**In the matter of the K Trust**
Royal Court
14th July, 2015

**JUDGMENT 31/2015**

**Loss of trust and confidence in the Protector appointed in respect of a discretionary settlement resulting in an application by adult beneficiaries for the removal of the Protector and seeking further relief in relation to the delivery up of the Protector's papers and documents.**

Approved Text
14.07.2015

**IN THE ROYAL COURT OF GUERNSEY**

**(ORDINARY DIVISION)**

**Between:** **B1 AND TEN OTHER BENEFICIARIES** **Applicants**

**-and-**

**(1) PROTECTOR**
**(2) TRUSTEE** **Respondents**

**IN THE MATTER OF THE K TRUST**

**Hearing dates: 10th, 11th and 12th (am only) December 2014**

**Judgment handed down: 14th July 2015**

**Before: Richard James McMahon, Esq., Deputy Bailiff**

| | |
|---|---|
| **Advocate for the Applicants:** | **Advocate J M Wessels** |
| **Advocate for the First Respondent:** | **Advocate R Clark** |
| **Advocate for the Second Respondent:** | **Advocate S H Davies** |

**<u>Cases & legislation referred to</u>:**

The Trusts (Guernsey) Law, 2007
*<u>Letterstedt v Broers</u>* (1883) LR 9 App Cas 371
The Trusts (Guernsey) Law, 1989
The Cayman Trusts Law (2001 Revision)
*<u>In the matter of the Bird Trust</u>* [2008] JRC013
*<u>Re Skeats' Settlement</u>* (1889) 42 Ch D 522
*<u>In the matter of the R and RA Trusts</u>* (unreported, 20 May 2014)

*In the matter of the A Trust* [2012] JRC169A
*Re Papadimitriou* [2004] WTLR 1141
Rimmer, *Indemnifying protectors* (*Trusts & Trustees*, Vol. 19, p. 916)
*IFG International Trust Company Limited v French* (2012) CHP 2012/0048
*In the matter of the HHH Employee Trust* [2013] JRC023
*AG v Mayor of Norwich* (1837) 2 Myl & C 406
*Re Grimthorpe* [1958] Ch 615
*Lewin on Trusts*, 19th ed. (2015)
*Wester v Borland* [2007] EWHC 2484 (Ch)
*In the matter of the Bird Trusts* [2012] JRC006
*In re B* [2011-12] GLR 694

**Introduction**

1. This case arises from a loss of trust and confidence in the Protector appointed in respect of a discretionary settlement (to which I will refer as "the K Trust") and the adult beneficiaries of the K Trust. This situation led the Applicants, being 11 of the 14 adult beneficiaries (who also have the written support of the remaining three adult beneficiaries), to bring an application dated 8 September 2014 for the removal of the Protector with immediate effect. That application also sought further relief in relation to the delivery up of the Protector's papers and documents. The Applicants' application has since been amended into its final form and I will refer to the application, as amended, as "the Removal Application". The Protector is the First Respondent and the current trustee of the K Trust is the Second Respondent to the Removal Application. For ease of reference, I will continue to refer to the First Respondent as "the Protector".

2. On 3 October 2014, I declined to order the Protector's summary removal. At that time, the Protector intimated her intention to make her own application for directions pursuant to section 69 of the Trusts (Guernsey) Law, 2007, primarily relating to whether it was permissible for her to retire from office in the circumstances in which she found herself and the consequences of her doing so. A formal application dated 7 November 2014 was subsequently made (to which I will refer as "the Retirement Application").

3. Both the Removal Application and the Retirement Application were heard together in December 2014. At the conclusion of the hearing, each of the parties having given the Court various undertakings which satisfied me that the administration of the K Trust would operate satisfactorily and that steps to appoint a replacement protector would not be taken without first seeking authority of the Court, I announced that I would grant the primary relief sought in both Applications. Accordingly, I made an order for the removal of the Protector, but stayed the effect of that order until 5 pm on 15 December 2014, whilst at the same time determining that it was permissible for the Protector to retire without appointing a successor protector and that to act in that fashion would not render her being in breach of duty. I reserved my decisions on the other aspects of the relief sought by the Applicants and the Protector and indicated that I would give full written reasons for all my decisions in due course. This judgment contains those reasons. Although the hearing proceeded in private, I have prepared this judgment as an anonymised one so that it can be published.

4. I can only apologise to all concerned for the massive delay in preparing this judgment. Having started work on it at the beginning of the year, the rest of the first half of 2015 has been fully occupied with having to deal with other matters. Having been informed that the Protector had resigned from office in the aftermath of the December hearing, I was conscious of the need to determine the other elements of the Applications, but the immediacy of the situation had, at least in part, resolved itself. That is not intended as being any excuse for having diverted my attention to other matters and I do appreciate that with the passage of time, matters have become more pressing again and the parties are entitled to know the outcome of their Applications so as to finalise matters. I am grateful for their patience and understanding in this regard.

## Background

5. The evidence before the Court was contained in four affidavits. The Removal Application was supported by an Affidavit from the first-named of the adult beneficiaries of the K Trust, the Settlor's widow (and to whom I will refer as "B1"), dated 26 August 2014. The Protector's Affidavit in response, and also in support of her own Retirement Application, is dated 10 November 2014. B1 has provided a Second Affidavit dated 24 November 2014 and a director of the Second Respondent has provided further information in an Affidavit dated 26 November 2014. That director has also addressed how the interests of the minor and any unborn beneficiaries might be affected by orders made pursuant to the two Applications, because I had previously ruled that there was no requirement for anyone else to be appointed to represent those interests. The Second Respondent's view was that the interests of minor and unborn beneficiaries would be best served through the termination of the Protector's term of office and, because they have not received any distributions from the K Trust, there were unlikely to be any other adverse effects.

6. The K Trust was settled in 1990. It is a Guernsey trust. The Settlor had previously amassed a considerable fortune, enabling him to retire in the 1960s. It is agreed, however, that the Settlor was a frugal man. He had established a residence in Switzerland by no later than the early 1970s. The Settlor's living and other arrangements were apparently designed to sever his links to the United Kingdom for tax purposes. The original trustee of the K Trust, to whom I will refer simply as "the Original Trustee", was an adviser to the Settlor and was also a friend of the Settlor. The Protector was appointed as the protector of the K Trust at the outset and so had continued in office from 1990 to 2014. The Protector was also appointed by the Settlor as protector of other trusts he formed. The Protector and the Settlor had met through the latter's role as a financial adviser in the 1980s, following which a friendship had developed. Whilst the Settlor was alive, the Protector spent significantly more time communicating with him than she did with B1. B1 acknowledges that the Settlor and Protector had a close relationship, centring around discussing finance and business.

7. B1 married the Settlor in 1991. By that time, both of them were already what might kindly be described as being of an advanced age. They were both pensioners and the age gap between them was in excess of 15 years. Their relationship, however, had been formed many years previously and before the Settlor established his residence in Switzerland. Indeed, the Settlor's house in England was transferred to B1 before his move to Switzerland was completed. The Settlor and B1 spent their time between the two houses. However, B1 continued to be domiciled in England and Wales.

8. The Settlor died in 2001. He happened to be in England at the time. His body was buried in England, where it remains. The Settlor and B1 did not have any children. B1's closest relatives are her nephews and nieces and their families. At the time of the Settlor's death, B1 was the only beneficiary of the K Trust. B1 requested that consideration be given to adding some of her relatives as beneficiaries. The Original Trustee, at his own request, was replaced as trustee by a Liechtenstein-based professional trust company, the Second Respondent, in 2002. The Second Respondent, with the consent of the Protector, proceeded to add various additional beneficiaries from 2003 onwards. Those added included B1's relatives, the Original Trustee and his immediate family, the Protector and her immediate family and a number of charitable organisations. A good number of these added beneficiaries, including the Original Trustee and his family and the Protector and her family, were then excluded as beneficiaries in 2011.

9. The assets in the K Trust have comprised 100% shareholdings in two companies and cash. One of those two companies is the vehicle through which a valuable piece of London real estate is held. The other company holds a portfolio of investments. Since the Settlor's death, considerably more extensive distributions to the beneficiaries have been made than during the time preceding it. However, the current value of the trust assets is understood to be in excess of £17 million. It may even be higher than that because the value attributed to the London property may not reflect its current value.

