

CIFO guidance on Sufficiently Close Relationship of Trust Beneficiaries to a Financial Services Provider to a Trust

Introduction

The Channel Islands Financial Ombudsman (CIFO) is reviewing complaints against a respondent financial services provider (FSP) in relation to losses incurred on specific investments. Some of the complaints referred to CIFO involve these same investments, recommended by the FSP, held in trust. In these cases, the FSP is a service provider to the trust (serving as an investment manager). The trust provider is also a financial services provider and is therefore not an eligible complainant against the respondent FSP under the law governing CIFO's mandate. CIFO was therefore asked by several trust providers to consider whether beneficiaries of a trust could complain against the FSP providing investment management services to the trust. More specifically, are trust beneficiaries eligible complainants by virtue of them having a sufficiently close relationship to the respondent FSP service provider to the trust?

CIFO asked the respondent FSP for its views on this matter. CIFO was provided an extensive written opinion from the respondent FSP's external counsel.

CIFO also asked the trust providers that had requested this decision to provide their views. One trust provider submitted a substantial written response while two others submitted emails expressing their high-level views on this matter.

Analysis

1. The question raised is a general one, though it is prompted by a number of complaints which have been made to CIFO against a particular investment management firm about what are said to have been conflicts of interest and/or unsuitable investments which have caused loss to investors

and investment portfolios held in trust, some of which were pension plans. CIFO has a statutory mandate and can entertain complaints only from complainants who are eligible to complain within the existing legislation. A complainant who is an individual having his or her own account with the FSP is clearly eligible; a complainant which is a holding company having an account with the FSP has been previously determined not to be eligible. The question concerns the eligibility of a complainant who is a beneficiary of a trust, the account then being held by the trustee. The trust concerned may or may not be a pension trust.

2. In what follows I deal first with the general structure of the relevant legislation and then with the eligibility of trust beneficiaries. I am deciding on the question of complainant eligibility, but I think it important to set the question in context.

3. CIFO’s jurisdiction extends to both Jersey and the Bailiwick of Guernsey. In this instance, the complaints are Jersey-based, so I consider only the Jersey legislation though I note that the relevant legislation is essentially the same in both jurisdictions. For convenience, I adopt the following abbreviations:

Financial Services Ombudsman (Jersey) Law 2014	Ombudsman Law
Financial Services Ombudsman (Exempt Business) (Jersey) Order 2014	Exemption Order
Financial Services (Jersey) Law 1998	Financial Services Law
Guidelines required by article 8(7) of the Ombudsman Law	<i>Guidelines</i>

I. GENERAL STRUCTURE OF LEGISLATION

4. CIFO operates in Jersey under the Ombudsman Law. The Law distinguishes between the Office of the Financial Services Ombudsman (“the OFSO”), the Principal Ombudsman and other Ombudsmen appointed under the Law. Strictly complaints are referred to the OFSO and the term Channel Islands Financial Ombudsman (adopted to extend to the OFSOs in both Jersey and Guernsey) does not actually appear in the Law; but the distinctions in the Law are immaterial for present purposes, so I shall refer simply to CIFO to extend to whichever is relevant.

5. The Ombudsman Law provides that the function of CIFO is to secure that complaints about financial services are resolved.¹ For that purpose, the Law turns on the following:

- (1) What an “eligible complaint” is, which requires identifying
- (2) What a “relevant financial services business” is, and
- (3) Who is an “eligible complainant”, together with
- (4) Who can be made a respondent to a complaint.

I take those points in order.

Eligible complaint

6. An eligible complaint is one about an act done by someone in the course of relevant financial services business when the complaint is made by an eligible complainant.² There are also “timing conditions” (complaint not too late, not too early, and must be about an act done on or after 1 January 2010)³ but they do not matter for present purposes.

7. The Ombudsman Law says next to nothing about the possible subject-matter of a complaint, though it must of course concern financial services. It is apparent from the remedies which CIFO is authorised to provide that the complaint may be about financial loss, material distress or material inconvenience, since they are comprised in the definition of compensatable loss for which CIFO may award compensation,⁴ though CIFO may direct the taking of other steps too.⁵ It is useful to note here that the references to distress and inconvenience, which do not in general give rise to a cause of action, make it clear that CIFO may entertain a complaint based on matters which could not be redressed by a court.

8. Otherwise the mandate of CIFO depends on the definitions of relevant financial services business and eligible complainant, which I consider next.

¹ Ombudsman Law, art. 3(1).

² *ibid.*, art. 7(a), (b). Strictly the article does not actually define the term “eligible complaint”, though the term is used in the heading; it merely identifies what complaints can be referred to CIFO.

³ *ibid.*, arts. 7(c), 11.

⁴ *ibid.*, art. 16(1)(a), (3).

⁵ *ibid.*, art. 16(1)(b), (5).

Relevant financial services business

9. Relevant financial services business is expansively defined in the Ombudsman Law.⁶ The definition, however, does not actually determine the present scope of CIFO's jurisdiction. The reason is that the Law provides for the relevant minister to exempt classes of business from the category of relevant financial services business and the power has been exercised, in the Exemption Order, so as to exempt *all* business unless it falls within one of the classes specified in the Order.⁷ In other words, what matters is whether business falls within the classes specified in the Order, not whether it falls within those specified in the Law.

