The Guernsey Court of Appeal held that a contractual option (a chose in action) is trust property, and trustees owe duties to take prudent steps to safeguard its value. The trustee's gross failure to ensure an orderly handover, where it had practical control, amounted to a breach of duty, and the appeal was allowed.

[2025]GCA091

IN THE GUERNSEY COURT OF APPEAL

(CIVIL DIVISION)

Court of Appeal Case No. 599

23rd December 2025

BEFORE:

Clare Montgomery KC, President;

Roddy Dunlop KC, JA; and

The Rt Hon Dame Julia Macur, JA

ON APPEAL FROM THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

BETWEEN:

PILATUS (PTC) LIMITED

Appellant

and

RBC TRUSTEES (JERSEY) LIMITED

Respondent

Advocate A M Davidson for the Appellant

Advocate E R Gray for the Respondent

INTRODUCTION AND FACTUAL SUMMARY

1. The case arises from the retirement of the defendant - RBC Trustees (Jersey) Limited (RBC) – as trustee of the Shallan Trust on 30 October 2015. The Claimant, Pilatus (PTC) Limited ("Pilatus"), is the current trustee, and alleges that RBC breached its duties by resigning as trustee in circumstances where, in co-ordinated agreement to divest the trust and its in-house companies of any connection to the Shallan Trust by 31 October 2015, the trustee resigned and its house companies resigned from the boards from the boards of Primefuels Investments Limited ("PIL") and Primefuels Holdings Limited ("PFHL") — entities connected to the trust

structure — without first securing suitable replacements. Pilatus argue this conduct was grossly negligent and caused prejudice to the trust's interests in the Primefuels business structure.

2. The case went to trial on the question of breach of trust only (reserving for later determination, if necessary, questions of causation and loss) before the Bailiff. There was little dispute as to the factual background, which may be summarised as follows.

3. The Shallan Trust, a Guernsey discretionary trust, was established in 1990, with the trust fund comprising shares in Shallan Group Holdings Ltd ("SGHL"), which in turn wholly owned Shallan Overseas Limited ("SOL").

4. SOL originally wholly owned Shallan Overseas Investments Limited ("SOIL"), which in turn held a 50% stake in PIL. PIL owned 85% of PFHL, with the other half of PIL owned by New Rodina (on behalf of a Mr. Abdulla). PFHL was the main Primefuels group holding company, operating in East Africa. It in turn had a number of wholly owned subsidiary companies.

5. In February 2011, SOL sold SOIL to Hanif Somji ("Mr Somji"), a beneficiary of the Shallan Trust. The purpose of the sale was to enable Primefuels Kenya Ltd (a wholly owned subsidiary of PFHL) to obtain commercial funding without having to provide due diligence information about all the beneficiaries of the Trust. The sale expressly contemplated an option to reacquire SOIL, and indeed in July of that year, SOL and Mr Somji entered into a Put & Call Option Agreement, giving SOL the right (or, if called upon by Mr Somji, the obligation) to repurchase SOIL within a specified window (February 2015–February 2017). In the meantime, SOIL, PIL, and PFHL ceased to be directly or indirectly owned by the trust or its subsidiaries: the sale of the shares in SOIL to Mr Somji had divested the trust of those assets in their entirety, leaving only the Option.

6. RBC's wholly owned in-house service companies (RBC Directorship and RBC Corporate Services) acted as board members and administrator for PIL and PFHL until 30 October 2015. The same people involved as directors in RBC were the directors of RBC Directorship and RBC Corporate Services.

7. As part of its resignation, RBC arranged for its subsidiaries to resign as directors/secretary from PIL and PFHL in co-ordination with its own resignation. Replacement appointments were arranged and were intended to be Stonehage Fleming entities, however these appointments failed because (a) in the case of PIL, a BVI company, there was need for consent from both directors, and Mr. Machan (representing New Rodina) refused to consent; and (b) for PFHL (a Mauritian company), the board meeting held to appoint replacements was inquorate and thus ineffective.

8. As a result, control of PIL and PFHL shifted to the New Rodina side, with alleged loss of representation for the trust's interests.

9. The Option was exercised by SOL in 2017, resulting in the return of SOIL to the trust. By then, it is said (though this would remain a matter for determination at a trial on *quantum*), the loss of control in PIL and PFHL had resulted in a devaluing of SOIL, to the loss of the trust.

10. The claim failed because the Bailiff concluded that the complaints did not relate to trust property. The Bailiff found that the sale of SOIL to Mr Somji was such as to mean that the companies were not trust property, saying:

> "123. I do not find that the Put and Call Option Agreement is anything other than a chose in action. It was a contractual right to acquire (or require SOL to acquire) the shares in SOIL. Until clause 3 could be exercised, Hanif Somji was the legal and beneficial owner of SOIL and he remained as such until one of the options was

exercised. Whilst it is apparent that the option was exercised in January 2017, the time during which it was capable of being exercised might have passed without either option being exercised. As such, Hanif Somji would have remained the owner of SOIL….

