ARRESTED DEVELOPMENT: ENFORCEMENT AGAINST A DISCRETIONARY TRUST?

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Can the rights of a beneficiary under a Jersey discretionary trust be arrested by arrêt entre mains? Although in Kea Investments Ltd v Watson[1] *the Royal Court of Jersey declined to confirm such an arrest, this article considers that they can be. The Court's reason for not arresting those rights was that it considered them to form a bundle of rights subject to the fraud on the power doctrine not to exercise the discretions in question other than for the benefit of their beneficiary. It therefore considered such rights attach of necessity personally to the discretionary beneficiary in that capacity and so are inseparable from that person as long as he or she has that capacity. As they attach inalienably to that person, they are incapable of transmission to another, and therefore the Court declined to transmit them to the arresting creditor. As examined below, however, the rights in question may not be owed to the debtor beneficiary exclusively, but be shared with other beneficiaries. In particular, the right for the trustee not to commit a fraud on the power is enjoyed by persons in other capacities, such as other members of the beneficial class of the power, or those who take in default of its exercise. As these rights are enjoyed by others, they cannot be inseparable from the debtor beneficiary in question, and since other parties may benefit from them, they should therefore be capable of arrest.*

Introduction

1 Kea Investments Ltd ("Kea") was a judgment creditor of Eric Watson. Mr Watson was one of several beneficiaries under three Jersey discretionary trusts. Kea sought to execute against Mr Watson's interests as beneficiary under those interests by way of *arrêt entre mains.*

2 The terms of the trusts were not spelt out in the judgment but it was clear that, under each, the trustees had wide discretionary powers to appoint income and capital to the benefit of any one or more of the beneficiaries, thus including Mr Watson.[2] It was common ground that

[1] [2021] JRC 009 (Clyde-Smith, Commr, and Jurats Crill and Averty).
[2] *Kea*, paras 6, 7, 9, 11, 27.

he was a discretionary beneficiary, with only a hope of benefitting from the trustees' exercise of these powers and no rights or interests in any property of the trust funds itself.[3] However, Kea argued that under Jersey law a discretionary beneficiary such as Mr Watson had a movable property interest susceptible to arrest by *arrêt*. It referred to:

(a) The definition in the Trusts (Jersey) Law 1984 ("Trusts Law") of "beneficiary" including not only persons entitled to benefit under trusts (in the narrower sense used in English law)[4] but also those "in whose favour a discretion to distribute property held on trust may be exercised".[5]

(b) The Trusts Law providing that the interest of a beneficiary—including such a discretionary object within the definition of art 1(1)—constitutes movable property.[6]

(c) An *arrêt entre mains* being available to arrest movable property in the hands of a third party but which belongs or is owed to the debtor.

Therefore, it argued, where a debtor who is the beneficiary of a trustee's discretion to distribute, his or her rights as such are therefore capable of arrest by *arrêt entre mains*.

3 Kea accepted that such rights would be arrested as it found them, and it could not therefore obtain any greater rights than Mr Watson had (nor give it any special advantage over the other beneficiaries that Mr Watson did not have by reason of his being beneficiary of the discretion in question).

4 However, Kea argued that by reason of arresting Mr Watson's rights it could, would, and so should stand in Mr Watson's shoes as such a beneficiary and exercise his rights as such.

(a) Kea accepted that the *arrêt* would give it no interest in the trust funds. Instead, it focused on Mr Watson's rights as beneficiary to request and compel the trustee to consider making a distribution to pay the debt owed, and also obtain trust accounts to assess the assets of the trust.

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[3] *Kea*, para 13. Mr Watson's fixed proportionate share in the trust assets under the default trusts was disregarded as being incalculable at the time of the judgment. Mr Watson was also a creditor of the trusts—Kea's application for an *arrêt* over those loans was not contested and is not considered further in this article.

[4] *Kea*, para 17(i)–(ii).

[5] Trusts (Jersey) Law 1984, art 1(1).

[6] Trusts (Jersey) Law 1984, art 10(10).

(b) In particular, Kea focused on Mr Watson's rights as a beneficiary to due consideration by the trustees of exercising their discretions in his favour.[7] To this end, envisaged that Kea's interests could be considered in place of Mr Watson's.[8]

(c) Kea also focused on Mr Watson's rights to due administration of the trusts and disclosure of trust accounts which it also argued it could enforce in his place.[9]

5 Against this, Mr Watson's son (also a beneficiary of the trusts in question) intervened and made a number of points. The particular submission that seems to have told with the court (considered further below) was that it was not clear whether Mr Watson's interests (as the debtor-beneficiary) should be considered when the trustee decided whether to make a distribution at the arresting creditor's request, or the arresting creditor's in his place. If it was contended that the arresting creditor's interests be considered, he submitted, that was plainly not the intention of conferring the discretion and to do so would be a fraud on a power. If Mr Watson's interests were to be considered, however, the arrest added nothing. The trustee could consider whether to make a distribution in Mr Watson's benefit to satisfy the debt in any case.

The court's decision

6 The court held that—

> "The issue in this case is whether the rights of a discretionary beneficiary are transmissible either individually or collectively and whether by assignment or, as in this case, by distraint, so that they can be exercised by a third party, in this case a creditor, independently of the discretionary beneficiary."[10]

7 The court considered that a beneficiary cannot extend the beneficial class of the power by assignment of his or her interest under the power to a third party.[11] (It referred to the beneficiary having no ability under the trust deeds before it, but such an ability would be atypical in standard discretionary trust instruments.) Later in the judgment, the court also drew from *Lewin*[12] that under English law, where a discretionary beneficiary assigns his or her rights in respect

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[7] *Kea*, para 17(xi).
[8] *Kea*, para 33.
[9] *Kea*, para 17 (xv).
[10] *Kea*, para 20.
[11] *Kea*, para 28.
[12] Para 26–011 of *Lewin*, at *Kea*, para 34.

of any future appointment under the discretion, the assignment risks being tainted as a fraud on the power where the trustee makes the appointment to benefit the assignee rather than the beneficiary.[13]

8 The court noted that the trustees' powers and discretions were to be exercised exclusively for the benefit of any one or more of the discretionary beneficiaries, otherwise, tritely, the exercise would be a fraud on the power.[14] The court's starting point was that under the trust instruments, the trustee had wide fiduciary discretionary powers to distribute income and capital, all of which had to be exercised for the benefit of any one or more of the beneficiaries "as defined". It was the risk of not considering their (the beneficiaries'), but the creditors' interests, that the court considered would not be permissible under the fraud on a power doctrine.[15]

9 It is this that appeared to detain the court and inform its decision. It referred to passages in *Lewin* describing the fraud on a power doctrine[16], and the principle that an intention to benefit a non-object is sufficient to vitiate an exercise of the power as a fraud on that power.[17] It then observed that:

> "The bundle of complementary rights of a discretionary beneficiary of the trusts are rights which of necessity attach to the person of the discretionary beneficiary in that capacity and by their nature are not separable from that person for so long as he or she has that capacity. In a sense it is akin to the two sides of a coin. On one side of the coin is the trustee with the discretionary powers to benefit the discretionary beneficiary. On the other side of the coin is the discretionary beneficiary who can benefit from the exercise of such powers and who necessarily has the rights commensurate to that status. These are not rights which can exist and be exercisable independently of the discretionary beneficiary. They are not transmissible."[18]

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[13] *Kea*, paras 34–35. These paragraphs dealt expressly with a submission that Kea's interests could be considered in substitution or addition to those of Mr Watson, but given the court's conclusion at para 30 (set out at para 10 of this article) it appears to tie in with the court's concern that only the beneficiaries' interests can be considered when exercising the discretion and that the right to have their respective interests so considered is inalienable.

[14] *Kea*, paras 27 and 29.

[15] *Kea*, paras 29–30 and 39.

[16] *Kea*, para 29, citing *Lewin*, paras 30–066 to 30–068.

[17] *Kea*, para 29, citing *Crociani v Crociani*, paras 339–340.

[18] *Kea*, para 30.

10 Thus, the reason the court considered the fraud on a power doctrine to be engaged was that it considered that the interests the trustee must consider are those of the beneficiary personally, which are inalienable.

