IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

IN THE MATTER OF THE ARASBRIDGE UNIT TRUST

Between:	**KLEINWORT BENSON (GUERNSEY) LIMITED** **in their capacity as trustee of the AUT**	**Applicant**
	and	
	ARAS INVESTMENT MANAGEMENT LIMITED **as Manager of the AUT**	**First Respondent**
	and	
	ACTIVE FUND SERVICES LIMITED **As Administrator of the AUT**	**Second Respondent**
	and	
	JEREMY LE TISSIER **in his capacity as Representative of the Beneficiaries, Subscribers and other Applicants for Subscription of or to the AUT**	**The Representative**

Judgment handed down: 17th March 2017

Before: Sir Richard Collas, Bailiff

Advocate for the Applicant: **Advocate J P Greenfield**
Advocate for the Second Respondent: **Advocate S Brehaut**
The Representative: **Advocate J T Le Tissier**

Introduction

In this judgment: (1) I give the reasons for having made a declaration that, as a matter of law, the Public Trustee is able to be appointed as the Trustee of a Unit Trust regulated by the Guernsey Financial Services Commission as a Class B Fund; (2) I consider whether, on the facts before me, there are grounds for appointing the Public Trustee; if so, (3) whether to accept the surrender of

discretion by the Current Trustee to decide whether it should retire as trustee of the Unit Trust in favour of the Public Trustee; and, if so, (4) whether to order that the Current Trustee shall retire in favour of the Public Trustee.

Dramatis Personae and Definitions Used in this Judgment

I have used the following definitions.

> The "Fund", alternatively the "Unit Trust", is the Arasbridge Unit Trust including sixteen sub-Funds.
>
> The "Trust Instrument" is the Instrument under Guernsey law whereby the Fund was constituted as an open-ended unit trust.
>
> The "Current Trustee" is Kleinwort Benson (Guernsey) Limited which is, and has been at all times, the trustee and custodian of the Fund.
>
> The "Manager" is Aras Investment Management Limited, a Guernsey registered company, incorporated for the sole purpose of acting as manager of the Fund. The Manager is currently incapacitated, having no directors capable of acting on its behalf.
>
> The "Administrator" is Active Fund Services Limited, the administrator of the Fund.
>
> "Nerine" is Nerine Fund Administrators Limited, the former administrator of the Fund which was replaced by the Administrator.
>
> The "Representative" is Advocate Jeremy Le Tissier, appointed by Act of Court to represent the beneficiaries, subscribers and other applicants for subscription of or to the Fund.
>
> The "Unitholders", alternatively the "Investors", are the beneficiaries of, that is to say the investors in, the Fund.
>
> "Mr Schram", a director of Irdaned BV, holds Powers of Attorney on behalf of 328 Unitholders as at the date of the hearing, representing more than 83% of all of the Unitholders both by number and by value.
>
> The "Questionnaire" is a survey sent out by the Representative with the assistance of Mr Schram to all the Unitholders they were able to contact. 153 replies were received, 125 of whom declared they were represented by Mr Schram.
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> The "POI Law" is the Protection of Investors (Bailiwick of Guernsey) Law, 1987 as amended.
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> The "Class B Rules" are the Authorised Collective Investment Schemes (Class B Rules), 2013 made pursuant to the POI Law.
>
> The "Trusts Law" is the Trusts (Guernsey) Law, 2007, as amended.
>
> The "PT Law" is the Public Trustee (Bailiwick of Guernsey) Law, 2002.
>
> The "Public Trustee" is appointed under the terms of the PT Law. The current office holder, Catherine Rowe MSc, ACIS, TEP, Dip IOD, was present at the hearing but did not address the Court.
>
> The "GFSC" is the Guernsey Financial Services Commission.
>
> The "13 April 2016 Application" is the application made by the Current Trustee described in further detail in paragraph 6 hereunder.

The "Representative's Application" is the application lodged by the Representative on 12 September 2016 and described in further detail in paragraph 10.

The "8 November 2016 Application" is the further application made by the Current Trustee described in further detail in paragraph 11.

The Factual Background and the Applications before me

1. There have been a number of applications and court hearings relating to the Fund but for the purposes of this judgment, the relevant facts can be summarised succinctly.

2. The Fund was constituted on 17 November 2006 when the Trust Instrument was executed. Just over two years later, on 23 January 2009, a decision was taken to suspend the Fund. As at that date, twenty sub-Funds had been created, of which sixteen were active and the other four sub-Funds had received no subscription monies. Fifteen of the active sub-Funds had invested solely into a single underlying fund and the other had invested in two underlying funds. The Fund has never resumed trading and it remains suspended.

3. A formal decision was taken by the Current Trustee to wind up the Fund at a Meeting held on 27 January 2016 and the Current Trustee has been realising and liquidating assets of the sub-Funds. At the hearing I was advised that there remain only three assets in the underlying funds that are not liquid. One is an investment fund which is itself in liquidation, the proceeds of which are expected to be received at any time. A second is a BVI hedge fund which is also in liquidation and where the proceeds are expected within a matter of months. The third will require a decision in due course and is likely to have to be disposed of on a secondary market.

