
**Trinity Term**
[2025] UKPC 32
**Privy Council Appeal No 0037 of 2024**

# JUDGMENT

# Ashley Dawson-Damer (Appellant) *v* Grampian Trust Company Ltd and another (Respondents) (The Bahamas)

## From the Court of Appeal of the Commonwealth of The Bahamas

before

**Lord Lloyd-Jones**
**Lord Leggatt**
**Lord Burrows**
**Lady Rose**
**Lady Simler**

**JUDGMENT GIVEN ON**
**7 July 2025**

**Heard on 14 and 15 May 2025**

*Appellant*
Richard Wilson KC
Andrew Holden
Sparsh Garg
John Minns (of The Bahamas Bar)
(Instructed by Charles Russell Speechlys LLP (London))

*Respondent*
Penelope Reed KC
James MacDougald
(Instructed by Taylor Wessing LLP (London))

The second respondent, Lyndhurst Ltd did not appear and was not represented.

**LORD BURROWS AND LADY ROSE:**

## 1. Introduction

1. This appeal concerns a discretionary trust. The first respondent ("Grampian") is the corporate trustee of a family discretionary trust known as the Glenfinnan Settlement (which we shall sometimes shorten to "Glenfinnan"). The appellant, Ashley Dawson-Damer, who has been referred to throughout the proceedings as "Ashley", is a discretionary beneficiary of the Glenfinnan Settlement. Grampian has exercised its discretionary power by making two appointments by which approximately 98% of the trust assets in Glenfinnan were transferred into new trusts of which the class of discretionary beneficiaries did not include Ashley. She seeks to set aside those two appointments on the basis that they constituted an improper exercise of discretionary power by the trustee. More specifically, she argues that the trustee took into account irrelevant considerations or failed to take into account relevant considerations in exercising its discretion. There was, in other words, a breach of duty by the trustee by what was labelled "inadequate deliberation" in the leading case of *Pitt v Holt* [2013] UKSC 26; [2013] 2 AC 108 ("*Pitt v Holt*"), para 60. Ashley therefore argues that the two appointments are voidable (ie liable to be set aside) and that it is appropriate for the Board to exercise its equitable discretion by setting aside those appointments.

2. Central to those submissions is that Grampian incorrectly identified the wish or intention of the settlor of the Glenfinnan Settlement as being that the primary purpose of the trust was for the benefit of future generations coming after Ashley. The settlor was a company called Spey Limited ("Spey"). It will therefore be necessary to consider not only the law on inadequate deliberation but also the law on ascertaining a company's wishes or intentions, ie the law on corporate attribution. It is not in dispute that the relevant law in the Bahamas is the same as English law.

3. The trial judge, Winder J, dismissed Ashley's claim and his decision was upheld by the Court of Appeal. Ashley now appeals to the Board.

## 2. Facts

### (1) George Skelton Yuill's fortune and the 1973 Settlement

4. The dispute is ultimately concerned with the Glenfinnan Settlement under which Grampian was the sole trustee. But in order to understand how that trust came about, it is necessary to understand its historical background.

5. The family members with which the appeal is primarily concerned are George Skelton Yuill's two great-grandchildren: George Dawson-Damer, who was the 7th Earl of Portarlington, and his younger brother the Hon. John Dawson-Damer. George married Davina and they had four children: Charles, Edward, Marina, and Henry. John was married twice, the second time to Ashley. John and Ashley adopted two children, Piers and Adelicia.

6. George Skelton Yuill was a very successful businessman. A Scotsman, he emigrated to Australia in 1880 and made his fortune in the production of beef and butter in Australia and the Far East throughout the late 19th and early 20th centuries. Following his death in 1917, the funds of his substantial estate were administered by four executors. Subsequently there were "Family Advisers" who performed a similar role.

7. Over the decades subsequent to 1917, there was a series of settlements of the funds from George Skelton Yuill's estate by which Bahamian discretionary trusts were set up. On 29 May 1973, there was a new declaration of trust of the funds with the trustee being Arndilly Trust Company Limited (the "1973 Settlement"). The class of beneficiaries under the 1973 Settlement included George, John, their wives and their children and remoter issue. This 1973 Settlement was the immediate precursor to the Glenfinnan Settlement.

**(2) The 1992 Restructuring**

8. In 1992 Robert Walker QC (later Lord Walker of Gestingthorpe) advised that the 1973 Settlement should be restructured to achieve certain tax planning objectives, fresh perpetuity periods, and to create separate settlements for the benefit of John, Ashley, and their adopted children, as well as for George, Davina and their children. Mr Walker advised that it was unlikely that the terms of the 1973 Settlement would be construed as including adopted children in the class of discretionary beneficiaries and the family has proceeded throughout on the basis that Piers and Adelicia were not so included. However, Mr Walker also advised that, even if the adopted children were not included, the trustees could make settled advances for their benefit, given that they had a moral claim on John's bounty – a so-called *Pilkington* advance (named after the decision in *In re Pilkington's Will Trusts* [1964] AC 612). The 1992 restructuring involved the trustee, Arndilly, first transferring assets from the 1973 Settlement, worth around US$40 million, to George and John to resettle on new Australian trusts for their respective families. Most of the remaining assets of the 1973 Settlement (around US$150 million) were transferred to a new company, Spey, which was incorporated in August 1991 in The Bahamas to receive and hold these assets absolutely and beneficially (and not as trustee or in a fiduciary capacity), subject to the objects set out in Spey's Memorandum of Association.

9. Mr Walker advised Arndilly that for tax and other purposes it was important that the appointment of assets to Spey was not part of a pre-ordained scheme to resettle those assets. To avoid this, Mr Walker advised that the board of directors of Spey should be differently composed from that of Arndilly. In the event, Arndilly and Spey had one director in common, Geoffrey Johnstone (later Sir Geoffrey Johnstone). The other two directors of Spey were Reginald Lobosky and Roland Lowe.

10. Spey's board of directors discussed and resolved how to deal with the assets transferred from Arndilly during the course of a meeting of the board held on 12 to 14 February 1992 ("the February meeting"). All three Spey directors, Mr Johnstone, Mr Lobosky and Mr Lowe, attended that meeting. They were joined, at their invitation, by three other individuals, Michael Hamilton, John Duff, and Michael Stanford-Tuck. Mr Hamilton and Mr Duff were there as two of the three Family Advisers. They were in more frequent contact with the family members, Mr Duff being based near the families in Australia, and were invited because they were in a better position to advise the trustees of the beneficiaries' interests and aspirations. Mr Stanford-Tuck is a solicitor and a former partner at Taylor Joynson Garrett (now Taylor Wessing LLP). He had acted as the solicitor for Arndilly, and subsequently Grampian.