10. At around the time of settling the K Trust, the Settlor gave to the Original Trustee his handwritten wishes. In the first instance, if his then fiancée, B1, survived him, she should be "*the first and only beneficiary*" benefiting from these and other assets in accordance with his various wills. If the Settlor survived B1, the assets should be his to dispose of. Thirdly, if they both died, by virtue of a handwritten Rider, the Settlor identified various classes of persons to whom differential percentages of the assets should be distributed. The main class comprised relatives of B1. The final class included the Original Trustee and the Protector. All of this is consistent with B1's understanding that the Settlor's purpose in settling the K Trust was to make appropriate and adequate provision, in light of their impending marriage, for B1 in the event of the Settlor's death.

11. In 1994, the Settlor signed a typewritten Memorandum of Wishes in similar terms. Subject to the proviso that she survive him by at least one month, the trust assets should be held for the sole benefit of B1 "*regarding both capital and income, as long as she shall live*". If so, upon B1's death, the trust assets should be distributed in the same way as if B1 had pre-deceased the Settlor, albeit the percentage allocations to family members of B1, others and charities had been revised, "*but subject always to such different wishes as [B1] might express after [the Settlor's] death*". The Settlor's will was made at the same time and made similar provision.

12. It appears to have taken a few years following the death of the Settlor for a pattern of dealings with the affairs of the K Trust to have become established. Periodic meetings of the Second Respondent and the Protector and their respective teams (to which I will refer as "trustee meetings") have been convened for a number of years and various minutes of such meetings have been exhibited to the Affidavits before the Court. They offer a flavour of the matters under discussion from time to time. As the Second Respondent notes, there appears to have been no concerns raised by the Protector about the operation of the K Trust whilst the Settlor was alive; her concerns about the operation of the trust, including in relation to the expenses being incurred, have only been aired by her since the Settlor's death.

13. In the immediate aftermath of the Settlor's death, B1 authorised the Protector to act on her behalf in respect of resolving matters relating to the Settlor's estate, of which B1 was the executrix. For a time, the relationship between the two of them was friendly. However, by 2005, B1 and members of her family felt the Protector should relinquish her office. Such a proposal was put to the Protector by B1's then legal adviser, but the Protector indicated at a trustee meeting on 31 May 2005 that this was out of the question.

14. Within approximately a year, at a subsequent trustee meeting, the position of the Protector was discussed further. The Protector had had a meeting with another of the beneficiaries, one of B1's nephews, who is the Fourth Applicant (and to whom I will refer as "B4"), because it was felt by B1 and other members of her family that B4, being a professional in the trusts field, might be a suitable replacement Protector. It is apparent from the comments made in the Protector's Affidavit about the meeting between her and B4 and the minute of the subsequent trustee meeting, that the Protector firmly believed that the Settlor had appointed her because he did not want a family member in that office and that she considered that she was privy to his wishes and able to see them given effect. The minute records that the Protector acknowledged that she had lost her relationship with B1, but that she wanted that relationship to improve.

15. At a trustee meeting attended by B1 a little over six months later, B1 expressed the view that the Protector's retirement was something she desired as being in the interests of the beneficiaries. The minutes demonstrate that a considerable amount of the discussion focused on the issues raised by this request and the stance being adopted by the Protector.

16. There has been no social interaction between B1 and the Protector since 2007. Accordingly, from at least that time, and most likely extending to a period of a couple of years before that, the relationship that was once friendly during the Settlor's lifetime had broken down quite significantly. B1 did attend further trustee meetings, but not all of them. She has explained that she felt marginalised, which feeling influenced her decision as to how often to attend.

17. By late 2011, written representations were made to the Second Respondent by B1 and three other beneficiaries, who I consider can properly be regarded as the *chefs de famille* of the various branches of B1's relatives (and to whom I will refer collectively as "B2 to B4"), indicating their request that steps be taken to terminate the K Trust. The Protector has not been supportive of this course of action. It is fair to note that the Second Respondent has not formally decided that this is what it wishes to do and so has not formally sought the Protector's consent to take this step. However, there has been extensive discussion of matters related to this question, including about the appropriateness of obtaining an insurance policy to cover some of the risks associated with possible prospective tax liabilities. For the purposes of this judgment, I do not need to rehearse in any detail what those issues are and what the differences of opinion are. In particular, I do not need to make any comment about how I perceive the positions adopted by the parties might be resolved. Those may be questions for another day, whether in this jurisdiction or elsewhere. It suffices for present purposes for me to summarise the position as being a significant difference of opinion about how the potential tax liabilities have been assessed by the advisers to the Second Respondent and the advisers to the Protector, which has led to what appears to be a hardening of the Protector's position about whether the K Trust needs to be continued for some years to come whilst at the same time holding assets as a contingency against whatever liability might subsequently be found to arise.

18. During the course of the past nine years or so, a number of requests have been made to the Protector for her to resign from office, culminating in the following recent events. B1 made a direct plea by handwritten letter to the Second Respondent towards the end of 2013 stating her wish that the Protector should resign or be removed from office. The seriousness of B1's position is demonstrated by her enclosing a contemporaneous letter from her personal legal adviser confirming that, in the legal adviser's opinion, B1 had written her letter of her own free will and that it represented B1's personal views. Thereafter, a formal letter dated 13 June 2014 was written on the Applicants' behalf by Advocate Wessels to Advocate Clark, who had been instructed by the Protector, setting out in considerable detail why the Applicants had lost trust and confidence in the Protector and requesting the Protector to resign her office, failing which these proceedings would be commenced. That letter also set out the legal basis on which the Removal Application would be pursued. Because it referred to the principles relating to trustees who are asked to leave office but refuse to do so, as set out in ***Letterstedt v Broers*** (1883) LR 9 App Cas 371, I will adopt the style used by Counsel of referring to this document as "the ***Letterstedt v Broers*** letter".

19. Advocate Clark's response to the ***Letterstedt v Broers*** letter was dated 18 July 2014. It is a similarly lengthy account of the history of events to that point and sets out the reasons why the Protector had remained in office. It concluded by indicating that the Protector "*would be quite willing to retire in favour of a suitably qualified successor*" subject to a number of assurances, principally relating to risk mitigation over the prospective tax liabilities, indemnification of any liability she may have as Protector and costs. That position was reiterated in a further letter from Advocate Clark dated 27 August 2014.

20. The view of the Second Respondent, as set out in its Advocate's letter of 29 September 2014, was that, without attributing blame between the parties, there has been a breakdown in the relationship between the Applicants and the Protector resulting in a situation where the Second Respondent believes, from a practical point of view that, until a new protector is appointed, the K Trust has become unworkable. In doing so, the Second Respondent has explicitly confirmed that the description of the concerns addressed in section 2.2 of the ***Letterstedt v Broers*** letter adequately reflects the difficulties it has been experiencing.

21. B1 and the other Applicants apparently appreciate that there needs to be a sensible approach to the possible contingent tax liabilities before the K Trust could be terminated. However, what they regard as unacceptable behaviour is the way in which the Protector has used this issue in a manner they regard as contrary to the interests of the beneficiaries. They perceive that the Protector has become something of a "standard-bearer" for a position in relation to the Settlor that was not previously held to the same extreme as it now appears to be. The last

straw was the decision of the Protector after these proceedings commenced to seek advice from English Tax Counsel. The consequences of taking that advice and disclosing it to the Second Respondent include the need now for the Opinion given to be addressed further, whereas previously the Second Respondent had received its own advice with which it was satisfied. Given the existence of these proceedings and the imminence of her own Retirement Application at that time, the only explanation for having done this seems to me to be that the Protector's position was that she should not cease to be the protector of the K Trust. However, the position was not strenuously advanced at the hearing, by which time it seemed that there was full agreement that the Protector realistically could no longer retain that office, the more pressing question being the mechanics of reaching the outcome everyone desired.

22. I have deliberately refrained from setting out in any greater detail the full history of the events leading to this breakdown in relationships. From my consideration of the four Affidavits and all the material exhibited to them, I can well understand that the Applicants feel that little to no progress has been made despite their concerns over a good number of years and that the Protector believes that she has been acting quite legitimately on behalf of all the beneficiaries, both current and past, to ensure that nothing adverse to their interests takes place. For the purposes of deciding the Removal and the Retirement Applications, I do not need to make any findings attributing blame for the position reached and I consider that it will be unhelpful to elaborate further, at least at this stage.

**The trust instrument**

23. In order to put the two Applications into their proper contexts, I should highlight the very extensive powers conferred on the Protector of the K Trust.

24. Clause 21 of the trust instrument provides:

> "*NOTWITHSTANDING anything herein contained and in particular conferring an absolute or uncontrolled discretion on the Trustee hereof all and every power and discretion vested in the Trustee by such provisions of this Settlement as are specified in the Fifth Schedule hereto shall only be exercisable by him with the prior or simultaneous written consent of the Protector*".