10. Under the Exemption Order, pension business (other than some occupational pension business) is specified.⁸ I need not go into the exact definition. The conduct of such business therefore falls within the jurisdiction of CIFO. Although pension trusts are not expressly mentioned in the Order, pensions are almost invariably provided through trusts. There is no indication in the Order that the legal structure through which the pension business is carried on has any relevance; on the contrary, "relevant pension business" is defined there in such a way as to make it clear that pension trusts are within the remit of CIFO.⁹

11. As to other trusts, their omission from the Exemption Order means that the carrying on of trust business is not itself within the jurisdiction of CIFO but it does not mean that all business activities for trusts fall outside CIFO's jurisdiction. Investment business is specified in the Order,¹⁰ the definition of investment business being taken from that in the Financial Services Law.¹¹ It follows that investment business for a trust, whether the investment decisions are taken by the trustee or by an investment manager, are within the jurisdiction of CIFO. That applies not only to a

⁶ *ibid.*, art. 9(1).

⁷ Exemption Order, art. 2.

⁸ Exemption Order, arts. 2(2)(j), 3, 6.

⁹ The rather tortuous legislative sequence is this:

- Exemption Order defines "relevant pension business" by reference to Ombudsman Law, Sched. 3 (subject to qualifications).
- Ombudsman Law, Sched. 3 defines "relevant pension business" by reference in turn to Income Tax (Jersey) Law 1961, art. 131G(1) or certain overseas legislation.
- 1961 Law, art. 131G is no longer in force in the form that it took when Ombudsman Law came into effect (it was replaced by Income Tax (Amendment No. 44) (Jersey) Law 2014 and there is no longer an art. 131G(1)) but in that form it listed a series of "funds" defined elsewhere in 1961 Law and some of those were trusts.

¹⁰ *ibid.*, art. 2(2)(i).

¹¹ Financial Services Law, art. 2(2).

trust formed for the actual purpose of investment, such as a unit trust, but also to an ordinary family trust where the making and transposing of investments is required.

12. I should add here that though the Exemption Order does not mention trusts at all, the Ombudsman Law does mention them twice. I deal with those references here because they are material to the scope of relevant financial services business. They are as follows:

- (1) The first is a provision that the categories of eligible complainant – a term I have not yet reached – may be expanded by the minister in delegated legislation, by adding any other category that “related to charities, trusts, foundations or other bodies”.¹² I do not read that as implying that trusts are presently outside CIFO’s jurisdiction. The implication is the other way round. The minister’s power is on its face to expand the categories of eligible complainant, not to expand the definition of relevant financial services business. The Law therefore assumes that trusts, at any rate for some purposes (*sc.* investment), are already within CIFO’s jurisdiction.¹³ It is true that the applicable definition of relevant financial services business is now to be found in the Order rather than the Law but that makes no difference, because the function of the Order is to limit the definition, not to expand it.

- (2) The other mention of trusts in the Ombudsman Law is a provision that one of the reasons why the complaint is inappropriate for CIFO – the Law gives a list – is that the complaint is about “a decision by the respondent exercising a discretion under a ... trust”.¹⁴ This specific exclusion indicates that the Law again assumes that trusts, at any rate for some purposes, are already within CIFO’s jurisdiction.¹⁵

¹² Ombudsman Law, art. 8(3)(c). The power has been exercised once; see below, para. 18(2).

¹³ An alternative construction of art. 8(3)(c) is that by implication it confers an implied authority to expand the definition of relevant financial services business beyond that in art. 9 in addition to the express authority to expand the categories of eligible complainant. If that construction of art. 8(3)(c) is adopted, it is neutral on the question whether trusts, for some purposes, are already within CIFO’s jurisdiction.

¹⁴ Ombudsman Law, art. 12(2), (3)(d)(iv).

¹⁵ I do not think that the indication is weakened by the fact that the list of complaints inappropriate for CIFO also includes “employment matters” (*ibid.*, art. 12(3)(d)(i)), when even in the absence of such a provision no one would imagine that CIFO was a general employment tribunal. The reason for that provision is surely that in its absence an employee of an enterprise carrying on a relevant financial services business would be able to say that an act such as an arguably unfair dismissal was an act done by the enterprise in the course of that business and so attracted CIFO’s jurisdiction.

13. Accordingly, complaints about services provided to trusts are within CIFO's jurisdiction, though except for pension trusts the complaint must be about investment. CIFO's publicly stated view of its own jurisdiction, and past engagement with such-themed complaints, accords with that analysis.

Eligible complainant

14. Article 8 is a somewhat convoluted provision for identifying an eligible complainant. The general thrust is to limit eligibility to individuals and others in a similar position, there being references to reserving the services of CIFO primarily for persons likely to lack resources, expertise or other characteristics to resolve complaints through some other means than CIFO.¹⁶

15. A financial services provider is automatically ineligible to make a complaint.¹⁷ A financial services provider is anyone carrying on relevant financial services business¹⁸ and the provider seems to be ineligible whether or not its business has got anything to do with the complaint. Otherwise a complainant has to fulfil two requirements, as follows.