11. Spey's Memorandum of Association was drafted in broad terms and permitted Spey to provide benefits from time to time to all and any of the descendants, including adopted or legitimated descendants, of George Skelton Yuill's grandson, Viscount Carlow (who had died in the Second World War in 1944 and whose sons were the George and John referred to in para 5 above). Under the terms of its constitution, Spey was therefore able, though not obliged, to give its assets to or for the benefit of George, John, their spouses, their descendants and the spouses of their descendants.

12. The structure that was set up as a result of the decisions made at the February meeting was as follows:

(a) Two settlements for the benefit of George and his family (the Islay and Annan Settlements) would receive 25% of the assets;

(b) One settlement for the benefit of John and his family (the Willards Settlement) would also receive 25% of the assets; and

(c) One settlement for the remainder of the assets of the 1973 Settlement (the Glenfinnan Settlement) would receive the remaining 50% and would be for the benefit of the same class of discretionary beneficiaries as the 1973 Settlement.

13. It was specifically noted in the minutes of the board meeting that "the beneficiaries of the 1973 Settlement do not include adopted children and it was agreed that the beneficiaries of the 1992 Glenfinnan Settlement should not include adopted children, although the beneficiaries of the Islay, Annan and Willards Settlements should".

14. The assets were duly transferred by Spey to Grampian which was the sole trustee of all four settlements. The directors of Grampian at the time of the 1992 restructuring were Sir Geoffrey Johnstone, Peter Higgs and Sarah Lobosky, all of the Bahamian law firm Higgs & Johnson.

15. Some time after the February meeting, in September 1992, Mr Stanford-Tuck prepared a document entitled "The Yuill Trusts: Explanatory Memorandum and Diagrams (For the use of Trustees and Trust Advisers)" ("the 1992 Memorandum"). The 1992 Memorandum sets out the history of the family and the various settlements and then describes the carrying out of the 1992 Restructuring which, it says, was intended "to make a fixed and final division of the trust assets between the two families". Under the heading "The Current Structure" the 1992 Memorandum describes each of the trusts created. For Glenfinnan it says that the trusts are "Discretionary for the benefit of George and John and their families (excluding adopted children)". It also says: "Objects–Long term accumulating trust for the benefit of next generation beneficiaries". It states that all decisions of the various trust and holding companies are taken by directors who are assisted by the Family Advisers. The latter's functions include keeping in close touch with the beneficiaries and advising the trustees of their interests and aspirations.

16. Grampian's case in these proceedings has from the start been that the 1992 Memorandum set out what Mr Stanford-Tuck considered to have been the objectives of the 1992 Restructuring. Mr Stanford-Tuck accepted in his evidence at trial that, when he prepared the 1992 Memorandum, he was not acting on behalf of Spey and it is now common ground between the parties that the 1992 Memorandum is not a document that can properly be attributed to Spey. In 1992, Mr Johnstone received a copy of the 1992 Memorandum but it is Ashley's case that there is no evidence that the other two directors of Spey at the time (Mr Lobosky and Mr Lowe) ever received, read, or knew about it. It is Grampian's case that the 1992 Memorandum accurately set out what Spey's wishes and intentions were, as settlor, when it transferred the assets to Grampian under the Glenfinnan Settlement. Mr Stanford-Tuck understood that the reference in the 1992 Memorandum as regards the Glenfinnan Settlement to the "next generation beneficiaries" was to those beneficiaries of the 1973 Settlement other than George, John and their wives.

**(3) The 2006 and 2009 appointments**

17. There were no appointments made from the Glenfinnan Settlement between 1992 when it was established and 2006. In a letter dated 8 July 1999, John raised the question of the future of the funds in Glenfinnan. It was this letter that formed the basis of Ashley's contention at trial that Spey's wishes and intentions as regards the assets in Glenfinnan were not that the assets would be accumulated in the long term but rather that they would remain on those trusts provisionally and in due course would be split between the two families.

18. Ashley's husband, John, died in a motor-racing accident in 2000. Following John's death, relations between the Family Advisers and Ashley soured and ultimately became strained and acrimonious. This led to the assets held in the Willards Settlement being moved out of the family trust structure for which Grampian was a trustee. On 3 July 2003, Grampian adopted a resolution that no distributions of capital or income should be made from the Glenfinnan Settlement for the time being except in the event of changed circumstances and unforeseen contingencies "and that the income of the trust assets should be accumulated for the future benefit of the next generation of beneficiaries, meaning George's natural children, grandchildren and remoter issue and their wives and widows."

19. In 2006 Grampian decided to move 60% of the assets in the Glenfinnan Settlement to be settled on new discretionary trusts. The reasons for this are contentious but it is clear that the new discretionary trusts were all for the benefit of George's children and his descendants. The trustee of each of these new settlements was the second respondent, Lyndhurst Ltd, which has not played any part in the proceedings but will clearly be affected if the appointment in 2006 is set aside. The new settlements arising from the 2006 appointment were:

(a) For Charles, his wife, and his children (the Came Settlement);

(b) For Edward, his wife, and his children (the Emo Settlement);

(c) For Henry, his wife, and his children (the Hewish Settlement).

20. There was no trust established for the fourth child, Marina, (see para 5 above) because at this time she was a UK resident and such a trust would be disadvantageous for her for tax purposes. It was understood that some of the money left in Glenfinnan was earmarked for her benefit. The beneficiaries of those new trusts did not include Ashley or any other members of John's family. In 2007 George and Davina were removed from the class of beneficiaries of Glenfinnan.

21. In 2009, a further appointment was made of the assets of the Glenfinnan Settlement for the benefit of another class of "Qualifying Beneficiaries", namely for George's children (the Moray Settlement). Grampian was the trustee of the Moray Settlement.

22. The effect of the 2006 and 2009 appointments was that 2% of the assets of the Glenfinnan Settlement were left, still subject to the terms of that Settlement (which were broadly the same as the terms of the 1973 Settlement except that after 2007 they excluded George and Davina). At the time this 2% amounted to about US$6.6 million and the Board was told that the amount had grown to US$14 million by 14 May 2025. The effect of moving the other 98% out of the Glenfinnan Settlement was therefore to preclude any further appointments from those assets either to Ashley or, by way of a *Pilkington* advance, to her children. The combined value of the funds transferred out of the Glenfinnan Settlement in 2006 and 2009 amounted to US$402 million. It is common ground that Ashley was not consulted by Grampian or the Family Advisers before the 2006 and 2009 appointments were made. She only became aware in November 2013 that the vast majority of assets had been moved out of the Glenfinnan Settlement.