4. The Current Trustee is actively pursuing litigation against the Manager and Nerine for the repayment of what are claimed to be overpaid establishment fees where the issues are whether a 12% fee should have been taken in a single payment or by instalments over a period of time and whether Nerine should have paid up the fee to the Manager as a lump sum.

5. The Representative and Mr Schram allege that there are possible additional claims that require investigation and which could or should be pursued by a trustee of the Fund; they include a claim or a possible claim against the Current Trustee and hence could only be pursued by a replacement trustee. The claims are described by the Representative as assets of the Fund, the proceeds of which would be available for distribution between the Unitholders.

6. In an application dated 13 April 2016 ("the 13 April 2016 Application") made pursuant to sections 68, 69 and 71 of the Trusts Law, the Current Trustee sought the blessing of the Court on a Public Trustee v Cooper basis of its decision to proceed to wind-up the Fund *"in the most efficient and cost effective manner available in the best interests of the Unitholders and creditors"* of the Fund. The Current Trustee had identified five issues on which it had taken a decision and in respect of which it sought the blessing of the Court before it could progress the winding-up process. In relation to those issues, some Unitholders have conflicting interests and not all of them will benefit equally. I have not yet heard submissions on those issues and if the Current Trustee were to be replaced, the replacement trustee would have to investigate the issues in order to reach its own decision and/or to make any application to the Court.

7. In a judgment delivered on 19 July, I adjourned the 13 April 2016 Application, having heard Mr Schram's strong criticism of the Current Trustee articulated on his behalf by Advocate Le Tissier. He described a complete loss of trust and confidence in the Current Trustee on the

part of Unitholders. I was not persuaded that their views were justified as there could be other explanations for the loss of the value of their investments. However, I considered that if another authorised trustee could be appointed it might be preferable. I formed no view at that time as the first issue was to identify a possible trustee. The purpose of the adjournment was to give the opportunity for an application to be made to the GFSC for the authorisation of partners of Grant Thornton to act as trustees for the purpose of conducting the winding-up of the Fund.

8. During the period of the adjournment, Advocate Le Tissier wanted to establish whether Mr Schram was fairly representing the views of those Unitholders on whose behalf he held Powers of Attorney and whether their views were representative of the views of all the Unitholders. To assist himself, Advocate Le Tissier prepared the Questionnaire.

9. Before the Questionnaire was sent out to Investors, Grant Thornton informed Advocate Le Tissier that they had withdrawn their application to the GFSC for a licence to act as trustee of the Fund. Unfortunately, that information came too late to alter the content of the questions, but in a covering letter, Advocate Le Tissier advised Investors that another licensed entity, Lancaster Investment Services Ltd, would act (with the assistance of Grant Thornton) if the GFSC would licence them to do so. In fact Lancaster had not agreed to act and were merely considering a request to do so. In order to explain the position, Advocate Le Tissier sent a corrective email. It seems unlikely that the confusion is material to the lessons that can be learned from the results of the Questionnaire but some of the comments in the Investors' replies need to be read with that in mind.

10. On 12 September, the Representative lodged an application (the "Representative's Application") for a number of orders, including for the removal of the Current Trustee and the appointment of the Public Trustee as a replacement trustee. Alternatively he sought an order that a meeting of the Unitholders be convened for the purpose of voting upon amendments to the Trust Instrument, the effect of which would be to enable the Unitholders in General Meeting to vote to replace the Current Trustee with the Public Trustee if they were so minded.

11. A further application was brought by the Current Trustee dated 8 November (the "8 November 2016 Application"). Paragraph 1 thereof sought a Declaration, or Ruling, as to whether the Public Trustee could be validly appointed by the Court as a Trustee of the Fund under sections 2, 3 and 4 of the PT Law, section 1 of the POI Law and the Class B Rules. Subject to the answer to that paragraph, paragraph 2 thereof sought either the dismissal of the Representative's Application and an order that the Current Trustee's application to wind-up the Fund be granted (pursuant to the 13 April 2016 Application) or, alternatively that the Court accept the surrender of discretion by the Current Trustee in order that the Court may decide whether to appoint the Public Trustee in its place.

12. At the hearing before me, I dealt first with paragraph 1 of the 8 November 2016 Application and I granted the Declaration sought, reserving my reasons to be given in this written decision. We then went on to consider the Representative's Application for the removal of the Current Trustee and its replacement by the Public Trustee, in conjunction with paragraph 2 of the 8 November 2016 Application and the 13 April 2016 Application. I also received some submissions on that part of the Representative's Application seeking an order for the convening of a meeting of the Unitholders to consider the proposition to replace the Current Trustee by the Public Trustee although Advocate Le Tissier would wish to address me further before I could reach a formal decision.