Personal characteristics

16. The first requirement is that the complainant must ordinarily be an individual, not acting for the purpose of a trade or profession.¹⁹

17. Also eligible are (i) a micro-enterprise within an E.U. instrument and (ii) anyone in any other category specified by the minister that relates to charities, trusts, foundations or other bodies.²⁰ As to those additional categories:

- (1) The former is not material here.
- (2) I have already mentioned the latter,²¹ which expands the category of complainant only in so far as the power has actually been exercised. The sole exercise to date has been to bring in certain small charities and their trustees.²² Charities have no

¹⁶ *ibid.*, art. 8(4), (5)(a).

¹⁷ *ibid.*, art. 8(2)(b).

¹⁸ *ibid.*, art. 1.

¹⁹ *ibid.*, art. 8(2)(a), (3)(a).

²⁰ *ibid.*, art. 8(2)(a), (3)(b), (c).

²¹ Above, para. 12(1).

²² Financial Services Ombudsman (Eligible Complainants) (Jersey) Order 2014.

beneficiaries in the ordinary sense and so I do not consider them further.

Relationship

18. The complainant must also stand in a particular relationship with the person whose act is complained of,²³ called the relevant provider.²⁴ Under article 8(6) of the Ombudsman Law, the complainant must be:

- (1) A client of that person;
- (2) Someone attempting to become a client; or
- (3) Someone with any other relationship which appears to be sufficiently close for the purpose.

19. The last category is critical for the ability of beneficiaries to complain and I return to it below.²⁵

Respondent

20. The respondent to a complaint, against whom CIFO can make an award, will ordinarily be the relevant provider, *i.e.* the person whose act is complained of.²⁶

21. There are provisions permitting a complaint also against (i) a person to whom a liability for the relevant act has been transferred from the relevant provider or (ii) a person designated by CIFO to whom any business, liability or asset at all was transferred from the relevant provider if that provider no longer exists or the complainant would be prejudiced if he or she could complain only against that provider.²⁷ I can see that a successor trustee may possibly fall within either provision.

II. BENEFICIARIES OF TRUSTS

22. I turn to consider the status of beneficiaries as complainants.

²³ Ombudsman Law, art. 8(2)(c), (6).

²⁴ *ibid.*, art. 8(1).

²⁵ Paras. 33 *et seq.*

²⁶ *ibid.*, art. 10(2)(a).

²⁷ *ibid.*, art. 10(1), (2)(b), (c), (3)-(4).

Beneficiaries as eligible complainants: personal characteristics

23. The requirement that a complainant must be an individual will embrace most beneficiaries.

24. On occasion, a beneficiary of a trust may be described as another trust or, more accurately, the trustees for the time being of the other trust. If those trustees or any of them are individuals, the individual trustees will satisfy this requirement, notwithstanding that they will not be complaining in their own right. So will individual beneficiaries of the other trust.

25. A company which is a beneficiary, as is sometimes so, is not an eligible complainant.

Beneficiaries as eligible complainants: relationship

26. The further requirement of a relationship between the complainant and the relevant provider is less straightforward. As mentioned, the relationship must be that of a client, or someone attempting to become a client, or some other sufficiently close relationship.

Client and intending client

27. A beneficiary is not, as such, a client of the trustee.

28. The class of beneficiaries may include the settlor; and some trustees are in the habit of referring to the settlor as “the client”, a term which carries the unfortunate connotation that the trustees’ function is to do whatever the settlor wants. The settlor may well have been a client of the trustee before the creation of the trust, if the trustee – more accurately, the intending trustee – was giving advice about the usefulness of a trust and about suitable trust provisions. But once the trust is constituted the settlor is not a client, whether or not he is also a beneficiary.

29. A beneficiary is similarly not ordinarily a client of some third-party providing services to the trust, such as an investment manager, a lawyer, a surveyor or the like. The client is the trustee who engages the third party and ordinarily the contractual arrangement is between them. A trustee contracts as principal, not as agent for the beneficiaries.

30. In general, therefore, a beneficiary cannot qualify as a complainant in virtue of being either a client or an intending client of either the trustee or a third party engaged by the trustee. There may be exceptions. Family trusts can be modelled to suit the preferences of the settlor when creating the trust and I do not rule out the possibility that in an unusual structure a beneficiary may have a client relationship.

Other relationship

31. That leaves the category of “other relationship”. It requires more extended treatment. In the section following,²⁸ I deal with beneficiaries generally. What I say is subject to a significant qualification which I make afterwards.²⁹

Legislation and guidelines as to “other relationship”

Ombudsman Law

32. The legislative description of an other relationship which will make a complainant eligible is found in article 8(6)(c) of the Ombudsman Law and is this:

any other relationship, appearing to the person examining the complaint under Article 12(1)(a) to be sufficiently close to give appropriate standing for the services of [CIFO] to be available to the complainant, taking account of the guidelines published under paragraph 14.

The reference to the person examining the complaint is simply to the requirement, imposed by article 12(1)(a), for CIFO to examine the complaint at the outset to see whether it is one which may be referred under the relevant part of the Ombudsman Law and, if not, to reject it. The *Guidelines*, as I call them here, are for the use of the examiner and are required to be prepared and published by CIFO.³⁰

33. The provision quoted does not in terms confer a discretion but the effect is similar: it requires a judgment on the closeness of the relationship. The judgment is to be exercised taking account of the *Guidelines*, which

²⁸ Paras. 32-46.