124… As a contractual right, I do not consider that [the Option] meant that SOL had any ownership interest in SOIL and I do not regard the Put and Call Option Agreement as creating the deemed vesting in SOL of the shares in SOIL. In short, the shares in SOIL were not "*trust property*".

125. … Because the option was not exercised until January 2017, it follows that I cannot find that there was any breach of trust on the part of the Defendant because, at the time of its retirement, SOIL did not form a part of the Shallan Trust.

126. … the gross negligence alleged against the Defendant … all relates to breaches involving PIL and/or PFHL. In respects of all the duties it is alleged the Defendant breached, these only apply in respect of property falling within "*property held on trust*". The sale of SOIL to Hanif Somji in February 2011, without the option having been exercised to restore SOIL as part of the trust property before the retirement of the Defendant and so covering the consequences relating to PIL and/or PFHL is, in my judgment, sufficient to dismiss the action on liability. For the reasons I have given, I am not persuaded that the shares in SOIL in 2015 can be regarded as being deemed to be held or vested in the Defendant at that time. The shares in SOIL were held or vested in Hanif Somji instead and that means that they were not trust property.

127. As a result, the Plaintiff's claim for gross negligent breach of trust has to be dismissed."

11. The Bailiff considered that duties as trustee were owed strictly in respect of property currently held in the trust fund. Since SOIL, PIL, and PFHL were not held in that way at the relevant time, no fiduciary duty in respect of them (or their boards) applied to RBC as trustee at that time.

12. The Bailiff concluded that the "overarching" trustee duty to act *en bon père de famille* (i.e., as a prudent professional) runs only in respect of trust property; it does not extend to managing non-trust assets simply because their fortunes may affect the value of trust assets (such as the Option).

13. On the premise that he was wrong in that regard, the Bailiff analysed the concept of gross negligence as established in Guernsey case law, and found that the defendant's conduct (if duties had attached) would have been grossly negligent, particularly as regards holding an inquorate meeting at PFHL and effecting resignations without safeguarding representation for the trust's interests. It was agreed at trial, and on appeal, that the trust deed meant that liability for breach of trust would only arise on proof of gross negligence.

14. However, because there was no duty capable of being breached (in relation to non-trust assets), questions as to gross negligence and exculpation in the trust deed did not arise.

15. Accordingly, the claim failed because, as at the date of the alleged breach, SOIL, PIL, and PFHL were not trust property: RBC as outgoing trustee owed no trustee duty (as claimed) regarding board appointments for those companies.

16. Pilatus appeals to this Court, contending that the decision on SOIL as a trust asset is wrong in law and pointing out that, had the Bailiff found otherwise, he would have sustained the claim.

17. RBC cross appeal on the Bailiff's findings, arguing as follows:

18. RBC asserts that it did not itself provide directorship or company secretary services to PIL or PFHL, whether *qua* trustee or otherwise. Instead, those services were provided contractually by two separate group companies — RBC Directorship Services (CI) Limited and RBC Corporate Services (CI) Limited (the "RBC Corporate Officers"). The trust instrument did not require RBC (as trustee) to provide those services. Accordingly, even if PIL and PFHL were to be viewed as trust assets, any failings in company administration could not be attributed to RBC as trustee.

19. RBC contends that the RBC Corporate Officers' provision of corporate services was governed by written terms and conditions (T&Cs), which expressly allowed those entities to resign from office at any time and without giving reasons. The Bailiff correctly found the T&Cs permitted such resignations, and should have concluded that — on their true construction — they allowed resignations "at any time." The existence of these contractual rights was incompatible with any duty on RBC as trustee to prevent the resignations or to secure replacements before resignation.

20. RBC argues the Bailiff was wrong to treat the knowledge or conduct of individual officers acting for multiple group companies as "fixing" RBC (as trustee) with liability. The RBC Corporate Officers were not agents of RBC in their capacities as directors or secretaries of PIL and PFHL. There was no basis for inferring an agency, no pleaded vicarious liability, and merely having common individuals across companies does not suffice.

21. Moreover, RBC submits the Bailiff was wrong to find gross negligence, as allegations were not pleaded with the required precision. The focus on what individuals did in the course of resigning from directorships did not amount, clearly or causally, to grossly negligent trustee conduct; nor was it adequately specified what RBC "should have done and when" given the factual obstacles (such as the inability to secure consent for replacements and lack of control over PIL/PFHL post-sale).

THE BAILIFF'S FINDING THAT SOIL, PIL, AND PFHL WERE NOT TRUST ASSETS

22. Pilatus submits that the Bailiff erred in law in finding that RBC Trustees owed no relevant duty as at 30 October 2015 because SOIL, and thus PIL and PFHL, were not "trust property" at that time. The argument is advanced that — irrespective of the strict proprietary position — the trust fund was economically and functionally invested in those companies *via* the structure, and that, as a result, RBC Trustees had a duty to protect that investment and grossly failed to do so by permitting the resignations from the boards without replacement appointments.