## 3. The proceedings below and the issues before the Board

23. Ashley started proceedings against Grampian on 20 March 2015. The case was heard by Winder J in November and December 2020 and February 2021 in a trial lasting 21 days. By the time of the trial, the three directors of Spey at the time of the 1992 Restructuring had died. Mr Hamilton, one of the Family Advisers in 1992 had also died before the hearing though there was a witness statement from him. The witnesses giving evidence at the trial included:

(a) Two of the three directors of Grampian at the time of the 2006 appointment (Philip Dunkley KC (the Senior Partner of Higgs and Johnson at the time of trial) and Surinder Deal);

(b) Michael Morrison and Jim Burns (both Family Advisers);

(c) Ashley, Mr Stanford-Tuck, Mr Duff (a retired Family Adviser), Tony Carroll (an Australian accountant and advisor to Ashley) and Simon Taube KC (who advised Grampian in 2006).

24. The main issues at trial focused on the justification for the 2006 and 2009 appointments. Ashley's case was, broadly, that Grampian had followed a policy of excluding her and her children as beneficiaries of the assets because the directors of Grampian and the Family Advisers were very hostile towards her. Grampian's case was that in making those appointments they were fulfilling the wish and intention of the

settlor, Spey, that, although formally Ashley had been a beneficiary of the Glenfinnan Settlement, those assets were to be accumulated for future generations. Ashley further argued that Grampian had failed adequately to consider her position and, in particular, that Grampian's directors had failed to ensure that they had up-to-date information about her financial and other circumstances. Grampian's case was that, bearing in mind that it had never been Spey's intention that Ashley should benefit substantially from the Glenfinnan Settlement, it had had enough information to give an appropriate level of consideration to her future needs and wishes. That, Grampian said, was why they had left 2% of the fund in Glenfinnan as a "safety net" for her in case she should need that in future.

25. In an impressive judgment handed down on 17 January 2022, 2015/CLE/gen/00341, Winder J considered, first, what were Spey's wishes or intentions for Glenfinnan in 1992. He recorded that Grampian's pleaded case was that Spey's intention for Glenfinnan had been reflected in the 1992 Memorandum and was that Ashley and her generation would not benefit other than in exceptional circumstances. Ashley's contention was that Grampian misunderstood Spey's wish and intention; that Spey had not intended to exclude John's adopted children from future indirect benefit from Glenfinnan and that Spey's true intention was that Glenfinnan should be available for a further division between John's branch of the family and George's branch in a few years' time: see paras 55 and 56.

26. On this issue, Winder J accepted Ashley's submissions and held that the 1992 Memorandum "could not be attributed to Spey as its document" (para 59). However, he went on to determine what were the wishes and intentions that Spey, as settlor, had for Glenfinnan. He noted that there was no formality required to convey or record a settlor's wishes and that, in the absence of a formal letter of wishes, the court could look to other material, such as the evidence of witnesses and contemporary documents to discern that intention. He concluded that Spey's wish and intention had been, as Grampian contended, that the assets be held long term for the benefit of future generations, subject to ensuring that George and John and their wives were well provided for from other sources.

27. Winder J then considered whether Grampian had breached its duties as trustee by failing properly to consider Ashley when it made the 2006 and 2009 appointments. At para 81, Winder J accepted that there had been some hostility and animosity towards Ashley on the part of some of the Family Advisers. He said that the language they had used in the contemporary documents to describe her and the motives they attributed to her were "unfair, unprofessional and unfortunate". But he found that this was not the attitude of all the Family Advisers or of the Grampian directors at the most relevant time, which was the time of the 2009 appointment. He noted that in 2009 Grampian had reserved a greater sum in the Glenfinnan Settlement than had been originally proposed and he concluded that the 2% reserved for her did not amount to unfair treatment. He found at para 86:

> "Ultimately therefore, notwithstanding any Family Adviser hostility, I did not accept Ashley's assertion that Grampian's real purpose in making the 2006 and 2009 Appointments was to exclude her. I find that the motives upon which Grampian acted, in my view were noble namely the undeniable tax advantages and the repositioning of the assets for the emerging families representing George's branch of the family. On this complaint I am satisfied that Grampian acted fairly, honestly and in good faith in keeping with the settlor's wishes, as I have found them."

28. Turning to whether there had been inadequate deliberation because Grampian had failed properly to consider Ashley's circumstances, Winder J recorded (para 93) that advice taken from leading counsel in 2006 was that there was a need to consider the claims of all beneficiaries, including Ashley, and that Grampian needed to ensure that it had sufficient information in order to be able to do so. Winder J agreed with Ashley's assertion that this element of counsel's advice appeared not to have been passed on to Grampian by either the Family Advisers present at the relevant consultation or by Mr Stanford-Tuck. He found that there had been "a very cursory/curt assessment of Ashley's circumstances" (para 94) and that this fell short of what a prudent and diligent trustee ought to have done. In particular, Grampian failed to consider whether provision should be made from Glenfinnan for Ashley, or whether she should be a beneficiary of the resettled trusts, given that the evidence at trial had shown that her exclusion from the new trusts was not necessary to achieve the tax advantages which prompted the 2006 and 2009 appointments. Winder J was highly critical of the conduct of the Grampian directors who had failed, he found, to make any real effort to obtain information on Ashley or to establish a meaningful channel of communication with her once they knew that the relationship between her and the Family Advisers had broken down. Instead, he said, Grampian proceeded on the basis of old information from sources known to be adverse to Ashley who were themselves relying upon newspaper reports as to Ashley's circumstances. He concluded at para 98:

> "In the absence of updated information Grampian could not properly take into account Ashley's financial circumstances and weigh them against the needs of the beneficiaries in whose favour the Appointments were being made. Grampian says that it knew Ashley's position 'in broad terms' and that position in 2009 was based, in part, on an assumption as to the performance of the Willards Trust."

29. Finally, Winder J considered whether Grampian's failings amounted to a breach of trust warranting setting aside the appointments. Having dealt in detail with the judgment in *Pitt v Holt* he noted that Grampian not surprisingly argued that the test to be applied was that the court should only set aside the appointments if satisfied that Grampian "would have" come to a different conclusion and so would not have made the

appointments if they had fulfilled their fiduciary duty. Richard Wilson KC, for Ashley, argued that the appointments should be set aside if the court concluded that Grampian "might have" decided differently and might not have made the appointments. Winder J said at para 113 that he was satisfied "that the appropriate test to employ in determining whether any inadequacy in Grampian's deliberations was material (or serious) is the 'would not' test as opposed to the 'might not' test." Given that the primary purpose of the Glenfinnan Settlement was to benefit future generations, he was not satisfied that Grampian or the reasonable trustee would not have made the appointments had it given adequate deliberation to Ashley's circumstances. Winder J regarded these matters as going to whether there was a breach of trust by Grampian. He concluded that there was no such breach. At para 116, he said:

> "Having regard to Ashley's considerable wealth, her fairly stable circumstances, her age at the time of the appointments, and the primary purpose of the fund (being for the next generation of Yuill descendants) I find that it could not be said that Grampian or a reasonable trustee would not have made the appointments had it given adequate deliberation to Ashley's circumstances. In which case, *the inadequate deliberation was not sufficiently material to amount to a breach of trust on the part of Grampian*." (Emphasis added)

Ashley's claim was therefore dismissed.