The Fifth Schedule then lists the following clauses (albeit referring to them as paragraphs): 1(d), 2, 3, 4, 5, 6, 7, 8, 9, 10, 14, 16, 19, 23, 25, 27 and 33(b) & (c). These clauses deal first with the definition of "*the Trust Period*". They then fall under the following headings: overriding power of appointment; allocation and accumulation of income; trust of capital; wide investment; trustee's powers; power to transfer funds; company comprises (sic); nominee holdings; retirement of trustee; trustee's charging clause; trustees' directors' remuneration; and taxation payments. Finally, clause 33 deals with changing the law applicable to the Settlement. The reference to clause 25 (trustees' directors' remuneration) in the Fifth Schedule was added in manuscript. As is apparent from the long list of headings, there is comparatively little affecting the K Trust that does not require protector written consent.

25. Clause 20 deals with the protector of the Settlement. Sub-clause (a) identifies the appointment of the Protector as the first holder of that office and the clause continues:

> "*(b) The Protector shall hold office for life or until he or she shall be incapable of acting whether by virtue of mental or physical incapacity or because he or she cannot be found or for any other reason whatsoever or be desirous of being discharged from the position of Protector or (being a company) is put into liquidation (whether voluntary or compulsory) or is declared en desastre or otherwise ceases to exist or passes a resolution to the effect that it desires to be discharged from the position of Protector or whenever the person for the time being having power to appoint a new Protector (other than the*

*Trustee) desires that the Protector for the time being shall be removed as Protector*

*(c)* *Whenever occasion arises for appointing a new Protector such new Protector shall be appointed by declaration in writing or by will or codicil signed by the person making such appointment and reciting the reason for any previous Protector ceasing to hold office and the same shall be effective when the document or certified copy thereof affecting the same is received by the Trustee who shall cause a memorandum of such appointment to be endorsed on or permanently attached to this Settlement*

*(d)* *Power to appoint a new Protector shall be vested in such persons as are specified in the Fourth Schedule hereto in the order of priority and in the manner and subject to such conditions (if any) therein specified*

*(e)* *If at any time there is for a period of three months no Protector the Trustee shall himself forthwith appoint a person other than himself to be the Protector and any appointment duly made by him under this power shall have effect in all respects as if it has been duly made under sub clause (d) of this clause*".

The Fourth Schedule lists the persons having power to appoint a new protector in the following order:

"*(a)* *The Protector for the time being or if there is no Protector or if the Protector is for any reason incapacitated from acting then*

*(b)* *The Settlor or if the Settlor has died or is for any reason incapacitated from acting*

*(c)* *The person named in paragraph (ii) of the Second Schedule hereto namely [B1]*".

Accordingly, prior to the hearing, the trust instrument conferred the power to appoint her successor on the Protector herself and thereafter, because the Settlor had died, on B1. There is a default position if the office of protector is vacant for three months requiring the Trustee, ie, the Second Respondent to fill the vacancy.

26. Finally, provision is made by clause 22 for the release or abeyance of the protector's powers:

"*(a)* *The Protector may from time to time by written notice to the Trustee (a memorandum of which shall be endorsed on or permanently attached to this Settlement) declare (either generally or in relation to any particular act or acts and either permanently or for such period as shall be specified in the notice) that any act or acts herein declared to require the consent of the Protector shall not require such consent and the said notice shall be effective according to its terms*

*(b)* *If and whenever and so long as the office of protector shall be vacant a memorandum to that effect shall be endorsed on or permanently attached to this Settlement by the Trustee stating so far as possible the date upon which such vacancy occurred and all the provisions of this Settlement (other than paragraph 20 and this present paragraph) shall be read and have effect as though reference to the Protector or the consent of the Protector were omitted*".

## Discussion

*Nature of Protector's powers*

27. Although everyone had proceeded for many years on the basis that the powers conferred on the Protector by the trust instrument were fiduciary in nature, in his Skeleton Argument on behalf of the Protector, Advocate Clark raised the possibility that they were not. I do not believe that he advanced this submission with any great enthusiasm, because a ruling that the Protector was not a fiduciary would potentially have far-reaching effects on what has happened historically, but he did so because his reading of the 2007 Law led to that conclusion. One immediate consequence would be that the Applicants could not invoke the jurisdiction on which they relied for removing a fiduciary. Indeed, Advocate Clark was keen to emphasise that the Protector had always conducted herself throughout her involvement with the K Trust as if she were the holder of fiduciary powers.

28. The provision in the 2007 Law from which the submission derives is section 15:

> "*(1) A trust is not invalidated by the reservation or grant by the settlor (whether to the settlor or to any other person) of all or any of the following powers or interests –*
>
> > *(a) a power to revoke, vary or amend the terms of the trust or any trusts or functions arising thereunder, in whole or in part,*
> >
> > *(b) a power to advance, appoint, pay or apply the income or capital of the trust property or to give directions for the making of any such advancement, appointment, payment or application,*
> >
> > *(c) a power to act as, or give directions as to the appointment or removal of, a director or other officer of any corporation wholly or partly owned as trust property,*
> >
> > *(d) a power to give directions to the trustee in connection with the purchase, retention, sale, management, lending or charging of the trust property or the exercise of any function arising in respect of such property,*
> >
> > *(e) a power to appoint or remove any trustee, enforcer, trust official or beneficiary,*
> >
> > *(f) a power to appoint or remove any investment manager or investment adviser or any other professional person acting in relation to the affairs of the trust or holding any trust property,*
> >
> > *(g) a power to change the proper law of the trust or the forum for the administration of the trust,*
> >
> > *(h) a power to restrict the exercise of any function of a trustee by requiring that it may only be exercised with the consent of the settlor or any other person identified in the terms of the trust,*
> >
> > *(i) a beneficial interest in the trust property.*
>
> *(2) The reservation, grant or exercise of a power or interest referred to in subsection (1) does not –*
>
> > *(a) constitute the holder of the power or interest a trustee,*

> (b) *subject to the terms of the trust, impose any fiduciary duty on the holder, or*
>
> (c) *of itself render any trustee liable in respect of any loss to the trust property.*"

29. Advocate Clark pointed out that this provision was a Guernsey invention and that it had not appeared in the earlier Trusts (Guernsey) Law, 1989. As a member of the group reviewing the 1989 Law, as amended, prior to its replacement by the 2007 Law, he even volunteered to shoulder part of the blame for the state of affairs that had arisen because of the effect of section 15(2)(b), which he submitted meant that there was no imposition of a fiduciary duty on the Protector as the holder of any of the powers referred to in subsection (1). He did not, of course, need to do so. The policy letter leading to the 2007 Law (Article VIII of Billet d'État No. XXI of 2006) explains that the origin of section 15 had been to look towards section 14 of the Cayman Trusts Law (2001 Revision) "*so as to make it plain that the express reservation of any specified matter will not invalidate a trust, and that any exercise of any reserved powers absolves the trustees from any liability as a result of such exercise*" (see section 4.8).

30. In response, on behalf of the Applicants, Advocate Wessels first pointed out that the jurisdiction of the Court being relied on was section 69(1)(a)(iii) of the 2007 Law, so the issue raised was not determinative of the Removal Application. (This is, of course, correct, and was accepted by Advocate Clark, but I have chosen to deal with this issue at the outset because it impacts on other matters.) In relation to section 15(2)(b), the non-imposition of any fiduciary duty is expressly "*subject to the terms of the trust*". As the Royal Court of Jersey had stated in ***In the matter of the Bird Trust*** [2008] JRC013 (at para. 82):

> "*The powers of a protector vary considerably from one trust to another. In some he may be given very limited powers; in others they may be extensive. It is a question of construction of the particular trust deed as to whether a particular power of a protector is fiduciary or not. It may well be the case that, in relation to a particular trust, some powers of a protector are fiduciary and others are personal.*"

It was common ground that the powers of any protector of the K Trust are extensive. The Protector was given the power to appoint new or additional trustees (clause 29), which has all the hallmarks of being of a fiduciary character (see, eg, ***Re Skeats' Settlement*** (1889) 42 Ch D 522). As previously noted, the Protector was given the power to appoint a successor protector under clause 20(b), which was regarded as being fiduciary in the ***Bird Trust*** case. Indeed, if this power to appoint a successor on retirement were wholly non-fiduciary in nature, there would have been no necessity to include this in the trust deed as the holder of a personal power would be free to retire at any time. As can be seen from the extensive list of clauses where the Protector was given an effective veto, if this were only a personal power, and not fiduciary, there would be no accountability and the trust would be unworkable. Construing the Settlement as a whole, this does not appear to have been the intention of the Settlor.

