

**IN THE ROYAL COURT OF GUERNSEY  
(ORDINARY DIVISION)**

**IN THE MATTER OF THE J AND K TRUSTS**

**AND**

**IN THE MATTER OF THE TRUSTS (GUERNSEY) LAW, 2007, AS AMENDED**

**Hearing Date (In Private): 22 March 2022**

**Judgment Handed Down: 7 April 2022**

**Counsel for the Trustee: Advocate A C Lyne**

**Counsel for Beneficiary A: Advocate J Le Tissier**

**Counsel for Beneficiary B: Advocate A M Davidson**

**Counsel for the Unborn and Unascertained Beneficiaries: Advocate M D P Jones**

**Counsel for the Protectors: Advocate J P Greenfield**

**Cases, texts and legislation referred to:**

The Trusts (Guernsey) Law, 2007, section 35(2)

In the Matter of the K Trust [2020] GCA 080

des Pallières v JP Morgan Chase & Co [2013] JCA 146

Re H Trust [2019] JRC 072

BA v Verité Trust Co Ltd re the E, L, O and R Trusts [2008] JRC 150

Re Buckton [1907] 2 Ch 406

Bristol & West Building Society v Mothew [1996] 4 All ER 698

Lewin on Trusts, paras 46-041 and 48-033

**Background**

1. I am concerned with the “J Trust” and the “K Trust”, the two trusts that were the subject of the Court of Appeal decision in In the Matter of the K Trust [2020] GCA 080. The two Trusts were established on the instructions of the economic settlor (“the Settlor”) when he was terminally ill. For the purposes of this judgment, it is sufficient to say that the principal beneficiary of the J Trust is the Settlor’s wife “Beneficiary A” and that initially the principal beneficiaries of the K Trust were the Settlor’s two young daughters, one of whom tragically died in August 2017 before reaching the age of majority so that the principal beneficiary is now her surviving sister, “Beneficiary B”. The Court of Appeal held that on the true construction of the Declaration of Trust constituting the K Trust, following the death of the sister, one half of her “share” of the K Trust fund, that is to say, one quarter of the K Trust fund is to be transferred to the J Trust backdated to the date of her death. The nature of the

assets held in the fund are such that ascertaining what is to be transferred and on what terms gives rise to some difficult issues.

2. The Settlor appointed the same Trustee to each of the Trusts and for the time being “the Trustee” remains as trustee of both although for reasons I will explain, it has agreed to retire from both Trusts. Following the handing down of the Court of Appeal decision, Advocates for Beneficiary A wrote to the Trustee on more than one occasion requesting that it resign on several grounds, including conflicts of interest that they claimed were disrupting the efficient administration of both Trusts. The Trustee took legal advice both from Leading Counsel (“the Opinion”) and from its Guernsey Advocates who advised that it was not in a position of conflict that would require its resignation from either of the two Trusts; any conflict that did exist arose from the terms of the K Trust Instrument and in the circumstances, there was little option but to apply to the Court for directions. Acting on that advice, the Trustee lodged the “Directions Application” on 1 July 2021 seeking a declaration and orders that the Trustee did not have an unauthorised conflict of interest and/or that any conflict was authorised by the terms of the Trust instruments and alternatively proposing methods for managing any conflicts. Beneficiary A responded to that Application on 20 August 2021 and lodged a cross- Application, the “Removal Application”, seeking the removal of the Trustee from both the J and K Trusts on grounds of conflict of interest and alternatively of breakdown of trust and confidence.
3. The hearing of the Directions Application and the Removal Application was rendered otiose when Beneficiary B’s Advocate wrote to the Trustee on 8 October 2021 requesting that it resign following which, on 18 October, the Trustee confirmed it would do so subject to certain conditions which were accepted by the Beneficiaries and the Protectors.

### **The Cost Applications**

4. All that remains to be decided from those two Applications are the costs. Paragraph 3 of the Directions Application sought an order for the:

*“Costs for the Trustee, Beneficiary A, Beneficiary B and the Protectors as the Court sees fit”.*

5. Paragraphs 3 and 4 of the Removal Application were:

*“3. That [Beneficiary A’s] costs of this Application shall be paid in equal proportions, or such other proportion as may be ordered by the Court, by the Trustee of the J Trust and the Trustee of the K Trust personally and on the indemnity basis.*

*4. That the Trustees of the J and K Trusts may not draw any fees or remuneration from the J and K Trusts nor may be indemnified for any legal fees, disbursements or other associated costs relating to the issue of whether they should cease to act as Trustees, as appropriate, from 11 September 2020 and that any such sums which have been paid to the Trustees from that date shall be repaid in full to the J and/or K Trust as appropriate.”*

### **The Legal Principles**

6. The legal principles were not in dispute, it was their application to the facts of the present matter that was controversial.