30. Ashley appealed to the Court of Appeal (Madam Justice Crane-Scott, Mr Justice Jones and Mr Justice Evans JJA). The court dismissed her appeal in a judgment handed down on 3 May 2023, SCCivApp No 30 of 2022. On the question of Spey's wish and intention, it was held that Winder J had been plainly correct to conclude that the 1992 Memorandum could not be attributed to Spey as its document: para 116. The court then referred to the submissions made by Mr Wilson for Ashley, which are the submissions renewed before the Board, that the judge had failed to apply the correct rules of corporate attribution and that no intention to earmark Glenfinnan's funds for the next generation of the heirs of Yuill could properly be attributed to Spey in the absence of either documentary evidence or witness testimony that Spey's board of directors had ever discussed or taken any other steps to adopt such a resolution. The Court of Appeal rejected this. It concluded, at para 173, that there was no basis on which the court could interfere with the judge's primary finding of fact as to Spey's intention for Glenfinnan; moreover, it was satisfied that the finding was correct. The court also agreed with the judge's finding that Grampian had exercised the power of appointment with an open mind and that it was not unfair to Ashley: para 199.

31. Turning to the allegation of inadequate deliberation, the Court of Appeal rejected the submission that, at para 116 of his judgment, Winder J had wrongly elided two

separate issues, namely first, whether the failings he had identified were sufficiently serious to amount to a breach of trust and, secondly, how the court should respond to that breach. At para 229, the court rejected the argument that there were two distinct stages of legal analysis that were here required; rather Winder J had implicitly found that "there was no vitiating error on the part of Grampian that required him to proceed to the second stage". The Court of Appeal's view was that the judge had concluded that Grampian's failings were not sufficiently serious to amount to a breach of trust and the Court of Appeal agreed with that conclusion.

32. The two issues before the Board can be expressed as follows. First, did the lower courts err by applying the wrong test when attributing to Spey the wish and intention, when transferring the assets to Glenfinnan, that those assets should be used to benefit future generations rather than all the beneficiaries of the 1973 Settlement including Ashley? This issue is dealt with as "Issue 1: Spey's wish and intention". Secondly, was there a breach of duty by inadequate deliberation and what follows from that? This issue is referred to as "Issue 2: inadequate deliberation?"

33. It can be seen that the answer to Issue 1 feeds into the consideration of Issue 2. That is, Spey's wish and intention will affect whether there was, or was not, inadequate deliberation.

34. The relief sought by Ashley from the Board is that:

> (a) The 2006 and 2009 appointments be set aside and the funds returned to the Glenfinnan Settlement.
>
> (b) The matter then be remitted to the court in The Bahamas to decide whether a new trustee should be appointed for the Glenfinnan Settlement so that the new trustee can consider afresh what appointments if any should be made from the restored funds.

35. It is not asserted by Grampian that there would be any particular difficulty, as a matter of law or practicality, in setting aside the appointments and reconstituting the Glenfinnan Settlement.

## 4. Issue 1: Spey's wish and intention

### (1) The parties' submissions

36. It is common ground that the settlor's wish and intention when settling the assets on a discretionary trust are a relevant factor that the trustee must take into account when making appointments from the trust assets. Lord Walker said in *Pitt v Holt*, at para 66, that the settlor's wishes are always a material consideration in the exercise of fiduciary discretions, though they should not displace all independent judgement on the part of the trustees themselves. It is also clear that those wishes and intentions can be communicated informally to the trustee by the settlor and do not have to be expressed in a formal document. In *In re Manisty's Settlement* [1974] Ch 17, 26 Templeman J said that:

> "In practice … reasonable trustees will endeavour, no doubt, to give effect to the intention of the settlor in making the settlement and will derive that intention not from the terms of the power necessarily or exclusively, but from all the terms of the settlement, the surrounding circumstances and their individual knowledge acquired or inherited."

37. In *Grand View Private Trust Co Ltd v Wong* [2022] UKPC 47; [2023] WTLR 149, at para 63, the Board contrasted the kinds of material external to the trust deed which may be admissible when determining the purpose of a fiduciary power with the material that was admissible when determining the wishes of the settlor. It had been common ground, in the Board's view correctly, that trustees could legitimately have regard to wishes expressed by the settlor after the trust was set up as to how the trustees should exercise their dispositive powers but that, by contrast, only documents contemporaneous with the trust instrument were admissible in determining the purpose of the power.

38. Mr Wilson's argument on behalf of Ashley on Issue 1 can be summarised as follows. Since Spey is a corporate rather than an individual settlor, it is important to identify who within Spey is the "directing mind" and so whose wishes and intentions are to be treated by Grampian as those of the settlor. He argued that the ordinary rules for "corporate attribution" apply. Those rules were set out by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 ("*Meridian*"). According to the Memorandum and Articles of Spey, decisions are to be made by a majority of the board of directors, that is to say, by the joint decision of at least two of Sir Geoffrey Johnstone, Mr Lobosky and Mr Lowe.

39. Mr Wilson submitted that Winder J failed to make any finding that the supposed wish and intention that the Glenfinnan Settlement be used primarily for the benefit of future generations had been decided upon or adopted by the board of Spey. Instead,

Winder J appeared to have relied on a selection of documents created by other people, evidence from the Family Advisers and Mr Stanford-Tuck and other material, none of which evidenced a decision by the board of Spey. There was therefore no finding of fact made by the judge that the directors of Spey had collectively formed the wish and intention that the assets going to the Glenfinnan Settlement should be used for future generations. The judge therefore erred in finding that that had been Spey's wish and intention rather than simply the wish and intention of the Family Advisers or the other people involved in devising the 1992 Restructuring.

40. Penelope Reed KC's argument, on behalf of Grampian, can be summarised as follows. She accepted that Spey's wish and intention must be identified by applying the corporate attribution rules and that this means that the directing mind of Spey for this purpose was a majority of the three directors. That had been common ground between the parties; the submissions addressed to Winder J at trial had proceeded on that basis. In the present case, Grampian therefore accepted that it was necessary for the judge to find that the relevant wishes and intentions were adopted by the majority of the board of Spey. Ms Reed argued that the Court of Appeal was right to conclude that there was plenty of material before the judge, other than the 1992 Memorandum, from which he was entitled to infer, and so to find, that there had indeed been a decision of the board of Spey that the assets being transferred into the Glenfinnan Settlement were to be used for future generations. That decision had been communicated to Grampian and Winder J was therefore entitled to find, and did find, that Grampian was acting in accordance with Spey's wish and intention when making the 2006 and 2009 appointments.