31. In Holden's work, *Trust Protectors*, he comments at para. 2.94 about the hallmarks that indicate that the office of protector exists independently of its occupant, having been created for an independent purpose. In relation to express authorisation, he states:

> "*In cases where a protector is expressly authorised to take some action that a fiduciary would be debarred from taking, this express authorisation may itself demonstrate that the protector occupies a fiduciary position. For instance, a protector in a fiduciary position can be given express authorisation to enter into or approve transactions that would otherwise involve the protector in a conflict of interests; and the protector can be authorised to disclaim his or her powers or to resign from office altogether. Where the protector is given express authorisation, the trust instrument plainly contemplates that the protector would otherwise be debarred from acting in that way. The authorisation presupposes the obligation.*"

In the light of this guidance, the overall impression from reading the trust deed of the K Trust is that it creates a distinct office of protector and endows that office with fiduciary rather than personal powers, even though some of them might fall into the latter category.

32. It is also necessary to consider the effect of section 32 of the 2007 Law:

> "*(2) The terms of the trust may require a trustee to consult or obtain the consent of another person before exercising any function.*
>
> *(3) A person shall not, by virtue of being so consulted or giving or refusing such consent -*
>
> *(a) be deemed to be a trustee, or*
>
> *(b) if the terms of the trust so provide, be under any fiduciary duty to the beneficiaries or the settlor.*"

Advocate Wessels suggested that this provision created an opposite burden to section 15(2)(b). On the one hand, any of the powers or interests in section 15(1) does not, unless the terms of the trust (which phrase is defined in section 80(1) as meaning "*the written or oral terms of a trust and any other terms applicable under its proper law*") indicate otherwise, impose any fiduciary duty, whereas, on the other hand, being consulted or giving or refusing consent as required will not involve any fiduciary duty if the terms of the trust provide that there is no fiduciary duty. Advocate Clark noted that section 32 of the 2007 Law is in the same form as section 28 of the 1989 Law as regards the substance of what is now subsection (3)(a), but that paragraph (b) has been added. Section 4.11 of the 2006 policy letter explains that the recommendation for that amendment was "*to make it plain that a person consulted by the trustee in relation to the affairs of a trust need not be under any fiduciary duty or obligation if the terms of the trust so provide.*"

33. Although at first sight there may have appeared to be some inherent tension between the two provisions and the possibility that section 15(2)(b) has created the position that the Protector did not hold fiduciary powers, on a closer analysis, I have concluded that this is not the case. I take the view that the opening words of section 15(2) are key here. Each of the three acts has to be looked at separately. The K Trust was settled in 1990, many years before the new provision that section 15 represents was commenced, namely 17 March 2008, when the 2007 Law entered into force in accordance with section 86. Accordingly, at the time of the reservation or grant of the powers or interests referred to in section 15(1) as they feature in the K Trust deed, it was not part of the law of Guernsey that those acts would not impose a fiduciary duty unless the terms of the trust expressly so provided. The limitation created by section 15(2)(b) does not, therefore, apply to the K Trust.

34. It would potentially be different in relation to the exercise of any power or interest of a type specified in section 15(1) where the exercise of the power takes place after the commencement of the Law. However, in relation to paragraph (d) or even paragraph (h), the determination of the Removal Application does not involve the exercise of any power by the Protector. Further, because the Protector is not seeking to appoint a successor to that office, there is similarly no exercise of the power. In those circumstances, I do not need to resolve whether there is any tension between section 15(2)(b) and section 32(3)(b).

35. For these reasons, I am satisfied that there is nothing applicable in the 2007 Law which makes the bulk of the powers of the Protector, which clearly have the hallmarks of being fiduciary obligations, anything other than ongoing fiduciary obligations. Accordingly, insofar as it matters, I can properly treat the Protector as a fiduciary for the purposes of considering the relief sought by the Removal and Retirement Applications rather than regarding her as the holder only of personal powers.

*Basis for removal of protector*

36. The Applicants make their Removal Application pursuant to section 69 of the 2007 Law and, in particular, rely on subsection (1)(a)(iii), seeking an order in respect of "*any person connected with a trust*". The Applicants also invoke the inherent jurisdiction of the Court. As has been confirmed by the Court of Appeal in *In the matter of the R and RA Trusts* (unreported, 20 May 2014), the wording of section 69 is extremely wide. It is clear that the Applicants, as beneficiaries of the K Trust, have standing under section 69(2) to seek an order in respect of the Protector, having further satisfied me that she is a "*person connected with*" the K Trust. Advocate Clark accepted as much. Consequently, there is clearly a route into the Court pursuant to the 2007 Law for the making of the Removal Application, whatever the status of the Protector as a fiduciary or not.

37. In the absence of any Guernsey authority as to how to approach an application to remove a protector, Counsel have looked to comparable jurisdictions for guidance. The Royal Court of Jersey has accepted that the guiding principles are akin to those applicable to the removal of a trustee (*In the matter of the A Trust* [2012] JRC169A), because the jurisdiction flows from the fiduciary nature of the protector's office. As Lord Blackburn pointed out in *Letterstedt v Broers* (*supra*, at pages 386, 387 and 389):

> "*... if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the Court might think it proper to remove him; but cases involving the necessity of deciding this, if they ever arise, do so without getting reported. ...*
>
> *In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety. But they proceed to look carefully into the circumstances of the case. ...*
>
> *It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded.*"

These principles show that it is the welfare of the beneficiaries and the competent administration of the trust in their favour that found the jurisdiction for the removal of a trustee and so, by analogy, a protector. I am satisfied that it is appropriate for the Court to adopt the same approach as a matter of Guernsey law.

38. In relation to how to apply that test, Advocate Wessels has drawn attention to the conclusion reached in *In the matter of the A Trust* (at para. 10):

> "*In the present case, mutual hostility and distrust between the Representor Beneficiaries and the protector had led to a breakdown of relations that was quite plainly having a seriously detrimental effect on the execution of the trusts and was likely to continue to do so. This alone would have been a sufficient basis for the exercise of the Court's jurisdiction had that been the only way in which the situation could have been redressed. But add to this the fact, as we found, that S [the protector] bore much of the responsibility for this state of affairs and we were left in*

> *no doubt whatever that this was a case in which it was right for the protector who was reluctant to retire to be removed from office.*"

39. Advocate Clark, in turn, has highlighted the approach taken in the Isle of Man in Re Papadimitriou [2004] WTLR 1141 through reference to the headnote. The judgment of Deemster Cain sets out (at para. 70) that "*the court would only remove a protector when that was essential to prevent a trust failing*" and, after quoting from Letterstedt v Broers, indicated at para. 71:

> "*I am not prepared to say that the court does not have, in any circumstances, an inherent power to remove a protector, if that were necessary to protect the assets of a trust or to prevent the trusts failing, or if the continuance of a protector would prevent the trusts being properly executed. However, I consider that the court would only so act in exceptional circumstances.*"

I accept the submission of Advocate Clark that the Applicants must properly show a basis on which the Protector should be forcibly removed but, insofar as he relies on the Manx case to set the threshold as high as it only being exercised in exceptional circumstances, I disagree. I prefer to take a similar stance to that taken in Jersey and so to go no further than to acknowledge that this is not a jurisdiction to be exercised lightly. It is a significant step to take in relation to a trust and caution is required before making such an order.

40. Having carefully reviewed the evidence adduced at the hearing, I was satisfied that there is more than personal hostility involved in what has happened between the Protector and B1 and how that has impacted upon the other Applicants. The Protector herself has described the breakdown in the relationship with B1 as one she "*bitterly regrets*". There is no question, therefore, that the relationship is anything but broken. I fully understand that, during the lifetime of the Settlor, the role the Protector had to take was different. The dynamic between the two of them and the Original Trustee was based on personal friendships. Following the Settlor's death, I am persuaded that the Protector was of assistance to B1 helping her in the administration of the Settlor's estate. The Original Trustee then resigned in favour of the Second Respondent being appointed as the current trustee. Over the next few years, the manner in which the K Trust was operated seems to me to have developed in a way that has led to the Protector almost becoming a de facto trustee. Attending trustee meetings with her own advisers potentially introduced a level of scrutiny that implied that everything the Second Respondent might do needed to be picked over with a fine-tooth comb. Quite why this happened in this way has not been entirely clarified but it strikes me as being the root of the problems experienced by the Applicants. That said, decisions were taken by the Second Respondent to which the Protector has consented. Other beneficiaries were added to the class and subsequently removed. In the meantime, substantial distributions were made. This was, it seems, in accordance with the wishes of B1. To that extent, there was no justification historically for forcing the Protector from office during those years.

