STEPHENSON HARWOOD

ATTACKS ON TRUSTEE DECISION MAKING: RECENT TRENDS AND CASES

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STA CONFERENCE 2026

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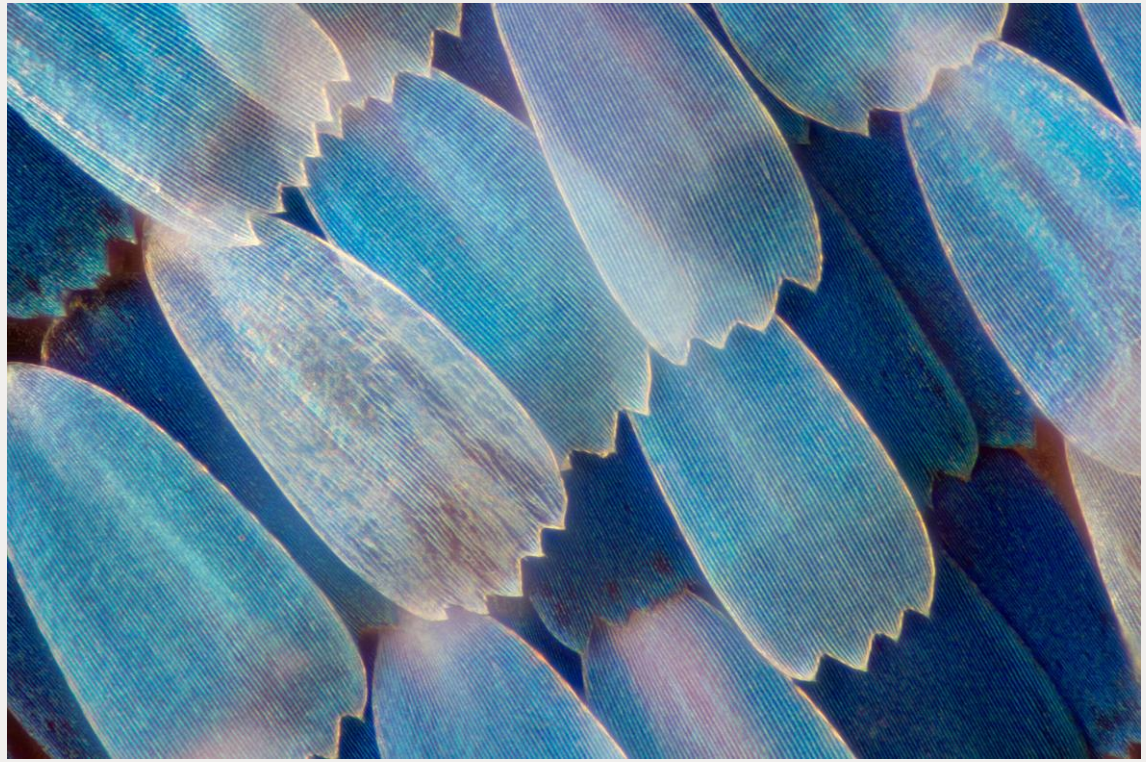
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INTRODUCTION

- Challenges to the exercise of trustee powers are becoming more frequent
- Beneficiaries and those advising them are more intensely scrutinising the actions of trustees
- Potential role of AI in giving beneficiaries the tools to more easily test decisions?
- Number of high-profile recent cases have placed the spotlight on the process adopted by trustees to taking decisions
- Courts around the common law world are imposing ever higher standards on trustees in relation to their decision making
- Risk of court overreach and deviation from the 'non-intervention' principal?



AGENDA

1. **A cautionary tale:** *Dawson-Damer v Grampian Trust Company Limited [2025] UKPC 32*
2. Common grounds on which trustee decisions are attacked
3. Tips to reduce the risk of attack
4. Case study and practical points to consider
5. What steps can a trustee take to protect itself?
6. **Another cautionary tale** – blessing a momentous trustee decision: *Rhino, Buffalo and Giraffe Trusts [2026] JRC 2025*
7. Final thoughts

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1. A CAUTIONARY TALE: DAWSON-DAMER V GRAMPIAN TRUST COMPANY LIMITED [2025] UKPC 32

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A cautionary tale

DAWSON-DAMER V GRAMPIAN TRUST COMPANY LIMITED [2025] UKPC 32

+ **Background/Facts:**
  - Glenfinnan Settlement: large Bahamian discretionary trust
  - Trustee transferred 98% of assets into new trusts, excluding Ashley Dawson-Damer
  - Ashley challenged the appointments: argued trustee failed to consider her interests and needs
+ **The Lower Courts:**
  - Both first instance and Court of Appeal ruled against Ashley
  - Ashley appealed to the Privy Council on two main issues:
    - The trustee incorrectly identified the corporate settlor's wishes
    - The Trustee breached the duty of adequate deliberation