13. By the time of the oral hearing, it had been accepted that apart from the Public Trustee there was no one who would be prepared to make application to the GFSC to be appointed as a trustee of the Fund in place of the Current Trustee. There had been a suggestion that the

Public Trustee might be appointed as a co-trustee to act jointly with the Current Trustee but that idea had been abandoned and was not addressed by counsel in their submissions so it does not fall to be considered in this judgment.

Could the Public Trustee be appointed, as a matter of law?

14. Under the terms of Appendix G of the Trust Instrument, the power to appoint a new trustee in the event of a trustee desiring to retire is vested in the Manager. That is not possible because the Manager has had no directors for some time and is incapacitated. The Trust Instrument does not provide a means for appointing a new trustee where the Manager is incapacitated so it is necessary to look to section 18(1) of the Trusts Law pursuant to which the power to appoint a new trustee vests in the existing trustee. In the present application, the Current Trustee is not offering to resign but instead it is offering to surrender its discretion to the Court. If the Court were to accept the surrender of discretion by the Current Trustee, the Public Trustee could be appointed with the agreement of the Public Trustee under section 3(1)(a) of the PT Law. Alternatively, the Court may appoint the Public Trustee under section 3(1)(c) of the PT Law.

15. Advocate Greenfield said the Current Trustee takes a neutral position on the question of whether as a matter of law the Public Trustee could be appointed. By way of assistance to the Court, he submitted there were three issues for consideration. First, does Rule 4.01 of the Class B Rules prevent the Public Trustee from being appointed? Sub-Rule (a)(ii) implies that a trustee of an authorised scheme shall be a company rather than an individual and sub-Rule (a)(iii) says that such a trustee shall be licensed under the POI Law. The Public Trustee potentially falls foul of both sub-Rules as she is an individual and does not hold the requisite licence. Second, section 1(1) of the POI Law provides that a person shall not carry on a controlled investment business in the Bailiwick except under and in accordance with a POI Law licence which the Public Trustee does not hold. Third, section 2(1)(a) of the PT Law contains provisions which Advocate Greenfield submitted were equivalent to conditions precedent for the Public Trustee's appointment so I would have to consider whether they were satisfied in this case.

16. The first two of those issues were addressed satisfactorily by Advocate Le Tissier. Rule 4.01 of the Class B Rules does not create any impediment to the appointment because section 3(4) of the PT Law provides that the appointment of the Public Trustee shall have effect notwithstanding any enactment or rule of law. Similarly, section 1(1) of the POI Law poses no problem; the Law Officers of the Crown have advised that the Public Trustee is prohibited by section 2(2) of the PT Law from making a profit and therefore could not be described as acting by way of business, so she would not require a licence. The GFSC has said, in an email to Advocate Le Tissier dated 11 November 2016, that it accepted the Law Officers' advice and that, even if that advice were not correct, the GFSC has power under Rule 2.03 of the Class B Rules to exclude the licensing requirement and it would do so in favour of the Public Trustee, if requested. Furthermore, section 3(4) makes it clear that an appointment of the Public Trustee is valid notwithstanding the terms of the trust or any enactment or rule of law.

17. In relation to the third issue, Advocate Le Tissier challenged Advocate Greenfield's interpretation of the PT Law. He had submitted that the PT Law restricts the circumstances in which the Public Trustee may be appointed and that the restrictions should be treated as "conditions precedent" or "pre-conditions". Advocate Le Tissier's reply was that the PT Law should not be read as if it included words that the legislature had not used. Section 2(1) does not dictate the validity or ability of the Public Trustee to be appointed or to act. Instead, section 2 of the PT Law defines the functions of the Public Trustee so that she knows the

basis of her statutory role and knows the matters which she must take into account when deciding whether to accept an appointment.

18. He said that if Advocate Greenfield's interpretation were correct, the Public Trustee could only act if and when the conditions set out in Section 2 existed and continued to exist. By way of an example of the difficulties that interpretation would cause, Advocate Le Tissier said that if the Public Trustee had been appointed as a trustee of a trust on the ground that beneficiaries of the trust could not be identified, she would have to cease acting as soon as she has succeeded in identifying the beneficiaries.

19. Instead of "conditions precedent" or "pre-conditions", Advocate Le Tissier referred to "gateways". The Public Trustee could be appointed as a trustee if the circumstances satisfied one of the "gateways". He adopted the advice given to the Public Trustee by the Law Officers that the appointment potentially falls within the functions of the office under section 2(1)(iii) of the PT Law:

> *"it is necessary or desirable for him so to act:*
>
> *(A) for the purposes of preserving the trust assets or otherwise in the interests of the beneficiaries of the trust:*
> *(B) for the protection or enhancement of the reputation of the Bailiwick".*

20. He submitted it was desirable (rather than necessary) for the Public Trustee to act in the best interests of the Investors in order to preserve the assets of the Fund, most notably by pursuing a claim against the Current Trustee for the losses to the Fund arising from its alleged failures of supervision which amounted to breaches of trust on its part. Furthermore, he was asking the Court to make the appointment because, following the resignation of the Manager, there was no clear procedure available to the Investors to remove the Current Trustee whereas previously there could have been a request to the Manager to convene an AGM of the Investors. An additional reason for the appointment was the escalating costs of the present litigation which ultimately are being borne out of the assets of the Fund at the expense of the Investors. For their sakes, it is essential that the matter be resolved as soon as possible.