23. Pilatus contends that the rights under the option agreement, being a chose in action, mean that SOIL should be regarded as "trust property" for the purposes of the duties owed, given their economic centrality to the Trust's value.

24. Counsel for Pilatus relied on: (a) the structure and intentions revealed in the correspondence; (b) a "prudent man" standard of care and use of control or influence to protect trust investments even where not strictly a shareholder; and (c) the precedent of *Bartlett v Barclays Bank Trust* (which holds that a trustee's duty extends, or may depending on the precise facts extend, to use of powers to protect trust property).

25. The respondent submits that, after 25 February 2011, following the sale of SOIL to Hanif Somji, SOIL, PIL, and PFHL were no longer trust assets. The Trust's only interest was in the option agreement held by SOL, and as a matter of law, this did not confer proprietary rights over SOIL, PIL, or PFHL.

26. The distinction between vertical and "economic" trust property is denied as lacking any support in law or authority: trustees owe their fiduciary duties in respect of assets held on trust — not in respect of assets that have lawfully ceased to be so, regardless of their effect on value.

27. The respondent denies any "control" over the boards of PIL and PFHL post-transfer, and denies any basis for attributing the acts of corporate service providers (RBC subsidiaries) as agents or instruments of the trustee.

OUR ASSESSMENT

28. The Bailiff (at [118]), and indeed parties, have focussed on the definition of "trust property" in Section 80 of The Trusts (Guernsey) Law, 2007, as follows:

> "trust property" means property held on trust…

29. We do not think that this should be the true focus. Rather, we find more helpful the definition of "property" itself in the same Section, as follows:

> "property" - (a) means real and personal property of any description, wherever situated, and any share, right or interest therein, and ***includes tangible or intangible property and any debt or thing in action***,
>
> (b) in relation to rights and interests, includes rights and interests whether vested, contingent, defeasible or future…

30. Moreover, the 2007 Law provides, at Section 7. (1):

> "Any property may be held on trust."

31. Accordingly, there is no limit to the kind of property which may be held on trust; and the property which can be held on trust expressly includes any "thing in action".

32. Here, the Option has been – to our mind correctly – described as a chose in action (or, to use the wording deployed in Section 80, a "thing in action"). As such, it is property; and, as property, it can be held on trust. That is what happened here.

33. The Option was potentially valuable trust property. It could be exercised any time between February 2015 and February 2017. At the time of resignation (October 2015), it was capable of exercise but had not yet been exercised. As would have been (and indeed as was, for the reasons discussed below) apparent to RBC, if anything was done by the trustee which might imperil the value of the Option, that would (or at least might) cause loss to the trust.

34. That being so, on what basis can it be said that the fact that SOIL itself was not a trust asset means that RBC owed no duties in respect of the Option to reacquire SOIL?

35. We can find no such basis. Obviously, there is a difference between the scope of duties on a trustee when considering assets actually held and those which might prospectively be acquired. In particular, if there was an Option to acquire an asset over which the trustee had no power or influence, then the trustee could hardly be criticised for failing to take steps to protect that asset. However, that is not this case. Here, the structures put in place for SOIL and its subsidiaries, and the acquisition of the Option to reacquire it after the sale in 2011, were designed to allow trustee protection of SOIL. This, and RBC's awareness of the position, is clear from the letter of 15 December 2014, in which RBC's intention to resign was intimated. That letter includes the following:

> "As part of our resignation as trustee to the Trust, we will arrange, among other things, for the orderly transfer to a new financial services provider of the Trust's banking and/or investment relationships with our affiliates in RBC Wealth Management and the

closure of relevant accounts ***and where applicable relationships or accounts maintained for relevant entities in the Trust structure as set out below***…

Primefuels Investments Limited

Primefuels Holdings Limited…

Shallan Overseas Limited…

Shallan Overseas Investments Limited…

We understand that this may take some time to complete, but we hope to be able to work with you and your advisors over the coming months to ensure a smooth handover of responsibilities to the **new trustee and applicable service providers** as efficiently as possible"

36. Given what we have said already, we consider that RBC was correct to identify, as it did, PIL, PFHL and SOIL as "relevant entities in the Trust structure" and to recognise the role of the RBC Corporate Officers as essential service provides in the structure. The Option made the corporate service providers and the entities they served relevant to the trust, as their financial health was relevant to the value of the Option itself which, as we have said, was trust property.