²⁹ Paras. 47-55.

³⁰ *ibid.*, art. 8(7)-(9), (12), (14).

themselves have to be formulated by reference to the closeness of the relationship.

The Guidelines

34. The *Guidelines* as they currently stand state in relevant part that, save in exceptional circumstances, the relationship of the complainant to the relevant provider is sufficiently close in each of the following circumstances:

Pensions

6.2 The complainant was a beneficiary, or had an actual or prospective beneficial interest, under a pension scheme for which the relevant provider carried on relevant business, or the complainant attempted to enter into that relationship.

...

Trust

6.3 The complainant was a beneficiary, or had an actual or prospective beneficial interest, under a trust, foundation or estate of which the relevant provider was a trustee or personal representative, or the complainant attempted to enter into that relationship.

The statement that, absent exceptional circumstances, one of those relationships *is* sufficiently close, not merely that it may be, is authorised by the Ombudsman Law.³¹

Trustee as respondent

35. In the case of both pension and other trusts, the *Guidelines* treat a beneficiary as eligible to complain against the trustee. Complaints concerning other trusts would have to be about investments.

36. In my view that treatment is authorised by the Ombudsman Law. Strictly the questions are whether the examiner under article 8(6)(c), taking account of the *Guidelines*, can rationally decide that there is a sufficiently close relationship between beneficiary and trustee to give appropriate standing and whether the *Guidelines* can rationally state that

³¹ *ibid.*, art. 8(9)(a).

that will be so in the absence of exceptional circumstances. My answer to both questions is in the affirmative. Indeed, any other treatment of beneficiaries would be hard to justify. There is self-evidently a relationship within the Law, that of beneficiary and trustee.³² It is a close relationship, because the administration carried out by the trustee immediately affects the interests of beneficiaries. Given that pension and other trusts are placed within the scope of CIFO's jurisdiction by the Ombudsman Law, it is necessary for beneficiaries to be admitted as complainants against their trustees. To treat them as ineligible would render the jurisdiction largely nugatory.

37. There may be a case against admitting complaints from certain beneficiaries. The point applies primarily to family trusts rather than pension trusts. I have in mind that some beneficiaries have very remote rights, in the sense that it is most unlikely that the trust will ever benefit them. In a family trust, for example, there may be successive classes of beneficiaries, so that (say) the second cousins will take an interest only if everyone else is dead. Again, whether or not the trust takes that form, there is typically an ultimate provision³³ in the form of a gift to X to take effect if all the prior provisions are exhausted by death or the like. When legal rights are in question, although the general rule is that any beneficiary has standing to sue the trustee for breach of trust, it has been held in Jersey (when the plaintiff's standing was under challenge) that the court has a discretion whether to grant relief in any particular case.³⁴ My view is that, by analogy, if a complainant has a very remote interest that could amount to exceptional circumstances within the *Guidelines* justifying a rejection of the complaint.

Non-trustee as respondent: pension trusts

38. In the case of pension trusts, the *Guidelines* admit a complaint by a beneficiary not only against a trustee but also against any other person carrying on a relevant business, *i.e.* a third-party, since it is not said that the relevant provider has to be the trustee. An instance would be an investment manager managing the pension fund.

39. In my view that treatment is authorised by the Ombudsman Law. Strictly again the questions are whether the examiner under article 8(6)(c),

³² For what constitutes a relationship, see below, paras. 40-42.

³³ The usual expression is "ultimate trust", using "trust" in the sense of an individual provision comprised within a given settlement, the whole settlement also being commonly called a "trust". I use the word "provision" above to avoid ambiguity.

³⁴ *Freeman v. Ansbacher Trustees (Jersey) Ltd* [2010] W.T.L.R. 569 at [44]-[45].

taking account of the *Guidelines*, can rationally decide that there is a sufficiently close relationship between beneficiary and third party to give appropriate standing and whether the *Guidelines* can rationally state that that will be so in the absence of exceptional circumstances. My answer to both questions is in the affirmative. That can be correct, of course, only if there is a relationship between the complainant and the provider. A relationship within the Ombudsman Law evidently need not be contractual but a narrow reading of the term might confine it to a case in which there was some form of dealing or contact between the complainant and the provider (unlikely in the case of a third party provider). I do not think that the Law confines the term in that way. Although there is no definition of “relationship”, the Law does give some assistance with the construction of the term when it lists matters that must be covered in the *Guidelines*. The requirement, in article 8(8), takes the form of listing various relationships as to which guidance must be provided. One or two of the relationships listed imply no such dealing or contact. An instance is the true owner of a cheque when a bank has collected payment on behalf of someone not entitled to it,³⁵ the relationship between the owner and the bank being constituted solely by the bank’s act and its impact on the owner. Indeed, even in the case of a trustee there may be no dealing or contact between trustee and beneficiary: a relationship obviously exists between a pension trustee and an employee’s dependant who is a beneficiary even though there will typically be no dealing or contact between them before the death of the employee.