41. The position worsened, though. Whilst it is true that the Second Respondent has not actually taken any decision that the Protector has declined to approve, the impression one gets from the positions being taken on certain matters is that there was a distinct possibility this would be the case. The Second Respondent appears not to have wanted to force the position by taking a decision and seeing whether consent would be forthcoming or refused. Instead, the position seems to have been to refrain from acting in the hope that the Protector would volunteer to retire from office. I consider that I can properly regard this state of affairs as confirming that the proper functioning of the K Trust was being frustrated because of the existing tensions between all concerned. I do not, however, entirely accept the submission on behalf of the Applicants that the administration of the trust is paralysed. In my view, that exaggerates the position. There is, though, good evidence that the breakdown in relations between the Protector and the beneficiaries had a negative impact on the administration of the K Trust and that it was becoming ever more significant with the passage of time and the apparent stalemate that had arisen.

42. This was put into starker contrast because of the decision of the Protector to seek advice from English Tax Counsel in relation to an issue everyone else considered had been adequately addressed. This is, in my view, a clear example of something going beyond mere mutual hostility and distrust. As the Second Respondent has acknowledged through its director's evidence, and as explained on its behalf by Advocate Davies, by virtue of receiving a copy of this advice, the Second Respondent now has to react to it; it cannot simply be passive. This has, in my judgment, removed any doubt that might have been said to exist in relation to the grounds for ordering the removal of the Protector. Even without this having happened, I would still more likely than not have concluded that there was sufficient evidence that the breakdown of relations between the Protector on the one hand and B1 and the other beneficiaries on the other had produced an adverse effect on the welfare of the beneficiaries and the competent administration of the K Trust. However, the decision to seek such advice unilaterally, particularly at a time when these proceedings had been commenced was, I think, unwise. It led me to the conclusion that the position the Protector wished to articulate was a confused one. It was unclear whether she wished to argue that she was the only person who could be regarded as independent of the family members of the beneficiary class acting so as to protect them from themselves, meaning that she should remain in office, yet at the same time she was indicating that she recognised she should vacate the office on terms that were proposed by her but which were not acceptable to the other parties. Either way, taking this step provided the clearest evidence that hostility and distrust had tipped over into doing something that, in the particular situation in which the Protector found herself, was potentially damaging to the interests of the beneficiaries.

43. In the light of this review of the deterioration of the relationships concerned, the indication from the Second Respondent that this went beyond simple personal hostility and was having a negative impact on how it administers the K Trust and the impression I formed that the Protector had unwisely acted in a manner that will have consequences for the ongoing smooth administration of the trust, I was satisfied that the Applicants had demonstrated that grounds existed to order the removal of the Protector. Paragraph 1 of the Removal Application was granted on that basis. However, because of the Protector having given a firm indication through Advocate Clark that, if the Court ruled that she could validly exercise her power to retire without first appointing a successor she would do so forthwith, I decided that it was fair to her, and just to all the parties, to stay the effect of a removal order for a short period of time in case retirement remained her preferred option. I did this because the ultimate relief sought by the Applicants was to be left in the position of there being a vacancy in the office of Protector and the precise mechanism to achieve that outcome was really irrelevant.

*Retirement without appointing successor protector*

44. As demonstrated in the correspondence exchanged between the parties' Advocates prior to the hearing, the question of the Protector retiring was more about whether she benefited from indemnities given by the Applicants than about the actual step of retiring. The Protector had also expressed some concerns about the entity being proposed by B1, with support from the other Applicants, as the successor protector because she felt she had insufficient information about it. Her position relating to retirement seemed to vacillate quite a lot. At various times she indicated she was quite willing to retire immediately but only in accordance with certain conditions she imposed. Subsequently, at para. 130 of her Affidavit, she stated:

> "*In the event that the court considers the position I have adopted to have merit, I would suggest it follows that I should not step down as protector at this point, either at all or at least without appointing a successor whom I am confident would take an independent view of the matter and would be robust in resisting pressure from the Applicants to abandon that view.*"

By the time of the hearing, Advocate Clark did not advance a case based on the Protector remaining in office. In my view, that was a pragmatic and sensible position to adopt. As I have found, the Removal Application leads to the termination of the protectorship and the only question remaining was whether the Protector should be afforded the opportunity to retire rather than be removed by Court order. The Skeleton Argument of the Applicants put this rather bluntly as being that that "*if she is to be pushed, she would like permission to jump first*".

45. The concerns expressed on behalf of the Protector by Advocate Clark include that a retirement that was in fraud of the power to retire or of the power to appoint a successor may be ineffective by analogy with the position of a trustee resigning to facilitate a breach of trust (section 20(3)(a), 2007 Law) and may amount to a breach of fiduciary duty or otherwise be actionable. He recognised, however, that once the matter moved from the possibility of agreement without troubling the Court to being one for a Court adjudication, a decision resulting in the Protector's removal, or directions given that retirement without appointing a successor was permissible, would mean that the Protector would be unlikely to face any further action. Advocate Wessels submitted that an order of the Court provided a complete answer to the Protector's apparent concerns and that, because an order for removal would serve the same ends as directions given pursuant to the Retirement Application, which was why there was no need to give the directions sought by the Protector. He did, however, not oppose staying the order for removal for a short time to leave open the option of retirement if that were the Protector's preference.

46. By virtue of clause 20 of the trust instrument, the Protector was in principle appointed for life. However, "*if desirous of being discharged from the position of Protector*", the Protector could bring about the termination of her office (sub-clause (b)). Where a new Protector is to be appointed, sub-clause (d) lists the persons in order of priority in whom that power is vested. Clause 20, therefore, empowers the Protector to appoint a successor as the new protector but does not, on my reading of this provision, require her to do so. The term of office can, in my view, end through voluntary retirement, thereby creating a vacancy in the office, in the same way perhaps as death or incapacity would, which would be filled by the person ranked next in the priority list. This is consistent with the wording of the Fourth Schedule which refers to "*The Protector for the time being or if there is no Protector*". The power of appointment of a successor protector exists whilst the protector remains in office. If a new protector is appointed, and the instrument making that appointment recites that the previous protector will be retiring voluntarily from office with effect from a given date, after which the new protector will assume office, I am satisfied that would comply with clause 20. Equally, however, if the Protector retires and leaves a vacancy in the office, which the scheme of clause 20 itself recognises through sub-clause (e) as being a possibility, then the instrument appointing a new protector would similarly recite the retirement as the reason for the previous protector ceasing to hold office.

47. In this regard, the words at the end of clause 20(b) ("*or whenever the person for the time being having power to appoint a new Protector (other than the Trustee) desires that the Protector for the time being shall be removed as Protector*") also bear scrutiny. This wording suggests that the term of office of a protector can be ended through action taken by the person next in priority desiring the removal of the protector. In the present case, following the death of the Settlor, that is B1. Clearly, upon forcible removal, the Protector would vacate office and not be in a position to appoint a successor. I incline to the view, therefore, that the Protector herself can voluntarily vacate office without finding herself obliged to appoint a successor first in a situation where the person with the power to seek her removal first invites her to resign. Indeed, in the situation where the breakdown in relations was as final as it had become, for the Protector to seek to impose on the K Trust a successor as protector in whom the beneficiaries were not necessarily confident would have been a recipe for further litigation. It would not appear to be an act in the best interests of the beneficiaries.

48. In those particular circumstances, and because the determination sought by the Protector was ultimately about whether something was permissible or not, I was willing to rule that it was a valid exercise of the power of the Protector to retire without her needing to appoint her successor as protector. This was not, in my judgment, precluded by the terms of the trust instrument. Moreover, I was satisfied that this was the outcome that the Applicants had long been pursuing and that, with the effective blessing of the Court, the Protector would not risk

further action for breach of duty. For these reasons, paragraph 2(a) and (b) of the Retirement Application were granted.

49. That concludes the reasons I now give for the decisions I announced at the end of the hearing. I could have elaborated further, particularly on all the factual issues that lead to those conclusions but, having been informed that the Protector executed an instrument of retirement on 13 December 2014, I do not regard it as necessary or even helpful to ventilate matters that can properly be regarded as private to the parties, even in an anonymised form, and unnecessary to understand the approach I took to these matters. I now turn to the parts of both Applications in respect of which I formally reserved judgment.