37. This is also apparent from the background to the sale of SOIL and the creation of the Option. The purpose of the sale was to enable Primefuels Kenya Ltd to obtain commercial funding without having to provide due diligence information about all the beneficiaries of the Trust. The purpose of the Option Agreement was – as RBC Trustees explained at the time – to ensure that "the trustees will be in no different position than had they continued to have held [SOIL] within the Shallan Trust structure": see the letter dated 5 August 2011 from the then Managing Director of the Respondent to Hanif Somji. The Bailiff thought that this betrayed a misunderstanding of the legal position, but we conclude otherwise. On the contrary, it seems to us that the letter of 5 August 2011 accurately recognised the continuing importance of SOIL, PIL and PFHL to the trust. Indeed, the only sensible conclusion is that this is precisely why the decision was taken to have the RBC service companies retained on the boards of PIL and PFHL. If those companies were truly divorced in their entirety from the interests of the trust, there is no reason why RBC entities should have had any involvement on their boards. The true position is that the sale of SOIL and the Option to reacquire it were put in place to allow Primefuels Kenya Ltd, a wholly owned subsidiary of PFHL, to obtain commercial funding, to the benefit of PFHL and PIL, which would in turn (it would have been supposed) enhance the value of SOIL itself as 50% shareholder in PIL. The sale of SOIL was thus a (perfectly understandable and legitimate) device to allow a subsidiary company to grow without excessive due diligence requirements, whilst at the same time retaining the ability of SOL, and thus the trust, to benefit from that growth.

38. We are fortified in this conclusion by the following considerations.

39. First, the decision of the High Court of Australia in *Elder's Trustees v Higgins* (1963) 113 CLR 426 makes it clear that a trustee owes duties in respect of an option. If a trustee can be liable in breach of trust for failure to exercise an option, we struggle to see the basis upon which the same trustee would not be liable for allowing, by gross negligence (if such is established), financial harm to be suffered to that same option.

40. Second, we consider that any attempt to draw such a distinction would be artificial. We find helpful the comments of Bannister J in the High Court of the British Virgin Isles in *Appleby Corporate Services v Citco Trustees,* 20 January 2015, in which the only trust asset, technically

speaking, consisted of shares in a company. In rejecting the possibility that underlying securities held by that company fell to be excluded from the notion of trust property, Bannister J said:

> "I had asked myself whether these arrangements amounted to a delegation by Citco pursuant to paragraph 4(q)7, since the assets placed under the management of Consultatio were not, strictly speaking, assets of the Trust. Neither Counsel would accept that that was more than a purely technical distinction. On reflection, I think that they were right. Under the IMA Citco explicitly reserved rights of overall supervision and control over the underlying assets, making any distinction between assets held legally by Citco in its capacity as Trustee and the underlying securities held by the Company, upon which the Trust Fund depended for its value, artificial."

41. Similarly here, we consider that a distinction between SOL (clearly trust property) and SOL's option to reacquire SOIL would also be technical and artificial and, as such, unwarranted.

42. We acknowledge, of course, that there are significant factual differences between these cases and the present. In *Elder's Trustee*, the trust had the legal power to exercise the option for the direct benefit of the estate and failed to do so. Here, there is no criticism that the Option was not exercised; rather the argument is that it provided a contractual right to reacquire SOIL, whose exercise (and value) depended on maintenance of a particular factual situation (i.e. board composition in downstream companies). The *Elder's Trustee* and *Appleby* approaches must be read with these caveats in mind.

43. Third, like the Bailiff we find relevant the comments of Lord Upjohn in *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291 at 314, albeit for different reasons. His Lordship said:

> "The grantee of an option has not, in reality, an estate in the property. Of course, he has an interest in it which can be measured by saying that he can obtain an injunction preventing the grantor from parting with the property except subject to the option and in this case having regard to the express terms of clause 2 from parting with the property at all; and that he can enforce the option against all subsequent owners except purchasers for value without notice. Essentially, however, an option confers no more than a contractual right to acquire property on payment of a consideration, and that seems to me a very different thing from the ordinary case where the doctrine of a resulting trust has been applied."

44. Lord Upjohn was there dealing with questions of resulting trusts. He was not considering what sort of property may be held on trust. When he said that "the grantee of an option has not, in reality, an estate in the property", he was talking about the property which is the subject of the option. He was not saying that the option *itself* is not property. As already noted, any property can be held on trust; and "a contractual right to acquire property on payment of a consideration" is clearly property.

45. That being so, we cannot agree with the sole reason upon which the Bailiff found that the claim failed. The Option was trust property. It is orthodox, and not here disputed, that the trustee owes irreducible core duties — including acting *en bon père de famille* — with respect to all forms of trust property.

46. However, while the duties attach to the property actually held, the law is less clear as to whether duties owed regarding a chose in action (here, the expectation of regaining SOIL *via* the option) can require positive steps by the trustee to manage or safeguard assets to which the chose relates, but which are not themselves trust property — for instance, requiring action "downstream" to prevent the erosion of the value of the option's subject matter (SOIL/PIL/PFHL) when the trust does not hold those shares at the material time. That is a rather different question from the primary one of whether the Option was trust property. Absent real,

legal, or practical abilities to act to prevent the erosion of value downstream, the trustee cannot be fixed with an impossible duty; only where it has meaningful influence should positive action be required.

47. Albeit not stated in terms, we read the Bailiff as having held that because the Option gives only a contractual right — a chose in action — therefore the trustee's duties run only to the "property held on trust," i.e., to the enforcement, preservation, and realization of the Option itself, not to the management or board composition of companies currently outside the trust's direct or indirect ownership. However, we do not find that a compelling argument. Fiduciary duties are purposive and the essence of the no-exculpation rule for gross negligence is to prevent trustees from escaping consequences for failing to act reasonably to safeguard trust assets.