**(2) What test did the judge apply when finding "Spey's intention"?**

41. In *Meridian* Lord Hoffmann was applying corporate attribution rules for the purpose of attributing the knowledge of a senior portfolio manager (who was not a director of the company) to the company such that the company had failed to comply with a notification obligation under statutory provisions relating to the holding of securities listed on the stock exchange. The issue was whether the manager was the directing mind and will of the company for this purpose. Lord Hoffmann said, at p 506, that a company's primary rules of attribution will generally be found in its constitution, typically in the articles of association. Other rules are implied by company law. But these rules are "not enough to enable a company to go out into the world and do business". The company will therefore appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as acts of the company. Any statement about what a company has, or has not, done is, Lord Hoffmann said, necessarily a reference to the rules of attribution (primary and general) as they apply to that company.

42. It is certainly true that the minutes of the February meeting do not say in terms that the assets in Glenfinnan are to be held for future generations rather than for George and

John and their wives even though they were beneficiaries of the 1973 Settlement. The handwritten notes of the meeting describe the 50% of funds left in Glenfinnan as "long term fund and Arndilly rump" but those words did not make their way into the typed-up minutes. However, there is clear authority that a decision by the board of directors does not have to be formally adopted and recorded in a board meeting minute in order to be attributed to the company. In *Runciman v Walter Runciman plc* [1993] BCC 223 a claim for wrongful dismissal was brought by a director of the company. One issue was whether his notice entitlement had been extended from the three years provided in the contract. The company's deputy chairman had written to the claimant purporting to increase this to five years. The company argued that no one with authority had authorised the increase on the company's behalf because there had been no proper determination of the issue by the directors as required by the company's articles of association. Simon Brown J rejected this defence. He noted that the relevant term had never been decided at a directors' meeting. But there was nothing in the articles of association of the employer company stipulating how the directors were to arrive at their decisions. He held that, provided that by the time the term was sought to be enforced, all the other directors could be shown to have concurred in the agreement of that term, then it could fairly and properly be said that they had determined it as the articles of association required. Simon Brown J went on to find that the other directors' involvement went beyond mere informal acquiescence. When some of the directors were told about the proposed increase by those who had approved it, they, as directors, had the opportunity to query it and had not done so: see p 230.

43. Spey was incorporated on 1 August 1991 under The Bahamas International Business Companies Act, 1990. Spey's articles of association deal with the powers of directors at para 77. There are some matters which the articles state must be decided by a resolution of the directors such as fixing their emoluments (article 75) or appointing and removing officers or agents of the company (article 78). But the power to manage the business and affairs of the company is conferred by article 77 without specifying any particular way in which decisions are to be taken. Article 83 provides that the directors may meet at such times and in such manner and places within or outside The Bahamas as they may determine to be necessary or desirable. There has been no suggestion in these proceedings that the board had delegated any task, for example, to Sir Geoffrey Johnstone or to any other servant or agent of Spey.

44. In the section of his judgment where he addressed the question of Spey's wish and intention, Winder J referred at para 64 to the witnesses at trial who all gave evidence that "their personal knowledge and understanding" was that in 1992 the proposed intention for the Glenfinnan Settlement was as described in the 1992 Memorandum. The contemporary documents he described also bore that out. The only contrary evidence was the July 1999 letter from John to Mr Duff. Winder J therefore concluded at para 69, that, notwithstanding his finding that the 1992 Memorandum could not be attributed to Spey, he was satisfied that its contents generally reflected "Spey's intention", which phrase he was clearly using in the sense that the Board has used it in respect of Issue 1, namely as

referring to Spey's wish and intention as regards the assets it transferred to Grampian to fund the Glenfinnan Settlement. He said in para 69:

> "I accept that the object of Glenfinnan was that it was to be a long term accumulating trust primarily for the benefit of next generation beneficiaries. Spey's intention was that the funds were to be earmarked for the next generation of the heirs of Yuill. I am not persuaded however that it was intended to be as rigid as Grampian asserts, that the intention was such that John and George's generation were only to benefit in exceptional circumstances or 'if the unimaginable happened and Ashley lost *all* her money'. There is nothing to support this view that the situation would have to be so exceptional and bordering upon unimaginable circumstances."

45. The Board has concluded that when Winder J made his finding as to "Spey's intention" he was making a finding that that had been the wish and intention *of the board of directors of Spey*. That conclusion is based on the following reasons.

46. First, as explained earlier, one of the main issues raised by the trial was whether the 1992 Memorandum was a Spey document and it is clear that much of the argument about that revolved around who had seen and assented to that document. When addressing that issue Winder J set out Ashley's submissions about the document which referred to the rules of attribution referred to by Lord Hoffmann in *Meridian*. She argued (see para 58 of Winder J's judgment):

> "It is not the subject of any resolution of the board of directors of Spey, nor is it recorded as having been mentioned at any meeting of the board. … Not only is there no evidence that the Explanatory Memorandum was authorised or approved by Spey, there is no evidence that the directors of Spey had any involvement in the preparation of the Explanatory Memorandum. Indeed, there is no evidence to suggest that the majority of Spey's directors (Mr Lowe and Mr Lobosky) ever even saw it. It is not recorded as having been sent to them. Consequently, there is no proper evidential basis for a finding that they were even aware of its contents, let alone approved them"

47. There is no reason to think that Winder J, having applied the correct test when concluding that the 1992 Memorandum was not Spey's document, then promptly forgot

that that was the test he must apply when considering other evidence from which he might ascertain Spey's wish and intention.

48. Secondly, both parties' submissions at trial to Winder J on the issue of Spey's intention stressed the importance of finding what Mr Lobosky and Mr Lowe had intended. Mr Wilson's written closing submissions dealt in detail with *Meridian* in the context of the 1992 Memorandum. Counsel for Grampian, then Eason Rajah QC, (now Rajah J) in his oral closing submissions said that the judge's task was "to work out as a matter of inference what the board of directors' intention was when they created Glenfinnan": Day 17, page 113. His submissions referred to the *Duomatic* principle (named after *In re Duomatic Ltd* [1969] 2 Ch 365) that shareholders do not have to comply with formality when making a decision and submitted that the same principle applied to directors, citing *Runciman*. On Day 18, Mr Rajah, having taken the judge through all the evidence as regards the February meeting, placed particular emphasis on the importance of the judge making findings as to Mr Lobosky's and Mr Lowe's intentions. He invited the judge "to infer what the entire board of Spey thought, without having to have evidence specifically from them as to what they thought": Day 18 p 16. He pointed out that if they had disagreed with what was being proposed and did not intend Glenfinnan to be for future generations, that would have appeared in the minutes, there would have been a vote and Sir Geoffrey would have been outvoted.