21. He said the reputation of the Bailiwick is also at risk because of the loss of confidence in the Current Trustee on the part of, what he described as, the vast majority of the Investors. Some of the Investors have aired publicly their complaints and grievances and will publish those more widely if the Current Trustee is not replaced.

22. Another consideration is that there is one Investor with whom the Current Trustee has lost contact. So, as an additional ground, Advocate Le Tissier relied upon section 2(1)(a)(iv) of the PT Law: *"all or any of the beneficiaries of the trust cannot be identified, ascertained or found".*

23. Each and every one of those grounds justified the appointment of the Public Trustee, Advocate Le Tissier submitted.

Discussion and Conclusion re Appointment of the Public Trustee as a matter of law

24. The Office of Public Trustee was established under section 1 of the PT Law which provides for the holder of the office to be appointed by the States as an independent office holder, not a committee, servant or agent of the States. As the holder of a statutory office, the Public Trustee may only exercise the functions assigned to the office by legislation. Section 1(2) provides:

(2) The States shall, on the recommendation of the States Committee for Economic Development ("the Committee"), appoint the Public Trustee who shall exercise the functions assigned or transferred to him by or under this Law and any other enactment."

25. I interpret section 1(2) as meaning that the Public Trustee is mandated to exercise the functions assigned to that Office under the PT Law (and any other enactment). Counsel disagreed as to what is meant by the "functions" of the office. They are set out in Part II of the PT Law which is entitled "Functions of the Public Trustee" and includes section 2 which also has a sub-heading of: "Functions of Public Trustee". Section 2 provides:

"2. (1) The functions of the Public Trustee shall be –

(a) to act, subject to the provisions as to his appointment as trustee set out in section 3, as trustee of a trust described in section 4 where –

(i) the trust has no trustee lawfully able to act,

(ii) in the case of a trust the proper law of which is the law of Guernsey, the provisions of section 13 of the Trusts (Guernsey) Law, 1989 ("the number of trustees") are not satisfied, or

(iii) it is necessary or desirable for him so to act –

(A) for the purposes of preserving the trust assets or otherwise in the interests of the beneficiaries of the trust, or

(B) for the protection or enhancement of the reputation of the Bailiwick, or

(iv) all or any of the beneficiaries of the trust cannot be identified, ascertained or found,

(b) subject to subsection (2), to determine after consultation with the Committee –

(i) the fees payable (whether generally or in any particular case) in respect of the exercise of his functions,

(ii) the interest payable in the event of default in the due payment of fees, and

(iii) the persons by whom such fees and interest are to be payable,

(c) such other functions as may be assigned or transferred to him –

(i) by or under this Law and any other enactment, and

(ii) by Ordinance of the States made under and for the purposes of this section.

(2) For the purposes of subsection (1)(b), the fees and interest which may be recovered by the Public Trustee in any particular case shall not exceed the amount of the costs (including the cost of any fees or remuneration payable to the

Public Trustee and his officers and servants), fees, expenditure and liabilities actually and reasonably incurred by the Public Trustee in connection with the exercise of his functions in that particular case.

(3) The Public Trustee may act as trustee alone or jointly with other persons.

(4) The Public Trustee may in his absolute discretion decline to act as trustee of any trust or otherwise to exercise any of his functions."

26. In my judgment, section 2 of the PT Law must be read in conjunction with section 1(2). The functions assigned by or under the PT Law are those set out in section 2(1). When the two sections are read together, it is apparent that the Office of Public Trustee was created to act as a trustee in the circumstances set out in section 2(1) (or any other enactment) and in no other circumstances.

27. That meaning is clear from the Order in Council itself and there is no need to look at any other material. Advocate Greenfield submitted that in order properly to construe the PT Law, it is helpful to have an understanding of the reasons for the establishment of the office and he drew attention to the two policy letters presented to the States of Deliberation when it was considering whether to legislate for the appointment of a Public Trustee. In Billet XIX of 2002, at page 1553, the Advisory and Finance Committee explained that the Public Trustee was intended to be *"essentially a trustee of last resort".* The establishment of the office was considered necessary for two reasons. Firstly, it *"would avoid the situation arising where trust property is put at risk because there is no trustee, for example because the last trustee has died or become unable to act."* Secondly, in the context of the proposed licensing of trust companies and other fiduciaries, a situation could arise where an unlicensed person may need to be replaced as trustee to avoid placing the trust assets at risk. The other policy letter (Billet VI of 2003, page 830) quoted a letter from Her Majesty's Procureur proposing that provision be made for the Public Trustee to be appointed in a situation where all or some of the beneficiaries are not identified or identifiable. For my part, I can find nothing in either of the two policy letters to contradict my interpretation of the legislation; indeed they support my understanding of it.