11 Having reached this view, the court noted Kea sought expressly to obtain payment to it, in response to which it drew on *Lewin*'s comments (referred to above) that on a valid assignment of the beneficiary's interest under a discretion, the discretion must nonetheless be exercised to benefit that beneficiary or else defraud the power.[19] It then asked what utility there would be in granting Kea an arrest: the trustee could not make a distribution in order to benefit Kea, but it could to benefit Mr Watson with or without an arrest.[20] Finally, the court considered that a non-object's having, by virtue of an arrest, the beneficiary's rights to involve itself in the internal working of the trust would be inimical to good trust administration.[21] These latter three points, at least, appear to have counted as factors that led the court to exercise its discretion against confirming the *arrêt*. It is less clear whether its views as to the inalienability of Mr Watson's interests were also factors causing the court's discretion to be declined or considered an absolute bar to the arrest taking effect at all. However, it is clear that the court considered those interests to be inalienable, summarising at the end of its judgment that:

> "In conclusion, we accept that Mr Watson's interests under the trusts constitute movable property pursuant to article 10(10) of the Trusts Law, but it is not property that is assignable or in any way transmissible under the terms of the trust deeds, to which article 10(11) is subject, or by its inherent nature. We will not, therefore, confirm the arret over his interests."[22]

12 The core of the court's reasoning appears to be that the rights of a discretionary beneficiary—or at least the rights of Mr Watson and the discretionary beneficiaries of the powers and/or trusts before it—are inalienable and therefore incapable of arrest. It considered them inalienable because of the doctrine of fraud on a power which compelled the trustee to consider those beneficiaries', and only those beneficiaries', interests when exercising the discretions in question. Presumably, although the judgment does not say this, it considered that since the beneficiary can only compel consideration whether to exercise the discretion, and consideration of whether to exercise the

[19] *Kea*, paras 34–35.
[20] *Kea*, para 37.
[21] *Kea*, para 38.
[22] *Kea*, para 40.

discretion can only properly be carried out in the beneficiaries' best interests, the beneficiaries' interests are inalienable from the beneficiary, hence therefore so are the beneficiaries' rights. What it did say was that the obligations on the trustee and the rights of the beneficiary are two sides of the same coin.[23]

Scope of the *arrêt entre mains*

13 In any event, the court accepted that such a discretionary beneficiary's rights constitute movable property by reason of art 10(10) of the Trusts Law[24], noting further that "a beneficiary may sell, pledge, charge, transfer or otherwise deal with his or her interest in any manner", "subject to the terms of the trust".[25]

14 First, it reminded itself of the core characteristics of the *arrêt entre mains* as elaborated in *FG Hemisphere v Gecamines* [2010] JRC 195 and 2010 JLR 524 (CA).[26]

(a) An *arrêt* is a customary law remedy for the satisfaction of a debt by appropriating the debtor's movable property. It may be made against the debtor and his or her property directly, or against a third party over property owed by the third party to the debtor (an *arrêt entre mains*, or "arrest in the hands" of such a third party).

(b) The effect of the arrest is to charge the thing arrested and create a proprietary security interest in it in favour of the arresting creditor.

(c) The flexibility of the *arrêt* continues after its confirmation in respect of the precise benefit it confers on the arresting creditor in execution of his or her charge.

(d) An arrest may be effected against future property, where that future property can be identified with precision.

15 *Kea* accepted that—

> "the remedy of arrêt was available for all kinds of movable property. The arguments that arrêts entre mains were only available for limited kinds of debt was abandoned at first instance in FG Hemisphere v Gecamines to judicial approbation (paragraph 145) and on appeal, and in another context, the Court of Appeal saw no reason in principle to distinguish between

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[23] *Kea*, para 30.
[24] *Kea*, para 25.
[25] Article 10(11), para 26.
[26] Citing R Holden *Offshore Civil Procedure* (Sweet & Maxwell, 2013), paras JA11.3.3 and 11.4.2.

> goods or a liquidated sum in ordering surrender (paragraph 155)."

16 As the court observed, movable property is any property that is not immovable property, being essentially land and certain interests in it. It can be tangible or intangible, and there does not seem to be a distinction between the susceptibility of either to arrest. *FG Hemisphere* made clear that intangible movable property is capable of arrest by *arrêt entre mains*. As Matthews and Nicolle describe:

> "The typical example of an intangible movable is a debt or other claim on a person obliged to perform some action. In French law this is usually called a '*créance*', in English law a chose in action. In principle, such intangibles are capable of assignment to another person, whether for payment or gratuitously."[27]

17 Whether the French or English usage is preferred, intangible movable property comprehends rights of all kinds which are legally recognised and therefore enforceable. As Matthews and Nicolle describe, intangible movable property includes the right to the performance of obligations. The word "property" risks obscuring this, but whether movable property is considered from the perspective of an obligation owed to a *créancier* or a chose in action to which a person is entitled, it comprehends such rights to performance.

18 In English law, a "chose in action" describes an intangible right which exists only in law and enjoyment of which can only ultimately be enforced by legal action:

> "'Things in action' is when a man hath cause, or may bring an action, for some duty due to him . . . and because that they are things whereof a man is not possessed but for recovery of them is driven to his action, they are called 'things in action.'"[28]

19 This is not limited to debts, but any right enforceable by legal action:

> "It has been suggested that the expression 'choses in action' was originally only applicable to debts; and that by a lax usage it has acquired a secondary and wider significance. I am not able to adopt this view. The article 'Choses in Action and Choses in Suspense' in Brooke's Abr., fo. 140, seems to show that as early as 5 Edw. 4 the expression was held to include the king's right to the marriage of his ward; in 9 Hen. 6, the property in deeds in

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[27] Matthews & Nicolle *The Jersey Law of Property* (Key Haven, 1991), para 3.1.

[28] *Stroud's Judicial Dictionary*, 10th edn, cit *Termes de la Ley.*

> the hands of a third person was considered as a chose in action; and in the 33 Hen. 8, the classification of 'choses in action' into real, personal, and mixed was recognized."[29]

20 *Stroud's Judicial Dictionary* cites this passage, and then goes on to give as examples of choses in action in various cases including shares, debts, assignments of debts, and contractual rights. It could even be used in respect of certain equitable (as opposed to common law) rights.

21 As for the French usage, *FG Hemisphere* accepted Pothier's account of the *saisie-arrêt* as corresponding to the *arrêt entre mains*, and as Matthews and Nicolle note Jersey obligations were customarily thought of in civilian terms. Pothier's account of the *saisie-arrêt* can be reconciled with his account of obligations and (pre *FG Hemisphere*) the limited Jersey authority on *arrêts entre mains*.[30]

22 According to Pothier, obligations could be divided into obligations to give or obligations to do.[31] Either obligation existed between person entitled to performance of the obligation and the person bound to render it:

> "*Section III Des personnes entre lesquelles peut subsister une obligation*
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> *124. Il ne peut y avoir d'obligation sans deux personnes; l'une qui ait contracté l'obligation, et l'autre envers qui elle soit contractée. Celui au profit duquel elle a été contractée s'appelle créancier; celui qui l'a contractée s'appelle débiteur.*
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> *125. Quoiqu'il soit de l'essence de l'obligation qu'il y ait deux persounes, dont l'une soit créancière, et l'autre débiteur . . .*"[32]
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> [Section III Of the persons between whom an obligation can subsist
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> 124 There can be no obligation without two persons: the one who has undertaken the obligation, and the other towards whom it is undertaken. He or she to the profit of whom it has been

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[29] *Colonial Bank v Whinney* (1885) 30 Ch D 261 (CA), at 286, *per* Fry LJ; approved *Colonial Bank v Whinney* (1886) 11 App Cas 426 (HLE), at 438, *per* Lord Blackburn, at 446, *per* Lord Fitzgerald, and at 447, *per* Lord Ashbourne.

[30] Holden "Arrested and Charged: *FG Hemisphere* and the Proprietary Effect of the *Arrêt Entre Mains*" (2012) 16 *Jersey & Guernsey Law Review* 209.

[31] Pothier *Traité des Obligations* Pt 1 Ch 1 s IV 129–130, at 113.

[32] Pothier *Traité des Obligations* Pt 1 Ch 1 s III 9, at 110–111.

> undertaken is called the creditor; he or she who has undertaken it, the debtor.
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> 125 By which it is of the essence of the obligation that there be two parties: of which one is the creditor and the other the debtor].

