure to comply with the Act in the exercise of a power.

22 The requirements of regulation 6.17A do not apply to self-managed superannuation funds (SMSFs) unless the governing rules of the fund impose such requirements: Self-managed Superannuation Funds Determination SMSFD 2008/3; see also Donovan v Donovan [2009] QSC 26. There are also further restrictions stated in regulation 6.22.
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If the governing rules of the fund fix a shorter period, at the end of that period.'

It can be seen that the formal requirements (under subregulation (6)) for the making, amendment or revocation of a notice are strict, and similar to the formal requirements that apply in respect of the making of a will, although that similarity does not of itself signify that the power of a member to make, amend or revoke a notice is non-delegable.

The formal requirements for the continuation of a notice (under subregulation 5(a)) are less stringent. This may explain why some practitioners suggest that an attorney under an EPOA may renew a nomination, but not make, revoke or alter a nomination. In the absence of any express statement to that effect in the legislation, that view does not appear to be sufficiently supported by the terms of regulation 6.17A itself.

It is clear that there are two distinct acts that are required to be done by the member: the signature of the notice in accordance with subregulation (6) and the giving of the notice to the trustee. As regards the act of signature, regulation 6.17A is silent as to whether the member must sign the notice personally or may sign it by an attorney. There is, accordingly, a presumption that lends some assistance: that, where a person authorises another to sign for them, the signature of the person so signing is the signature of the person authorising it.23

The presumption is not rebutted by the way in which ‘member’ is defined in regulation 1.03 (‘a member of the fund’) or in the SIS Act.24 It therefore appears that, from the perspective of the superannuation legislation (and putting aside the distinct issue of the scope of an attorney’s authority), it is arguable that the acts of signature and of giving the notice are capable of being performed by an attorney.25 The matter is not, however, beyond doubt. A contrary argument could be made that the legislation contains an implied requirement that the member must act personally in the provision of such notice.

Determination D07-08\030
The only case to date in which the issue has featured is a decision of the Superannuation Complaints Tribunal: Determination D07–08\030. This concerned a complaint in respect of a final decision made by the trustee to pay the member’s death benefit as follows: 37.5 per cent to his daughter, 37.5 per cent to his son, and 25 per cent to the complainant (the sister of the member) as the legal personal representative (LPR) of the deceased member. The complainant submitted that the 25 per cent share should be paid to her personally, not as LPR.

The application to join the fund had been completed by the complainant acting as the member’s attorney under an EPOA. The binding death-benefit-nomination form was also completed and signed by her. The member’s will had been made prior to the grant of the EPOA, and it named the complainant and a friend of the member as executors, and provided for his estate to pass as follows: 37.5 per cent to the daughter, 37.5 per cent to the son, and 25 per cent to the complainant.

The nomination form was accepted by the trustee, notwithstanding that it was signed by the complainant rather than the member. Following the member’s death, the trustee decided that the nomination was not valid because the complainant was not a dependant of the member. Subsequently, the trustee, on being informed that the complainant was the member’s LPR and held his EPOA, decided that the nomination was valid, and

23 Dal Pont, at [5.28], citing R v Justices of Kent (1873) LR 8 QB 305 at 307 and Cordiant Communications (Australia) Pty Ltd v Communications Group Holdings Pty Ltd (2005) 55 ACSR 185; [2005] NSWSC 1005 at [31] per Palmer J.
24 SIS Act, ss10 and 15B, and SIS Regulations, regulation 1.04AAA.
25 In those jurisdictions, the suggestion that arrangements should be made for a member to sign a series of nominations dated at three-yearly intervals, which are handed to the attorney with an instruction that the attorney is to submit each signed nomination to the trustee on the stated date, therefore appears unnecessary.
that payment should be made in accordance with that nomination, with the complainant to receive 25 per cent as LPR.

As regards the fact that the nomination was provided by an attorney rather than by the member personally, the son and daughter argued that ‘for [the complainant] to nominate herself as beneficiary would not only be a flagrant breach of her fiduciary duties [as attorney] but quite beyond the power of the instrument’.26 The Tribunal, however, found as follows:27

‘Although the Tribunal acknowledges that the enduring power of attorney would have permitted the complainant to complete and sign the binding death benefit nomination, the nomination would only have been valid if the person nominated to receive the benefit was an individual who was either a dependant, or the legal personal representative acting in that capacity, rather than as an individual.’

The difficulty, on the facts, was that it was not clear on what basis the complainant was nominated on the form. The Tribunal found that this should have been clarified, together with the complainant’s status, before the trustee accepted the nomination. Once the trustee had learned, after the member’s death, that there were two LPRs, and in light of the fact that, as an individual, the complainant did not appear to be in a dependent relationship, it would have been fair and reasonable for the trustee to regard the nomination of the complainant as unacceptable because it was too vague. The Tribunal, therefore, determined that the trustee’s decision should be set aside, and that the whole of the death benefit instead be distributed to the member’s estate.

The finding quoted above has been interpreted by some practitioners as providing a definitive answer to the basic question. However, it is important to note that, in this particular case, the nomination was not found to be effective. Nor does the case contain any analysis of the scope of the attorney’s authority, or explain the basis for the statement quoted above.

THE WAY FORWARD?

For many persons, a binding death benefit nomination will form an integral part of their estate planning, as it should ensure (or, at least, increase the likelihood) that the relevant assets pass as the member intends.28 The uncertainty surrounding the basic question that we have examined above is, therefore, undesirable.

The practical importance of the issue was highlighted recently, albeit in passing, in a submission made by the Law Council of Australia, during an inquiry undertaken by the Australian Law Reform Commission (ALRC): Equality, Capacity and Disability in Commonwealth Laws. In response to a consultation question about possible changes to the superannuation exemption under the Disability Discrimination Act 1992 (Cth), the Law Council made the following comment:29

‘The Law Council broadly supports applying a consistent approach to supported and substituted decision-making for persons with a disability, in relation to decisions about their superannuation. In particular, the Law Council submits that clarification of mechanisms for supported and substituted decision-making in relation to binding death benefit nominations (regulation 6.17A of the Superannuation Industry (Supervision) Regulations 1994) would be beneficial for members, their carers and superannuation funds.’