A cautionary tale

DAWSON-DAMER V GRAMPIAN TRUST COMPANY LIMITED [2025] UKPC 32

+ **Inadequate Deliberation:**
  - Trustees must properly consider all beneficiaries' needs and circumstances
  - In this case, the trustee relied on outdated information from sources adverse to Ashley — a serious failing that amounted to a breach of duty
  - However, Ashley could not show the outcome would have been different if the trustee had acted properly
+ **Appointments were not set aside - appeal dismissed**
+ **Still a nightmare scenario for a trustee.....**

2. COMMON GROUNDS ON WHICH TRUSTEE DECISIONS ARE ATTACKED



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Common grounds on which trustee decisions are attacked

TYPES OF DECISIONS COMMONLY CHALLENGED

- Distributions: Exercising discretionary dispositive powers to choose when, who and how beneficiaries benefit from the trust
- Selling, buying or restructuring trust assets: Exercising administrative powers to sell family businesses or properties and investing the trust fund
- Adding or removing beneficiaries
- Restructuring beneficiary interests in the trust: Exercising powers to establish sub-trusts or to restructure the entitlements of beneficiaries
- Possibility of challenging protector powers

Common grounds on which trustee decisions are attacked

GROUNDS FOR CHALLENGE

- Formal validity – Acting outside of powers/excessive execution
  - Power of consent or veto vested in protector
  - Limitation on scope of power
  - Limitation on objects of power
  - Formality requirements
- Substantive validity – flawed process
  - Improper purpose
  - Inadequate deliberation
  - Mistake/negligence
- Impeachable decisions – conflict of interest or duty
- Remedies

3. TIPS TO REDUCE THE RISK OF ATTACK



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Tips to reduce the risk of challenge

HOW TO APPROACH A DECISION

+ **1. Check the trustee has the power to take the proposed action**
  - This can be complicated
  - Mistakes are common – be careful!
+ **2. Check the power is being exercised for a proper purpose**
+ **3. Ensure the trustee complies with its duty of adequate deliberation (this is the difficult bit)**
  - Take all relevant factors into account and ignore irrelevant ones
  - Letters of wishes are non-binding but are a material consideration
  - A trustee must exercise its own judgment and not follow directions of others
  - A trustee cannot act capriciously (e.g. acting out of personal animosity) or irrationally (high-threshold)
  - Don't make mistakes - seek advice!
  - Duty to act impartially?
+ 4. **Check and address any potential conflict**

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Tips to reduce the risk of challenge

TIPS FOR COMPLYING WITH THE DUTY OF ADEQUATE DELIBERATION

- **This is the difficult bit – what is required in practice will be very fact and circumstance specific (the list below is non-exhaustive)**
  - Tip 1: Ensure you have current and accurate information about all beneficiaries' circumstances, and wishes and needs
  - Tip 2: Rigorously evaluate how the proposed exercise of the power will affect the beneficiaries
  - Tip 3: Rigorously evaluate how the proposed exercise of the power aligns with the settlor's wishes
  - Tip 4: Carefully consider what alternative options exist and why they are not appropriate (consider how the decision might be attacked in advance)
  - Tip 5: Take and carefully consider professional advice where needed (e.g. legal and tax)
  - Tip 6: Carefully document the trustee's decision and deliberation process, including the information it has relied upon and the factors it has considered

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4. CASE STUDY AND PRACTICAL POINTS TO CONSIDER



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Case study

FACTS

- Trust established in 2010 for three children and grandchildren "*attaining the age of 30 or earlier if their parent is deceased*"
- There are 6 living grandchildren, the eldest being 29
- Trust holds majority shareholding in family business and a castle
- Settlor's original letter of wishes expressed his desire for the trust to benefit both his children and grandchildren
- Protector is the Settlor's brother with consent powers
- One month before the Settlor's death the Settlor requested the trustee amend the interests of the grandchildren so that they only have an interest upon "*attaining the age of 30 and after their parent has died*" – the Settlor does not otherwise update his letter of wishes
- The Trustee (with the consent of the Protector) amends the trust in the manner requested by the Settlor
- The Settlor dies in 2026
- Less than a month after the Settlor's death the three children approach the Trustee and request the trust be wound up and the assets distributed equally between them on the basis they do not get along and there is friction between them as a result of "*being involved in the same assets*"
- The Protector supports the proposal and is pressuring the trustee to accede to the request