23 The obligation naturally contains that which must be done by the debtor in favour of the creditor.

> "*SECTION IV. De ce cqui peut faire l'objet et la matière des obligations.*
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> *129 II ne peut y avoir d'obljgation, qu'il n'y ait quelque chose qui soit dû, qui en fasse l'objet et la matière.*
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> *130 L'objet d'une obligation peut être ou une chose proprement dite (res), que le débiteur s'oblige de donner; ou un fait (factum) que le débiteur s'oblige de faire ou de ne pas faire : c'est ce qui résulte de la definition que nous avons donnée de l'obligation.*"[33]
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> [Section IV. Of that which can be the object and subject of obligations
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> 129 There can be no obligation unless there be in it something that is due, which constitutes the object and subject matter of it.
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> 130 The object of an obligation can be either a thing properly so called (res), which the debtor obliges himself to give; or an act (factum) which the debtor obliges himself to do or not do; that is what results from the definition we have given of an obligation.]

24 A simple debt and a bare trust, can be seen to involve obligations to give. In either the case the *débiteur* is obliged to give the *créancier* the sum of money owed or property subject to the trust.[34] An obligation to give is still an obligation to do: the difference is that the verb give inherently indicates a thing to be given whereas the obligation to do focuses on the verb itself. However, the right corresponding to the obligation to give still attaches to the verb: it is a right to be given, not a right to the thing being given (hence *a ius ad rem* rather than *a ius in rem*, as Pothier noted[35]). There therefore seems no reason in principle why an obligation to do should not be equally susceptible to arrest as an obligation to give.

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[33] Pothier *Traité des Obligations* Pt 1 Ch 1 s IV 129–130, at 113.
[34] See *Lewin* para 1–028.
[35] Pothier *Traité des Obligations* Pt 1 Ch 2 art II 151, at 128.

25 In either case, the obligation is an obligation because it is enforceable at law:

> "150 *Les effets de l'obligation par rapport au créancier sont 1° le droit qu'el1e lui donne de poursuivre en justice le débiteur pour le paiement de ce qui est contenu dans l'obligation*."[36]
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> [150 The effects of the obligation as regards the creditor are 1° the right it gives him or her to pursue by court action the debtor for the rendering of that which is contained in the obligation.]

26 In any event, it is clear from *FG Hemisphere* that debts can be arrested. Shares can also be arrested.[37] Further, a beneficial interest under a bare trust is capable of arrest. In *Seaview Estate Agency Ltd v Morgan*[38] the plaintiff (Mr Morgan) obtained judgment against Mr Donaldson, and then an *arrêt des biens* in respect of it. The Royal Court ordered confirmation of the arrest in all shares beneficially owned by Mr Donaldson in Seaview—because the shares were in fact registered in Mrs Donaldson's name, but the Royal Court found she held them beneficially for Mr Donaldson. Relying on his standing *vis-à-vis* the shares having arrested them, Mr Morgan obtained an order to wind up Seaview. Seaview and Mrs Donaldson appealed this order, arguing that the confirmation of the arrest was defective because Mrs Donaldson, as registered legal owner of the shares, had not been summoned in respect of the arrest.

27 The Court of Appeal held that there was no question as to the evidence being sufficient to conclude that Mr Donaldson was beneficial owner of the shares registered in Mrs Donaldson's name. However, she should have been summoned just like any other subsidiary debtor or third party in whose hands the property arrested lay. The confirmation was therefore defective and the winding-up order set aside: however, the confirmation of the arrest had not been appealed and so remained on foot, the shares remaining arrested, pending subsequent applications and orders in respect of them.

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[36] Pothier *Traité des Obligations* Pt 1 Ch II art II 150, at 127.

[37] *Morrish v Ramus. La Société "Jersey Hotels Ltd" à la cause* (1952) 248 Ex 26; *Re Interactive Telesales Group* [2013]JRC009; *Botas Petroleum Pipeline Corporation v Tepe Insaat Sanayii AS* 2016 (2) JLR 101 (CA); *Tepe Insaat Sanayii AS v Botas Petroleum Pipeline Corp* 2016 (1) JLR 218 (RC): In Guernsey, see *Monument Trust Co Ltd v Gaudion* (1998), 26 GLJ 83 (CA); *Offshore Civil Procedure*, paras GB5.3–GB 5.5.

[38] GCA No 20 (Civil) (31 October 1986).

28 As to the procedure for confirmation of an arrest, the Court of Appeal observed that:

> "Different considerations may arise and a different practice may be appropriate where the subjects arrested are chattels which are in the possession of the debtor on the one hand, and where they consist of debts or other obligations due by a third party on the other hand. It was however agreed that where the subject arrested is a debt, such as a bank account, it is normal to summon the bank to state by one of its officers whether any sum is owed to the judgment debtor, and if the sum is less than the amount in the judgment what the sum is."[39]

29 It then analysed Mrs Donaldson's position—as bare trustee of shares to which Mr Donaldson was beneficially entitled—and saw no difference between that and any other third party owing the principal debtor the benefit of an obligation:

> "In the present case it is alleged that shares registered in Mrs. Donaldson's name truly belonged to Mr. Donaldson and if so she would be obliged to make those shares available to him if required. The arrest of those shares is an arrest in Mrs. Donaldson's hands of assets due by her to Mr. Donaldson. We see no distinction between: her possession and that of any other third party, such as a bank, in, the instance given above."[40]

And thus:

> ". . . we do not see any reason why property which truly belongs in beneficial ownership to a debtor should not be arrested even though it stands in the name of another person."[41]

30 That suggests that (in Guernsey, at least) a trust interest may be arrestable. However, from the facts it appears that the trust in that case was a bare trust and the language speaks of "beneficial ownership". On the other hand:

(a) A bare trust is simply the ownership by one party of property he or she is bound to convey to another. The trust is simply an obligation to give that property.[42]

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[39] *Seaview Estate Agency Ltd v Morgan* GCA No 20 (Civil) (31 October 1986), at 7, *per* Cameron JA.
[40] *Seaview Estate Agency Ltd v Morgan* GCA No 20 (Civil) (31 October 1986), at 8, *per* Cameron JA.
[41] *Seaview Estate Agency Ltd v Morgan* GCA No 20 (Civil) (31 October 1986), at 8–9 per Cameron JA.
[42] *Lewin* para 1–028.

(b) There was no argument or comment on the standing of Mr Morgan to seek a winding up order as the party arresting shares (and so standing in the shoes of the shareholder). The ground of appeal was that the Royal Court had been wrong to decide "that [Morgan] was an interested party and entitled to petition for the compulsory winding-up of [Seaview]". Had there been any merit in arguments that the arresting party does not arrest all rights comprising the shares, it would be expected that they would have featured with greater prominence than a procedural technicality. However, they did not. A share tritely being a bundle of rights, it therefore appears the arrest bit against all those rights.

(c) In both Jersey and Guernsey, art 10 of their respective trusts laws[43] provides that the interest of a beneficiary is personal or movable property, capable of being charged and assigned, And in both laws, "beneficiary" is defined to includes a person entitled to benefit under a trust and/or a person in whose favour a power to distribute trust property may be exercised.

31 Article 10 of the Trusts Law seems to put beyond doubt that a beneficiary's rights, under a trust or power, are arrestable, although given the factors above this would appear to be the case in any event. Any obligation can be characterised as movable property, and an *arrêt* (*entre mains* in Jersey, *des biens entre mains d'un tiers* in Guernsey) seems capable of arresting any right and therefore obligation.

32 The court in *Kea* acknowledged art 10 of the Trusts Law and therefore appeared to consider the rights of a discretionary beneficiary *prima facie* arrestable. As the court in *Kea* noted, "discretionary beneficiary" is not a term of art in itself, but instead the precise rights of any given beneficiary under any given trust are determined by the terms of that trust.[44] However, as noted above, the trusts in *Kea* provided wide discretionary powers to appoint income and advance capital to any one or more members of their respective beneficial classes, in addition to discretionary trusts to distribute the trust funds amongst beneficiaries at the expiration of the trust periods. Such discretionary powers and trusts are typical of Jersey law trusts, and without derogating from the court's correct assessment that "discretionary beneficiary" is not a term of art, it is generally understood to encapsulate the objects of such powers, and/or the beneficiaries of such trusts. It is therefore adopted here as a useful shorthand). What led it not to confirm the arrest was its analysis

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[43] In Jersey the Trusts Law, in Guernsey the Trusts (Guernsey) Law 2007.