7. The terms of the Trust Instruments constituting both the J and K Trusts are similar and provide that the Trustee is entitled to be remunerated for its work done and for the costs and expenses it incurs and that it be indemnified for anything done or omitted to be done (except wilful and individual fraud or gross negligence or wrongdoing on its part) from the Trust funds. It also has a statutory right to be remunerated under section 35(2) of The Trusts (Guernsey) Law, 2007 which states that: *“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”* and section 71 of the same Law provides for the Court to *“order the costs and expenses incidental to an application to court to be paid from the trust property in such manner and by such persons as the court thinks fit”*. However, the right to indemnity can be lost if the trustee is guilty of misconduct but not through allegations of misconduct (des Pallières v JP Morgan Chase & Co [2013] JCA 146). There is a high threshold to surmount before a trustee will be deprived of its indemnity due to having acted unreasonably (Re H Trust [2019] JRC 072). Whilst those two authorities are both Jersey cases, I am satisfied that Guernsey law is the same.
8. Advocate Le Tissier, on behalf of Beneficiary A, relied heavily upon the Jersey Royal Court decision in BA v Verité Trust Co Ltd re the E, L, O and R Trusts [2008] JRC 150 as authority for the proposition that where a trustee was faced with a plain and obvious conflict of interest and failed to resign but applied to the court seeking directions it could not be remunerated and was not entitled to an indemnity from the trust fund. Although there are some similarities with the facts of E, L O and R, there are significant differences and I deal below with the issue of whether the Trustee, in the present matter, was faced with a plain and obvious conflict and acted unreasonably in not resigning when requested by Beneficiary A to do so.
9. The other authority to which I was referred is Re Buckton [1907] 2 Ch 406. There was general agreement that the Directions Application and the Removal Application were fundamentally in the first category identified by Kekewich J so that, unless the Trustee had unreasonably refused to resign, all parties’ costs had been necessarily incurred for the benefit of the trust estates and their costs should be paid from one or both of the Trusts.

### **The Issues**

10. The issues can be summarised briefly. First, had the Trustee unreasonably refused to resign when faced with plain and obvious conflicts of interest and/or by a breakdown of trust and confidence such that it should be deprived of its costs? The only party arguing for that was Advocate Le Tissier on behalf of Beneficiary A. The second issue was whether the costs of one or more of the parties should be borne solely by the J Trust as they had been caused by the allegations of Beneficiary A and related principally to that Trust? Third, if costs were to be shared between the J and K Trusts, were they to be shared equally? Fourth, an option raised by the Trustee was that the costs of some parties be paid solely from the J Trust and of others, solely from the K Trust.

### **The Alleged Conflicts of Interest**

11. It is not the purpose of this judgment to determine the substantive issues in the Directions Application and the Removal Application which were not pursued following the agreement between the parties that the Trustee retire from both Trusts. However, in order to address Beneficiary A’s claim that the Trustee be deprived of its remuneration and indemnity and that the Trustee pay her costs personally, I do have to consider whether there was a plain and obvious conflict of interest and/or such a breakdown of trust and confidence that the refusal

of the Trustee to resign amounted to misconduct on its part. Such was the situation in E, L, O and R where the trustee had agreed to retire before an application for its removal came to be heard but nonetheless the Royal Court of Jersey considered the position of a trustee who is requested to resign and went on to find that the trustee had been faced with “an elementary case of a plain and obvious conflict of interest”. The Court ordered that it be deprived of its costs notwithstanding that the Court held it had acted in good faith and had not been obstructive.