28. In paragraph 7 of the first policy letter, the situations where the Public Trustee is to act are described as *"pre-conditions for the Public Trustee's appointment".* However the word "pre-condition" does not appear in the PT Law and nor does Advocate Le Tissier's alternative word - "gateways". I do not find it necessary or helpful to introduce language into section 2 of the PT Law that the draftsman of the legislation did not use. The position is that the Public Trustee is the holder of a statutory office who only has the functions assigned to the office. Those functions are to act as a trustee in the circumstances described in section 2 of the Law (or any other enactment, of which none were drawn to my attention). It is not the function of the Public Trustee to act as a trustee other than in circumstances assigned to that office by legislation.

29. Advocate Le Tissier questioned what would happen if the Public Trustee were appointed where the beneficiaries of a trust could not be identified and they were subsequently identified, perhaps as a result of the Public Trustee's efforts. The answer is that it would no longer be her function to continue to act. In practice, the beneficiaries would be advised to appoint another person to act as trustee and the Public Trustee could only continue if she were required to do so in pursuance of another of her functions, such as for the purpose of preserving the assets of the trust. Fortunately, if she did have to continue for a period of time until another trustee could be appointed, section 3(4) makes provision for her appointment to continue to be valid.

30. Section 2 is expressed to be subject to the provisions of sections 3 and 4. Section 3 specifies the mechanics of the process to be followed for the appointment of the Public Trustee. That is to say the Public Trustee will not act unless properly appointed in the manner specified. I reject the submission that section 3 permits the Public Trustee to be appointed e.g. by the Court even if section 2 were not satisfied. Section 2 expressly declares that it is subject to section 3. To suggest that section 3 could somehow over-ride the provisions of section 2 offends against the language used in the section.

31. Section 4 details the trusts in respect of which the Public Trustee may act, all of which involve a connection with the Bailiwick. It is not surprising that the legislature wished to make clear the type of connection that would be appropriate such as where the proper law of the trust is the law of any part of the Bailiwick; where there is a trustee resident in the Bailiwick; or trust property situate in the Bailiwick. The legislature made it clear that it is not the function of the Public Trustee to act as trustee of a trust where there is no connection whatsoever with this Bailiwick.

32. Thus both section 3 and section 4 operate as a restriction or limit on the trusts to which the Public Trustee may be appointed. They do not enlarge the functions of the Public Trustee set out in section 2, as suggested by Advocate Le Tissier.
33. I am satisfied that Rule 4.01 of the Class B Rules does not prevent the Public Trustee from being appointed. I respectfully agree with the advice of the Law Officers that the GFSC has the power under Rule 2.03 to exclude or modify any provision of the Rules if satisfied *"that compliance with that provision is not necessary in the interests of the protection of investors"*. The GFSC has indicated it would be prepared to do so if the Public Trustee were to be appointed, thereby overcoming any restriction under Rule 4.01. In any event, section 3(4) of the PT Law would override the restriction as it provides that the appointment of the Public Trustee *"shall have effect notwithstanding any provision …of … (b) any enactment or rule of law"*.

34. Similarly, section 1(1) of the POI Law does not apply as the Public Trustee would not be carrying on *"investment business if, by way of business…."*. The Public Trustee would be carrying out statutory functions, not conducting a business. It is also to be noted that the Public Trustee may not make a profit from her functions; section 2(2) of the PT Law limits the fees recoverable to the amount of *"the costs, …, fees, expenditure and liabilities actually and reasonably incurred by the Public Trustee in connection with the exercise of his functions in that particular case"*.

35. For the reasons given, I concluded that there would be no obstacle under the POI Law or the Class B Rules to prevent the Public Trustee being appointed trustee of the Fund provided that such appointment is for the purpose of carrying out her functions under the PT Law.

Do the circumstances engage the jurisdiction of the Public Trustee?

36. The submissions made by counsel were that, on the facts and circumstances before me, three of the functions of the Public Trustee fall to be considered: (i) *"it is …desirable for him so to act…in the interests of the beneficiaries of the trust"* (section 2(1)(iii)(A)); (ii) *"it is …desirable for him so to act…for the protection of the reputation …of the Bailiwick"* (section 2(1)(iii)(B)); and (iii) *"all or any of the beneficiaries of the trust cannot be identified, ascertained or found"* (section 2(1)(iv)).

