

# Challenges to (in)adequate deliberation after Dawson-Damer – a reminder for trustees

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## Dawson-Damer – an introduction

In a landmark decision of the Privy Council, *Ashley Dawson-Damer v Grampian Trust Company Ltd* [2025] UKPC 32 (**Dawson-Damer**), the Privy Council has grappled with a US\$402m trust dispute in which a discretionary beneficiary sought to set aside appointments that transferred 98% of trust assets to new trusts from which she was excluded from benefit.

While the dispute concerns Bahamian law trusts, the legal principles are relevant to decision making by fiduciaries (trustees and protectors) of both Jersey and Guernsey trusts as well.

The key principles in this trust dispute concern:

- the attribution of corporate intention (in this case the issue was establishing the intention of a corporate settlor) but the principles can easily be read across to other scenarios where it's necessary to establish the intention of a corporation involved in a trust structure (e.g. a corporate protector or a private trust company (**PTC**)); and
- the duty of 'adequate deliberation', providing fiduciaries with useful guidance on when a procedural failing will — and crucially will not — result in their decisions being overturned.

For trustees operating in an increasingly litigious environment, this judgment offers both reassurance that technical procedural failings will not automatically result in their decisions being unravelled, but is a stark reminder of the importance of the need for proper deliberation, particularly regarding up-to-date information about all beneficiaries' circumstances.

## Background to a trust dispute

This case concerns a discretionary trust known as the Glenfinnan Settlement, where Ashley Dawson-Damer (the **Beneficiary**), a discretionary beneficiary, sought to set aside two appointments made by the corporate trustee Grampian Trust Company Ltd (the **Trustee**) that transferred approximately 98% of the trust assets to new trusts from which she was excluded.

The dispute stems from the estate of George Skelton Yuill, a successful businessman who made his fortune in Australia and the Far East in the late 19th and early 20th centuries. Following his death in 1917, his substantial estate came to be administered through a series of Bahamian law discretionary trusts.

In 1992, a major restructuring occurred and a trust known as the 1973 Settlement was restructured to create separate settlements for different family branches, with assets worth around US\$150m being transferred to a new company, Spey Limited (the **Settlor**) which then established the Glenfinnan Settlement.

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Between 2006 and 2009, Grampian made two significant appointments transferring away 98% of the Glenfinnan Settlement assets (worth US\$402m) to new trusts benefiting only George's branch of the family, excluding the Beneficiary and her children.

## Key legal principles for trustees

### 1. Corporate attribution and settlor's wishes

The Settlor's wishes and intentions are always a material consideration when trustees exercise discretionary powers, though they should not displace all independent judgement. These wishes can be communicated informally and do not require formal documentation.

Where the Settlor – as in this case – is a company, the ordinary rules of corporate attribution apply as established in *Meridian Global Funds Management Asia Ltd v Securities Commission*. The 'directing mind' of the company must be identified to establish whether the relevant intention is properly attributable to the company. Typically the 'directing mind' will be its board of directors acting by a majority.

A board decision does not need to be formally recorded in minutes to be attributed to the company, provided all directors can be shown to have concurred in the decision. This principle is likely to be relevant to PTCs, corporate protectors and in circumstances where the relevant decision makers may wear multiple 'hats' with attributable knowledge in more than one capacity.

### 2. Inadequate deliberation and breach of fiduciary duty

The decision in *Dawson-Damer* is most important for what it says about the consequences of failing to undertake 'adequate deliberation' in fiduciary decision making. This is relevant for trustees as well as protectors.

A trustee, as a fiduciary, has a duty to undertake adequate deliberation in relation to its exercise of its powers. This duty is often framed under the rubric of 'taking into account only relevant considerations and discounting irrelevant considerations'. This principle is frequently encountered (but not limited to) court applications concerning what was formally known as 'the Rule in Hastings Bass'.

A trustee that breaches its fiduciary duty of adequate deliberation exposes its decision to the risk of being challenged. How the court remedies that breach is a matter of discretion. The court could potentially set aside the decision.

There are two separate stages in the analysis: (1) establishing breach of fiduciary duty, and (2) determining the consequences of that breach, including the court's remedial discretion whether to set aside the disposition.

In *Dawson-Damer* the court was critical of the trustee. The trustee's decision was made with 'a very cursory/curt assessment of [the Beneficiaries'] circumstances' which was a serious failing.