12. In doing so, the Royal Court of Jersey adopted the key aspects of the nature of a fiduciary duty identified by Millett LJ in Bristol & West Building Society v Mothew [1996] 4 All ER 698 which, in my judgment, are equally applicable under Guernsey law. The distinguishing obligation of a fiduciary was said to be the obligation of loyalty which gives rise to certain specific obligations referred to as the ‘double employment rule’, the ‘no inhibition principle’ and the ‘actual conflict rule’ all of which Advocate Le Tissier alleged had been breached by the Trustee in the present case. The causes of such breaches had been identified in the correspondence from the lawyers acting for Beneficiary A and each had been carefully considered by Leading Counsel in her Opinion to the Trustee.
13. Advocate Le Tissier highlighted the difficulties the Trustee would face in giving effect to the transfer of 25% of the K Trust fund to the J Trust. The nature of the trust assets does not render them easily transferrable. He said that on the one hand the Trustee will want to retain the greatest possible benefit for the K Trust but on the other hand it will have a duty to maximise the benefit transferred to the J Trust. An independent advisor had identified four possible methods of approaching the valuation with a significant value difference between them of \$860,000. The Trustee had itself identified the problems when it suggested there would be a need for Beneficiary A to negotiate with Beneficiary B the terms of an Inter-Creditor Agreement, a task that would be conducted by the respective trustees if the two sets of trustees were different. The mother and daughter should not, he said, be placed in such a position when it should be for their respective trustees to deal with these matters.
14. The Trustee was criticised by him for having taken a neutral position on the Construction Application and for having declined a request to appeal the first instance decision. Instead, Beneficiary A and Beneficiary B were both joined as parties to the Application and had to present their opposing cases when, again, separate trustees could have done so on their behalf which would have avoided a mother and daughter acting against each other.
15. There had been some historic issues in relation to personal expenditure and general administration where Beneficiary A considered that the Trustee had not been impartial but had favoured her daughter, as a result of which Beneficiary A had lost trust and confidence in the Trustee.
16. In my judgment, when faced with requests that it resign, the Trustee acted correctly in seeking legal advice. At paragraph 38 of E, L, O and R, the Jersey Royal Court said:

*“we think that a trustee faced with an allegation of conflict of interest is entitled to make reasonable enquiries and take legal advice on whether a conflict does in fact exist and whether it should retire. Whilst it should respond reasonably promptly to such an issue, it is not necessarily reasonable to expect it to reach a decision overnight or forthwith.....the test in connection with depriving Verite of its remuneration and the indemnity for its legal fees is one of unreasonableness.”*

17. The act of taking legal advice does not provide a cast iron defence. That is illustrated by the facts of E, L, O and R where the trustee was receiving legal advice but was found to have failed to recognise a plain and obvious conflict of interest. In the present case, the allegation put forward by Beneficiary A is that Leading Counsel and the Trustee's Guernsey Advocates were plainly wrong in the advice they gave. I do not agree. The Opinion from Leading Counsel considered each of the allegations and gave a carefully reasoned analysis of each.
18. Leading Counsel said that the requirement to transfer 25% of the K Trust fund is a duty imposed on the Trustee by the Settlor under the terms of the Trust Instrument although he gave no guidance as to how to value the assets, what asset or assets should be transferred and what mechanism should be adopted in order to effect the transfer. Yet the duty is to transfer 25%, no more and no less, so the Trustee was entitled to apply to the Court for directions, as it had done. There is no breach of fiduciary duty "*where the trustee does not place himself in a position of conflict of interest and duty, but is placed in that position by the settlor or the terms of the trust*" – Lewin on Trusts at para 46-041. Leading Counsel said: "*There cannot, in my view, be any breach of fiduciary duty in circumstances where the Trustee of the [K] Trust is doing not only what the [K] Trust instrument mandates, but also what the Court has directed*". Leading Counsel dismissed the risk of any conflict in the Trustee having to conduct confidential discussions separately with Beneficiaries A and B. The Court will be involved; it is not an exercise of discretion but the performance of a duty, she advised.
19. Regarding the possible Inter-Creditor Agreement, Leading Counsel's view was that it was unlikely to be difficult to agree although she had not seen a draft. One interpretation is that the Trustee of the J Trust had to accept the transfer on the terms proffered, without negotiation, because the Trustee of the K Trust had a duty to make the transfer. However, an alternative view might be that the Trustee of the J Trust had a discretion whether to accept the terms, in which case there could be a need for negotiations. If so, and if that were seen as self-dealing, the Court would have the power to authorise the self-dealing because the duty had been built into the terms of the Trust.
20. Thus, Leading Counsel advised, there would be ways of making the transfer without the Trustee having to retire. Given that the Trustee had been in place for over 13 years, and that any change of trustee would incur significant cost and delay, it is likely that the Court would not remove the Trustee.
21. In relation to the allegations involving the payment of family expenses, Leading Counsel concluded that she had seen nothing to suggest that the Trustee had been subject to any conflict of interest in determining what expenditure to authorise in the exercise of its discretion under the terms of the Trusts.
22. The allegations of partiality had not been sufficiently particularised for Leading Counsel to conclude that they were other than a misunderstanding on Beneficiary A's part and, in any event, they fell far short of anything that would require the Trustee to resign. The allegations of breakdown of trust and confidence had also not been fully particularised but in the absence of any conflict requiring the Trustee to resign, the existence of friction or hostility between a beneficiary and trustee is not itself a reason to remove the trustee.
23. Leading Counsel's concluding advice was for Beneficiary B to be asked whether she wanted the Trustee to resign and, in the meantime, to apply to the Court for directions, as envisaged in