In the Commission’s final report,30 the issue was briefly mentioned in a section

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26 At [21]
27 At [34]
28 For self-managed superannuation funds, the issue of control of the fund following the member’s death also requires careful planning, even where there is a binding death benefit nomination in place; see Wooster v Morris [2013] VSC 594 and B Figot, The vital decision of Wooster v Morris and what practitioners need to know (2014) 17(2) REP 27
29 Submission 83, accessible at www.alrc.gov.au/inquiries/disability/submissions, at [113]. The Law Council’s suggested approach was supported by the National Mental Health Consumer and Carer Forum (submission 100)
30 ALRC Report 124, August 2014
entitled ‘Other issues’, but with reference to guardianship rather than to the position of an attorney, and without any proposal for reform:

‘11.65 While a limitation on the power of an enduring guardian is a matter that goes beyond the terms of reference for the inquiry, the ALRC concludes that, as a policy matter, the role of an enduring guardian is one focused on the lifetime needs of the person. It is not appropriate for an enduring guardian to make a binding death benefit nomination, which is like a will in effect.

The Law Council submitted that the SIS Act and SIS Regulations could be amended to make this clear so that a nomination “generally cannot be made on behalf of a member by a person exercising powers under an EPA”.

EPOAs are now commonplace in Australia, and impact on decision-making on behalf of incapacitated persons in a very wide range of situations. This is illustrated by the following few examples:

• In Price and Underwood (No.2), the Family Court of Australia determined that an attorney acting under an EPOA that conferred authority in respect of financial matters had the necessary authority to be appointed as case guardian for the purpose of conducting an application for divorce on behalf of an incapacitated person to a marriage.

• In the Will of Bob Wild Deceased concerned a probate application. It was held that an attorney acting under an EPOA was able to apply for a grant of probate on behalf of an incapacitated executor, the making of such an application being within the definition of a ‘legal matter’ under the Powers of Attorney Act 1998 (Qld).

• Many modern trust deeds are drafted so as to expressly permit an attorney acting under an EPOA to exercise certain powers of a personal nature, in the event of the incapacity of their principal.

• In the context of self-managed superannuation funds, s17A(3)(b)(ii) of the SIS Act allows a person who holds an EPOA in respect of a member to be trustee, or director of the corporate trustee, of a fund in place of the member without causing the fund to cease to be an SMSF.

The uncertainty surrounding death benefit nominations is a peculiarity that needs resolution.

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31 [2008] FamCA 267
32 [2002] QSC 200
33 The exercise of fiduciary powers by an attorney may be more problematic, as the attorney may be in a position of conflict of duty and duty
34 See also Self Managed Superannuation Funds Ruling SMSFR 2010/2
Jurisdiction in the dock
WHAT THE PRIVY COUNCIL RULING IN CROCIANI MEANS FOR EXCLUSIVE JURISDICTION CLAUSES

By Nicholas Williams

ABSTRACT
- The Judicial Committee of the Privy Council has ruled on the operation of exclusive jurisdiction clauses in trust deeds.
- This case was heard on appeal from the Jersey Court of Appeal, but the principle is likely to be applicable more broadly because of a lack of authority in other jurisdictions.
- Exclusive jurisdiction clauses will operate prima facie, but subject to disapplication.
- The burden for demonstrating that such disapplication is appropriate is less than in a contractual situation. This is because there is a fundamental difference between contracts and trust deeds, not least the operation of inherent jurisdiction in relation to the latter.
- Whether this difference has broader ramifications for trust deeds remains to be seen. There is an argument that it undermines the certainty of other clauses in trust deeds.
- The use of phrases such as ‘forum for administration’ and ‘exclusive jurisdiction’ are potentially troublesome because they rely so much on context. Careful drafting is required to ensure that the words used reflect the intentions of the parties.

On 26 November 2014, the Judicial Committee of the Privy Council (the Board) delivered judgment in the long-running case of Crociani and Others v Crociani and Others [2014] UKPC 40. The case was an appeal from Jersey’s Court of Appeal, and dealt principally with the thorny issue of ‘exclusive jurisdiction’ clauses in the context of trust deeds. When do they arise? What do they mean? When can they be avoided?

At the heart of these questions lay a more fundamental issue that has vexed and divided judges and academics alike: what are the essential similarities and differences between contracts and trust deeds when it comes to the enforcement of their express terms?

The definitive ruling of Jersey’s highest appeal court, on a topic that has seen little judicial guidance in other common-law jurisdictions, was awaited with interest both at a specific and general level, and by an audience transcending the boundaries of this particular bailiwick. Not only does the judgment provide instruction on the manner in which exclusive jurisdiction

1 Lord Neuberger, Lord Mance, Lord Reed, Lord Hughes and Lord Hodge
clauses might be drafted in future (and the scope of their operation and application), but it also provides insight into a broader question of the substance of a trust deed.

THE BACKGROUND
The case can briefly be summarised for the purposes of this article as follows. A trust called the Grand Trust was established in 1987. According to clause 15 of the trust deed, the Grand Trust was to be governed by Bahamian law. The Bahamas was also said to be the forum for administration.

Clause 12 of the trust deed provided that the original Bahamian trustees were able to resign in favour of trustees in another jurisdiction, and to declare that the Grand Trust should be subject to and governed by the law of the country of residence or incorporation of the new trustee.

From this point on, clause 12 said that: ‘... the rights of all persons and the construction and effect of each and every provision hereof shall be subject to the exclusive jurisdiction of and construed only according to the law of the said country which shall become the forum for the administration of the trusts hereunder’.

From October 2007, there were Jersey trustees so that, pursuant to clause 12, Jersey law was the governing law of the Grand Trust. In February 2012, Mauritian trustees were appointed so that, again pursuant to clause 12, Mauritian law was the governing law of the Grand Trust.

In early 2013, proceedings were brought in the Royal Court of Jersey seeking to impugn certain payments made, and actions taken, while the trust was administered by the Jersey trustees (i.e. between October 2007 and February 2012). One of the parties sought a stay of the Jersey proceedings on the basis that the effect of clause 12 was to confer exclusive jurisdiction on the courts of Mauritius to deal with trust disputes arising out of the Grand Trust. The case proceeded through the Royal Court of Jersey at first instance, to Jersey’s Court of Appeal, and, finally, to the Judicial Committee of the Privy Council. The appeal was heard in October 2014 and judgment was delivered on 26 November 2014.

CLAUSE AND EFFECT
The essential question for the Board was whether clause 12 conferred exclusive jurisdiction on the courts of Mauritius to deal with trust disputes arising out of the Grand Trust. The answer was an emphatic ‘no’. The Board’s reasoning derived from an interpretation of the specific words and context of clause 12. Therefore, in some respects, the lessons to be learned are unique to the Grand Trust. However, it is right to say that the judgment does yield broader instruction on the perils of loose language and/or assumptions as to meaning.

