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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 Jersey, Guernsey and Cayman 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 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.

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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.

Between 2006 and 2009, the Trustee 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.

The Beneficiary challenged the appointments, arguing that:

- The Trustee had misunderstood the Settlor's wishes, believing the trust was intended primarily for future generations of one family branch; and
- The Trustee had failed to give proper considerations to her circumstances, amounting to a breach of the fiduciary duty of adequate deliberation in accordance with the UK Supreme Court decision of Pitt v Holt.

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.

The Privy Counsel agreed with the lower courts that the Settlor intended the Trust to be a long-term accumulating trust for future generations of the Settlor's family. Separate provision for their spouses had already been made through other arrangements. This finding was supported by board minutes, contemporaneous documents, and credible witness evidence, even though no letter of wishes was in place.

Practical point: A board decision does not need to be formally recorded in minutes to be attributed to a 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.

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A trustee, as a fiduciary, has a duty to undertaken 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's intervention in striking down a decision that is impacted by inadequate deliberation.

Practical point: Trustees should maintain up-to-date records on all beneficiaries and avoid over-reliance on third party narratives , especially in cases of strained relationships which might give rise to the sharing of incomplete or inaccurate information which the trustee then relies upon.

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 transaction.

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.

4. The 'would' or 'might' debate…

As outlined above, the Privy Council looked at – but ultimately declined to be drawn on – the question of whether the causation test for a challenge based on inadequate deliberation should be 'would' or 'might'. For example, had the trustee considered what it was supposed to, is the court only to intervene when it is shown that that would have given in a different

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result or is it enough that the impact of adequate deliberation might have given a different result? 'Would' is clearly a more rigorous threshold than 'might'.

Art 47B-47J of the Trusts (Jersey) Law 1984 – the statutory enactment of what had been understood to be the legal position prior to the UK Supreme Court decision in *Pitt v Holt* uses the formulation 'would' not 'might' e.g. 'the trustee or person exercising the power would not have exercised the power…' which suggest the causation test used in Jersey to set aside the defective exercise of a power might be narrower than in England. None of the Jersey case law following the enactment of these provisions has been drawn on whether 'would' could mean 'might'. It may not matter. Art 47B-47J of the Trusts (Jersey) Law 1984 does not supplant the position at common law, as declared by *Pitt v Holt* (and followed in *Dawson-Damer*) but sits in parallel to it.

The fact pattern of the cases in Jersey has been such that it has clearly been obvious (owing to the seriousness of what has gone wrong as a result of the defective exercise of a power) that the result was clearly not intended and so the trustee clearly 'would not' have done what it did had it given adequate deliberation to the proper exercise of its powers.

A case that only met the causation threshold that something different 'might' have happened with adequate deliberation has a knock on consequence to the court's view of whether the defective exercise of the power is deemed sufficiently serious to justify its intervention.

Key takeaways for trustees in Dawson-Damer

1. Understanding the Settlor's intentions

- **Investigate thoroughly:** When dealing with corporate settlors (or even a corporate protector), ensure you understand the true intentions of the company's directing mind (usually its board of directors).
- **Look beyond formal documents:** 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.

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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 of duty 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.

Where *Dawson-Damer* is silent – and which will have to be developed in future cases is to give guidance to fiduciaries on the substance of the duty to give ‘adequate deliberation’, ie what is the minimum a fiduciary need to do (or not) to insulate its decision from the risk of it being struck down?

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.

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

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