40. Further help with construction is given by article 8(15), which requires both the person examining the complaint at the outset and the Ombudsman when preparing the *Guidelines* to take particular account of certain matters. The grammar is odd but appears to mean that the relationship can be regarded as sufficiently close where acts of the relevant provider are likely to have effects on the interests of the complainant and it is fair and reasonable to expect that provider to accept responsibility for those effects.

41. Hence my view is that the requisite close relationship may exist where an act of a third party provider, being an act done in the course of a relevant financial services business, has an economic or other impact on a beneficiary of a pension trust. If so, it is permissible for the examiner and the *Guidelines* to treat a pension beneficiary as an eligible complainant not

³⁵ *ibid.*, art. 8(8)(e).

only against the trustee but against such third parties.³⁶ The obvious example is an investment manager but there may be others, such as a provider carrying on an insurance business.³⁷

42. I have not forgotten that, in legal proceedings, it is in general for the trustee and not a beneficiary to enforce rights held by the trust. In the typical case in which a third party, such as an asset or investment manager, is engaged by the trustee to act on behalf of the trust, there will be a contract between the third-party and the trustee and the trustee will be the proper plaintiff for relief for a breach. The same applies where property rights of the trust have to be vindicated, the assets being vested in the trustee. A beneficiary may in fact sue on behalf of the trust in special circumstances.³⁸ The broader answer, however, is that CIFO is not confined to legal rights enforceable in the courts³⁹ or to remedies which the courts could provide.⁴⁰

Non-trustee as respondent: other trusts

43. By contrast, when referring to a non-pension trust the *Guidelines* deal only with the case of a beneficiary making a complaint against the trustee. That, however, does not preclude a complaint against a third-party provider: it merely means that the *Guidelines* as they currently stand do not deal one way or the other with that case.

44. In this instance the only question at present is whether the examiner under article 8(6)(c) can rationally take the view that there is a sufficiently close relationship between beneficiary and third party to give appropriate standing. I consider that it would be reasonable for CIFO to admit complaints against third-parties (if they concern investments), the main instance being that of an investment manager. The *Guidelines* could rationally be amended to state as much. The reasons for saying that there is a relationship between the complainant and the third party and that it is sufficiently close are the same as in the case of a pension trust.⁴¹

³⁶ I do not consider that a different answer is required by *ibid.*, art 8(8)(b), which includes in the list of relationships for which the Guideline must make provision a relationship that a complainant has “as a person to or in respect of whom benefits are to be provided under a pension scheme in respect of which the relevant provider carries on the relevant business”. The definite article in “the relevant provider” and “the relevant business” does not imply that there can be only one relevant provider in a pension scheme: “the relevant provider” is simply the person whose act is complained of, see art. 8(1).

³⁷ The business will be relevant financial services business if within Exemption Order, art. 2(2)(g)-(i).

³⁸ *Lewin on Trusts* (20th ed.), paras. 47-006 *et seq.*

³⁹ See above, para. 7.

⁴⁰ Ombudsman Law, art. 16(2)(a).

⁴¹ See above, paras. 38-42.

45. In support, I will mention a narrow point and a wider point. In some trusts – I have unit trusts particularly in mind – the trustee is usually little more than a custodian and decisions on investment and other matters of administration are taken by an investment manager, who is identified in the trust instrument and whose functions are stated there. It would be strange if a beneficiary could complain against the trustee, with extremely limited responsibilities, but not the investment manager.

46. More broadly, if the act causing loss or some other adverse consequence to a beneficiary were that of a third party rather than a trustee, it would be at best unsatisfactory to leave the beneficiary unable to complain against the third party. The trustee is likely to be a financial service provider and so unable itself to make a complaint;⁴² although the beneficiary can complain against the trustee, the trustee may have done nothing wrong; if it is unclear to the beneficiary where responsibility lies, he would be unable to make a complaint against both and rely on CIFO to investigate.

Qualification – discretionary beneficiaries

47. I turn now to the qualification that I said I had to make to the foregoing section. It concerns the remedy available from CIFO and it especially affects discretionary beneficiaries. It is best explained by looking at the remedies available from a court.

Remedies in court proceedings

48. In court proceedings by a beneficiary against a trustee, the ordinary remedy for a breach of trust which has caused loss is reconstitution of the trust fund.⁴³ If, say, an unauthorised investment has been made or trust money has been misapplied, the loss is obviously suffered by the whole fund. The defaulting trustee is then ordered to make good the loss to the whole fund. If new trustees have been appointed, the order will be for a payment to them equivalent to the loss. The ordinary remedy is not the payment of compensation to the individual beneficiary who sues. A

⁴² *ibid.*, art. 8(2)(b).

⁴³ *Lewin, op. cit.*, para. 41-010. For Jersey, see *Crociani v. Crociani* [2017] JRC 146 at [688]-[689] (“It is the right of each beneficiary of the Grand Trust to have the whole trust fund reconstituted”). On appeal, at [2018] JCA 136A, only the extent of the reconstitution was in issue.

successful claim for breach of trust therefore enures to the benefit of all the beneficiaries.⁴⁴

49. Where the claim is against a third party, such as an investment manager, the same necessarily applies. The third party will ordinarily have been engaged by the trustee to provide services for the trust. If, say, the third party causes loss to the trust by negligence, the trustee is the ordinary claimant and any damages recovered are recovered for the benefit of the whole fund.