As an opening gambit, the Board acknowledged that there was ‘obvious force and, at least on an initial reading, very considerable attraction’ in an argument that the exclusive jurisdiction of a particular country impliedly conferred such jurisdiction on the courts of that country in relation to disputes as well. However, ‘less immediate’ was an argument that the same

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2 [2013] (2) JLR 369
3 [2014] JCA 089
4 The interpretation of trust deeds under Jersey law has recently been confirmed (in September 2014) in Consolidated Resources Armenia v Global Gold [2014] JRC 169. Applying the principles set out in the earlier case of Trilogy Management Ltd v YT Charitable Foundation (International) Ltd [2012] JCA 152, the Royal Court confirmed that: (i) the aim is to establish the presumed intention of the parties from the words used; (ii) the words must be construed against the background of surrounding circumstances; (iii) the words must be read in the context of the document as a whole; (iv) the words must be given their ordinary meaning; (v) where parties have used unambiguous language, that meaning must be applied; and (vi), if there are two meanings, then the meaning that accords with business common sense should prevail.
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The conclusion could derive from the reference to a country as the ‘forum for administration’.

The Board, therefore, began by asking itself what ‘forum for administration’ and ‘exclusive jurisdiction’ actually meant both generally and in the context of clause 12.

**Forum for administration**
The Board accepted that, in the right circumstances, the phrase ‘forum for administration’ could refer to the courts that were intended to enforce the terms of a trust. Indeed, it cited authority where the words had been used in that manner. However, it added that the phrase did not have ‘such a well-established technical significance’ that it could mean this and only this. According to the Board, the phrase could also refer (as the respondents contended) simply to ‘the place where the trust is administered in the sense of its affairs being organised’.

The Board scrutinised the word ‘forum’. It concluded that the word was of such breadth and flexibility that it could potentially be used to refer to a court, but equally could simply refer to a ‘place for any purpose’. Every court is a forum, but not every forum is a court. Moving on to the word ‘administration’, the Board also saw ambiguity in potential meaning between ‘the function of the court’ and the ‘running of the trust’.

It is apparent from this simple yet effective deconstruction exercise that the combination of these words does not create a technical phrase that is greater than the sum of its parts. For the draftsman, it emphasises the danger of assuming that phrases have precise technical and legal significance simply through long usage in precedents. There is inherent uncertainty in using this phrase, and, if it is to be used (which is probably now not to be recommended, at least not in isolation), the context of its engagement will be crucial.

In the context of the Grand Trust, the Board concluded that the phrase was intended to mean only ‘the place where the trust is administered in the sense of its affairs being organised’. The Board thought that, had the draftsman of the trust deed meant the phrase to include the judicial resolution of disputes, there would have been express drafting to this effect. Thus, the Board saw a subtle but potentially fundamental difference between the wording ‘[jurisdiction X] as the forum for administration’ and ‘the courts of [jurisdiction X] as the forum for administration’.

Even more subtle, but possibly just as integral, was a difference between saying that ‘the forum for administration is [jurisdiction X]’ and that ‘the forum for administration is in jurisdiction X’. Again, the emphasis on careful drafting is evident.

There is inherent uncertainty in using the phrase ‘forum for exclusive jurisdiction, and, if it is to be used, the context of its engagement will be crucial’

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Even more subtle, but possibly just as integral, was a difference between saying that ‘the forum for administration is [jurisdiction X]’ and that ‘the forum for administration is in jurisdiction X’. Again, the emphasis on careful drafting is evident.

5 It is of note that the Board concluded that, even if the term ‘forum for administration’ had provided jurisdiction for the judicial resolution of disputes, it was doubtful that this jurisdiction was exclusive. This overrules the previous position in *Koonmen v Bender* [2002] JCA 218, where the Court of Appeal held that: ‘… there is no meaningful distinction between these two expressions [exclusive jurisdiction and forum of choice]. If a clause provides that disputes shall be referred to a particular forum, or that that forum shall be the forum for the resolution of such disputes, that constitutes an agreed choice of forum, whether or not the word “exclusively” is added.’
In addition, the Board considered it ‘perfectly feasible’ to think that the draftsman’s aim was to stipulate simply where the Grand Trust’s affairs were to be conducted. For example, it may potentially have been relevant to the tax treatment of the trustees to be able to show that they had no connection with a particular country.\(^6\)

The Board did not go further and provide guidance on what local activity might be necessary to comply with a requirement that the affairs of trust be organised or administered in a specified jurisdiction. There can be no hard and fast rule – the context of the trust in question will be critical. However, it does leave some questions ripe for further clarification.

It would seem unlikely to constrain a trustee from outsourcing accounting tasks, or appointing a foreign investment manager. By contrast, it would perhaps seem likely to require the keeping of records in the jurisdiction. However, this is simply the author’s personal view. Does it require all trustee decisions to be taken in the jurisdiction? Is it to be defined by reference to the place where regulatory requirements – for example, obligations under anti-money laundering legislation – must be complied with? Is it, as Professor Paul Matthews says at paragraph 21 of his seminal article ‘What is a Trust Jurisdiction Clause?’,\(^7\) to be defined by the jurisdiction whose courts are empowered to assist in non-hostile questions such as construction of terms, disclosure of documents, distributions, Beddoe applications and the appointment/removal of trustees?\(^8\)

**Exclusive jurisdiction**

The Privy Council then turned to the meaning of ‘exclusive jurisdiction’. The appellants had argued that this was clearly intended to include the exclusive jurisdiction of the courts of the particular country. However, the respondents had argued that the purpose of ‘exclusive jurisdiction’ was to avoid ‘dépeçage’ – i.e. a situation where different aspects of the Grand Trust might be subject to different governing laws. The purpose of the provision was, therefore, to ensure consistent universal application of the same law in the administration of the trust.

Again, the Privy Council favoured the respondents’ point of view. As well as repeating the point that there was no express reference to the courts of the country in question (only to the country itself), the Privy Council also saw an inconsistency between clauses 12 and 15 on the appellants’ own arguments. The Privy Council considered that it could not have been intended for the exclusive jurisdiction of the courts of a particular country only to have come into play on the appointment of new trustees pursuant to clause 12, but not to have been operative in the context of clause 15 (while the Grand Trust remained originally governed by Bahamian law). There was no sense in such a position.

The Privy Council added that, if a provision in a document was to provide a particular court with exclusive jurisdiction, then ‘one would expect it to be clear in its effect’.

**CONTRACTS VERSUS TRUSTS: THE DEBATE CONTINUES**

Although it was not strictly necessary, the Board did consider whether the proceedings in Jersey would have been permitted to continue even if there had been an exclusive jurisdiction clause in favour of the courts of Mauritius. In this context, the Board concluded that there are fundamental differences between a contract and a trust deed which point to the need for a different approach in the context of the operation, applicability and enforcement of exclusive jurisdiction clauses.