(i) The beneficiary who cannot be found

37. The submission that the Public Trustee should be appointed because there is a beneficiary who cannot be found is a stand-alone matter which I will consider first. Exhibited to the First Affidavit of Oliver Fattorini, an associate of Advocate Le Tissier's firm Ashton Barnes Tee ("ABT"), is an exchange of emails between ABT and the Administrator asking for an address for one Investor (who I will call "Ms X"). Neither Mr Schram nor the Administrator knew of her whereabouts and Mr Schram does not hold a Power of Attorney for her.

38. The issue came to light when the Administrator advised that a few copies of a circular recently issued on behalf of the Current Trustee had been returned due to unrecognised addresses. All the Investors involved, apart from Ms X, had been tracked down. There was no evidence that the Administrator had conducted any detailed enquiries to try to locate Ms X and no evidence to suggest that the Administrator had exhausted all possible lines of enquiry.

39. There are many reasons why professional service providers may lose contact with their investors and other clients. Common examples include that someone may move address without supplying forwarding details, or they may change their name or they may go on a long holiday. There are many other reasons that explain why people may temporarily be difficult to locate. Loss of contact with an investor does not necessarily mean that the investor cannot be found.

40. To remove a trustee from office and replace him with the Public Trustee is a significant step. It cannot have been the intention of the legislature that the Public Trustee's jurisdiction could be invoked whenever a trustee may lose contact, even temporarily, with a beneficiary. Before section 2(1)(iv) could be invoked, it would be necessary to prove that every reasonable step had been taken to identify, ascertain or find the beneficiary concerned. Such evidence has not been put forward in respect of Ms X in the present case. Indeed, even if every reasonable step had been taken and there remained only one single Investor in a Unit Trust who could not be found. I doubt it would be sufficient to justify the appointment of the Public Trustee except in a most exceptional case.

(ii) The interests of the beneficiaries of the trust and the reputation of the Bailiwick

41. It is easier to take these two issues together as the fundamental allegation underpinning them both is that the Investors have lost all trust and confidence in the Current Trustee. The loss of trust and confidence is much in evidence including in the results of the Questionnaire; in the views expressed by some of the Investors in their replies and in other correspondence; and in the opinions expressed most forthrightly by Mr Schram. Advocate Le Tissier as the Representative of the Investors has independently reached the same view.

42. In the oral hearing, both Advocate Le Tissier and Advocate Greenfield spent time explaining the results and conclusions of the Questionnaire. The thrust of Advocate Le Tissier's submissions was that the high response rate achieved and the substantial level of opposition to the Current Trustee continuing to be involved in the winding-up of the Fund showed deep-seated concern at its actions and a serious loss of trust of confidence in the Current Trustee which overwhelmingly supported the case for the removal of the Current Trustee both in the interests of the Investors and for the sake of protecting the reputation of the Bailiwick.

43. On the other hand, Advocate Greenfield sought to belittle the results on the grounds that only 144 Investors replied out of a total of 369 plus another nine who did so anonymously. Of those who replied 125 were represented by Mr Schram; that is to say, only 34% of those for whom he holds powers of attorney responded. Advocate Greenfield criticised the information given to Investors in the Questionnaire about the cost and delay that would result from a change of trustee and the lack of detail concerning the additional costs. The wording of some

questions, such as number 17, was not even-handed; it started with the words *"Mr Schram maintains very strongly that Kleinwort Benson should be removed…"*

44. Advocate Le Tissier placed such great reliance on the results of the Questionnaire that it needs to be placed in context in order to assess what weight can properly be attached to it. The Questionnaire was sent out by Advocate Le Tissier in August 2016 following a hearing at which the Current Trustee had sought the Royal Court's blessing of its decision to proceed to wind-up the Fund *"in the most efficient and cost effective manner available in the best interests of the Unitholders"*. In a judgment handed down on 19 July, I had adjourned the application following submissions made by Advocate Le Tissier who had argued for the adjournment because of the loss of trust and confidence in the Current Trustee. He had requested that members of Grant Thornton be given the opportunity to obtain the necessary licence from the GFSC to enable them to be appointed as trustee to wind-up the Fund in place of the Current Trustee.

45. The motivation for the Questionnaire was that questions had been raised as to whether Advocate Le Tissier was able to represent the views of Unitholders when he was largely dependent on advice from Mr Schram who held Powers of Attorney from some but not all of them and who might not have been perceived as being impartial. In paragraph 25 of his First Affidavit, Advocate Le Tissier explained that:

> *"The objective of the Survey was always to find out what the investors' genuine views were……. I therefore approached the Survey as carefully as I could with the view of trying to elicit useful and unbiased information which gives an insight into the investors' views on a number of important issues concerning the [Fund] and which are relevant to the current proceedings. I consider that the Survey has worked well from that perspective."*

46. 153 Investors completed the Questionnaire, of whom 144 gave their names in answer to question 1. 125 of the 153 said they were represented by Mr Schram. 137 said they did not object to the Fund being wound-up, 12 objected and 8 did not feel they had enough information. 110 objected to the Current Trustee winding-up the Fund, 15 did not object and 5 did not feel they had enough information. 107 preferred to see someone else wind-up the Fund, 5 wanted the Current Trustee to do so, 10 had no preference and 8 did not have enough information.