50. A consequence of recovery for the whole fund is that it is not necessary to value the interests of individual beneficiaries.⁴⁵ Difficulties thereby avoided are illustrated by the following examples:

- (1) The trust is to pay the income to A for life and subject thereto to hold the capital for B.

If there were a breach of duty by the trustee or a third party and A had to be compensated by way of a lump sum payable to him alone to represent his individual loss, the sum could be ascertained only by valuing his interest. That could certainly be done, using actuarial tables and making assumptions as to future interest rates and levels of tax, but as with all such calculations (for instance, working out a lump sum for loss of future earnings in a claim for personal injury) events would almost certainly falsify the figure. The same would apply if B were being individually compensated.

- (2) The trust is again for A for life, remainder to B, but in this example the trustees also have a power to appoint capital to A. Here it would be difficult to calculate A's individual loss (except that it must be no less than in the first example), since the value of his interest depends on the likelihood or unlikelihood that

⁴⁴ Difficulties can arise where a non-claiming beneficiary could not himself have sued and so ought not to share in the reconstituted part of the fund, *e.g.* where he would have been barred by limitation or he consented to the breach. In England, but not in Jersey, statute makes provision for the case of limitation (Limitation Act 1980, s. 21(4)); in neither jurisdiction is there statutory provision for other cases. The case of consent was considered in Jersey in *BNP Paribas Jersey Trust Corp. Ltd v. Crociani* [2018] JCA 136A.

⁴⁵ It is true that a given loss may affect only one beneficiary or one class of beneficiaries. For instance, if there is a beneficiary entitled to income and the trustee misapplies trust income or a third-party managing agent fails to collect rent, then only that beneficiary has suffered a loss. But there is still no occasion to value the beneficiary's interest, since the compensation or damages will go into the trust fund and will be held for that beneficiary.

the trustees will exercise the power. Any allowance for the power would be more or less of a guess.

- (3) The trust is a wide discretionary trust: there is a class of beneficiaries, in favour of any of whom the trustees have a power to appoint income or capital during a trust period (or, in Jersey, indefinitely).

The beneficiaries taken together may represent the entire value of the fund but it would be almost impossible to value the interest of any one of them, since it depends on the imponderables of the trustees' decision whether to benefit him at all and, if so, when and to what extent. If (say) the settlor's children are within the class of beneficiaries it may be easy to infer that they were meant to benefit substantially and a letter of wishes may provide a strong indication but even then the trustees are not bound to follow the letter of wishes or benefit the children equally or at all.

Remedies under the Ombudsman Law

51. As I have already mentioned, under the Ombudsman Law a complaint to the Ombudsman does not have to be based on legal rights enforceable in the courts, nor is the Ombudsman confined to remedies which the courts could provide.⁴⁶ Nonetheless, one remedy – perhaps the principal remedy – which the Ombudsman can order is a money award for compensatable loss, which includes financial loss.⁴⁷

52. The question then arises whether the Ombudsman can make an award for compensation payable to the trust fund rather than the individual complainant. Article 16(1)(a) of the Ombudsman Law defines a money award quite loosely but article 16(3), defining the compensatable loss for which a money award may be made, refers to loss “suffered by the complainant” and article 16(9) makes the award recoverable by the complainant as a debt due from the respondent. Those provisions make it extremely difficult to contend that the Ombudsman can order reconstitution of the trust fund by way of a money award. Nor can he do so by way of his jurisdiction to direct other steps under article 16(1)(b), because by article 16(5)(a) such a direction must not include a payment of money.

⁴⁶ Above, para. 42.

⁴⁷ Ombudsman Law, art. 16(1)(a), (3)(a).

53. It follows that a money award must be limited to financial loss suffered by the particular beneficiary. It may be difficult and, in many cases, almost impossible for the Ombudsman to fix a rational award for an individual beneficiary asserting a financial loss. Establishing a loss to the trust fund will not establish the quantum of the loss to the beneficiary. If the beneficiary's interest is wholly discretionary at the time of the complaint, I find it hard to see what money award could be made. Even in the case of a pension trust there may be some difficulty in doing so to the extent that benefits are discretionary, though I should expect that it would ordinarily be possible to reach a rational figure.

54. Of course, if (say) the trustees have made an absolute appointment in favour of a given beneficiary it should then be possible to put a figure on a loss and it would not matter that the beneficiary's interest was previously discretionary. That is plainly so if the appointment pre-dated the act complained of. If it post-dated the act complained of, the loss would be the same unless, perhaps, it appeared that the trustees did not appreciate that the loss could be compensated and would have made a different appointment, or none, had they been better informed. Absent a special consideration of that kind, I do not think that it would matter that the appointment post-dated the act complained of or even post-dated the making of the complaint itself as long as CIFO had not reached a decision by then.

55. In a situation involving a discretionary beneficiary where it is possible to establish the quantum of the loss to the trust fund but difficult to establish the quantum of the loss to the individual discretionary beneficiary, even if no direction making an award for compensation can be made, the Ombudsman is not precluded from issuing a non-binding recommendation that the losses suffered by the discretionary trust fund be restored.