*Protector's indemnity*

50. By paragraph 2(c) of the Retirement Application, the Protector seeks a determination "*whether on such a retirement or in any event [she] is entitled to be indemnified out of the Trust Fund against liabilities properly incurred by her as Protector and against such costs and expenses as may properly be incurred by her with respect to the same before or following her retirement*". By sub-paragraph (d)(ii), she also seeks directions to be given to the Second Respondent as to how and in what sum such indemnity should be secured or provided for. As Advocate Clark has submitted, the Protector is not looking for an exoneration for her acts or omissions as protector but for an indemnity for the proper liabilities, costs and expenses she has incurred and might incur as a result of having served as protector.

51. In this regard, Advocate Clark has referred to an article by John Rimmer, *Indemnifying protectors* in *Trusts & Trustees*, Vol. 19, p. 916, in which an analysis is undertaken of a Manx case (*IFG International Trust Company Limited v French* (2012) CHP 2012/0048) and a Jersey case (*In the matter of the HHH Employee Trust* [2013] JRC023) dealing with indemnities to protectors. In both cases, the person in question held fiduciary powers and was embroiled in legal proceedings. The distinction in the present case is that there are as yet no legal proceedings to which the Protector is subject. Instead, she is seeking relief in advance of there being any such litigation. Rimmer prefers the approach in the Jersey case because in it the Royal Court recognised that an implied right of indemnity existed for a protector who had been acting properly. Such an implied right of indemnity could be displaced by a clear contrary intention in the trust instrument or through unreasonable conduct, which by implication would amount to improper conduct. In particular, it was held that having been actioned in its capacity as a fiduciary, it effectively followed that the same principles about indemnifying a fiduciary should follow.

52. This general principle is set out in a similar way in *Trust Protectors*, referring to *AG v Mayor of Norwich* (1837) 2 Myl & C 406. Holden suggests that the reason for implying the right to be indemnified against the costs and expenses reasonably incurred in the course of the office derives from the fiduciary position of the holder. The costs encompassed might include travelling expenses, accommodation costs, costs of obtaining legal advice on the proper performance of the protector's functions, costs of employing agents and any liability incurred by the protector as a result of the tortious acts of an agent properly so employed. This is, of course, consistent with the approach taken to indemnifying a trustee, in respect of which Advocate Clark referred to *Re Grimthorpe* [1958] Ch 615 (at page 623):

> "*It is commonplace that persons who take the onerous and sometimes dangerous duty of being trustees are not expected to do any of the work on their own expense; they are entitled to be indemnified against the costs and expenses which they incur in the course of their office; of course, that necessarily means that such costs and expenses are properly incurred and not improperly incurred. The general rule is quite plain: they are entitled to be paid back all that they have had to pay out.*"

53. The summary given in *Lewin on Trusts*, 19th ed. (2015), at para. 21-041 is to like effect:

> "*Trust instruments which confer fiduciary functions on protectors or other third parties often contain express provision for their indemnity in respect of costs incurred in connection with the discharge of their fiduciary functions. Even in the absence of an express provision authorising indemnity, and subject to any contrary intention expressed in the trust instrument, we consider that it is the better view that third parties with fiduciary functions in relation to the trust have an implied equitable right of indemnity in respect of costs reasonably incurred by them in the discharge of those fiduciary functions. For it is well settled that the costs reasonably incurred by the donee of a power of appointment of new trustees properly fall on the trust fund, and there seems no good reason why different considerations should apply to costs reasonably incurred by third parties in connection with the discharge of other fiduciary functions in relation to the trust which, like the trustee's own fiduciary functions, involve the performance of duties, if only in relation to the exercise of powers, for the benefit of the beneficiaries or some of them. Third parties are in a different position from trustees in that they do not hold the trust property, but that is no reason why an equitable right of indemnity should not take effect by way of a right of reimbursement from the trustees who are in turn entitled to reimbursement from the trust fund, or perhaps by way of a direct right of exoneration from the trust fund exercisable against the trustees.*"

This passage was cited with approval in *In the matter of the HHH Employee Trust* (*supra*), in which the Royal Court of Jersey concluded that it would be wrong for the settlor in that case, which was being actioned in its capacity as a fiduciary, to have to pay any part of the costs it had incurred as a fiduciary out of its personal assets (see para. 27).

54. It was common ground that there is no express provision in the K Trust deed giving the Protector any form of indemnity, or even any entitlement to remuneration. The position of the Trustee of the K Trust is different. Clause 23 is the charging clause:

> "*Any Trustee for the time being hereof being an Advocate Solicitor Accountant or other individual engaged in any profession or business or any such person associated with such Trustee or in the case of a corporate Trustee any such person associated or beneficially interested or in any way connected with such Trustee shall be entitled to charge and to be paid all the usual professional or other charges for business done and time spent services rendered by him or his firm in the execution of the Trusts and powers hereof whether in the ordinary course of his profession or business or not and although not of a nature requiring the employment of a solicitor or other professional person and shall be entitled to retain any commission which would or may become payable to him notwithstanding such commission is payable as a direct or indirect result of any dealing with property which is or may become subject to the Trusts hereof*".

Further, by clause 17:

> "*Without prejudice to any other law or provision relieving against liability no Trustee (being an individual who is not a professional trustee and who has not charged remuneration as hereinafter mentioned) shall be liable for any loss caused by his own act or omission unless he knew or ought to have known at the time of such act or omission that it was a breach of trust*".

55. As noted in correspondence from the Second Respondent's Advocates prior to the hearing, the costs and expenses (reasonably incurred and in a reasonable amount) which have been incurred by the Protector whilst holding the fiduciary role of Protector were being met by the trust fund. Once the Protector ceased to hold office, she would no longer be incurring costs and expenses associated with that office so there should be nothing further to recoup from the fund. This is, as Advocate Wessels points out, no more and no less than a restatement of what is a general proposition that a fiduciary is generally entitled to be indemnified. The Protector already has the comfort of knowing that she can rely on this because Advocate Clark's

suggestion that she might not be a fiduciary has been rejected. In those circumstances, Advocate Wessels submits nothing more is required because the Court will decline to declare the general state of the law.

56. If, however, the Protector is seeking some form of blanket indemnity and discharge in respect of all her previous acts as Protector, this is opposed on behalf of the Applicants and the Second Respondent. Indeed, Advocate Wessels further notes that Advocate Clark had accepted that the Court would not have power to impose what are effectively contractual indemnities that the Protector had invited the Applicants and the Trustee to agree to avoid the need for the matter being aired before the Court. Advocate Clark conceded that the contractual indemnities would no longer be needed if the Court gave the directions the Protector was seeking in relation to the lawfulness of her retirement from office without appointing a successor protector. This is what has happened. Accordingly, the part of paragraph 2(c) of the Retirement Application that refers to "*on such a retirement*" has not really been pursued and can safely be dismissed without further comment.

57. The second part of that sub-paragraph, however, refers to "*in any event*". The relief sought by the Protector is, on that basis, potentially extremely wide and does appear to invite the granting of an open-ended, blanket indemnity. I am not persuaded that the Court should confer such a wide indemnity on the retired Protector as that. To do so would, it seems to me, go considerably further than the approach I have described based on the authorities of affording to a fiduciary an indemnity in respect of costs reasonably incurred and in a reasonable amount. In the absence of painstakingly considering the propriety of every act undertaken by the Protector (and possibly also any instances of omission), to do so would potentially leave the Applicants and the Second Respondent in the position where the reasonableness of the Protector's conduct could not subsequently be challenged, whatever else might come to light. In my judgment, that would produce an unfair outcome and be contrary to the general principles set out in the cases and commentaries to which I have referred. The indemnities given to third parties are provided on a case by case basis in the light of knowledge of the relevant circumstances at the time. In my view, that is the way that any future reliance by the Protector on what would be the usual indemnity to be given to her for the performance of the fiduciary functions of her office should be addressed. In other words, the need to obtain an indemnity arises in known, rather than abstract, circumstances, at which time the way to deal with it can properly be determined, with all parties interested in making representations having the opportunity to be heard.

58. I have also considered whether, within the generality of paragraph 2(c) of the Retirement Application, it would be appropriate for the Court to rule on a narrower indemnity in respect of the possible tax liability to which the Protector might theoretically be exposed. This particular concern has been raised on behalf of the Protector by Advocate Clark. In fact, it might be just this issue that is motivating the Protector pursuing this element of her Application, especially paragraph 2(d) relating to the size and manner of making appropriate provision. I have, however, noted that a copy of advice received from Counsel in late 2003 on the question of the availability of such indemnities was provided to the Protector at that time and indicates that, because the trust deed is silent, they would not be available.