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6 The Board cited UK capital gains tax provisions as an example, where both s52(1) Capital Gains Tax Act 1979 and s69(1) Taxation of Chargeable Gains Act 1992 make reference to the place where ‘the administration of the trusts is ordinarily carried on’


8 Professor Matthews notes that such applications were once referred to as ‘administration actions’
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The historical context
In order to understand the background to this conclusion, it is necessary to summarise briefly the history of the law in Jersey in this area. In *EMM Capricorn Trustees v Compass Trustees,* it was put to the court that an exclusive jurisdiction clause in a trust deed should be given the same weight as in a contract. The Royal Court (Birt DB, as he then was) rejected this submission at paragraph 16:

‘But that is to ignore the difference between the two documents. If A and B agree in a contract that they will refer any dispute to the courts of a particular country, one can well understand why they should generally be held to their bargain. They have agreed it; why should one of them then be allowed to go back on what has been freely agreed? But the position is very different in relation to a trust. The exclusive jurisdiction provision of a trust deed will have been agreed only between the settlor and the original trustee. Actions in relation to the trust may be brought by beneficiaries who were never parties to the trust deed; indeed they may not even have been alive at the time of its execution. The policy considerations which lead to a party to a contract being held to his choice of exclusive jurisdiction cannot apply to a beneficiary who played no part in the choice of exclusive jurisdiction made in the trust deed.’

The Royal Court then reiterated (at paragraph 18) the differing policy considerations pertinent to contracts and trusts expressly in relation to exclusive jurisdiction clauses, meaning the application of a common test but ultimately with a different pass mark (at paragraph 19):

‘In our judgment, the policy considerations which result in such a heavy burden being placed upon a party to a contract who seeks to resile from an exclusive jurisdiction clause do not apply with equal force in the case of a trust deed and we do not think that such a clause should be given the same weight in a trust deed as it is in relation to a contract.’

(Paragraph 19.)

The Royal Court limited the scope of its judgment to the treatment of exclusive jurisdiction clauses. It drew its conclusions from the peculiarities of exclusive jurisdiction clauses, applying those in a trust framework. It did not suggest that differing policy considerations resulted in the broader malleability of provisions in trust deeds generally.

The issue was then considered by the Jersey Court of Appeal in *Koonmen v Bender,* where Rokison JA started from the same fundamental premise: that the approach to exclusive jurisdiction clauses should be the same in both contracts and trusts. However, Rokison JA alluded to broader differences between contracts and trusts deeds:

‘…the courts still retain a discretion to override an express choice of forum in a contract or trust deed. But prima facie, the court’s function is to interpret and apply the agreement of the parties or the expressed intention of those creating the trust deed, and, as a general rule, the courts will give effect to a choice of forum. The court will override an agreed choice of forum only in exceptional circumstances. The rule is clearly stated in *Dicey and Morris* in rule 32(2) and in the following text and the cases thereafter cited. Although it may be argued that the presumption in favour of applying the express provisions of a trust deed may not be as strong as that in favour of holding parties to a contract to the terms of their agreement, I see no reason why the presumption should not be just as strong as between the settlor and those claiming to have been “standing behind” the settlor, as Mr Koonmen and Mr Bender were in this case, and the trustees.’ [Italics added for emphasis.]

*Koonmen v Bender* has been subject to extensive criticism by Professor Paul Matthews in his aforementioned article ‘What is a Trust Jurisdiction Clause?’ Those criticisms will not be repeated here, save to note that they

9 [2001] JLR 205  
10 [2002] JCA 218
have largely been vindicated by the Board in the current case. However, it is right to add one further point. Rokison JA’s allusion (in italics above) to an argument that organic differences between contracts and trust deeds might result, in certain circumstances, in general disparities in the enforceability of their terms was troublesome. Rokison JA did not indicate what weight he afforded to such an argument – the circumstances of Koonmen did not require him to – nor did he indicate the limits of such an argument. He simply left the door ajar to the possibility that a beneficiary or third party might seek to make such an argument in relation to any provision of a trust deed that they considered unfair.

In the Jersey Court of Appeal decision in Crociani,12 Michael Beloff QC, sitting as President, criticised the approach of the Royal Court in EMM Capricorn Trustees, stating at paragraph 114:

‘Whilst I accept the then Deputy Bailiff’s premise in para 16, I respectfully disagree that the first sentence of para 19 is either consequential upon it or correct. True it is that beneficiaries are not contracting parties but in the context I consider that the distinction is one without a difference’.

The president saw as ‘germane’ arguments proffered by Professor Jonathan Harris, in a passage from The International Trust,13 that the weight to be given to an exclusive jurisdiction clause should be the same in a contract and trust deed. The President concluded:

‘I would, for my part endorse that passage shorn of its academic reservations: if beneficiaries are to take the benefit of the settlor’s bounty, they must accept the burden (if such it is) of an exclusive jurisdiction clause as one of the incidentals of their status.’

The President did not reflect on the alternative view expressed by Professor Matthews that the burden of a trust deed does not comprise a personal obligation or liability on the beneficiaries (for example, the obligation to remunerate the trustee and repay reasonable costs and expenses).14

The Board is of the opinion that, in the case of a trust deed, the weight to be given to an exclusive jurisdiction clause is less than the weight to be given to such a clause in a contract

THE DECISION OF THE BOARD
And so to the decision of the Board in Crociani, and the need for clarity in an area where there was evidently a significant difference of opinion. Does the Judicial Committee provide a total answer? Its binding force in this area is pervasive. However, its conclusions may leave some questions still open to debate.

The relevant parts of the judgment can be found at paragraphs 33–36. At paragraph 35, the court expressed the essential difference:

‘Contrary to the appellant’s argument, the Board is of the opinion that it should be less difficult for a beneficiary to resist the enforcement of an exclusive jurisdiction clause in a trust deed than for a contracting party to resist the enforcement of such a clause in a contract. The Board is of the opinion that, in the case of a trust deed, the weight to be given to an exclusive jurisdiction clause is less than the weight to be given to such a clause in a contract’.

At paragraph 36, the Judicial Committee set out its reasons for this difference, which are notable because of their generality and potentially wide-ranging application:

12 [2014] JCA 089
14 Paragraph 32 of ‘What is a trust jurisdiction clause?’
EXCLUSIVE JURISDICTION CLAUSES

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‘In the case of a clause in a trust, the court is not faced with the argument that it should hold a contracting party to her contractual bargain. It is, of course, true that a beneficiary who wishes to take advantage of a trust can be expected to accept that she is bound by the terms of the trust, but it is not a commitment of the same order as a contracting party being bound by the terms of a commercial contract’.