49. Winder J was not, therefore, being asked by Grampian to apply some different test from the test set in *Meridian* and his conclusion was clearly to accept Mr Rajah's submissions and to make the inference that Mr Lobosky and Mr Lowe had the same intention as Sir Geoffrey. Again, there is no reason to suppose that Winder J had silently constructed some different, incorrect test which no one had invited him to apply.

50. Thirdly, it is true that it is difficult to pinpoint where Winder J expressed the finding of fact that the Spey directors had agreed to the policy expressed in the 1992 Memorandum even if that Memorandum was not itself formally a document attributable to them and hence to the company. But the Board agrees with the Court of Appeal's analysis on this point. The Court of Appeal noted that Winder J had the oral evidence and "countless documents" before him from both before and after Spey's incorporation. Spey's intention could reasonably be inferred from that evidence – in particular it was reasonable to infer that the four people who had definitely received the 1992 Memorandum (that is Sir Geoffrey and Messrs Hamilton, Duff and Morrison) had read it and they knew that John had not objected to the proposed split of assets which was then described in it. They had all been present at the February meeting and the minutes of that meeting record that the Family Advisers had advised the Spey board that the proposed split had been discussed with George, John and other members of the family. Messrs Stanford-Tuck, Duff and Morrison gave evidence at trial and they had all had personal knowledge of the reasons for the 1992 Restructuring, and had all been present at the February meeting and, according to the minutes, had conveyed relevant information to Spey's directors.

51. Mr Stanford-Tuck's clear evidence at trial had been that one of the reasons for the way in which the assets had been distributed by Grampian was that, after provision for John and George's families, Spey's intention had been that the Glenfinnan Settlement would be for the benefit of future generations coming after George and John's generation. Mr Stanford-Tuck had said in cross-examination that it would be "unrealistic" to suggest that there had been no discussion between the directors of Grampian and the directors of Spey as to how they should exercise their discretion. That evidence was supported by the oral evidence of Mr Morrison and Mr Duff, and of the Grampian directors Mr Dunkley and Ms Deal as the Court of Appeal described in paras 161 to 168 of its judgment.

52. As the Court of Appeal noted at para 167, there was "an obvious gap in the evidence" because the three Spey directors in 1992 had all died. The judge had been entitled to consider all of the evidence and materials that had been placed before him and to give them such weight as he thought they deserved, even if they post-dated the 1992 restructuring. Ashley's contention that Spey's intention had been that Glenfinnan should be for the benefit of the same class of beneficiaries as the 1973 Settlement (which would have included her but not her children) was assertion and nothing more.

53. The Board is fully satisfied that when Winder J referred to "Spey's intention" he was using that as shorthand for saying the intention (ie the wish and intention) of all (or a majority) of the board of directors of Spey. It follows from the reasons we have given that, in the Board's view, the judge was entitled to make that finding and he was applying the correct legal test of corporate attribution. It follows that the Court of Appeal was correct to uphold Winder J on this issue and Ashley's case on Issue 1 should be rejected.

## 5. Issue 2: inadequate deliberation?

### (1) The law on inadequate deliberation laid down in *Pitt v Holt*

54. The Board is concerned with the exercise of a discretionary power by the trustee. This is not a case where the trustee is alleged to have acted outside the scope of its power or has used its power for an improper purpose. Rather, in the shorthand terminology used by Lord Walker (for the first time in English law) in *Pitt v Holt* (see, eg, para 60 of that judgment), we are concerned with whether there was a breach of duty by the trustee because of "inadequate deliberation" when the trustee exercised its power.

55. Prior to *Pitt v Holt* the law in this area had taken a wrong turn by not requiring a breach of duty by the trustee (or other fiduciary). The rule had been that, irrespective of any breach of duty, a voluntary disposition by trustees could be set aside (that is, rescinded) by a court if the trustees had failed to take into account relevant considerations, or had taken into account irrelevant considerations and, had that not been so, a different decision would, or might, have been made. This became known as "the rule in *Hastings-*

*Bass*". In fact, this was a misnomer for the rule because *In re Hastings-Bass, dec'd* [1975] Ch 25 had a different focus being concerned with the scope of the power in question (which, on the facts, was partially void) rather than the exercise of the decision-making power but, in a number of cases, the court used that case name to refer to the above rule.

56. Lord Walker, giving the leading judgment of the Supreme Court in *Pitt v Holt*, explained the misnomer while indicating that, given its familiarity, it was best to continue using it. But on the important substantive question, he put the law back on its correct track by making clear (confirming Lloyd LJ's judgment in the Court of Appeal [2011] EWCA Civ 197; [2012] Ch 132) that the court's intervention, on the basis of inadequate deliberation (and leaving to one side rescission, or setting aside, for mistake) was dependent on there having been a "breach of fiduciary duty". This confirmed the central point in the earlier judgment of Lightman J in *Abacus Trust Co (Isle of Man) v Barr* [2003] EWHC 114 (Ch); [2003] Ch 409. Lord Walker was obviously using the term "breach of fiduciary duty" in a wide sense (and the Board, so as to avoid confusion in applying his judgment, will do the same) as meaning a breach by a trustee or other fiduciary of its duty of proper consideration. He was not using breach of fiduciary duty in the strict narrow sense (preferred by, eg, Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1, 16–18) of a breach of the duty to avoid a conflict of interest and duty (ie a breach of the core duty of loyalty). For Lord Walker's explanation of his preference for the language of "breach of fiduciary duty", see his article, "When will the court grant relief for trustees' mistakes? *Pitt v Holt* and *Futter v Futter*" (2014) HKLJ 759, 765-766.

57. There are issues, outside the scope of what the Board needs to decide in this appeal, as to how far this duty that is imposed on a fiduciary to give proper consideration differs, if at all, from a fiduciary's duty of care and skill. For an illuminating discussion of those issues, see Michael Ashdown, *Trustee Decision-Making: The Rule in Re Hastings-Bass* (2015) chapter 4.

58. It was important in *Pitt v Holt* that, even if it might be said that there had been a failure to take into account relevant considerations (most obviously the tax consequences of the disposition), a court would not set aside the disposition on this basis unless the trustee had been in breach of fiduciary duty. Most obviously, there would be no relevant breach of fiduciary duty where the trustee took, and acted on, reputable professional advice (for example, from a competent tax adviser). It was also made clear that, even if there were failings by the trustee, those failings had to be sufficiently serious to constitute a breach of fiduciary duty. It was not enough to show that the deliberation by the trustee fell short of the highest possible standards.