48. If the trustee knows, as here, that the value of the trust's chose in action is integrally bound up with board control of downstream entities, and that only a prudent handover will prevent that value vanishing or being diluted, then to do nothing (and actively permit a known risk to materialize) seems at odds with the irreducible core obligation of prudent stewardship of all trust property — even non-physical, contractual assets.

49. Lewin on Trusts states as follows:

> "**34-050** Trustees must do more than secure the title to and custody of the trust property. They must preserve and manage it for the benefit of the beneficiaries… property in its existing state of investment calls for preservation and management….
>
> **34-056** Trustees with shareholdings which are small in proportion to the whole issued share capital of the company—as will usually be the case with holdings in publicly quoted companies—may have to consider from time to time how to exercise their voting rights, but in general their most important duty in connection with the management of the trust property will be to keep the suitability of the particular investment under review. ***But a shareholding may be large enough to confer control of the company or a substantial measure of control. In such circumstances, rather different considerations apply***:
>
> (1) It is not enough for the trustees to leave the running of the company wholly to the directors. They are under a duty, usually called the *Bartlett* duty after the best-known decision, to keep themselves informed about the company's affairs and about the directors' plans for the future. They may arrange to receive a report from the board at regular intervals or themselves appoint a representative to the board; the mechanics are unimportant.
>
> (2) They must be willing to act on the information so provided and will be liable for breach of trust if, for example, they fail to prevent the dissipation of the company's assets in a speculative and ill-considered venture."

50. Similarly, in *Bartlett v Barclays Bank Trust Co Ltd*, [1980] Ch. 515, Brightman J said:

> "I turn to the question, what was the duty of the bank as the holder of shares in BTL and BTH? I will first answer this question without regard to the position of the bank as a specialist trustee, to which I will advert later. The bank, as trustee, was bound to act in relation to the shares and to the controlling position which they conferred, in the same manner as a prudent man of business. The prudent man of business will act in such manner as is necessary to safeguard his investment. He will do this in two ways. If facts come to his knowledge which tell him that the company's affairs are not being conducted as they should be, or which put him on inquiry, he will take appropriate action. Appropriate action will no doubt consist in the first instance of inquiry of and

> consultation with the directors, and in the last but most unlikely resort, the convening of a general meeting to replace one or more directors. What the prudent man of business will not do is to content himself with the receipt of such information on the affairs of the company as a shareholder ordinarily receives at annual general meetings. Since he has the power to do so, he will go further and see that he has sufficient information to enable him to make a responsible decision from time to time either to let matters proceed as they are proceeding, or to intervene if he is dissatisfied."

51. We consider that it is consistent with this guidance to hold that, where it is grossly negligent not to, the trustee's duty regarding trust property includes rational, necessary steps to safeguard its value — even if those steps require action affecting property no longer directly held, when the connection is clear, foreseeable, and wholly or substantially within the trustee's practical control (*per* Lewin at 35-056).

52. We are conscious of the need to avoid imposing impossible or unduly onerous burdens on trustees. In many cases, imposing duties with regard to non-trust assets would be unprincipled and unworkable. However, as it seems to us the necessary control mechanisms, confining trustee responsibilities to what is reasonable in all the circumstances, come in the concept of negligence (or, here, gross negligence), and not in the notion of trust "property".

53. Trust property is a binary question: property is either trust property or it is not. Here, for the reasons given, we consider that the Option was plainly trust property.

54. It is important that we stress the limits inherent in this finding. Although the Option is clearly property capable of being held on trust, the duties owed by a trustee in respect of such a chose in action may differ from those owed in respect of legal title to realty or shares. Distinctively, the duty is to consider the value of the Option and take prudent steps to preserve it, as with other trust assets, but this does not automatically translate into a duty to manage or control non-trust assets, unless the circumstances of the Option — such as its practical effect, the trustee's retained powers and the trust instrument — warrant such an extension.

55. The controls necessary to keep trustee exposure within proper limits lie in the concepts of negligence or gross negligence. Negligence is a flexible concept that will be intensely fact-dependent. A trustee considering an Option to purchase assets over whose value he has no control or influence whatsoever, or where he could not reasonably foresee that action or inaction on his part would have an adverse effect, is highly unlikely to be vulnerable to a charge of negligence of any sort. But this is where the boundaries are appropriately struck, and not in the anterior question of what is trust property. Once an asset is trust property, as the Option here clearly was, duties arise. Whether they have been breached will turn on the precise facts of the case in hand. As will become apparent, highly relevant in this respect is the fact that arrangements had been made to allow the protection of the value of the Option.

56. A key factor is thus that of control or influence. By "control" we do not mean necessarily the ability to dictate. As the passage from Lewis cited earlier shows, substantial control is enough, and we would say the same of the ability to influence or to take other actions. A trustee's positive duty to act in relation to non-trust property to preserve the value of trust assets (such as the Option) only arises where: (a) the trustee's powers or influence are sufficient to realistically affect the outcome, (b) it is reasonable and practical for the trustee to take such steps, and (c) there is no legal or third-party obstacle that would render prudence or action futile or disproportionate. As we have stressed already, it is important that the law should not impose duties which are impossible to fulfil.