47. I have no reason to doubt Advocate Le Tissier's statement that the results of the Questionnaire have assisted him in gaining an insight into the views of Investors. The results indicate to me that a significant number of the respondents have lost all trust and confidence in the Current Trustee and wish to see someone else appointed in its place to complete the winding-up of the Fund. If there were another licensed fiduciary willing to undertake the task, I would be more inclined to endorse the wishes of the Investors but there is not and the present situation is different. In view of the restrictions imposed by the PT Law as to when the Public Trustee may be appointed as trustee of a trust, it would be wrong to equate the Public Trustee with a licensed fiduciary conducting investment business by way of business. Being a statutory office holder, the Public Trustee does not enjoy the same freedom as another fiduciary to decide when to accept, or reject, appointment as trustee of a trust.

48. Advocate Le Tissier submitted that it is the wish of an overwhelming majority of Investors that the Public Trustee be appointed. However, that is not sufficient. It is not simply a matter that they could appoint the Public Trustee if they wish to do so. The Public Trustee may only be appointed if it would be within the functions of her office to act as the trustee which means, for the purposes of section 2(1)(iii)(A) of the PT Law, that it is not the beneficiaries who decide whether it is in their best interests; the assessment must be objective. It is for the

Court to decide whether grounds have been put forward by the Representative that would justify the appointment of the Public Trustee in place of the Current Trustee.

49. The grounds put forward by Advocate Le Tissier (and by Mr Schram) rely mainly on the breakdown of trust and confidence and also the need to investigate possible claims against the professionals who have been involved in the Fund, including the Current Trustee. Advocate Le Tissier has not commented on the viability or otherwise of any claims as that would go beyond the terms under which he was appointed by the Court as a Representative. Mr Schram is more forthright in his comments but has not produced any expert advice or legal opinion to support his allegations. He blames the Current Trustee for failure to safeguard the value of the investments on behalf of the Investors. He requires there to be an investigation to establish why a fund that was to invest in low risk investments has lost in the region of 80% of its value and he clearly holds the Current Trustee responsible for failure properly to supervise the investment activities of the Fund.

50. The assumption has been made that there is a claim that could be brought against the Current Trustee for breach of trust. The submission was made that the claim would have to be pursued by a successor trustee and not by any individual Investor because the claim is an asset of the Fund. Hence the Current Trustee would have to be replaced. In other words, it would require an independent trustee to protect the value of the Fund on behalf of Investors.

51. The assumption that there is a potential claim is not supported by any legal opinion. There is no clear evidence of any breach of trust on the part of the Current Trustee, merely allegations made by Mr Schram and some of the Investors. The fact that the investments made by the Fund have lost a substantial portion of their value is not, by itself, sufficient evidence of a breach of trust by the Current Trustee.

52. The Administrator, through Advocate Brehaut, did not make extensive submissions but did make three succinct observations. First, she supported the contention that the Public Trustee could not be appointed unless one of the "gateways" under section 2 of the PT Law was engaged. Of those, it was only sections 2(1)(iii)(A) and (B) that could apply. Second, she said that the Administrator had seen no evidence that could justify making an appointment under either of those sections. Third, if there were to be a change of trustee it would give rise to additional costs and delays, both of which would be a concern. I do not know what information the Administrator has seen so I cannot attach great weight to its opinion but it is noteworthy that the Administrator has seen nothing that would justify the involvement of the Public Trustee.

53. Some of the Investors and Mr Schram have expressed great criticism of Guernsey, its financial services and its regulatory framework. Their comments were described by Advocate Le Tissier as going far beyond 'normal criticism'. The criticism centres on the loss in value of the Fund's investments and the fact that, apparently, nothing, or not sufficient, has been done by the GFSC or the Current Trustee to investigate or to correct the errors. They have threatened to involve the media and to publicise what has occurred to the detriment of the Bailiwick and the reputation of its financial services.

54. They therefore request the appointment of the Public Trustee *"for the protection or enhancement of the reputation of the Bailiwick"*. However, in the absence of any *prima facie* evidence of a breach of trust on the part of the Current Trustee, there is no sound basis for concluding that it is necessary to appoint the Public Trustee in order to protect the reputation of the Bailiwick. The protection and enhancement of the Bailiwick's reputation is expressly included as part of the exercise of the general functions of the GFSC (section 2(2A)(a)(iv) of the Financial Services Commission (Bailiwick of Guernsey) Law, 1987, as amended). It is reasonable to assume that the GFSC will have more information available to it than will have

been presented to the Court and that they could have taken steps to replace the Current Trustee if they had considered it necessary to do so, whether that were necessary for the protection of the Bailiwick's reputation or otherwise. They have not done so. They are aware of these proceedings and have chosen not to participate. There would have to be good reason for the Court to intervene where the GFSC has decided not to do so. The unsubstantiated allegations of a possible claim for breach of trust in the present matter do not, in my judgment, amount to sufficient justification to appoint the Public Trustee for the purpose of protecting or enhancing the reputation of the Bailiwick.