[44] *Kea*, paras 24–25, citing RC Nolan *Equitable Property* (2006) 122 LQR 232. See also *Re Tantular* 2014 (2) JLR 25, at para 26.

(quoted at para 9 above) that the fraud on a power doctrine meant those rights could not be parted from the beneficiary whose rights they are.

Rights of a discretionary beneficiary

33 Tritely, a discretionary beneficiary has no interest in the trust fund itself. He or she has merely a hope or expectation of receiving some portion of the fund on the trustee (or donee's) exercise of discretion. As the Royal Court observed in *Re Tantular*:[45]

> "26 For the purposes of this judgment, it is not necessary to draw a distinction between a beneficiary under a discretionary trust (in the strict sense) and the discretionary object of a power of appointment. We therefore propose for the sake of brevity to refer to a beneficiary of a discretionary trust to cover both categories. In our judgment, it is clear and abundantly well-established law that a beneficiary of a discretionary trust has no "entitlement" to any of the trust property. His sole right is to be considered as a potential recipient of benefit by the trustee and he also has a right to have his interest protected by a court of equity (see Lord Wilberforce in *Gartside* v. *Inland Rev. Commrs* ([1968] A.C. at 617)).
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> 27 A convenient description of the position is to be found in *Snell's Equity*,[46] as follows:
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> . . .
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> 22–005 (b) Nature of the beneficiary's interests. The beneficiary's only right is to be considered for the exercise of the trustee's discretion and to compel due administration of the trustee's duties. He has no more than a hope that the discretion will be exercised in his favour. Except for any money that the trustee has already appointed to him, he therefore has no interest that his creditors or assigns could claim against. His interest is not alienable to another person."

34 However, such hope refers only to the beneficiary's rights (or lack of them) in respect of the assets comprising the trust fund in respect of which the power might (but might not) be exercised in that beneficiaries' favour. The beneficiary is not, however, without rights against the trustee which the beneficiary can enforce against that

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[45] 2014 (2) JLR 215 (RC).
[46] 32nd edn, paras 22–004—22–005, at 647–648 (2010).

trustee. While the beneficiary cannot compel the trustee to exercise the discretion in question to convey any part of the trust fund to him or her, the beneficiary can compel the trustee to consider from time to time to consider how to exercise the power of which he or she is beneficiary.[47] Thus, in *Re Hay's Settlement Trusts*,[48] contrasting a discretionary power with a mandatory trust, the High Court observed that:

> "A mere power[49] is very different. Normally the trustee is not bound to exercise it, and the court will not compel him to do so. That, however, does not mean that he can simply fold his hands and ignore it, for normally he must from time to time consider whether or not to exercise the power, and the court may direct him to do this.
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> When he does exercise the power, he must, of course (as in the case of all trusts and powers) confine himself to what is authorised, and not go beyond it. But that is not the only restriction. Whereas a person who is not in a fiduciary position is free to exercise the power in any way that he wishes, unhampered by any fiduciary duties, a trustee to whom, as such, a power is given is bound by the duties of his office in exercising that power to do so in a responsible manner according to its purpose. It is not enough for him to refrain from acting capriciously; he must do more. He must 'make such a survey of the range of objects or possible beneficiaries . . .' as will enable him to carry out his fiduciary duty. He must find out 'the permissible area of selection and then consider responsibly, in individual cases, whether a contemplated beneficiary was within the power and whether, in relation to other possible claimants, a particular grant was appropriate.'[50]
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> If I am right in these views, the duties of a trustee which are specific to a mere power seem to be threefold. Apart from the obvious duty of obeying the trust instrument, and in particular of

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[47] *Lewin*, para 1–008.

[48] [1982] 1 WLR 202, cited by *Lewin* at paras 1–061, 29–008—29–009 and 33–033, as the highpoint of modern authority for the proposition quoted.

[49] *I.e.*, a fiduciary, discretionary power which the donee has discretion whether to exercise and must therefore consider whether to exercise from time to time: *Lewin* para 28–023.

[50] *Re Hays Settlement Trusts* [1982] 1 WLR 202 (Ch), *per* Megarry VC, at 209.

> making no appointment that is not authorised by it, the trustee must, first, consider periodically whether or not he should exercise the power; second, consider the range of objects of the power; and third, consider the appropriateness of individual appointments. I do not assert that this list is exhaustive; but as the authorities stand it seems to me to include the essentials, so far as relevant to the case before me."[51]

35 Thus, as the House of Lords observed in *Gartside*:

> "No doubt in a certain sense a beneficiary under a discretionary trust has an 'interest': the nature of it may, sufficiently for the purpose, be spelt out by saying that he has a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a court of equity. Certainly that is so, and when it is said that he has a right to have the trustees exercise their discretion 'fairly' or 'reasonably' or 'properly' that indicates clearly enough that some objective consideration (not stated explicitly in declaring the discretionary trust, but latent in it) must be applied by the trustees and that the right is more than a mere spes."[52]

36 It is the first of these duties on which Kea concentrated its *arrêt* in *Kea*,[53] but the third which appeared to detain the court as being ultimately inalienable from Mr Watson on the grounds that to do so would involve the fraud on a power doctrine.

The fraud on a power doctrine

37 The fraud on a power doctrine[54] is well known, and its aspects alluded to but not fully outlined in the excerpts from *Hays* and *Gartside* above. As the Royal Court put it in *Crociani v Crociani*:

> "339 The 2010 appointment can also be impugned as a fraud on the power, namely, as *per* Lord Walker in *Pitt* v. *Holt* . . . ([2013] 2 A.C. 108, at para. 61), an appointment made ostensibly within the scope of the power but for improper purposes. The classic statement of principle is that of Lord Westbury in *Portland (Duke)* v. *Lady Topham* . . . (11 E.R. at 1251; 11 H.L. Cas. at 54):

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[51] *Re Hays Settlement Trusts* [1982] 1 WLR 202 (Ch), *per* Megarry VC at 210.

[52] *Gartside v IRC* [1968] AC 55*3* (HLE), *per* Lord Wilberforce, at 617–618.

[53] *Kea*, para 17(xi).

[54] This article concentrates on dispositive powers. However the doctrine applies to administrative powers: *Re Bird Charitable Trust* 2008 JLR 1 (RC).

> '. . . [T]he donee, the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power.'

340 As *Lewin*, 19th ed., para. 29–290, at 1368 (2015), says: 'The term "fraud" in this context . . . merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power.'"[55]

38 This latter excerpt from *Lewin* is itself taken from *Vatcher v Paull*,[56] a case on appeal to the Privy Council from Jersey, but in respect of an English law settlement. Lord Waddington observed that:

> "The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could properly be termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power . . . It is enough that the appointor's purpose and intention is to secure a benefit for himself, or some other person not an object of the power. In such a case, the appointment is invalid, unless the court can clearly distinguish between the quantum of the benefit bona fide intended to be conferred on the appointee and the quantum of the benefit intended to be derived by the appointor or to be conferred on a stranger."[57]

39 It is clear from *Crociani* that the fraud on a power doctrine applies in Jersey. Thus, the donee of a fiduciary, discretionary power (such as the trustee in *Kea*) may not exercise that power fraudulently, in the sense explained in *Crociani*, *Lewin* and *Vatcher*. He or she must not only periodically consider whether to exercise it, but when doing so exercise it only *bona fide* to benefit the object of the power.

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[55] 2017 (2) JLR 303 (RC), at paras 339–340.
[56] [1915] AC 372 (PC).
[57] *Vatcher v Paull* [1915] AC 372 (PC), *per* Lord Waddington, at 378.