57. Moreover, and again anticipating a point to be discussed further below, it is important not to conflate questions of breach of duty with questions of causation. A finding that a trustee ought to have taken certain steps, or indeed not to have done certain things, is not determinative of

the question of causation. If in the particular circumstances of any given case the (grossly) negligent act or omission would have made no difference to the result which obtained, then the case will fail. But that is a question of causation, with which the Bailiff was not concerned in the restricted trial which took place here.

58. Allied to this is RBC's argument that the duty to preserve or enhance value was excluded. The Bailiff held that clause 26 of the trust instrument excluded the statutory duty to preserve/enhance value. We agree with his reasoning on that point, but also with his subsequent conclusion that this was not determinative of the question. He held as follows:

> "131. … the Plaintiff pleads that the Defendant owed a duty to preserve and protect the trust assets. Clause 26 of the trust instrument excludes what was section 19 in the 1989 Law (and is now section 23 in the 2007 Law) from applying to the Settlement. As a result, there was no duty placed on the Defendant to preserve or enhance the value of the trust property. I am satisfied, therefore, that this was effective to remove from the Defendant any such duty and that this meant that there was no corresponding duty of care in the manner of fulfilling that duty… This duty is not engaged and so cannot have been breached.
>
> 132. Section 22 of the 2007 Law cannot be excluded. The duty to act *en bon père de famille* is one of the foundation stones of the customary law and was codified in the 1989 and 2007 Laws. As explained in para. 20 of Lord Clarke's judgment in the *Spread Trustee Co Ltd v Hutcheson* case, "the duty is to act as a reasonable and prudent trustee would act, that is with reasonable care and skill"… it is, in my view, possible for that overarching duty to be breached in such a way that it amounts to gross negligence, turning on the degree of the seriousness or flagrancy of the negligence involved."

59. Before us, the Respondent conceded that exclusion of the s.26 duties could not elide liability for gross negligence. We agree. The duty to preserve and protect the trust assets was excluded; but that does not elide or restrict the duty to act *en bon père de famille.* If someone acting *en bon père de famille* would have acted in a particular way, and if failing to act in that manner would have been grossly negligent, then that is actionable – even if the failure related to the value of the trust property. Otherwise, excluding the duty to preserve or enhance the value of the trust property would have the effect of, impermissibly, excluding liability for gross negligence – something which RBC here accept cannot be done.

60. Accordingly, the appeal must be allowed.

61. That being so, the Plaintiff is entitled to judgment, unless the cross-appeal succeeds. We will thus turn shortly to the grounds of cross-appeal.

62. Before doing so, we should address Pilatus' criticism of the Bailiff's ruling that RBC could not be criticised for what it did after resignation. We see nothing in that criticism. The principle that a trustee cannot, by resigning, defeat accountability or escape liability for breaches committed during its tenure is clear. But liability cannot be based on things happening after retirement unless the retiring trustee still has an ability to influence trust property or is complicit with a co-trustee's breach at that time, which the Bailiff found not to be the case here (and there is no suggestion the resignation was motivated to escape liability). Moreover, and in any event, the core complaint here is that RBC resigned without ***first*** effecting an orderly handover with regard to PIL and PFHL. The complaint is thus focussed on what was done (or omitted) before resignation, not after.

CROSS APPEAL: GROSS NEGLIGENCE

63. If, contrary to the Bailiff's primary conclusion, trust property was in play (as we have held), the Respondent cross-appeals, arguing that the finding of gross negligence is itself legally unsound, essentially for these reasons:

    (1) First, the Defendant did not provide directorship or company secretary services. The legal duties of the RBC Companies in those roles are distinct, and the trust instrument did not require the trustee to provide such services.

    (2) Second, the Bailiff was wrong to treat the acts of the same human personnel in different corporate guises as attributable to the trustee. This collapses fundamental corporate law distinctions.

    (3) Finally, even if some duty applied, Pilatus did not adequately particularise — either factually or legally — what the trustee should have done differently, given the refusal of Mr Machan to approve appointments and the polyvalent contractual and legal rights of the parties; nor was the sequence of events so obviously grossly negligent, rather than merely error or haste in a multi-entity context.

64. We are not convinced by these criticisms. As a starting point, the respondents face a fundamental hurdle given that an assessment of negligence, gross or otherwise, is an evaluative question which turns on the fact-finder's impression of the evidence as a whole, and which will not lightly be overturned on appeal. If authority for that is needed, it can be found in the recent decision of this Court in *Kazzaz v Standard Chartered Trust* [2024] GCA 058, at [18]-[20]. As Lewison LJ memorably said in *FAGE UK Ltd v Chobani UK Ltd* [2014] FSR 29, para 114 (referred to in *Kazzaz*) the first instance judge (the Bailiff) will have had regard to "the whole of the sea of evidence presented to him whereas an appellate court will only be island hopping". The argument for the respondent does not convince us that the Bailiff was plainly wrong, being the standard that the respondent would need to meet.