The position in England following *Pitt v Holt* (which was the law the Privy Council applied in *Dawson-Damer*) is that court intervention requires first that 'inadequate deliberation' must be sufficiently serious to amount to a breach of fiduciary duty by the trustee.

Jersey operates along slightly different principles to England and Guernsey because it has enacted legislation that makes it clear that a breach of fiduciary duty will be sufficient, but is not necessary, to justify the court striking down a decision that is impacted by inadequate deliberation.

### 3. Remedial discretion and causation tests

Even if a breach of fiduciary duty of inadequate deliberation is established, the court has a flexible discretion whether and how to remedy that breach, including whether to set aside the disposition.

The question of whether trustees 'would' or 'might' have acted differently (had there been adequate deliberation) is relevant but is not decisive to there being a remedy. The court won't apply a rigid rule but will seek the best practical solution depending on the circumstances.

Ultimately, in *Dawson-Damer*, despite there being a clear breach of the requirement of adequate deliberation, amounting to a breach of fiduciary duty, the court declined to grant the Beneficiary a remedy.

## Key takeaways for trustees in Dawson-Damer

### 1. Understanding the Settlor's intentions

- **Investigate thoroughly:** When dealing with corporate settlors (or even that of a corporate protector), ensure you understand the true intentions of the company's directing mind (usually its board of directors).
- **Look beyond formal documents:** Settlor intentions can be discerned from various sources including witness evidence and contemporary documents, not just from formal letters of wishes.
- **Apply correct attribution rules:** For corporate settlors (and corporate protectors), apply proper corporate attribution principles to identify whose intentions really matter.

### 2. Adequate deliberation requirements

- **Gather current information:** While a trustee is not bound to consult with beneficiaries, trustees should ensure they have up-to-date information about all beneficiaries' circumstances and not rely upon old or potentially biased sources of information.
- **Consider all beneficiaries:** Failure to properly consider the needs and wishes of all potential beneficiaries, even those not favoured, can constitute a breach of fiduciary duty and leave the trustee's decision open to challenge.
- **Maintain independence:** Do not rely solely on indirect and potentially hostile sources for information about beneficiaries - establish direct communication channels where possible.

### 3. Decision-making process

- **Document reasoning:** Clearly record the factors considered and rationale for decisions – just because decisions don't need to be recorded in minutes doesn't mean the safest course isn't to prepare complete records of decision making.
- **Seek professional advice:** Taking and acting on reputable professional advice (legal, tax, investment etc) can help avoid a breach of fiduciary duty.

- **Balance competing interests:** Consider both the settlor's wishes and the current needs of all beneficiaries

#### 4. Practical risk management

- **Regular reviews:** Periodically review beneficiary circumstances, especially when relationships have broken down
- **Maintain records:** Trust disputes can have a long-tail. Preserve communications and records of circumstances that might be relevant to future challenges.
- **Professional distance:** Maintain professional objectivity and avoid being influenced by personal animosity towards beneficiaries.
- **Safety nets:** Consider retaining some assets as a safety net for excluded beneficiaries, particularly in family trust situations.

#### 5. Remedial considerations

- **Breach doesn't automatically void decisions:** Even where breach of fiduciary duty is established, courts will only set aside appointments where trustees would or might have acted differently.
- **Compelling factors matter:** Strong factors supporting the original decision (such as clear settlor intentions and adequate provision for excluded beneficiaries) may prevent setting aside even where there has been procedural breach.

*Dawson-Damer* demonstrates that while trustees are expected to follow proper procedures and consider all beneficiaries adequately, courts will not automatically set aside appointments where the substantive outcome aligns with the settlor's clear intentions and provides reasonable provision for all concerned.

### How can Collas Crill help?

Collas Crill's private client and trust team have decades of experience advising trustees and beneficiaries about trustee decision-making. Our advisory practice frequently assists fiduciaries with the increasing complexity of decision making, including restructuring.

When decision-making has gone wrong, leading to complaints of a possible breach of trust, Collas Crill's skilled and experienced disputes team can advise on how best to challenge and correct the defective decision making.

For more information please contact:



**James Sheedy**

Partner // Jersey

**t:**+44 (0) 1534 601795 // **e:**james.sheedy@collascrill.com



**Christian Hay**

Partner // Guernsey

**t:**+44 (0) 1481 734290 // **e:**christian.hay@collascrill.com

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