40 Since the donee is under such a legal duty, there must be a corresponding legal right to performance of that duty (or to enforcement of its performance or to remedy for failing to perform it), "or else it is not an obligation, but an aspiration".[58]

41 Since the duty is an incident or aspect of the power which is conferred to benefit its objects, to whose benefit the power must therefore be exercised, it seems to follow that those objects must be those to whom the duty is owed. If so, they must have the corresponding right. This appears to be the conclusion of the court in *Kea*, when it held that:

> "The bundle of complementary rights of a discretionary beneficiary of the trusts are rights which of necessity attach to the person of the discretionary beneficiary in that capacity and by their nature are not separable from that person for so long as he or she has that capacity. In a sense it is akin to two sides of a coin. On one side of the coin is the discretionary beneficiary who can benefit from the exercise of such powers and who necessarily has the rights commensurate to that status. These are not rights which can exist and be exercisable independently of the discretionary beneficiary. They are not transmissible."[59]

42 If that is the case, it would follow that only the object of the power can bring an action attacking the purported exercise of that power as a fraud on it. This was the case in *Crociani*: the action was brought by Cristiana, who was one of two sisters, daughters of Mme Crociani, who were the beneficiaries of the Grand Trust. The Grand Trust contained a power to appoint trust property to any trust settled for the benefit of Grand Trust beneficiaries. The trustees (of whom Mme Crociani was one) appointed to the Fortunate Trust of which Mme Crociani was lifetime beneficiary, with Cristiana and Camilla (the other daughter) as reversionary, discretionary beneficiaries. The appointment was found to have been made for the benefit of Mme Crociani (and also for the benefit of a professional co-trustee of Mme Crociani's which wished to reduce the risk of its trusteeship). The appointment was void as fraud on a power, and Cristiana succeeded in her action.

43 However, in *Kea* it was not Mr Watson who challenged Kea's ability to arrest his interest but his children, who intervened in Kea's action for the *arrêt*. The children were also members of the beneficial

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[58] L Ho and RC Nolan *The Performance Interest in the Law of Trusts* (2020) 136 LQR 402, at 411.
[59] *Kea*, para 30.

classes of the trusts in question, and like Mr Watson both the objects of the relevant discretionary power and beneficiaries of the default, terminal trusts. As discretionary beneficiaries, the children would be owed the same duties. That begs the question, how did their *locus standi* arise? If it derived from their rights as discretionary beneficiaries, wouldn't they be limited to arguments arising from those rights? And if their rights reciprocal to the trustee's duty to them not to commit a fraud on the power were personal to and indivisible from them, wouldn't they be limited to arguments regarding consideration of those aspects, rather than those personal to Mr Watson, because their rights would be only to expect and compel consideration of those aspects?

44 It would further follow, if that were the case, that a discretionary beneficiary could only challenge the exercise of a power as a fraud on the power where it was purportedly exercised in his or her favour. However, the court heard (and upheld) his arguments that fraud on the power would be engaged as regards Mr Watson (in respect of whom the power would putatively be exercised) because of Kea's involvement, when Mr Watson's rights are indivisible from Mr Watson. How can Mr Watson's children have standing to raise such arguments?

45 The answer is that they have an interest in the proper execution of the power in Mr Watson's favour because where it is properly exercised for the purpose for which it was granted (including to benefit Mr Watson over them) they cannot legitimately complain. But where the power is improperly exercised outwith its intended scope, the fund available from which they hope to benefit in the future is reduced in circumstances where it should not have been. The children therefore had a legitimate interest in controlling the trustee when exercising its power as regards Mr Watson.

46 Thus, where there is fraud on a power of appointment, those interested in default of appointment are entitled to challenge the exercise of the power.[60] *Lewin* cites *dicta* suggesting the rationale is that the limitations in default of appointment represent the primary intention of the donor: so a trust for Jack with power of appointment to Jill is a primarily a trust for Jack.[61] However, it acknowledges that analysis is not truly representative of modern discretionary settlements, especially in Jersey, under which the settlor truly intends to benefit the discretionary objects.[62] However, that reality in fact

[60] *Lewin* para 30–082.
[61] *Lewin* para 30–082, *cit Vatcher v Paull.*
[62] *Lewin* para 30–082.

does not detract from the analysis in law: the trust remains a trust for the default beneficiaries which trust is subject to the powers engrafted on it. Hence, rather than intention, a better analysis is that the exercise of the power may be challenged by those who, but for the exercise of the power, might expect to take the property appointed.

47 That the fraud on a power doctrine may be invoked by the disappointed beneficiary rather than the appointee appears from the authority originating the term. In *Lane v Page*,[63] a husband was tenant for life under a settlement which gave him a power of jointure (*i.e.* a power, on marriage, to make provision for his wife in the event of his death). On marrying, he exercised the power but, being in debt, separately agreed with his wife that she apply a certain amount of the provision made for her towards paying off his creditors. Lord Hardwicke, LC held:

> "This is a new invention, and the Court will put a stop to it, if possible; for though it is said to be honest in him to pay his debts, yet he must do so out of his own estate.
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> . . . If the Court should admit to such an execution of this power, so directly contrary to the intent of the power, it would be attended with the greatest inconveniences. Nothing could be more contrary to the power; it is a fraud on the power, and those creating it."

48 The action was brought by the remainderman of the husband's settlement, against whom it was argued that he was not defrauded by the exercise of the power in this way, rather than the wife (who was object of the power):

> "Said, the plaintiff has no reason to complain; if anybody has, it is the wife. But this case does not come up to Turton v Benson (2 Vern 764) for here is no fraud on the wife. It is all but one act no evidence of two agreements. She has avowed it since her husband's death and it appears to have been made in consequence of the husband's creditors pressing him for their debts.
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> Here is no private agreement contrary to a public one with her friends; she was at age, and acted for herself. Those cases were determined on public considerations. This is a fraud on the property of a third person, the remainder man."

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[63] (1755) Amb 233.

49 In *Re Greaves*,[64] the issue was whether revocation of the revocable exercise of a power could be subject to the fraud on a power doctrine. It was held that it could not because revocation restored the property appointed to the fund available to the remaindermen who would not therefore be prejudiced. In so holding, the court held that—

> "The well-known language of Lord Parker of Waddington in Vatcher v. Paull may once more be cited: 'The real vice of an appointment on condition that the appointee shall benefit the appointor or a third party is that the power is used not with the single purpose of benefiting its proper objects but in order to induce the appointee to confer a benefit on a stranger.' It is, therefore, in our judgment, fundamental to the vice that the appointor should have assumed the burden of making an appointment which (in such a case as the present) he was never bound to do; and should then have distorted its stated purposes. To that extent he has defrauded the persons entitled in default of appointment; for he has divested such persons of their interests otherwise than for the purposes and in the way limited by the donor of the power."[65]

50 It is therefore not the person in whose favour the power is purportedly exercised who is defrauded by its exercise, but those disappointed by its exercise. Hence:

> "The 'duty' in relation to any exercise of the power of appointment is no more than a 'duty' not to exercise the power otherwise than for the single benefit of the members of the designated class of objects. If, therefore, the 'duty' applies to the revocation of an appointment already made, to whom is it owed? Clearly not to the original appointees or to the class of possible appointees; for the donee of the power never owed any duty to them to exercise it at all, and they can, therefore, have no valid ground for complaint if he chooses to recall a revocable exercise of it. Moreover, if the 'duty' were held to be owed to these persons, it could only be a duty not to exercise the power of revocation otherwise than for their single benefit; and as revocation per se can never benefit the objects of the power as such, this would mean that the power of revocation could never be exercised save with a view to re-appointment."[66]

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[64] [1954] Ch 434.
[65] *Re Greaves* [1954] Ch 434, at 445–446.
[66] *Re Greaves* [1954] Ch 434, at 447–448.

51 Thus, an alternative analysis to one based on the settlor's intention is that the donee of a power having no imperative duty to make an appointment, the donee's duty can only be to those who take in default of appointment. This explains why, in *Kea*, the children had standing to complain of an exercise of the power purportedly in the interest of another discretionary beneficiary—if the power is improperly exercised, their hopes are wrongly dashed.

52 If this were given strict application, it may mean that objects of the power could not complain but only default or residual beneficiaries could do so. Thus, the children's standing to complain would arise because they held this latter capacity, irrespective of their simultaneous capacities as objects of the power. However, English authority recognised the ability of the objects of the power to complain about its exercise, too—including where the exercise is purportedly in their favour. In *Re Pauling's Settlement*,[67] the objects of the power were able to challenge its exercise in their apparent favour. A marriage settlement contained a power of appointment in favour of the children of the marriage. The power was exercised numerous times to buy and furnish houses, putatively for the benefit of the children, but who subsequently challenged the appointments made. At first instance and appeal, the courts were clear in finding the payments frauds on the power and the children had standing to set aside the payments purportedly made in each of their favour. What qualified this standing on the facts was that unsurprisingly it was found to be a defence that, even where payments were wrongly made, they were made pursuant to a valid request or consent to such payment.