65. On the contrary, we can well-understand why the Bailiff, on the premise that he was wrong on the point regarding trust property, found as he did. On his findings, the manner, urgency and lack of care in the handover, particularly the inquorate PFHL board meeting and the unconditional/precipitous resignations from both companies, without replacements, can easily be described as gross negligence in the professional context.

66. In this case, the trustee knew exactly the contractual structure and its risks, and on the findings of the Bailiff the loss of board balance was foreseeable and disastrous. As already observed, this was precisely why the RBC service companies had been installed and maintained on the PIL and PFHL boards in the first place. It is also why RBC itself indicated, in December 2014 when intimating its intention to resign, that it would need to ensure an orderly handover (including with regard to PIL and PFHL). Accordingly, the trustee's duties regarding the Option (as a chose in action) were not discharged just by "holding" it — they included, in the particular circumstances of the structures which had been put in place, the duty to take reasonable steps to have effectual replacement directors appointed as part of prudent management of trust property. If, despite reasonable efforts to do so, they would in any event have failed, that would be a defence – but it would be one of causation, and not one of absence of duty.

67. The Bailiff's analysis of "gross negligence" was rooted in the professional standards expected, his assessment of the evidence, and the foreseeable consequences. In this regard, we note what happened when the Option was granted, as recorded by the Bailiff at [57]:

> "On 5 August 2011, the then Managing Director of the Defendant sent a letter to Hanif Somji relating to SOIL. That letter starts by referring to the interest held by the Shallan Trust in a company referred to as Primefuels Kenya Limited, with that interest being "*held through various holding companies owned by the trust, one of which is*" SOIL.

Because Primefuels Kenya Limited required funding, which was being obtained through Standard Chartered Bank in Kenya, and the apparent reluctance of the beneficiaries of the Shallan Trust for the Defendant to provide due diligence information, SOIL was sold to Hanif Somji, so that he could provide his KYC information, thereby avoiding the Defendant needing to provide such information on behalf of the beneficiaries. The letter continues:

"*The sale was carried out on an arms length and commercial basis at fair market value. In order to protect the position of the trustees and indeed yourself, Shallan Overseas Limited agreed to enter into a Put and Call Option Agreement with you which grants Shallan Overseas Limited the right to repurchase the shares at effectively the same value at which they were sold to you and grants you the right to sell back to Shallan Overseas Limited the shares at the same value for which they were acquired. The options can be exercised at anytime after 25 February 2015 and before 25 February 2017. Effectively by putting the option contracts in place, the trustees will be in no different position than had they continued to have held Shallan Overseas Investments Limited within the Shallan Trust structure and you will be in no different position either.*""

68. The Bailiff discounted the relevance of that letter, saying (at [124]):

"The letter dated 5 August 2011 does not, in my view, affect this position. It appears to be based on a misunderstanding by the then Defendant's Managing Director, Alan Pearce, as to the legal effect of the agreements that had been put in place. The final paragraph on the first page explains that "*The sale was carried out on an arms length and commercial basis at fair market value.*" The final sentence of that paragraph states that: "*Effectively by putting the option contracts in place, the trustees will be in no different position than had they continued to have held Shallan Overseas Investments Limited within the Shallan Trust structure and you will be in no different position either.*" What I take from that sentence is that there was an acknowledgement that SOIL was outside the Shallan Trust structure rather than within it, although Mr Pearce considered that the trustees were in no different position, when legally they were. What he appears to have overlooked in what he wrote is the definition of what is a trust found in section 1 of the 2007 Law. Whilst it was reasonable of him to point out that the risk lay with both parties depending on whether the value of the shares in SOIL increased or decreased, it was apparent that the time at which either option could be exercised was between four and six years after the Share Sale Agreement. There is no reference in the Plaintiff's Cause to there being any legitimate expectation produced by Hanif Somji being sent this letter in August 2011, nor was that the way in which Advocate Davidson addressed the issue. As a contractual right, I do not consider that it meant that SOL had any ownership interest in SOIL and I do not regard the Put and Call Option Agreement as creating the deemed vesting in SOL of the shares in SOIL. In short, the shares in SOIL were not "*trust property*"."

69. For the reasons already given, we do not agree with this passage insofar as it bases the argument that no trust property was in play: on the contrary, the Option was trust property. Once that is recognised, the other comments of the Bailiff are apposite: the letter involved a recognition by RBC that "the risk lay with both parties depending on whether the value of the shares in SOIL increased or decreased". That being so, the letter was correct when it said "the trustees will be in no different position than had they continued to have held Shallan Overseas Investments Limited within the Shallan Trust structure and you will be in no different position either". That is because the structures which had been put in place allowed the trustees to protect the value of SOIL, which was necessary given the value, or at least the potential value, of the Option to the trust. That is, no doubt, why the respondent attempted to make sure that the "orderly

handover" which it promised included proper replacement of the RBC entities on the boards of PIL and PFHL: the respondent knew that this was important to the trust.