Effect on eligibility

56. I stress that the problem of making a money award for financial loss leaves unaffected my conclusions about the eligibility of beneficiaries to make a complaint. The problem does not justify the conclusion that trust beneficiaries in general, or discretionary beneficiaries in particular, lack standing to complain. An award may be made not only for financial loss

but also for loss caused by material distress or material inconvenience.⁴⁸ A discretionary beneficiary may suffer individual distress or inconvenience for which an award would be appropriate. A direction for the respondent to take other steps, such as providing an apology, may also be made on a complaint from a discretionary beneficiary.

Respondent counsel's letter

57. It may be helpful to say something here about the views expressed by the respondent's counsel in their letter opinion of 28 May 2019.

Beneficiaries as complainants

58. I shall not go through respondent counsel's letter paragraph by paragraph. It is not altogether clear exactly what their contention is. At first sight it is that no beneficiary of a trust has standing to complain against either the trustee or another provider, since they assert that "beneficiaries of Jersey trusts are not eligible complainants under the Law"⁴⁹ and a section of their letter is headed "Beneficiaries not eligible complainants".⁵⁰ But after lengthy general remarks they comment that the *Guidelines* indicate that "the relevant provider must be the trustee" (though that is not how I read them⁵¹) and then say, "It makes sense that the beneficiary may complain about (or sue) the trustee".⁵² So their point appears to have narrowed to asserting that no beneficiary can complain against a non-trustee provider. Then there is a further narrowing, because under the heading "Beneficiary no 'interest' to protect (Art 8(15))" they go on to deal solely with discretionary beneficiaries, asserting that a beneficiary under a discretionary trust has no "interest" to protect within article 8(15) of the Ombudsman Law and therefore cannot be an eligible complainant.⁵³ I have mentioned the function of article 8(15) above.⁵⁴

59. I do not think that respondent counsel have provided intelligible reasons why no beneficiary of a trust is an eligible complainant or why no beneficiary is an eligible complainant against a non-trustee. But I will deal with the case of a discretionary beneficiary.

⁴⁸ *ibid.*, art. 16(3)(b).

⁴⁹ Respondent counsel's letter of 28 May 2019, para. 3.

⁵⁰ *ibid.*, heading to paras. 7 *et seq.*

⁵¹ Above, para. 43.

⁵² Respondent counsel's letter of 28 May 2019, paras. 20c, 21.

⁵³ *ibid.*, heading to paras. 21 *et seq.* and paras. 22-24.

⁵⁴ Para. 40.

60. Respondent counsel’s contention apparently turns on the word “interests” in article 8(15) (though they mention that provision only in a heading). “Interest” is a word with a variety of meanings. It is true that a purely discretionary beneficiary is sometimes said to have no “interest” in the trust property; but then all that is meant is that he has no identifiable proprietary right in any given part of the trust assets, such as a life interest or a contingent remainder. The point matters for tax, if the taxing legislation is construed to require an interest in that sense;⁵⁵ it matters when a discretionary beneficiary becomes bankrupt, because there is no property which can pass to a trustee in bankruptcy or other person for the benefit of his creditors;⁵⁶ it matters when a forfeiture order affecting proceeds of crime is sought against a discretionary beneficiary.⁵⁷ But even in the context of trusts, the term “interest” is often used more broadly to refer to the legal rights of a discretionary beneficiary. The Trusts (Jersey) Law 1984, for example, authorises the court to consent to a variation of a trust on behalf of various persons, including:

any person in respect of any interest of his or hers that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined.⁵⁸

The word “interest”, where it first occurs, necessarily means the legal rights of a discretionary beneficiary and not a fixed proprietary interest.⁵⁹ The corresponding English provision actually refers to “any discretionary interest”.⁶⁰

61. Article 8(15) is not even dealing specifically with trusts. When it refers to “the interests of persons having that relationship”, *i.e.* a sufficiently close relationship to qualify as a complainant, it is referring to all possible complainants having such a relationship, including all those listed in article 8(8). Some of those can have no relevant proprietary interest to protect, *e.g.* someone who relies on a cheque guarantee card or

⁵⁵ *Gartside v. I.R.C.* [1968] A.C. 553 (H.L.), the English decision always cited in this context.

⁵⁶ *Lewin on Trusts*, *op. cit.* para. 27-090.

⁵⁷ *Tantular v. Att.-Gen.* [2014] JRC 128, cited by respondent’s counsel, where, however, the relevant statutory terms were “realisable property” and “beneficially entitled”, not “interest”.

⁵⁸ Art. 47(1)(d).

⁵⁹ See too *UEB Industries Ltd v. Brabant* [1992] 1 N.Z.L.R. 294, [1991] P.L.R. 109 (N.Z. C.A.), where in a pension trust a provision precluded an amendment if it would adversely affect a member’s “interest” and the court gave a broad meaning to the term, see at [34]-[35].

⁶⁰ Variation of Trusts Act 1958, s. 1(1)(d).

receives a banker's reference.⁶¹ The word "interests" is in my view obviously used in a broad and non-technical sense.