Thus, the Board’s approach stemmed from a perception of a general difference in the enforceability of clauses in contracts and trust deeds respectively (as alluded to in Koonmen). Its approach was not constrained to the unique circumstances of exclusive jurisdiction clauses, where the question of departure exists regardless of the overall enforceability of the balance of the document. This is potentially of concern, not least because it is seemingly at odds with the judicial approach taken in Jersey when a party seeks to vary or alter the terms of a trust deed. Further reference will be made to this later.

The Board also referred, later in paragraph 36, to the inherent supervisory jurisdiction of the court in relation to trusts, which it saw as a fundamental difference with contracts:

‘In the case of a trust, unlike in a contract, the court has an inherent jurisdiction to supervise the administration of the trust – see e.g. Schmidt v Rosewood Trust Ltd [2003] UKPC 26, [2003] 2 AC 709, para 51, where Lord Walker of Gestingthorpe referred to “the court’s inherent jurisdiction to supervise, and, if necessary, to intervene in, the administration of trusts”. This is not to suggest that a court has some freewheeling unfettered discretion to do whatever seems fair when it comes to trusts. However, what is clear is that the court does have a power to supervise the administration of trusts, primarily to protect the interests of beneficiaries, which represents a clear and, for present purposes, significant distinction between trusts and contacts’.

It is unclear whether the Board was simply saying that the inherent supervisory jurisdiction of the court is one of the differences between a trust deed and a contract (which of course it is), or whether it was indicating that the inherent supervisory jurisdiction might operate to water down the potential enforceability of trust deed clauses by allowing the court to interfere where necessary. The fact that the Board saw this distinction as significant ‘for present purposes’, and the fact that it follows immediately after the general point referred to in paragraph 3 under the heading ‘The decision of the Board’, rather suggests the latter. However, the point is only briefly made and is, therefore, unclear.

Mentioned above is the question of variation/alteration of trust provisions. No consideration was given by the Board to the interplay with, or effect on, the limitations on inherent jurisdiction (and its statutory formulation in article 51 of the Trusts (Jersey) Law 1984 (as amended)) set out in the decision of the Royal Court (Birt DB, again) in IMK Family Trust.15

At paragraph 65, it confirmed that the Royal Court had no power to ‘alter’ the terms of a trust either under article 51 or its general supervisory jurisdiction. In this sense, ‘alter’ means authorising the doing of something by the trustees that is outside the powers conferred on them by the trust deed (as opposed to ‘vary’, which means changing the trusts in a manner which the trustees would have been empowered to do of their own volition). The Royal Court also

15 [2008] JLR 250
noted that ‘subject to certain minor historical exceptions, this is the position in relation to the equivalent supervisory jurisdiction of the English Chancery Division. That court has no general power to alter a trust. See Chapman v Chapman [1984] AC 429; and Lewin on Trusts (18th edn), para 45-11’.

The underlying reasoning behind the stance of the Royal Court is stated, at paragraph 65(iv) of IMK, as follows:

‘A settlor determines the provisions of a trust when he establishes it. He is entitled to insert such provisions as he thinks fit, provided they are lawful. It is his decision as to how and in what manner he chooses to benefit the beneficiaries and what powers he chooses to give the trustees in relation to the beneficiaries. Why should the court assume a power to override the expressed intentions of the settlor when it is the settlor who is contributing his assets to the trust for the benefit of the beneficiaries? It seems to us that the position is not far removed from the situation under the law of contract. A court has no power to rewrite a contract entered into by the contracting parties simply because it thinks it would be beneficial to do so; parties are entitled to expect that the court will uphold and enforce the very bargain which they have entered into. Similarly, a settlor is entitled to expect that the court will uphold and enforce the provisions of the trust which he has established.’ (Italics added.)

This appears to be inconsistent with the conclusions of the Board. Arguably, the Board seeks to rely on inherent jurisdiction in a manner that was not contemplated in IMK – i.e. to justify a departure from the clear words of a trust deed in the form of an exclusive jurisdiction clause. The availability of the inherent supervisory jurisdiction is of course a difference between a contract and a trust deed, but it is arguably irrelevant for the purposes of the Board’s decision because inherent jurisdiction should only operate within the confines of the provisions of the trust deed for the purposes of proper administration. As stated in IMK at paragraph 65(ii), it is concerned with the manner in which ‘the trustee should act in connection with the trust (which suggests that it is concerned with the manner of exercise of powers conferred on the trustee under the trust deed)’. This accords with the English and Welsh decision in Breakspear and Others v Ackland and Another,16 which refers at paragraph 71 to ‘the court’s administrative jurisdiction’, and the Bermudian decision In the Matter of an Application for Information about a Trust,17 which refers at paragraph 48 to ‘...the threshold test of whether or not such intervention is required in order to hold the trustees accountable for the due administration of the trust’.

The Board’s general conclusion that a beneficiary is not bound by the terms of a trust deed in the same way as a contract is also inconsistent with the conclusion in IMK that contracts and trust deeds are analogous and that a court has no power to rewrite a trust deed.

In light of the binding nature of Privy Council decisions, one is left wondering whether the reliability of IMK, which is of importance in the context of Jersey’s approach to the orders of foreign matrimonial courts affecting Jersey trusts, has in any way been affected.

Does it open the door, however slightly, to the possibility that trust clauses generally may be considered to have softer underbellies than contractual clauses, making them more susceptible to challenge and attack? Might, therefore, the same principle apply to the disapplication of other terms – from flee clauses to dispositive provisions?

Does this judgment point towards a possible development of the general supervisory powers of a court, justifying alterations of provisions? Or is it to be read as only coming into play in relation to a departure from exclusive jurisdiction clauses, where the door is already ajar as a matter of first principles? These are questions that may need to be considered in due course.

16 [2008] EWHC 220 (Ch)
17 [2013] SC (Bda) 16 Civ (12 March 2013)
EXCLUSIVE JURISDICTION CLAUSES
NICHOLAS WILLIAMS

The applicable test
The Board concluded that, if there had been an operative exclusive jurisdiction clause, then, just as with a contract, it was:

‘... appropriate to start with the exclusive jurisdiction clause and ask whether arguments of the party seeking to avoid it (after taking into account the arguments in support of enforcing it) outweigh the simple point that prima facie effect should be given to such a clause.’