59. Of course, these are matters that inevitably need to be thought about by the Second Respondent. The Second Respondent has the benefit of section 35(2) of the 2007 Law ("*A trustee may pay from the trust property, and may reimburse himself from the trust property for, all expenses and liabilities properly incurred in connection with the trust*"), so that if the expenses and liabilities of the Protector are properly payable from the trust fund, this can be done. Accordingly, assuming (as I think I must) that the Trustee performs its functions in good faith and with due regard to what liabilities might arise in future in respect of which the primary recourse would be to the trust fund, any risk that the liability will somehow devolve on the Protector should be completely mitigated. Further, as Advocate Wessels has submitted, by analogy with the burden resting on a trustee to demonstrate that there are substantial grounds upon which to exercise the lien and that the trustee has taken reasonable steps to ascertain any liability (see ***Wester v Borland*** [2007] EWHC 2484 (Ch), at para. 13), I

am persuaded that a similar burden should lie on the Protector here. She has not discharged that burden because I do not have a clear enough assessment of what the Protector's liability might be or really any assessment of the level of risk to which she is, or might be, exposed. In those circumstances, I do not consider that I should make any determination or order in her favour in respect of indemnities.

60. For these reasons, I am satisfied that the primary concern of the Protector has been addressed by the order for her removal as Protector or alternatively by her voluntary retirement in accordance with the order she sought, both of which remove the possibility that she will face any further liability in that regard. However, aside from having set out how I understand the law of Guernsey would respond to an application for costs and expenses properly and reasonably incurred by the Protector, which should provide a degree of comfort to her, I am unable to make any order pursuant to paragraph 2(c) and (d) of the Protector's Retirement Application and so dismiss both of those sub-paragraphs.

*Delivery up of documents*

61. The final aspect with which I have to deal is the second part of the Applicant's Removal Application. The relief sought evolved from the way it was originally pleaded to the form in respect of which Advocate Wessels sought leave to amend after the conclusion of the hearing. There was no opposition to the application to amend in this manner from the Protector and the Second Respondent, so the relevant paragraphs falling to be determined are as follows:

> "2. *Within 42 days the First Respondent will at her own expense (save for the reasonable costs of transporting the same) deliver up unto, Ogier, Redwood House, St Julian's Avenue, St Peter Port, Guernsey GY1 1WA, on behalf of the Second Respondent, all information, papers, documents and other materials of any sort whatsoever together with all copies thereof (and which shall include all electronic information held by the First Respondent) in her possession or control which she holds in her capacity as protector of the Trust and which relate to the Trust, the Settlor, the assets of the Trust and/or the Applicants and which, for the avoidance of doubt, shall include all legal, accountancy, tax, investment and other advice obtained by the First Respondent at the expense of the Trust Fund.*
>
> 3. *Within 42 days the First Respondent will direct the firms of Frank Hirth, Lenz & Staehelin, Carey Olsen and Wedlake Bell and any other person, firm or company from whom she has received advice in respect of her Protectorship of the Trust, to deliver to Ogier, Redwood House, St Julian's Avenue, St Peter Port, Guernsey GY1 1WA, on behalf of the Second Respondent, all information, papers, document and other materials of any sort whatsoever in their possession to which the First Respondent as their client or former client is entitled together with all copies thereof (which shall include all electronic information held by such person, firm or company) to which the First Respondent as their client or former client is entitled and which relate to advice given to the First Respondent. For the avoidance of doubt: (1) to the extent that any of the said materials held by the firms Frank Hirth, Lenz & Staehelin, Carey Olsen and Wedlake Bell and any other person, firm or company from whom the First Respondent has received advice in respect of her Protectorship of the Trust are in her control for the purposes of paragraph 2 of this order, then she need take no further steps to comply with this order than to issue the direction referred to in this paragraph; and (2) any such firms shall be entitled to recover any reasonable transportation costs in complying with the direction referred to above out of the assets of the Trust.*
>
> 3A. *In the event that within 28 days of any order for her removal the First Respondent files a notice of appeal and/or seeks leave of the Court to appeal such an order, then any orders made in respect of paragraphs 2 and 3 above*

*shall be stayed pending the final disposal of any such appeal subject to an order that the First Respondent shall retain and keep confidential all information, papers, documents and other materials which are the subject of any orders made in respect of paragraphs 2 and 3 above.*"

62. The basis for seeking these orders is that it would be unjustified and inappropriate for the Protector to retain even a copy of anything comprising her protector's file, principally because she will not have any ongoing interest in the documents or the subject-matter of them. The Applicants also consider that there are dangers inherent in leaving sensitive and confidential documents in the possession or control of the Protector against their wishes, when it is the Applicants' confidences contained in them and where the Protector has shown that she is prepared to act unilaterally in respect of matters without reference to the wishes or interests of the Applicants as beneficiaries of the K Trust.

63. The case to which reference has been made as the origin for this aspect of the Removal Application is *Tiger v Barclays Bank Ltd* [1952] 1 All ER 85, which in turn gives rise to the propositions found in *Lewin on Trusts*, at para. 23-105:

> "*A new trustee is entitled to require the former trustee to deliver up to him all records, books and other papers belonging to the trust. He is also entitled to inspect and copy other papers (not belonging to the trust) in the hands of the former trustee so far as they contain information relating to the trust. The papers to which he is so entitled include the minutes of meetings of the trustees and the internal memoranda of a corporate trustee, and correspondence files.*"

64. These principles have been accepted as part of the law of Jersey, as shown by, for example, *In the matter of the Bird Trusts* [2012] JRC006. In that case, the explanation given was that the incoming trustee should be placed in as a good a position as the outgoing trustee. The documentation concerned could not be regarded as trust property as such, because it was incapable of being distributed to the beneficiaries, which was the reason why the Court concluded that it retained a discretion as to whether to direct the delivery up sought rather than it being the new trustee's statutory entitlement to receive the material. In effect, the required level of co-operation was perceived as part and parcel of the seamless transition between trustees, subject to the supervisory jurisdiction of the Court to ensure that the extent of the enquiries of a new trustee is reasonable in the circumstances.

65. Similar principles would, in my view, apply as a matter of Guernsey law if the application for delivery up of materials were being made by a new trustee in circumstances where the former trustee were not complying with an obligation to assist. To that extent, the foundation for arguing by analogy with the position of a trustee exists, but here the Applicants are seeking to extend those principles to encompass a protector. The difficulty is that the analogy is not an appropriate one. This is not a case of seeking information from the outgoing protector so as to assist the incoming protector. The incoming protector can potentially obtain whatever information about the trust it needs from the Trustee. As is set out at paragraph 7.62 of *Trust Protectors*:

> "*The protector's ability to participate effectively in the life of the trust may depend on the extent to which the protector can access documents recording both the history and the current state of the trust. Documents that might be sought by a protector include:*
>
> *(1) the trust instrument;*
>
> *(2) any ancillary instruments – such as a deed modifying the beneficial class;*
>
> *(3) any letter of wishes – particularly a letter addressed to the protector;*

(4) *financial documentation – trust accounts; tax returns; investment schedules and policies;*

(5) *documents relating specifically to the protectorship – deeds of appointment, removal or retirement of former protectors; minutes of previous meetings of the board of protectors; memoranda of deliberations prior to the past exercise of powers; and correspondence with trustees;*

(6) *documents relating to the trustee – minutes of trustee meetings; memoranda of past deliberations; internal correspondence;*

(7) *legal documents – advice sought by the trustee on trust administration; litigation advice.*"

66. In order to facilitate a new protector to get to grips with the K Trust, the Protector has previously agreed, through Advocate Clark's letter of 28 October 2014, that she will provide all reasonable assistance and all relevant documents to her successor as protector of the K Trust. In her Affidavit she indicates that she should be permitted to retain copies, whereas the terms of paragraphs 2 and 3 of the Removal Application go considerably further. Given that undertaking, I perceive that this element of the relief sought by the Applicants is less about providing a successor office-holder with information to facilitate the performance of the functions of that office and more about their concerns that the Protector will breach their confidences. In any event, the supervisory jurisdiction of the Court concentrates on ensuring that those connected with the trust are placed in a position to discharge their functions appropriately. There is no suggestion that a new office-holder has any entitlement to do more than inspect and copy the previous office-holder's other papers, still less has this been extended to the beneficiaries forcing the delivery up of all such materials. In the trustee cases, the documents that can be inspected and copied appear to be left with the former trustee. I see no reason why, if these principles are being extended to the Protector because she was a fiduciary, she should be in any different position.