62. Respondent counsel are more generally concerned to downplay the significance of a discretionary beneficiary. That too seems to me incorrect. While it is true, as respondent counsel say, that a discretionary beneficiary has only a hope that a discretion will be exercised in his favour, that only means that he cannot assert a proprietary right to receive any specific distribution. He is not in the position of someone holding out a begging-bowl. The legal rights of an individual discretionary beneficiary⁶² include:

- (1) A right to proper consideration of the exercise of the trustee's discretion;⁶³
- (2) A right to sue the trustee for breach of trust;⁶⁴ and
- (3) A right to apply for information about the trust.⁶⁵

Collectively, though not individually, they are the beneficial proprietors of the trust assets and so if they are all of full age and all of them agree (not that that often happens) they may ordinarily demand a winding-up of the trust and a distribution of its assets.⁶⁶

Financial loss

63. Respondent counsel go on to say that because a discretionary beneficiary has no interest, as they put it, in the trust assets, he can suffer no financial loss for which he can be compensated by an award under the Ombudsman Law.⁶⁷

64. I do not agree that he can suffer no financial loss. To take a strong case, suppose a wide discretionary trust with a class of beneficiaries, in favour of any of whom the trustees have a power to appoint income or capital during a trust period, at the end of which anything left goes to a charity; the class of beneficiaries is small, say the settlor's children, and the

⁶¹ Ombudsman Law, art. 8(8)(d), (f).

⁶² See *Lewin, op. cit.*, para. 1-061.

⁶³ *Gartside*, above, at 605-606, 617-618.

⁶⁴ *Freeman v. Ansbacher Trustees (Jersey) Ltd*, above.

⁶⁵ Trusts (Jersey) Law 1984, art. 29 (applying only to a trust governed by Jersey law); *Schmidt v. Rosewood Trust Ltd* [2003] 2 A.C. 709 (P.C.).

⁶⁶ Trusts (Jersey) Law 1984, art. 43(3), (4) (applying only to trusts governed by Jersey law), which largely reflect the English rule in *Saunders v. Vautier* except that the Jersey court is given a discretion to withhold a distribution. The English rule has been applied to enable discretionary beneficiaries to terminate the trust: *Lewin, op. cit.*, para. 22-022.

⁶⁷ Respondent counsel's letter of 28 May 2019, paras. 25-28.

settlor provides a non-binding letter of wishes stating that, other things being equal, his preference would be for all the beneficiaries to receive an equal share of capital at a suitable age. Trusts on those lines are common. The charity is most unlikely to receive anything;⁶⁸ the real interest in the trust is that of the discretionary beneficiaries. If the entire trust fund disappears through imprudent investment, it is surely impossible to say that each has suffered no loss.

65. The difficulty is rather that it is extremely difficult to quantify the loss of an individual discretionary beneficiary, a matter that I have already discussed. But it is a different point.

The situation in the United Kingdom

66. Having concluded my analysis on this matter, a supplemental consideration was to look at the perspective on this issue taken by the financial Ombudsman in the United Kingdom. Many FSPs active in the Channel Islands are subsidiaries of, or related companies to FSPs based in or operating from the United Kingdom (UK). It is therefore appropriate, depending on the circumstances, for CIFO to note the approach taken by the Financial Ombudsman Service in the UK (UK FOS) on similar issues and complaint facts. In conversations with senior management and internal legal counsel at UK FOS, it was confirmed that UK FOS treats trust beneficiaries, in all of the different circumstances considered in this decision, as eligible complainants against FSP service providers to the trust, and against investment managers in particular. While not binding upon CIFO, CIFO has often looked to the UK legal and regulatory environments, and to relevant decisions taken by UK FOS for guidance in assessing issues and coming to decisions consistent with CIFO's "fair and reasonable in the circumstances" test, particularly where the Jersey and Guernsey legal and regulatory provisions do not provide clear guidance that may differ from the UK approach. In this particular matter, the treatment of trust beneficiaries as eligible complainants against a respondent FSP service provider to the trust, I note that the views of CIFO, as expressed in this decision, and UK FOS are well-aligned.

⁶⁸ Cf. *Re Gea Settlement* (1992) 13 Tru. L.I. 188, in which the Jersey court considered that in the light of a letter of wishes it was unnecessary even to ensure that three charities named as ultimate beneficiaries were represented in trust proceedings, as it was clear from the letter that they had not really been intended to benefit.

III. OMBUDSMAN DECISION

67. In summary, I make the following decision in accordance with Articles 8(2)(c) and 8(6)(c) of the Ombudsman Law.

68. Pension trusts fall within the scope of the Ombudsman Law and so do other trusts as to investments.⁶⁹

69. In both cases a beneficiary, including a discretionary beneficiary, is an eligible complainant, both against the trustee⁷⁰ and against a third-party provider.⁷¹

70. The discretionary nature of an interest may make it difficult to quantify the financial loss of a given beneficiary but that does not affect the eligible complainant status of a discretionary beneficiary.⁷²

Douglas Melville
Principal Ombudsman and Chief Executive

Date: 12 August 2020

⁶⁹ See above, paras. 10-13.

⁷⁰ See above, para. 36.

⁷¹ See above, paras. 38-42 (pension trusts), 43-46 (other trusts).

⁷² See above, paras. 47-55.