This should be the definitive test to be applied in future cases. The Board indicated that, had it been required to consider the issue in this case, it would have departed from the exclusivity of jurisdiction. In this case, it found the following to be pertinent:

• that most of the salient issues in dispute were Jersey law issues;
• that much of the relevant documentation, and many of the witnesses, would be in Jersey;
• that the appellants had indicated that they were ‘willing and able to explain themselves to the Royal Court’ (although this did not give rise to estoppel arguments, it did indicate an acceptance that claims might be brought in Jersey); and
• the absence of any credible argument as to why Mauritius was a more amenable jurisdiction (the fact that it was the holiday destination of choice for one of the parties was described as ‘unimpressive’ by the Board).

CONCLUSION
The judgment of the Board provides significant clarity in this area. It is helpful confirmation that the appointment of trustees in a new jurisdiction cannot completely preclude the ability of beneficiaries to bring proceedings in the original jurisdiction. Beneficiaries should find this certainty comforting, but so should trustees.

The judgment also underlines just how careful trustees must be in drafting trust deeds. If it is intended that disputes be subject to the exclusive jurisdiction of the courts of a particular country, then this must be stated expressly and clearly.

Trustees and draftsmen may wish to reflect more extensively on whether other ostensibly technical phrases have slipped into industry vernacular without proper reflection as to their meaning. As Orwell said: ‘Never use... a jargon word if you can think of an everyday English equivalent... Break any of these rules sooner than say anything outright barbarous.’

Finally, whether the Board’s conclusions on the nature of trust deeds and the inherent supervisory jurisdiction of the court encourage an increase in litigation based on a perception of heightened vulnerability remains to be seen. It will depend on how future courts interpret the Privy Council’s decision. It does, however, seem at odds with other established principles of trust law and possibly the overriding principle of certainty that is required at the very heart of a trust relationship.

NICHOLAS WILLIAMS IS A PARTNER AT OGIER

The English and Welsh Court of Appeal’s decision in Akers v Samba is the latest foray into the challenge posed by the purported creation of trusts in civil-law jurisdictions that do not recognise the concept, or even the division of legal and beneficial ownership. The primary question is always: what law applies to what issues? Invariably, the answers to this question determine whether the settlor validly created a trust.

In England and Wales, and in many other jurisdictions, the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition provides the conflicts rules to answer these questions.

Nevertheless, the Hague Convention is not all embracing. The von Overbeck report, published by the Convention’s drafting committee, drew the distinction between the ‘rocket’ (i.e. the trust) and the ‘rocket launcher’ that propels it – in other words, those acts preparatory to the creation of the trust. In broad terms, the Hague Convention provided conflicts rules for the rocket, but not for the launcher, which article 4 excluded from the ambit of the Convention.

The real debate, however, is where to draw the boundary between the rocket and the rocket launcher. This is particularly the case where a
settlor declares themselves trustee, rather than vesting assets in a third-party trustee. This is a topic subject to considerable academic scholarship, but which has received limited judicial attention.

In a bold decision, the Court of Appeal in Akers v Samba held that article 4 did not exclude the law designated by the Convention from applying to govern the validity of declarations of trust, provided that the *lex situs* of the relevant property permitted alienation of the asset by the settlor ‘in some form’.

This article seeks to explore the problem outlined in Akers v Samba, the extent to which the decision has broken new ground, and the implications of the judgment.

**THE BACKGROUND**

The creation of the ‘trusts’
Mr Maan Al-Sanea formed the Saad group of companies in the 1980s. He was throughout domiciled and resident in Saudi Arabia. Saad Investments Company Ltd (SICL), incorporated in the Cayman Islands, was a company within the group.

Between 1998 and 2008, seven transactions (the transactions) took place in which SICL bought shares in five companies registered in Saudi Arabia (the shares). Following each of the transactions, the shares remained registered in Mr Al-Sanea’s name in Saudi Arabia.

The written agreements recording the first and second transactions contained choice-of-law clauses providing that Bahraini and Saudi Arabian law respectively governed them. However, these agreements also declared that Mr Al-Sanea retained ‘nominal ownership’, while ‘beneficial ownership’ passed to SICL.

A bill of sale and a declaration of trust recorded the third transaction. The bill of sale referred to a sale agreement dated 2005, which contained a Saudi Arabian choice-of-law clause. The declaration of trust was in a form typical in common-law jurisdictions, providing that Mr Al-Sanea held the shares as trustee for SICL. The declaration contained no choice-of-law clause. The remaining four transactions were identical to the third, save that there was no reference to a sale agreement dated 2005.

**SICL’s liquidation**
The Grand Court of the Cayman Islands wound up SICL on 18 September 2009; the claimants became its joint liquidators. SICL was massively insolvent.

However, on 16 September 2009, and after the presentation of the winding-up petition, Mr Al-Sanea transferred the shares to Samba Financial Group (the September transfer). At this point, the shares were said to be worth USD318 million.

**The English proceedings**
The joint liquidators obtained recognition in England, where Samba had a strong presence. They then commenced a claim to set aside the September transfer on the grounds that the transactions created trusts governed by the law of the Cayman Islands in favour of SICL and, consequently, the September transfer was void under s127 Insolvency Act 1986.
Samba contested jurisdiction and applied for a stay on the grounds that the courts of Saudi Arabia were clearly and distinctly more appropriate for the determination of the claim. It was accepted that, if Samba succeeded, there was no prospect of a claim in Saudi Arabia. Those courts do not recognise trusts, nor do they apply foreign law. The Chancellor heard Samba’s application and granted a stay. The joint liquidators appealed.

THE ARGUMENTS

First instance
Before the Chancellor, the parties accepted that any claim under s127 Insolvency Act 1986 depended on SICL showing it had a proprietary interest in the shares. At common law, the lex situs governs the ownership of shares, which in this case was Saudi Arabia. The principal question was, therefore, whether the Hague Convention mandated a different result.

The Chancellor held it did not because: (1) article 15(d) permitted the law designated by English conflicts rules (Saudi Arabian law) to apply to the transactions; and (2), in any event, articles 6, 7 and 8, the conflicts rules in the Convention, also mandated that Saudi Arabian law applied.

The appeal
The Court of Appeal overturned both of these conclusions. It considered it was at least arguable that articles 6, 7 and 8 of the Convention mandated that Cayman Islands law governed the transactions, such that it was inappropriate to grant a stay. Further, as will be addressed below, the court also reconsidered the effect of article 15(d).

Article 4: the argument
However, debate focused on a new argument by Samba based on article 4 of the Convention, which provides:

‘The Convention does not apply to preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee.’