59. Even if there were a breach of fiduciary duty, Lord Walker made clear that it is a matter for the court's discretion whether to set aside the disposition. The relevant breach of fiduciary duty made the disposition voidable (ie liable to be set aside) not void. Lord Walker discussed whether the court should only set aside the disposition if it were

satisfied that the trustees *would* have made a different decision, but for the breach of fiduciary duty, or whether the court should set aside the transaction if satisfied that the trustees *might* have made a different decision but for that breach. This had been discussed in earlier cases such as *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 and *Sieff v Fox* [2005] EWHC 1312 (Ch); [2005] 1 WLR 3811 (favouring "would") and *Stannard v Fisons Pension Trust Ltd* [1998] IRLR 27 (favouring "might"). Clearly the "would" test imposes a greater burden on beneficiaries seeking to have the disposition set aside than the "might" test. Apart from the discretion tied in with the remedy of setting aside being equitable, and the recognition that the setting aside can be "on terms", Lord Walker indicated that whether one applied either "would or might" to the question of the impact on the decision is a matter for the discretion of the court and will depend on the circumstances. Cast in terms of a causal test, one might say that Lord Walker was viewing the relevant test, as between either "would or might", as being flexible. In *Gany Holdings (PTC) SA v Khan* [2018] UKPC 21 Lord Briggs giving the judgment of the Board followed Lord Walker and said, at para 54, that, if the necessary breach of fiduciary duty is established, the court has a flexible discretion whether to set aside the challenged disposition and the question whether, if properly informed, the trustees would or might have made a different decision will be "relevant, but not decisive". It is clear that Lord Briggs saw himself as summarising what Lord Walker had said in *Pitt v Holt* and should not be interpreted as, in any sense, departing from that reasoning.

60. Mr Wilson submitted that, once breach of fiduciary duty has been established, one moves on to the exercise of judicial discretion. If it were necessary to choose between them, he submitted (as he had done before Winder J: see para 29 above) that the correct test is that of "might" not "would". That preference for "might" is also the view taken by some commentators who seek clarity on this issue rather than leaving it all to the court's discretion. For example, Graham Virgo, *The Principles of Equity and Trusts* 5th ed (2023), p 418 writes as follows:

> "The preferable view is that the 'might not' test should be applicable regardless of the type of trust. If a beneficiary has established that the trustees breached their duty, it would be a very difficult hurdle also to have to prove that the trustees *would* have acted differently had they not breached their duty. This would unduly limit the beneficiaries' right to expect that the trust should be properly administered. If the beneficiaries can establish that the trustees *might* have acted differently had there not been a breach of duty, the court should be able to set aside the disposition."

This is also the view taken by, for example, Michael Ashdown, *Trustee Decision-Making: The Rule in Re Hastings-Bass* (2015), paras 5.30–5.31. For the contrary view, see Francis Ng, "*Pitt v Holt* and *Futter v Futter*: the rule in *Hastings-Bass*, mistake and tax avoidance" (2013) BTR 566, 572:

> "it is submitted that a requirement that, but for their breach of trust, the trustees *would* not have entered the transaction would promote clarity. It is hard to see why, notwithstanding that the breach was not causative on the balance of probabilities, a court should allow rescission under the rule."

61. Having summarised what Lord Walker was essentially laying down in *Pitt v Holt*, it may be helpful now to set out precisely what he said in the most important passages from his judgment.

62. At para 1 he said the following:

> "It is now generally recognised that the label 'the rule in *Hastings-Bass*' is a misnomer. The decision of the Court of Appeal in *In re Hastings-Bass*, *decd* [1975] Ch 25 can be seen, on analysis, to be concerned with a different category of the techniques by which trust law controls the exercise of fiduciary powers. That decision is concerned with the scope of the power itself, rather than with the nature of the decision-making process which led to its being exercised in a particular way: see R C Nolan, 'Controlling Fiduciary Power' [2009] CLJ 293, especially pp 294-295, 306-309. The rule would be more aptly called 'the rule in *Mettoy*', from the decision of Warner J in *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587. But the misnomer is by now so familiar that it is best to continue to use it, inapposite though it is."

63. At para 60 he said:

> "In the core of his judgment Lloyd LJ [in the Court of Appeal] correctly spelled out the very important distinction between an error by trustees in going beyond the scope of a power (for which I shall use the traditional term 'excessive execution') and an error in failing to give proper consideration to relevant matters in making a decision which is within the scope of the relevant power (which I shall term 'inadequate deliberation'). *Hastings-Bass* and *Mettoy* were, as he rightly observed, cases in quite different categories. The former was a case of excessive execution and the latter might have been, but in the end was not, a case of inadequate deliberation. Lloyd LJ therefore withdrew his doubts about the conclusions that Lightman J had reached in [*Abacus v Barr*] [2003] Ch 409."

64. At para 73 he went on:

> "In my view Lightman J was right to hold that for the rule to apply the inadequate deliberation on the part of the trustees must be sufficiently serious as to amount to a breach of fiduciary duty. Breach of duty is essential (in the full sense of that word) because it is only a breach of duty on the part of the trustees that entitles the court to intervene (apart from the special case of powers of maintenance of minor beneficiaries, where the court was in the past more interventionist…). It is not enough to show that the trustees' deliberations have fallen short of the highest possible standards, or that the court would, on a surrender of discretion by the trustees, have acted in a different way. Apart from exceptional circumstances (such as an impasse reached by honest and reasonable trustees) only breach of fiduciary duty justifies judicial intervention."

65. Then at paras 91 and 92 he said this:

> "*Would or might?*
>
> In his statement of the correct principle … Lloyd LJ did not provide an answer to the 'would or might?' debate. That was not, I think, an oversight. The *Hastings-Bass* rule is centred on the failure of trustees to perform their decision-making function. It is that which founds the court's jurisdiction to intervene if it thinks fit to do so. Whether the court will intervene is another matter. …
>
> It has been suggested … that 'would not' is the appropriate test for family trusts, but that a different 'might not' test (stricter from the point of view of the trustees, less demanding for the beneficiaries) is appropriate for pensions trusts, since members of a pension scheme are not volunteers, but have contractual rights. That is an ingenious suggestion, and in practice the court may sometimes think it right to proceed in that way. But as a matter of principle there must be a high degree of flexibility in the range of the court's possible responses. It is common ground that relief can be granted on terms. In some cases the court may wish to know what further disposition the trustees would be minded to make, if relief is granted, and to require an undertaking to that effect… To lay down a rigid rule of either

> 'would not' or 'might not' would inhibit the court in seeking the best practical solution in the application of the *Hastings-Bass* rule in a variety of different factual situations."