the postscript to E, L, O and R.

24. It is not for me to decide the substantive issue, as that has been withdrawn following the request from Beneficiary B that the Trustee resign, a request made out of concern for the sensitivities of the situation and to avoid conflict with her mother; she had no concerns of any conflict of interest, and she retained trust and confidence in the Trustee. So, it is not for me to decide whether Leading Counsel was right in every aspect of her Opinion although I can say that I see no immediate reason to disagree with her. The question for me is whether the Trustee has acted unreasonably. The Trustee acted correctly in taking legal advice on the allegations so Advocate Le Tissier has to persuade me that it was unreasonable for the Trustee to have followed Counsel's advice or that the advice was so plainly wrong that no reasonable trustee would have accepted it. He has failed to do so.
25. The facts of the present matter are distinguishable from those of E, L, O and R. In that case, there was a genuine dispute between two brothers that was likely to result in a petition under section 459 of the Companies Act 1985 in which the trustee, Verité, as trustee of one brother's set of trusts would be the complainant and as trustee of the other brother's set of trusts would be a possible respondent. Verité found itself, during the course of the administration of the trusts, in a position where, as a result of a family dispute, it could be on both sides of a contested hearing in a foreign court. Whereas, in the present matter, the issues involving and arising from the duty to transfer 25% of the assets of the K Trust to the J Trust arise from the terms of the Trust Instrument and the fact that in establishing the two Trusts, the Settlor appointed the Trustee as trustee of both. There will be an application to the Court to approve the details of the transfer, but such an application is very different from the type of hostile litigation anticipated in E, L, O and R.
26. I am satisfied that the Trustee acted correctly in following Leading Counsel's advice, making the Construction Application and asking the Royal Court to decide who should be convened to that Application. The Court ordered that Beneficiary A and Beneficiary B both be convened on the basis that they were the persons economically interested in the Trusts and thereafter the Trustee adopted a neutral position, in accordance with its legal advice.
27. There is nothing in the other allegations put forward by Beneficiary A that would justify an order depriving the Trustee of its remuneration and denying its indemnity in respect of the legal fees and disbursements properly incurred. For the same reasons, there are no grounds for ordering that all of Beneficiary A's costs be paid by the Trustee personally.
28. I note in passing that none of the lawyers acting for Beneficiary B, the Unborn and Unascertained Beneficiaries and the Protectors argued that the Trustee should be denied its fees and disbursements. None of them considered that the Trustee had acted unreasonably in refusing to resign.

### **The Allocation of Costs**

29. The next issue is to decide how the costs are to be allocated between the two Trusts. All parties are agreed that the Directions Application and the Removal Application fall within the first category of the classification of proceedings in Re Buckton, summarised at paragraph 48-033 of Lewin on Trusts as:

*“Proceedings brought by the trustee to have the guidance of the court as to the*

*construction of the trust instrument or some other question of law arising in the administration of the trust. In such cases the costs of all parties are, whatever the outcome, usually treated as necessarily incurred for the benefit of the trust fund and ordered to be paid out of it. But a trustee is at risk as to costs if he commences a construction claim unnecessarily, although he will be given credit if he does so on advice.”*