67. In relation to this aspect of the Applicants' Application, the Second Respondent is adopting a neutral position, subject only to having assurances that the documents in question will be kept confidential. The Protector herself has recognised that, as a result of her office, she has duties of confidentiality and that these duties extend beyond the end of her time in office. In Advocate Clark's letter of 28 October 2014, the Protector has accepted that she has the same duty of confidentiality as a trustee of a Guernsey law trust, referring to *In re B* [2011-12] GLR 694. This acknowledgement from the Protector that she is subject to the same duty of confidentiality as the Second Trustee must, in my view, offer some comfort to the Applicants that, whatever the extent of the breakdown in relationships between the Protector and B1 and indeed with others within the beneficial class, the Protector understands that her duty of confidentiality overrides such matters.

68. The approach taken by the Applicants involves questioning why the Protector thinks she needs to retain any documents at all. In my judgment, this is not the correct approach. If, as I have construed this part of the Application, the Applicants' concerns relate to a possible breach of confidence, I take the view that the Applicants bear the burden of establishing on the evidence why such a fear is held. The burden has not been reversed so that the Protector has to offer reasons why she should be permitted to retain copies. I have found that the office of protector is independent of the person holding that office, which is something that the Applicants appear to have overlooked. The evidence adduced on behalf of the Applicants does not discharge the burden on them as to whether their concerns have a proper foundation. There is no suggestion that the Protector has threatened to disclose documents that would otherwise be treated as confidential to her office. She appears to me to be a professional woman who fully appreciates the consequences of acting so rashly. It would inevitably be counter-productive for her to do so. On the basis that she understands the risks to herself in retaining copies of documents that she might otherwise choose to destroy, I think she is better placed to take those decisions than anyone else. The Court should not force her to divest

herself of everything she has related to her term of office. Indeed, there may be perfectly legitimate reasons why the Protector should be entitled to retain records and the Applicants have not shown that no such reasons exist or that simply affording her access to the documents in another place (and indeed somewhere other than where she resides) will suffice for these purposes. The impression I have formed is almost as if the Applicants wish to expunge from all records that the Protector played a part in the K Trust for a considerable number of years. Because the Protector was for some of that time also a beneficiary, the Applicants' attempt to make the order limited to materials she holds in her capacity as protector raises the spectre of someone having to review whether anything she retains is as a beneficiary rather than as former protector. This is not an attractive approach and would potentially involve the parties in yet more acrimony where I take the view that the Protector's promise to keep matters confidential to the same degree as any trustee would offers adequate protection to meet the Applicants' concerns.

69. In the absence of evidence identifying a real possibility that a confidence that the Protector as a former office-holder is obliged to maintain may be breached, I take the view that it would be wrong to order the office-holder to deliver up everything in physical and electronic form associated with that term of office. Provided that the Protector has supplied to her successor as protector of the K Trust all the material she has promised to supply to it and stands ready to offer further explanations in response to reasonable enquiries, in the same way as a former trustee would, I am satisfied that she is rendering the same degree of assistance as any other holder of a fiduciary office and so should not be ordered to take the additional steps sought by the Applicants. If it becomes apparent that the Protector has not supplied something associated with her protectorship when she should have done so, a further application can be made to obtain appropriate relief related to that specific matter. I therefore dismiss paragraph 2 of the Removal Application.

70. Even if I am being unduly cautious about what appears to me to be an extension of the usual approach to handovers between holders of an office, fiduciary or not, I would not be prepared to make the order sought by paragraph 3. The advisers to the Protector will each be subject to some obligation of confidence. Whilst the Applicants might regret that more people than they would wish are aware of certain matters relating to the K Trust, in all, or certainly nearly all, instances, the Second Respondent has not questioned the Protector seeking advice to enable her to perform the functions attaching to her protectorship. The Second Respondent has approved payment of the costs and expenses incurred by the Protector. To that extent, therefore, I am entitled to infer that the steps taken by her were legitimate steps for her to take. It may be for this reason that the Second Respondent has, quite properly in my view, confined itself to seeking assurances relating to maintaining the confidentiality of the K Trust's affairs, where those assurances have already been given by the Protector.

71. The notion that the Protector should now be directed to require all her advisers to provide to the Second Respondent's Advocates all materials, including copies, both physical and electronic, that they have in their possession and to which the Protector is entitled is, in my judgment, asking too much of her and of them. In any event, I am not even sure that it would be the right outcome to order that all these documents and electronic files of the Protector be passed to the Second Respondent's Advocates, rather than to a successor protector. They are distinct offices connected to the K Trust and so I expressly leave open the question of whether the Applicants have identified the correct recipient, even if the substance of this part of their Application were meritorious. The Applicants have not advanced any real justification in law or in fact for making this part of the Application, nor have they set out any possible professional restrictions imposed on the advisers concerned that might impact on any order made in the terms sought. I am not persuaded that this Court should make an order where there is no way of measuring how effective it will be. Simply directing the Protector to give an instruction to those from whom she sought advice during the years of her protectorship might not result in anything further happening for the benefit of the Applicants or the future administration of the K Trust. As such, making the order sought would appear to lack meaning.

72. Insofar as paragraph 3 is intended to ensure that the Protector bespeaks from her advisers copies of such advices that she has not retained so that they are available to be passed to her successor as protector, I can see the sense in that. As part of the handover process, I think the Protector should do her best to ensure that a full suite of materials is being made available to her successor, but that is not what paragraph 3 seeks. It seems to me that this is a further example of the Applicants wishing to take control over everything that might exist in the hands of others. However, they have not established a basis for the Court to make such orders and, as a consequence, paragraph 3 is dismissed. Further, having dismissed paragraphs 2 and 3, paragraph 3A of the Removal Application falls away.

**Conclusions**

73. History is littered with people who have hung on to office for longer than was wise and whose reputations have suffered as a result. Whilst the Protector's position is far less public than some of those I have in mind who have fallen into this category, I have reached the conclusion that she should have realised much earlier than she apparently did how untenable her position had become. The cautionary words of Lord Blackburn from ***Letterstedt v Broers*** should have resonated with her more than it seems they did. Certainly by the time of the hearing last December, there was no real resistance being offered to her being removed or retiring following adjudication of the lawfulness of her doing so without appointing a successor, which was something taken in isolation that the Applicants and the Second Respondent accepted could be done. Instead, the Protector's desire to secure indemnification in circumstances where I consider none could properly be given became conflated with the act of retiring voluntarily and so complicated the situation. In short, had she retired voluntarily, the Applicants would not have needed to seek her forcible removal. However, the Protector has obtained the comfort of knowing that no further action against her is possible in relation to the circumstances of her office terminating and the Applicants have secured the outcome they wished of there being a vacancy in the office of protector, which can then be filled by B1's nominee, subject to a further application to the Court.

74. For the reasons I have explained, it was clear that this was a case in which the Protector's term of office had to come to an end. The Court will not order removal of a protector lightly. Anyone applying for such an order must establish that the protector continuing in office is adversely impacting on the welfare of the beneficiaries of the trust and the competent administration of the trust. The evidence of the breakdown in relationships and how that had resulted in the K Trust's affairs not being progressed as perhaps otherwise they would have been, in my judgment, satisfies that test and justifies the making of an order for removal. Equally, the construction to be given to the trust deed demonstrates that a protector can vacate office without being obliged to name a successor protector. However, aside from having it confirmed that there is a general principle that a fiduciary acting properly has the benefit of being indemnified in respect of costs and expenses incurred, I was not persuaded that I could properly make any declaration or determination that the Protector enjoyed a general indemnity in respect of her entire protectorship. In my view, this is something that can only be resolved on a specific basis. Similarly, the delivery up of documents and other materials sought by the Applicants appears to me to be unwarranted in the absence of evidence that there is a real possibility of the Protector breaching the confidences to which she acknowledges she is subject. To have made such an order in the context of assisting a new office-holder to assimilate the functions of the office would have gone considerably further than what has previously been ordered, for which no good justification was offered.

75. In all these circumstances, I confirm the orders I made on 12 December 2014, namely that paragraph 1 of the Applicants' Removal Application is granted and paragraph 2(a) and (b) of the Protector's Retirement Application is granted but, subject to dealing with the Applications as they relate to costs, the other aspects of both Applications are dismissed.

 