66. It is important to recognise that, on Lord Walker's approach, there are two separate stages: breach of fiduciary duty; and the consequences of that breach. The latter comprises what one can regard as the causal effect of the breach on the decision made but also includes the court's remedial discretion as to whether or not to set aside the disposition. As regards the first stage, Lord Walker clarified that any alleged inadequate deliberation must be sufficiently serious as to amount to a breach of fiduciary duty. But it is clear that the seriousness being referred to goes to the standard of conduct of the trustee and not causation.

**(2) Applying *Pitt v Holt***

67. Applying the above law to the facts of this case, it is clear in the Board's view that Winder J found, first, that Grampian was not in breach of fiduciary duty by taking into account that the primary purpose of the trust was to benefit the next generation. Rather than being an irrelevant consideration, that was a very relevant consideration because, as the Board has concluded on Issue 1, Winder J found as a matter of fact, and applying the correct law on corporate attribution, that that was in compliance with the wish and intention of Spey as settlor.

68. But secondly, although he did not clearly state this, the best interpretation of Winder J's judgment (at paras 94–98) is that, as Mr Wilson submitted on behalf of the appellant, he did find that there was a breach of fiduciary duty in that Grampian did not properly take into account Ashley's needs and wishes in respect of the Glenfinnan trust. Her needs and wishes were relevant considerations which should have been taken into account. Grampian did not have the relevant information as to her wishes and needs because, in particular, Grampian had no updated information as to her financial circumstances.

69. Unfortunately, Winder J confused matters at para 116 (which has been set out at para 29 above and the last sentence of which, to reiterate, reads, "In which case, the inadequate deliberation was not sufficiently material to amount to a breach of trust on the part of Grampian") by eliding breach of fiduciary duty with the consequences of that breach. In this respect, the Board agrees with the submissions of Mr Wilson that Winder J was incorrectly eliding the two different stages in the analysis. In some of her submissions, Ms Reed, in seeking to defend what Winder J said at para 116, also tended incorrectly to elide the two stages. It further follows that we consider that the Court of Appeal's analysis at paras 201–240, in upholding Winder J that there was no breach of fiduciary duty, fell into the same error.

70. There is a further linked point that Ms Reed made. In her oral submissions Ms Reed denied that there was a breach of fiduciary duty because what mattered was whether the trustee had all the accurate, and hence relevant, information that was needed to make its decision. Here, she argued, that was satisfied because the needs and wishes of Ashley were known about, and taken into account, by the trustee and did not change over time. She submitted that Ashley had never identified in the course of these proceedings any relevant fact or circumstance that would have come to light if the Grampian directors had discussed the matter with her or asked the Family Advisers to provide them with more up-to-date information. However, in the Board's view, that submission falls down because the allegation being made was that it was relevant to consider the up-to-date wishes and needs of Ashley and, because the trustee did not have that information, the trustee did not take into account relevant considerations. As Mr Wilson made clear, and the Board agrees with him, information about Ashley's up-to-date wishes and needs was relevant to the decision being made and ought properly to have been considered.

71. We should add, as a footnote, that it was common ground that a trustee is not in breach of duty by failing to consult with a potential beneficiary: see, eg, *Re Y Trust* [2011] JRC 135, at para 63; *Lewin on Trusts*, 20th ed (2020), Vol II, para 28-116; and Winder J's judgment in this case at para 95.

72. It is the Board's view, therefore, in agreement with Mr Wilson' submissions on whether there was a breach of duty, that there were sufficiently serious failings by Grampian as to amount to a breach of fiduciary duty. The crucial question then turns to the effects of that breach of fiduciary duty.

73. Mr Wilson submitted that, in so far as it was relevant to think in terms of a causation test, the correct test was "might" not "would" because, having established a breach of fiduciary duty, the "would" standard would impose too exacting a hurdle on those seeking to set aside dispositions (and see to similar effect the views of Virgo set out at para 60 above). Mr Wilson argued that the discretionary beneficiary's right is a right to be properly considered for appointment. If the trustee has infringed that right, then the right should be vindicated by the decision being retaken unless there are circumstances that show that a reasonable trustee would inevitably have taken the same decision because of some compelling factor present at the time. Mr Wilson further submitted that, in this case, there were only a few beneficiaries whose circumstances needed to be considered and that it was not asserted by Grampian that there was any impediment to unwinding the 2006 and 2009 appointments. The assets transferred were all still sitting in the new trusts and could be returned to the Glenfinnan Settlement without having to unwind any other subsequent appointments in a way which might adversely affect another member of the family. Mr Wilson argued that since Grampian had not pointed to any compelling factor that would inevitably have caused a reasonable trustee in 2006 and 2009 to make the appointments, regardless of Ashley's circumstances, the Board should conclude, at the least, that Grampian's decisions might have been different if they had not breached their

duty of adequate deliberation. That was sufficient, Mr Wilson submitted, for the Board to exercise its discretion to set aside the contested appointments.

74. The Board disagrees. In para 116 (see para 29 above), and leaving aside the last sentence, Winder J took the view that, even if the trustee had given proper consideration to Ashley's circumstances, it could not be said that Grampian or a reasonable trustee would not have made the appointments. The Board agrees with that finding, but would go further. Once one accepts (as the Board has on Issue 1) that the wishes and intentions of Spey were that this trust was primarily for the benefit of the next generation, it is clear that Ashley cannot show that the decision would have been, *or even might have been*, different had there been no breach of fiduciary duty. Contrary to the advice of the Family Advisers, the trustee did provide for the needs of Ashley by holding back 2% (now worth some US$14 million) in the trust fund as a safety net for her. She was a very wealthy woman with funds from other sources, including the estate of her late husband John and, even though there was a breach of the fiduciary duty of proper consideration, Ashley cannot show that the trustee, or a reasonable trustee, would have acted, or even might have acted, any differently had there been no such breach.

75. The Board therefore considers that, in the exercise of its discretion in dealing with the consequences of the breach of the duty of proper consideration (the lower courts never reached this stage of the analysis because they incorrectly held that there was no breach of duty), the two appointments in 2006 and 2009 should not be set aside. They are valid not voidable appointments.

76. On Issue 2, therefore, the Board upholds the overall decisions of Winder J and the Court of Appeal, so that this ground of Ashley's appeal should be rejected, even though the Board considers that the precise reasoning of the lower courts was flawed in eliding breach of fiduciary duty with the consequences of breach.

## 6. Conclusion

77. As Ashley has failed on Issue 2 (and also on Issue 1), the Board will humbly advise His Majesty that her appeal should be dismissed.