55. In conclusion, the information presently available to me, amounting to a breakdown of trust and confidence in the Current Trustee and concerns about the loss of approximately 80% in the value of the Fund and its investments, are not sufficient in the absence of *prima facie* evidence of a breach of trust on the part of the Current Trustee to suggest that the statutory functions of the Public Trustee could be engaged. There are therefore no grounds to remove and replace the Current Trustee with the Public Trustee.

Surrender of discretion

56. In an alternative limb of the 8 November 2016 Application, the Current Trustee has offered to surrender its discretion to the Court to enable the Court to decide in its place whether to seek to appoint a new trustee pursuant to the power to do so under section 18(1) of the Trusts Law. If I were so minded, the appointment would have to be agreed by the Public Trustee; section 3 (1) (a) of the PT Law provides for the appointment of the Public Trustee *"by agreement with the person who has the power, under the terms of the trust, to appoint new or additional trustees"*.

57. In my judgment, it is not open to me to request the appointment of the Public Trustee when (a) I have held that section 3 of the PT Law is to be read subject to section 2 and does not override the provisions of section 2; and (b) I have decided that on the facts of the present matter, the circumstances do not establish a *prima facie* case that the functions of the Public Trustee could be engaged.

Amending the terms of the Trust Instrument

58. In the alternative, the Representative has requested that the Court amend the terms of the Trust Instrument to enable a meeting of the Unitholders to be convened for the purpose of considering a proposition to appoint the Public Trustee in place of the Current Trustee. Clause 1 of Appendix H to the Trust Instrument currently provides that the Trustee or the Manager **may** convene a meeting of Unitholders and that the Manager **shall** convene such a meeting if requested to do so by Unitholders holding not less than one-tenth of the Units in issue.

59. If the Manager had not become incapacitated through the resignation of its directors, the requisite number of Unitholders could have requested the Manager to convene a meeting of Unitholders, without having had to involve the Court. In order to restore that power to the Unitholders, the Representative seeks an Order from the Court to amend the Trust Instrument by substituting the Trustee in place of the Manager as being the entity that would be compelled to convene a meeting of Unitholders if requested to do so by Unitholders holding one-tenth of the Units in issue. A second proposed amendment would confer on a meeting of Unitholders the power to appoint a new trustee who is acceptable to the GFSC, in addition to the current power which permits the Unitholders to remove, but not replace, a trustee.

60. The idea of convening a general meeting of Unitholders to appoint a new trustee was described by Advocate Greenfield as a red herring. The Current Trustee has been requested to convene such a meeting and has declined to exercise its discretionary power do so. It

declined first when the request was for the purpose of appointing Grant Thornton; the Current Trustee would not consider convening a General Meeting until it knew whether the GFSC would approve the appointment. Similarly, in relation to the Public Trustee, the Current Trustee has reservations as to whether she is able to be appointed, for the reasons set out above. Consequently, the Trustee has not convened a General Meeting and for the same reasons, it sees no point in amending the Trust Instrument to require it to do so if requested by the appropriate number of Unitholders. A further issue raised by Advocate Greenfield was that neither the Representative nor Mr Schram had produced the draft of any resolution they would like the Unitholders to vote upon if a meeting were to be convened.

61. I understand that the Current Trustee has not ruled out the possibility of convening a meeting of Unitholders under the exercise of its discretionary power to do so if it were to receive a draft proposition which could be put into effect if it were adopted. Neither of the proposals put forward to date by Mr Schram and the Representative could have been progressed even if adopted; Grant Thornton did not have the required licence; and, for the reasons I have given, the Public Trustee's functions are not engaged. Although I received some submissions on this aspect of the Representative's Application, the matter was not fully argued and Advocate Le Tissier would wish to address me further before I could reach a conclusion. A preliminary observation I would make which I would invite him to consider before pursuing the matter further is that before amending the Trust Instrument, I would wish to see the draft of the proposition that would be put to any meeting of Unitholders in order to be satisfied that a meeting, if convened, would not result in further wasted time and cost.

Conclusion

62. The Current Trustee is already well advanced in the process of winding up the Fund, it has prepared an application to the Court on a Public Trustee v Cooper basis to address concerns arising from inadequacies in the register of members and details of subscriptions and redemptions in the Fund and it is conducting litigation against other service providers for the benefit of the Fund. In the absence of any *prima facie* evidence of any breach of trust on the part of the Current Trustee which could lead to any recovery by the Fund, there are no grounds for replacing it with the Public Trustee. Even if there were such grounds, the strength of the claim would have to be balanced against the additional costs and the delays that would result and would require very careful consideration before the Court could accede to the request.