53 *Lewin* also considers that objects of the power may be able to challenge its exercise as a fraud on that power where the donee of the power owes them a duty. This is based on a *dictum* of Warner, J's in *Mettoy Pension Trustees Ltd v Evans*,[68] accepting for the purposes of the case before him a categorisation of powers made in submission by Robert Walker, QC.[69] These included a category comprising:

> "any power given to a person to determine the destination of trust property without that person being under any obligation to exercise the power or preserve it. Typical of the powers in this category is a special power of appointment given to an individual where there is a trust in default of appointment. In such a case, the donee of the power owes a duty to the beneficiaries under

[67] [1964] 1 Ch 303 (CA).
[68] [1990] 1 WLR 1587, at 1613.
[69] *Lewin* para 30–083(2)–(3).

> that trust not to misuse that power, but he owes no duty to the objects of the power. He may therefore release the power, but he may not enter into any transaction that would amount to a fraud on the power, a fraud on the power being a wrong committed against the beneficiaries under the trust in default of appointment. See *In Re Mills* [1930] 1 Ch 654 and *In re Greaves* [1954] Ch 434."[70]

54 On the basis of this *dictum*, *Lewin* observes that:

> "It has been said that the donee of a special but non-fiduciary power owes a duty to those entitled in default of appointment not to misuse the power but none to the objects of the power. That suggests that the ability to challenge a fraud on the power depends on the existence of a duty owed to the objects by the donee; hence the objects of a power vested in trustees or other fiduciaries, being entitled to a proper consideration whether the power should be exercised, would be entitled to challenge a fraud on the power."

55 In *Mettoy*, the relevant issue concerned whether a power in the pension scheme, granted to the employer rather than the pension trustees, was fiduciary or not (and thus who could exercise it, the employer, receivers appointed under a debenture, or liquidators appointed pursuant to the Insolvency Act 1986.[71] Warner, J held that the power was fiduciary, otherwise the benefit to the beneficiaries, who were not volunteers but earned their standing as beneficiaries by dint of their employment, would be illusory especially on the insolvency of the employer (which is when the power would be triggered).[72] It was in that context that counsel submitted that for the purposes of the court's consideration of that issue, powers could be divided into four categories. These were: (1) special (*i.e*. limited) powers (being subject to the fraud on a power doctrine, but without any duty to consider their exercise and so capable of release: this was the category described in the passage cited above);[73] (2) powers conferred on trustees as trustees of the power itself ("fiduciary power[s] in the full sense", with duties to consider their exercise);[74] (3) any discretionary power in which the discretion is really a duty to form a judgment as to the existence of circumstances giving rise to

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[70] *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 at 1613G–H.
[71] *Ibid* at 1608.
[72] *Ibid* at 1615F, 1618E–G, 1620F–G.
[73] *Ibid* at 1613G–H.
[74] *Ibid* at 1614B–C—thus described more in analogy than analysis.

consequences;[75] and (4) discretionary trusts, under which the trustee (or some other) has a duty to select from a class who receives trust property and in what proportions.[76]

56 Categories (1) and (2) match the distinction recognised in Jersey in *In re VR Family Trust*,[77] drawing on *Lewin*, of limited powers and fiduciary powers as a species of limited power:

> "Beneficial powers can be exercised in any way for the benefit or purposes of the donee as the donee wishes without restriction. Limited powers must be exercised in good faith for the purposes for which they are given. They differ from beneficial powers in that they are conferred for the benefit of one or more of the beneficiaries other than the donee. The constraints on the exercise of a limited power are expressed in the doctrine of a fraud on a power. An exercise of the power can be impeached if, for example, it was made for a corrupt purpose, such as for the benefit of the donee himself. Fiduciary powers are a class of limited powers. The significance of the distinction, which according to *Lewin* has been elaborated in a recent authority, is that the donee of a fiduciary power owes a duty to the objects of the power to consider from time to time whether and how to exercise it and they have various remedies open to them if the donee does not or cannot do so. He is not bound to exercise it merely by virtue of its being a fiduciary power, the duty being to consider its exercise, although in the case of what is called a trust power he is bound to exercise it. If he does exercise it, the donee is subject to the doctrine of a fraud on a power, in the same way as the donee of a non-fiduciary limited power."[78]

57 The purpose of these summary categorisations in the *Mettoy* case was to assist identifying the characteristics and so nature of the power in question in order to address further questions of practicality, namely who could exercise the power in the circumstances of the donee employer's insolvency. They were not addressed to identifying the nature, rationale and full scope of the fraud on a power doctrine. This follows from the issue to which the submissions and characterisations were addressed[79] as well as the text in question. That this does not exhaustively survey the range of powers and all their incidents is demonstrated by the judgment containing no reference to

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[75] *Ibid* at 1614D.
[76] *Ibid* at 1613G–1614F.
[77] 2009 JLR 202
[78] Para 27.
[79] [1990] 1 WLR 1588, at 1608F, 1613G.

the second category of "fiduciary power[s] in their fullest sense" as being subject to the doctrine of fraud on a power. The *dicta* in respect of this appear to reflect the submission made that where a power is fully fiduciary it is as if the donee is a trustee of that power—and therefore subject to fiduciary duties in respect of its exercise.

58 The *dicta* in *Mettoy* should therefore not be over-extrapolated. They go no further than describing without analysing the characteristic of powers subject to the fraud on a power doctrine as subjecting the donee to a duty. That can be seen to correspond to the existence of the limits placed on the exercise of the power exceeding which have legal consequences. Since certain persons have the right to enforce those consequences, they can be said to be owed a duty. Insofar as *Mettoy* identifies those persons, it refers only to the beneficiaries under the trust of the property that remains in default of its appointment under the power (*i.e.* the default beneficiaries or remainderman as in *Greaves* above). Nor does it specify what the consequences are that can be enforced at their suit.

Consequences of fraud on a power

59 Where a power is exercised in breach of the equitable doctrine of fraud on a power, that exercise is void in equity.[80] How this quite plays into Jersey law, not distinguishing between law and equity as does English law, is not clear, as the Court of Appeal in *Crociani* observed but while nonetheless accepting it. The English position appears to be that (1) the exercise of a fraud on the power is void, in equity (rather than voidable), and (2) in effect the consequences at law may be avoided by equity (which would prevail over the law where the two are in conflict).[81] In Jersey the position therefore appears to be that the exercise of the power is void, but consequent transactions may be voidable in consequence as they will be *prima facie* valid on their face until set aside.[82]

60 Also, as demonstrated in *Crociani*, where it is not possible to unscramble the transactions founded on the fraudulent exercise of the power to restore to the trust the property actually appointed, the trustee will be liable to reconstitute the trust fund.[83]

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[80] *Cloutte v Storey* [1911] 1 Ch 18 (CA), *per* Farwell, LJ, at 31; *Crociani v Crociani* 2018 (2) JLR 175 (CA), paras 148–149, and 2017 (2) JLR 408 (RC) para 345.
[81] *Cloutte v Storey* [1911] 1 Ch 18 (CA), *per* Farwell, LJ at 31.
[82] *Crociani* (CA), para 148.
[83] *Crociani* (RC), para 682

61 Under the Trusts Law, "breach of trust" means a breach of any duty imposed on a trustee by the Trusts Law by the terms of the trust; "terms of a trust" means the written or oral terms of a trust, and also means any other terms made applicable by the proper law; and "trust" includes *inter alia* the rights, powers, duties, interests and obligations under a trust.[84] A discretionary power may be conferred by the trust instrument, but it is arguable whether—although a provision of the trust—it is a term of the trust comporting a sufficient duty failure to comply with which would qualify as a breach of trust as defined. Although it does not naturally follow from the statutory language, it could be argued that the fraud on a power doctrine is a duty inherent in the discretion conferred. Another analysis could be that a term of the trust imposed by law is the duty not to commit fraud on any power. A further analysis might be that since art 21(1) applies to the execution by a trustee of his or her duties "and in the exercise of his or her powers and discretions", and includes a duty to observe the utmost good faith when doing so. To use the power *bona fide* for its object could be said to be within the duty to exercise the power not only according to its express construction but also in good faith. To the extent that a fraud on a power can be placed within the statutory language in any of these ways, art 30(1)(2) of the Trusts Law provides that the trustee committing it is liable for any loss or depreciation of the trust property or loss of profit occasioned by it. In any event, *Crociani* did not feel the need to draw on any such analysis and English authority is that where the power is vested in trustees, it is a breach of trust if they exercise it in fraud of the power.[85]

62 These consequences help explain who has *locus standi* to bring an action in respect of a fraudulently exercised power and why. Remaindermen and default beneficiaries will be deprived of the distribution to which they are entitled under the trust of which they are beneficiaries. Discretionary beneficiaries, whether as objects of the power in question or beneficiaries of the trust in shares to be determined by the trustees, will also be deprived of the opportunity to have such property distributed to them. None of them have standing to complain (legitimately) where the power has been exercised properly, since that is what the power was for and enabled the donee to do. Their expectation or hope of benefit is always subject to the potential for such exercise. But it is not subject to an improper exercise of the power.