Case study

PRACTICAL POINTS TO CONSIDER

- Is distributing the entire trust fund to the children a proper exercise of the Trustee's powers?
- Should the trustee accede to the request?
  - What interests do the grandchildren have? Was the amendment to the grandchildren's' interests valid? Should the trustee obtain advice on this? Is this a relevant consideration?
  - What are the circumstances and wishes and needs of the beneficiaries?
  - What is the background to the friction between the beneficiaries? Why would distributing shares in the family business equally resolve this – does it risk making the situation worse? Could any other less draconian steps be taken to try to resolve these issues?
  - How does the children's request align with the Settlor's original letter of wishes?
  - What weight should be given to the Settlor's request to amend the interests of the grandchildren?
  - What alternative options might be available?
  - What are the tax consequences?
  - What impact would transferring the shares in the family business to the children equally have on the value of the company?
  - Are the Protector's views relevant?



5. WHAT STEPS CAN A TRUSTE TAKE TO PROTECT ITSELF AGAINST A BENEFICIARY ATTACK?

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What steps can a trustee take to protect itself against a beneficiary attack?

OPTIONS

- Risk of attack significantly reduced by taking steps suggested earlier **but cannot be eliminated**
- Potential options:
  - Indemnity
    - Only as good as the person giving it – may not be enforceable
  - Beneficiary consent
    - Ineffective against minor and unborn beneficiaries and often cannot be obtained from beneficiaries interested in challenging the exercise of the power
  - Blessing of a momentous decision under *Public Trustee v Cooper*
    - Decision must be sufficiently momentous
    - Likely to be appropriate if the decision is contentious and/or the value of the trust is high
    - Need to evidence that the trustee has complied with its duties when taking a decision and it has a duty of full and frank disclosure to the court
    - **Caution**: In practice the test for a blessing is higher than the threshold for establishing a retrospective breach of duty – risk of trustee being ordered to personally pay costs of wasted application means it is not risk free!

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6. ANOTHER CAUTIONARY TALE: *RHINO, BUFFALO AND GIRAFFE TRUSTS [2026] JRC 2025*

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Rhino, Buffalo and Giraffe Trusts [2026] JRC 2025

FACTS

- Trustee sought court blessing to partition assets of a Trust (worth circa £19m) between a beneficiary in her fifties and her young adult son
- Application arose from a severe breakdown in relations between mother and son
- Trustee proposed:
  - dividing liquid assets and proceeds of property sale equally (subject to a £2m adjustment in favour of the son)
  - distributing a £1m art collection to the mother (without compensation to the son)
  - writing off circa $12m of loans owed by the mother to the trust (partially on the basis she had an expectation they would be written off)
- The mother's distribution was to be outright whereas the son's share was to remain in trust (having rejected the son's proposal for distribution to a family investment company (**FIC**) on the basis the Trustee had concerns over making an outright distribution to him.
- The son challenged the Trustee's decision (broadly) on the basis that various aspects of the Trustee's decision were not rational and/or had not been adequately considered

Rhino, Buffalo and Giraffe Trusts [2026] JRC 2025

DECISION

- Court refused to bless decision on the basis (amongst others) that:
  - The Trustee had not properly informed itself of the background to the loans to the mother - the Trustee had also not adequately considered compensating the son for the significant benefit to the mother of writing off the loans
  - The Trustee had attributed too much weight to the sentimental value of the artwork to the mother when deciding to distribute it to her and had not adequately considered its economic value
  - The Trustee had not sufficiently informed itself of the son's personal circumstances and future needs and had given to much weight to its view that, generally, it was appropriate for a parent to receive a greater share than a child
  - The Trustee had not adequately explored or evaluated the suitability of the proposed FIC structure

Rhino, Buffalo and Giraffe Trusts [2026] JRC 2025

COMMENT

- Another recent example of the Jersey courts refusing to bless a trustee's momentous decision
- Was the Trustee's decision flawed or did the Court just disagree with the substance of the decision that had been taken?
- Some practical tips / issues to consider:
  - Importance of carrying out thorough consultations with interested parties
  - Risks of communicating provisional views before final decision reached
  - Documenting the decision (and the reasons for it)
  - Revisiting that decision where appropriate
  - Managing actual or potential conflicts
  - Imposing a standard of "fairness" on trustee decisions?
  - Role of protector/beneficiary

7. FINAL THOUGHTS



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Final thoughts

FINAL THOUGHTS

- Trustee decisions are under the microscope more than ever

- Risk that courts in some (historically) leading trusts jurisdictions are taking a more active approach and are being less respectful to the 'non-intervention' principle
  - Note the recent phenomena of "non-binding" judicial guidance and Jersey case of Representation of SG Kleinwort Hambros Trust (CI) Ltd [2023] JCA 088 (Jersey Court of Appeal)

- Trustees need to tread carefully!

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Q+A