70. We acknowledge the authorities emphasizing the distinction between trust property and non-trust assets, most notably *Vandervell v IRC* and *Gestrust v Sixteen Defendants*. We accept that the obligation of care is generally limited to property 'held on trust.' However, where the structure of the trust is such that a substantial part of the trust's value is embodied in a chose in action, and where the trustee retains practical means to prevent its dissipation, it is consistent with those authorities to recognise a fact-based duty to preserve its value — even if that entails steps with respect to non-trust assets. Our reasoning should not be taken as ignoring those authorities, but rather as adapting them for the circumstances where value preservation is, in practical terms, within the trustee's grasp.

71. As to the argument that the Bailiff erred in conflating the respondent with the other RBC entities, we do not find it necessary to consider the various seams of authority on corporate personality or attribution. That is because the simple proposition advanced by the appellant is that the respondent acted in breach of duty, i.e. with gross negligence, when it resigned without being clear that appropriate replacement directors were in place for PIL and PFHL. Resort to highly technical arguments about corporate *personae* do not avail the respondents in such circumstances: either the respondent was fixed with the knowledge of the same people who made the mistakes regarding the appointment of the replacements, in which case the basis for the finding of gross negligence is plain, or it is not, in which case it resigned without any proper basis for confidence on its part that the necessary replacements were in place, which would also warrant the finding of gross negligence. Moreover, this aspect of the argument seems to us to lack reality, given that, as we have found, the (wholly owned) RBC entities were in place to allow trustee influence in the PIL and PFHL companies.

72. We agree, of course, that the duties of the trustee company must be distinguished from those of its subsidiaries unless the facts and legal arrangements demonstrate that the trustee exercised direction or effective control over the group companies in their fiduciary actions. While shared officers and group policies are relevant, the law does not automatically attribute every act or omission to every group company. In this case, however, the group structure, operational overlap, and coordinated resignations support the finding of 'control' by the trustee sufficient to engage its duty in these particular circumstances: indeed, and recalling the discussion above on the notion of influence or control, that was precisely why the structures were arranged in the first place.

73. We have already (at [56] above) stressed the need not to impose duties which are impossible of fulfilment. But we see nothing impossible in the requirements found by the Bailiff (on the hypothesis that trust property was in play) to have been incumbent on the Respondent (see his Judgment at [167]-[174]). In short, resignation in circumstances where the Respondent knew that there were no competent replacement directors for PHFL and PIL, or at least had no proper basis to think otherwise, was a failure to act *en bon père de famille.* We see no reason to doubt that the defendant's own recognition (*per* the letter of December 2014) of what would be required of it in terms of an orderly handover is anything other than a recognition of what would be required of a professional trustee acting *en bon père de famille.* The evaluation of the Bailiff that this amounted to gross negligence is not one with which we consider we should interfere.

74. Finally (although logically this should have been its first point), RBC contends that gross negligence was not adequately pled. This is an unattractive argument. The need for proper pleading arises from requirements of fair notice. Parties here have joined issue on the material facts without any hint of ambush. We can see no basis upon which RBC might argue that it did not understand the case against it. The Bailiff found the pleading sufficient. Guernsey practice as to material facts in trust litigation does not require minute detail of each alternative step,

particularly in a simple sequence of failure to prevent a foreseeable outcome. The point taken by RBC here is a technical and artificial one, and cannot be sustained.

CONCLUSION

75. We do not consider that the approach discussed above involves an unwarranted extension of trustee duties. The duty to take prudent steps is not absolute or open-ended. Trustees are not insurers of the value of trust assets and are not required to take extraordinary or unreasonable steps — including embarking on contested litigation or indefinite delay of resignation — especially where legal, practical, or third-party barriers exist. What is required is to act reasonably, including making diligent attempts to secure replacements, to inform affected parties of the need for prompt action, and (importantly) not to create a vacuum by precipitous resignation when foreseeable harm is likely. Failure to take these precautionary steps may amount to gross negligence depending on the facts, but this must be assessed in light of the options realistically available to the trustee. The answer will be intensely fact-dependent.

76. Moreover, we stress that the conclusions contained herein are wholly without prejudice to RBC's arguments on causation. If, after inquiry on that matter, it is found that RBC could not have affected the outcome (for example, because of intransigence on the part of Mr Machan), then the claim will fail. But that is a question for another day.

77. We summarise our conclusions as follows:

    (1) A chose in action is trust property.

    (2) The duty of a trustee is not purely "do not dissipate the chose" — it is "take all prudent steps to safeguard the chose."

    (3) As the appointment of replacement directors was necessary to protect the chose, and as that was obvious, the trustee was duty bound not to resign without being clear that this had happened, and its gross failure in that regard is a breach *en bon père de famille*.

78. The appeal will thus be allowed, and the case remitted to the Bailiff for a trial on causation and *quantum.*