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[84] Trusts Law, art 1(1).
[85] *Lewin* 30–094; *Re Paulings Settlement Trusts* [1964] Ch 303 (CA).

63 Thus, the rights reciprocal to the donee's duty not to commit a fraud on the power when exercising it are not reciprocal to the elements that render the exercise fraudulent or not. It is for this reason that parties other than the object of the power, or purported object where it is exercised fraudulently, have standing in respect of it. They have the right to the power being exercised properly. The donee therefore has the duty to exercise the power properly. That duty is owed to those with an interest in the proper performance of the power, which is those concerned in the subject matter of the power but for its improper exercise. In the case of a dispositive power, this is those who are deprived of their opportunity to receive the property disposed of.

64 This is demonstrated by cases in respect of other breaches of trust that are not frauds on the power. *Freeman v Ansbacher Trustees (Jersey) Ltd*[86] was an action, brought by order of justice, for breach of trust. The breaches alleged were exercising less than due care and skill in the administration of the trust fund with the result that it was less valuable than it would have been if properly administered. The trust was—

> "relatively conventional in providing for accumulation trusts of income, subject to powers of appointment of capital or income in favour of a specified class of beneficiaries until the vesting date, and then ultimate default trusts in favour of those beneficiaries."[87]

The issue was whether a beneficiary who was (1) the object of a discretionary power of appointment, and (2) a contingent, ultimate beneficiary of the trust had standing to bring such an action. The Royal Court held that she did in both capacities at one and the same time.[88]

65 In so holding, the court drew on *Schmidt v Rosewood.*[89] As the object of a fiduciary power, the beneficiary had the right to the due administration of the trust fund which right extended (subject to the court's discretion when granting relief) to seeking reconstitution of the fund if dissipated through maladministration. [90]

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[86] 2009 JLR 1 (RC).

[87] *Freeman v Ansbacher Trustees (Jersey) Ltd* 2009 JLR 1 (RC), para 9.

[88] *Freeman v Ansbacher Trustees (Jersey) Ltd* 2009 JLR 1 (RC), paras 37, 42, 44–46.

[89] [2003] UKPC 26; [2003] 2 AC 709.

[90] *Freeman v Ansbacher Trustees (Jersey) Ltd* 2009 JLR 1 (RC), paras 39–43.

66 Although not spelt out in this way, save to dismiss any distinction in this respect between the beneficiary of a discretionary trust[91] and the object of a discretionary power, both of whom have a right to due administration of the trust fund, *Freeman*[92] identifies the reason why the object of the power and the contingent, default beneficiary are able to seek reconstitution of the trust fund. The reason is that the object of a discretionary, fiduciary power has sufficient interest in the constitution of the fund in respect of which the power might (and must be considered to) be exercised to be entitled to remedies preserving or reconstituting its value. If anything, the court drew on Lewin's comments to refer to the intention of the settlor, to the effect that a modern Jersey discretionary trust is generally settled to benefit the objects of the power who may or may not be beneficiaries of the ultimate trust, which may well be an unconnected charity or other default beneficiary with no real hope of or intended benefit.[93]

67 However, the court's conclusion in respect of the beneficiary's separate standing as a default beneficiary under the terminal trust helps illustrate this point. The court accepted the English position that:

> "In the past the existence of an equitable vested or contingent interest, however minute or remote, has been treated as sufficient to give a claimant *locus standi* to take proceedings to have the trust fund secured, or to take proceedings for breach of trust."[94]

68 The passage of *Lewin* cited by *Freeman* in this respect goes on to consider that traditional English position as difficult to reconcile with the suggestion in *Schmidt v Rosewood* (and accepted in *Freeman*) when considering applications for disclosure of documents or accounts that the court has a discretion not to grant relief to beneficiaries (including objects) with a remote or wholly defeasible interest, and equally difficult to distinguish (*e.g.* on grounds that reconstitution of the trust fund involves different considerations). It then offers that—

> "a court would be cautious in exercising its discretion to deny a beneficiary with a remote or defeasible interest a right to have the trust fund secured or a breach of trust remedied, on account

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[91] *I.e*. the beneficiary of a trust under which the trustee must distribute but to the beneficiaries in amounts chosen in his or her discretion.
[92] *Cit Schmidt v Rosewood* [2003] UKPC 26; [2003] 2 AC 709.
[93] *Freeman v Ansbacher Trustees (Jersey) Ltd* 2009 JLR 1 (RC), para 43(iii).
[94] *Freeman v Ansbacher Trustees (Jersey) Ltd* 2009 JLR 1 (RC), para 44, again *cit Lewin.*

> of the remoteness of his interest, and perhaps it is only where the interest is so remote that the court would be prepared to authorise a distribution notwithstanding a remote interest that no relief would be given."

69 An alternative approach would be to consider the discretion to attach to the remedy, and whether, despite its availability, it is appropriate to deploy it in the circumstances, rather than to the circumstances which therefore dictates the choice of remedies available. This is borne out by the observations of the Court of Appeal in *Crociani*, which "considered it correct . . . that remoteness of the interest of the beneficiary seeking equitable compensation is a relevant factor in exercising the discretion to award compensation".[95] Considering trustees' liability for loss or depreciation pursuant to art 30(2) of the Trusts Law to be equivalent to the approach developed in English case law, the Court of Appeal went on that:

> "28 . . . The basic rule is that, where property has been misapplied and cannot be restored in its original form, the trustee must restore the trust fund to the position in which it would have been but for the breach. That compensation, appropriately calculated, then forms part of the trust fund and is held on the same terms as the remainder of the fund unless the trust is at an end and payment of compensation can be made directly to the beneficiary or beneficiaries absolutely entitled to the trust fund. Particular reference can be made to the judgment of Lord Reed, JSC in *AIB* ([2014] UKSC 58, at paras. 90, 91, 94, 105 and 116).
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> 29 In the case of a misapplication of trust property by misuse, the application of the principle will often be straightforward. Subject to calculation of the appropriate amount of compensation to place the trust fund in the position in which it would have been had it not been for the breach, the trust estate must be fully reconstituted in order to continue to provide benefit—whether by way of discretionary payment or vested entitlement—to those entitled to participate in the income arising and those eventually entitled to participate in the distribution of the capital."

70 These passages demonstrate that some interest in the fund's existence—whether vested, contingent or discretionary—gives standing in respect of its constitution, and so to sue in the event of its diminution. Although *Freeman* was concerned with an action for breach of the trustees' duties of prudence, diligence and skill, which

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[95] *Crociani* (CA), para 26.

do comport a right to reconstitution of the fund to the extent it is diminished by breach of them (as examined above), its reasoning carries over to standing to sue for fraud on a power.

71 The duty owed by the donee of a power therefore includes the duty not to use the power improperly. Where it is a dispositive power, the duty is not to exercise the power (or purport to) in fraud of that power, such that the fund to which it relates will be reduced improperly. To the extent the fund is reduced, the impropriety vitiates the exercise of the power such that the reduction has no effect and is therefore liable to be restored. Where this is not possible, the donee is liable to make good the loss he or she has wrongfully caused. These duties and liabilities on the donee exist to the benefit of those prejudiced by the reduction, who are entitled to its reduction only on proper grounds, and they therefore have enforceable rights corresponding to those duties. These are the two sides of the coin of fraud on the power.