Samba contended that each of the transactions purported to be a declaration of trust by Mr Al-Sanea. Accordingly, the question was: could Mr Al-Sanea validly alienate the equitable interest in the shares by a declaration of trust?

Samba argued that the question was, to adopt the academic terminology, a rocket launcher question – in other words, a question about ‘acts by virtue of which assets are transferred to the trustee’. Therefore, article 4 excluded these questions from the Convention’s ambit and, it claimed, English common-law conflicts rules pointed to Saudi Arabian law as governing the issue.

Article 4: the decision
The Court of Appeal disagreed. It held that the words ‘acts by virtue of which assets are transferred to the trustee’ meant what they say. The law governing acts transferring property to a trustee fall within article 4, and therefore outside the Convention. However, ‘declarations of trust do not actually or purportedly transfer anything to the trustee’ and, on the facts in Akers v Samba, ‘Mr Al-Sanea always owned the shares in question, and was merely declaring that he now held them beneficially for SICL.’

Nevertheless, the Court of Appeal accepted that, where trusts are settled by declaration, there was a relevant preliminary question that fell outside the Convention. As it would make no sense for a person to be able to create a trust where they held inalienable property, there was always a prior question as to whether the subject matter of the trust was alienable.
‘in some form’ according to the law of the situs.\textsuperscript{10} Subject to that qualification, the conflicts rules in the Hague Convention would determine the law governing the validity of the declaration.

**ARTICLE 4: COMMENTARY**

**A result intended under the Convention?**

The Court of Appeal’s decision is bold in that it is not obviously one foreseen by those who drafted the Hague Convention.

At the outset, it is important to recognise that declarations of trust fit inelegantly into the Hague Convention. The Convention’s definition of a trust refers to a trust arising ‘when assets have been placed under the control of a trustee’.\textsuperscript{11} The Convention’s text simply fails to comprehend a trust settled by way of declaration, rather than by transfer of assets to trustees. This is unsurprising given its authors’ view that ‘a transfer of assets to the trustee is a sine qua non condition for the creation of the trust.’\textsuperscript{12} Nevertheless, it would be anomalous if the Convention excluded such trusts altogether, and, therefore, commentators have treated them as caught by its provisions.\textsuperscript{13}

Once it is understood that trusts created by declaration are only addressed implicitly, the words ‘acts by virtue of which assets are transferred to the trustee’ in article 4 could be understood as applying to questions of the validity of a declaration. Indeed, the Convention’s draftsmen believed it did. In Akers v Samba, the Court of Appeal quoted the following passage, but omitted its final sentence: \textsuperscript{14}

‘The words “assets or transfers to the trustee” are completely clear when the settlor and trustee are distinct persons. In contrast, one may doubt whether they cover the case of the declaration of trust in which these two persons are mingled: the owner of assets declares that henceforth he will hold these assets as a trustee. The Commission unanimously accepted that the acts by which this change in the capacity in which the acts were held was effectuated must also be envisaged by article 4 and therefore excluded from the Convention.’

While the Court of Appeal’s view might differ from that of the drafting committee, it is consistent with the strict wording of article 4. More importantly, a compelling logic underlies it. Acts transferring assets to trustees can raise many legal issues that are not trust issues in any real sense – for instance, compliance with any formality rules, the general law of gift, real property and, conceivably, of contract. A transfer to trustees is, until the trust is created, no different from a transfer in a non-trust context. Declarations of trust, on the other hand, are always inextricably linked to a trust’s creation.

Therefore, the Court of Appeal’s construction of article 4 has the virtue of distinguishing between declarations, which will always relate to the trust and which ought to be governed by the law of the trust as designated by the Convention, and transfers to trustees, which are more obviously a preliminary question for the lex situs generally. This is also consistent with the words

\begin{enumerate}
\item See article 2 of the Hague Convention
\item Von Overbeck, paragraph 53
\item Lewin on Trusts, 19th edn, paragraph 11-194; Underhill and Hayton: Law of Trusts and Trustees, 18th edn, paragraph 100.55
\item Von Overbeck, paragraph 57; see also Akers at [48]
\end{enumerate}
in article 8: ‘The law specified by article 6 or 7 shall govern the validity of the trust.’

The decision in Rangers and the alienation of inalienable property
Nevertheless, commentators have long recognised that the effect of construction such as the Court of Appeal adopted has certain unsatisfactory implications.

Joint Administrators of Rangers Football Club plc, a decision of the Scottish Court of Session (Outer House), is the only other judicial treatment of article 4 in the UK. Here an English-law contract purported to declare a trust of future ticket sales, thus depriving the club’s creditors in the course of the administration. However, under Scots law, the lex situs of the assets did not permit alienation of future property.

In addition to citing the view of the Convention’s drafting committee set out above, Lord Hodge rejected an argument that, as a consequence of article 4, the law designated by the Convention (in this case, English and Welsh law) governed the validity of the ‘steps needed to create the trust’, in which, it seems, he included the validity of any declaration. He held:

‘Were it otherwise, the results would be startling, as a settlor would be able to alienate property that he could not dispose of under the lex situs. It would create significant problems for the operation of insolvency law in the jurisdiction in which the asset was located.’

As is clear from Akers, the insolvency dimension cuts both ways. Lord Hodge’s view could equally prejudice the creditors of beneficial owners of property settled in certain civil-law jurisdictions. Nevertheless, either way, the prejudice caused to respective creditors is plainly an unsatisfactory answer to the issue raised as to the alienation by trust under one law of property inalienable in the lex situs.

The academic commentary and the Court’s qualification
Since the Convention’s creation in 1985, academics have shared Lord Hodge’s concern that settlers should not be permitted to use trusts to alienate property which is inalienable by the lex situs.

Nevertheless, these commentators introduced an important distinction. Professors Harris and Hayton contended two questions arose in relation to the validity of a declaration of trust. First, is the property alienable by the settlor at all? Second, is the property alienable by way of trust? They argued only the first question is truly a preliminary issue (or rocket launcher question) for the lex situs, as the second ‘should be seen as an aspect of the relationship between trustee and beneficiary and governed by the applicable law of the trust’. This, it was said, was consistent with the decision in Rangers.

In Akers, the Court of Appeal embraced this distinction to ensure its construction of article 4 did not render inalienable property alienable by the creation of a trust under a law different from that of the lex situs. Hence its conclusion that, provided under the lex situs the property was alienable ‘in some form’, the validity of declarations could be governed by the law designated by the Hague Convention.

Leaving aside the fact that it is difficult to find justification for the distinction favoured by the commentators in article 4, this approach is problematic.