30. A number of options were presented in argument. The Trustee submitted that the allegations affected the administration of both the J and K Trusts hence the Directions and Removal Applications were in respect of both Trusts. It sought an order that Beneficiary A recover her costs from the Trusts until 3 November 2021 but be denied her costs after that date and should pay the other parties’ costs from 3 November 2021. It was neutral as to the apportionment between the two Trusts but said an appropriate order could be a 50:50 split. The Trustee was also neutral on the question of which Trust or Trusts should bear Beneficiary B’s costs and the proportion in which they be shared. It suggested that the costs of the Protectors and of Advocate Jones be allocated on the same basis as the Trustee’s costs. An alternative proposal was that Beneficiary A’s costs be paid from the J Trust and those of Beneficiary B from the K Trust with all other costs allocated between the two Trusts probably on a 50:50 split.
31. Beneficiary A submitted that if she had failed to persuade me to order costs against the Trustee personally, there was no reason to distinguish between the two Trusts and all parties costs should be paid out of the J and K Trusts equally.
32. Beneficiary B argued strongly that all costs should be borne by the J Trust as the Directions and Removal Applications were driven by Beneficiary A and related primarily to the J Trust. Advocate Jones on behalf of the Unborn and Unascertained Beneficiaries and Advocate Greenfield on behalf of the Protectors also submitted that the costs should all be borne by the J Trust.
33. The purpose of a Buckton category 1 application was described by Kekewich J as:

*“In a large proportion of the summonses adjourned into Court for argument the applicants are trustees of a will or settlement who ask the Court to construe the instrument of trust for their guidance, and in order to ascertain the interests of the beneficiaries, or else ask to have some question determined that has arisen in the administration of the trusts. In cases of this character I regard the costs of all parties as necessarily incurred for the benefit of the estate, and direct them to be taxed as between solicitor and client and paid out of the estate.”*
34. The question for me to decide is whether the Directions Application and the Removal Application were lodged in Court for the benefit of both the J and K Trusts or solely for the benefit of the J Trust. Both applications were driven by Beneficiary A but was she doing so in the interests of the Trust of which she was the primary beneficiary or in the interests of both Trusts?
35. It is significant that the conflict of interest she raised was in effect a conflict between her personal interests and the interests of her daughter and remoter issue. It was not a conflict between the family and an unconnected third party. If it were with an unconnected third party, it would be understandable that she would want to protect the value of the family’s assets by ensuring that the third party was not overpaid. The conflict of interest was raised

in a letter to the Trustee dated 11 September 2020 in which Beneficiary A's solicitors, Taylor Wessing, wrote that "[Beneficiary A], as primary beneficiary of the [J] Trust, will want to ensure the maximum sum is transferred to the [J] Trust". In my judgment, that sentence sums up Beneficiary A's motivation and explains why the Directions Application and the Removal Application became necessary. Beneficiary A was seeking to maximise the value of her Trust and did not want the risk that the K Trust, the Trust for the benefit of her daughter and remoter issue, might be enriched at her expense. Similarly, in making the allegations about the Trustee's failure adequately to advance arguments in favour of the J Trust in the Construction Application, she was concerned with her Trust and her personal interests.

36. The Directions Application and the Removal Application referred to both Trusts. In light of the allegations that Beneficiary A was making, I can understand why the Trustee considered that it made sense for the Court to consider both Trusts even though she had not explained why it was necessary to remove the Trustee from the K Trust as well as the J Trust. If there had been an unauthorised conflict of interest that could not otherwise be managed or a breakdown of trust and confidence between Beneficiary A and the Trustee, those issues could have been resolved by removing the Trustee from the J Trust and not the K Trust.
37. I am therefore persuaded that, fundamentally, the Directions Application and the Removal Application were advanced for the benefit of the J Trust and hence that the costs of all parties should be borne by that Trust.
38. The Trustee sought a cut-off date of 3 November 2021, after which the costs be borne by Beneficiary A personally. The effect would be that the costs of the costs hearing and preparatory work be borne by her on the basis that it has been unnecessary because the issues should have been settled when it was agreed that the Trustee shall resign. The Trustee acknowledges that, in all likelihood, if I were to make that order, Beneficiary A would ask for a distribution from Trust J to enable her to pay. In my judgment, there is a high hurdle to cross before making an order of that sort against a beneficiary personally. Whilst I agree that the whole issue is regrettable, I am not minded to say that it has been so unreasonable or unnecessary as to justify an order against Beneficiary A.
39. Beneficiary A and B have suffered more than enough family tragedy. In these proceedings, there is an underlying tension between the two of them. I very much hope they can put it all behind them and be able to enjoy the loving relationship that every mother and daughter would wish to have.
40. In summary, I order that the costs and disbursements properly incurred by all parties in connection with the Directions Application, the Removal Application and this costs hearing be paid from the J Trust.

**Sir Richard Collas**  
**Lieutenant-Bailiff**

**7<sup>th</sup> April 2022**