First, the commentators’ distinction could be said to lack a principled justification. It is not immediately obvious why the effect of a rule of
the *lex situs* against the alienation of property generally ought to be preserved, but not the effect of a rule against the alienation of property by way of trust. This is not the distinction Lord Hodge sought to draw: his view, in *Rangers*, was not that, under Scots law, future assets could never be alienated – he only went so far as to say these assets were inalienable by way of trust.21

Second, the Court of Appeal’s distinction also arguably gives rise to ambiguity: to what extent need property be alienable under the *lex situs* before the law designated by the Convention governs the effect of any declaration?

If it is the case that, once a settlor has shown that under the *lex situs* they have some bare minimum capacity to alienate property, then they are entitled to declare a trust provided foreign law governs it, unusual consequences might follow. Conceivably, it might enable a settlor in a jurisdiction that does not recognise trusts to declare a trust governed by a foreign law as a consequence of some rule of the *lex situs* wholly unrelated to trusts.

**A SOLUTION IN ARTICLE 15?**

In the author’s view, the solution to the conundrum of permitting the Hague Convention to govern declarations of trust, without permitting settlors to declare trusts of inalienable property, might conceivably lie within the Convention itself.

Article 15 provides that certain non-derogable rules of the *lex situs* can apply, notwithstanding that some other law designated by the Convention governs the trust. Article 15 also expressly recognises that in certain circumstances this might prevent recognition of a trust.

The Court of Appeal’s view of article 15 was as follows:22

> To understand article 15, one needs to look at the other sub-articles that are concerned, for example, with the protection of minors, the effects of marriage, succession rights, and protection of creditors. The objective is plainly to preserve the application of mandatory rules of the *lex situs* as distinct from the law governing the trust.

In other words, the law of the trust is not to override the non-derogable rights of, for example, a wife or a child entitled to an inheritance. Equally, the law of the trust is not to override the mandatory rules of the *lex situs* concerning “transfers of title to property”.

On the facts of *Akers*, the Court of Appeal overturned the Chancellor’s decision on the basis that there was insufficient evidence before him to determine whether rules of the *lex situs*, Saudi Arabian law, were actually non-derogable rules – for example, (1) no equitable title separate from legal title is recognised, or (2) registration of shares in Saudi Arabian listed companies is conclusive of title.

Arguably, there is no reason why article 15 cannot provide a more rational basis for preventing a settlor from declaring trusts of inalienable property. The inquiry would no longer be: according to the *lex situs*, is it possible to alienate property in some form? Rather, the focus would be upon whether the rule of the *lex situs* preventing alienation by way of trust was non-derogable.

If the *lex situs* prevents the alienation of property by way of trust, a settlor should only be permitted to alienate property by way of trust where those rules are derogable. This approach has the virtue of being consistent with the text and avoiding the ambiguity in the Court of Appeal’s present formulation of the threshold enquiry.

The Court of Appeal’s judgment arguably already gives effect to this, given the view it has taken of article 15.23 For example, if the Saudi Arabian rules against the alienation of equitable interests are non-derogable, then those rules will apply by virtue of article 15(d) even if the Hague Convention mandates that Caymanian

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22 At [62]
23 It should be said that Vos LJ’s view that article 15 is only concerned with ‘the operation of the trust after it has been established’ would tend to the contrary. However, it is not clear that this reading is consistent with the text of the provision. [2014] EWCA Civ 1516 at [62]
law governs the validity of the declarations in respect of each of the transactions. If this is indeed the effect of the Court of Appeal’s judgment on article 15, the further qualification in article 4 is unnecessary.

CONCLUSION
The decision in Akers v Samba is a bold attempt to grapple with the twin difficulties of the treatment of declarations of trust by the Convention and the recognition and validity of trusts in jurisdictions that do not recognise them. The Court of Appeal’s construction of article 4 is laudable for its consistency with the text but, by adopting a certain distinction proposed by the commentators, introduces complications in circumstances where, arguably, the Convention already adequately guards against the problem of settlors alienating inalienable property. Readers will, however, have to await the Supreme Court’s judgment for the final verdict on the effect of these provisions.

MATTHEW WATSON IS A BARRISTER AT XXIV OLD BUILDINGS
This year, *Lewin on Trusts* is 178 years old. When it was first published, Victoria had recently ascended to the throne. How fitting that later this year Queen Elizabeth II may, God willing, surpass her record as the longest-reigning British monarch.

In those 178 years there have, until this year, been only 18 editions. Indeed, between the 16th and the 17th edition, some 36 years passed, which is a reasonably long period by anyone’s standards. Since then, however, the pace has been positively sprightly – a mere eight years has passed since the previous edition.

What a fascinating eight years those have been and how vital it is that we have a new *Lewin* to help us navigate the way forward. While times change and governments come and go, *Lewin* strides on and continues to guide us.

To review the entirety of the 2,400 or so pages would probably take this reviewer 178 years, but picking out the highlights is equally difficult. There really is so much in this book that is worthy of attention. It is a cornucopia of delights.

As the great John Mowbray QC says in his foreword, Thomas Lewin entitled his book a ‘practical treatise’. John carried this baton forward admirably in the late 20th century and now it has been handed to Lynton Tucker, Nicholas Le Poidevin and James Brightwell, assisted by Thomas Fletcher and Christopher Lloyd, for this new edition.

The great quality of *Lewin* is that, time and again, it provides the answer to the real question that confronts the practitioner. It is not some academic tome but rather a true font of practical knowledge. This 19th edition continues in the marvellous tradition of its predecessors and it is
noticeable how often *Lewin* is now the textbook referred to in case after case, be that in England and Wales or further abroad.

It is exceptionally hard to pick out individual examples of updates that are more relevant than others, but the following are just a few of the many that could be chosen.

It is good to see the section on shams in chapter 4 has been thoroughly rewritten, as this is a perennial favourite, and, of course, this new edition covers the law on mistake as propounded by the UK Supreme Court in *Pitt v Holt*. The provisions of the *Perpetuities and Accumulations Act 2009* are now addressed in chapter 5.

Good examples of the practicality of the book are the amendments made to chapter 21 and the discussions of the rights of indemnity of a trustee in the context of both contractual and personal liability, and the circumstances in which trustees’ liability is limited to the assets of the trust fund. The increasing use of trusts in commercial contexts means this is an extremely important area.

Generally speaking, this edition shows a number of changes where reorganisation has taken place, very much to the reader’s benefit. Chapter 17 now also includes information on the indemnity of outgoing trustees that was previously contained in chapter 14 but fits more sensibly here.

In summary, *Lewin on Trusts* is simply a must-have for any trust lawyer. This claim is made for many other tomes but truly justified in the case of *Lewin*.