Conclusion: fraud on a power and obligations to discretionary beneficiaries

72 What, then, does this show us?

73 The duty not to commit a fraud on a power can be owed to objects of the power, as demonstrated by *Re Pauling's Settlement Trusts* and *Crociani*. In each of these cases the objects of the power, the children and Cristiana respectively, were able to challenge the donee's purported exercise of the power as being fraudulent because the donee did not exercise it for the benefit of those objects but for him and herself. In *Pauling*, the power was exercised ostensibly for the benefit of its objects and in *Crociani* simply for the benefit of the donee. There is no suggestion that either of these cases was wrongly decided in law—where the power is for the benefit of the object, surely the object must have standing to challenge an exercise which is not to his or her benefit.

74 However, what the other cases show is that it is not only the object of the power who has an interest in the power being exercised purely for the benefit of the object. To an extent in *Pauling* and as was the case in *Lane*, the powers exercised in the older English cases (arising in the context of traditional family settlements) were often exercised ostensibly for the benefit of the object of the power, such as the children in *Pauling* or the wife in *Lane*, but with their connivance for an ulterior benefit, such as to benefit the donee of the power. In such circumstances, unsurprisingly, the object who consented could not successfully challenge that exercise. Nevertheless, as *Lane* showed, that does not mean that the fraud on a power doctrine does not apply nor that the fraudulent exercise of the power is victimless.

Those who would benefit from a trust, or even those who might in future benefit from the exercise of a power, over or in respect of property purportedly appointed in fraud of the power, are entitled to complain that they have been wrongly deprived of their opportunity.

75 Indeed, the standing of both categories of plaintiff can be seen to rest on the same footing. The object him or herself is as entitled as his or her co-objects to complain that the property subjected to the power has been wrongfully dissipated by misuse of the power other than for his or her benefit. He or she has correspondingly been denied the opportunity to benefit from that property in a proper exercise of the power, just as any other member of the class of objects of that power has. Similarly, just as the objects of the power in question are entitled to its proper exercise so that they are not improperly deprived, so also are any default beneficiaries, whether fixed or discretionary, who have a similar but different interest in the trust fund not being reduced save by a proper exercise of the power. That in many modern discretionary trusts the discretionary beneficiaries are at once the objects of powers of appointment and discretionary beneficiaries of the terminal trusts should not obscure this.

76 So, if there is a trust for Janet and John, with a power of appointment in favour of Jack and Jill, all four beneficiaries have an interest in the proper exercise of the power of appointment. If the trustee purports to appoint for the benefit of Jack but in reality for some collateral purpose, Jack may or may not have standing to complain that the appointment was not genuinely intended to benefit him, depending on the circumstances including whether or not he consented to the appointment or was party to some arrangement for its being made to further that collateral purpose. However, *prima facie* and whether or not Jack has any standing, Jill, Janet and John all would.

77 Thus, the duty not to commit a fraud on a power binds the donee, who stands on one side of the obligation not to do so. But while the object of the power in question may be on the other side of that obligation, enjoying the reciprocal right that no fraud be committed, so may other beneficiaries—whether objects of the power in question or not. It follows from this that the right not to have a power exercised fraudulently is not indivisible from the object of the power or its exercise in question, since others have that right too.

78 The content of the obligation is not to exercise the power fraudulently. In particular, where the power is a discretionary power of appointment, the obligation is not to exercise that power to appoint other than for the benefit of the object (to whom or to whose benefit the appointment is purportedly made). In the example above, Janet, John and Jill may be indifferent as to whether Jack truly benefits from

the appointment, which is a matter for him and his good fortune if he does. If he does not, again, their interest in the matter is not Jack's welfare but their own deprivation other than on proper grounds.

79 The donee is obliged to those having an interest (in the sense described above) in the constitution and proper administration of the trust and its property not to exercise the power improperly so that they are deprived of the proper constitution or administration of them to which they are entitled. It is an aspect of the propriety of the exercise whether the donee has acted for the benefit of the appointee (in the case of a dispositive power such as was in issue in *Kea*) as intended, or for some collateral purpose that renders the exercise a fraud on the power. Such considerations are distinct from the identity of those who owe or are owed the obligation, hence the default beneficiaries with a potential interest in the fund are entitled to police the exercise of the power, and are therefore owed the obligations in respect of its exercise. This is the case whether or not the individuals who happen to be the default beneficiaries are also objects of the power.

80 A further point follows from this. If the duty is not owed solely to the beneficiary, the arresting creditor does not arrest it. The arresting creditor does not stand in the shoes of the beneficiary when benefit to that beneficiary is considered when the trustee is deciding whether or not to exercise the power in his or her favour. All the creditor arrests in this regard is the right to compel such consideration (the interest and rights identified in *Gartside*) and to receive in the beneficiary's stead, but the duty to consider the beneficiary's interests is not owed only to that beneficiary but also to others with an interest in the trust. The arresting creditor cannot arrest the interests and rights of those others. Even to the extent the arresting creditor takes all the rights of the beneficiary whose interests he arrests, the trustee still owes other, unarrested obligations to other beneficiaries. These include the obligation not to commit a fraud on the power, even where the right to compel consideration of exercising the power and receive any benefit from its exercise have been arrested.

81 To the extent that the trustee owes parallel obligations to other beneficiaries not to commit a fraud on the power by exercising it other than for its proper purpose (of benefitting the object), it follows that the obligation is not indivisible from that object, in the sense of who are parties to that obligation. To the extent that it is divisible in this sense, allowing other parties to take the benefit of and enforce the obligation, it suggests it is capable of arrest. Equally, the rights of the object him or herself not to have the power exercised to his or her purported benefit but really to benefit another can be seen as separate rights to the right to be considered for benefit. On either view, the benefit of the obligation not to commit a fraud on the power does not

cleave inseparably to the person of the object but can be enjoyed by others.

82 However, the arresting creditor takes the rights arrested as he or she finds them. On arresting the rights of a discretionary beneficiary to (say) compel the trustee to consider exercising the power to appoint in favour of that beneficiary, the trustee remains subject to the duty not to commit a fraud on that power. If the content of that duty is to act only in accordance with the purposes of that power, and those purposes are to benefit the object of the power, then to the extent that the object itself is owed that duty all the creditor arrests is the right to benefit from its performance. What must be performed is the content of the obligation and so the creditor could compel only the consideration of the object's best interests. Equally, to the extent that the other beneficiaries have standing to enforce the trustee's duty not to commit a fraud on the power, their rights and the trustee's obligations to them are unaffected by the arrest which is *res inter alios acta*. This is true of their standing to enforce the duty, and *a fortiori* the content of that duty given the personnel on either side of it are the same.

83 An alternative way of looking at this is that if the creditor arrests and compels the duty to consider making an appointment, the content of that duty is to consider making an appointment. When doing so, the trustee must consider whether the appointment is to the benefit of that beneficiary (*i.e.* Mr Watson), and only make an appointment in order to do so. The duty in that latter respect is also owed to third parties and is not arrested. Therefore, irrespective of the arrest, the trustee is to consider the question of benefit by reference to the beneficiary, rather than his creditor. This, of course, was contrary to Kea's submission that it was its interests that fell to be considered post arrest.

84 Thus, it is concluded that the obligations of the donee of a power not to commit a fraud on it are distinct from the obligations to give due consideration to the exercise of it and remain enforceable by the beneficiaries interested in default of its exercise. In particular, the content of the donee's duty not to commit a fraud on the power remains to consider the interests of the beneficiary, not the assignee, arresting creditor or any other third party. To alter the parties at either side of the obligation does not necessarily alter the content of the obligation as it stands between them, and in particular does not do so in respect of the fraud on a power doctrine. That being so, the confirmation of an *arrêt* over the rights of a discretionary beneficiary ought not to be thought to invoke the fraud on a power doctrine, so that (subject to any express terms of a trust) the rights of a

discretionary beneficiary do appear to be capable of arrest in the hands of the trustee by *arrêt entre mains*.

85 However, that does not mean that the trustee is absolved from his or her duty not to commit a fraud on the power. If anything, the above shows that duty remains in favour of the debtor and others who can step in to complain should the trustee improperly exercise the power. As a result, it remains for consideration whether the trustee should, at any given time, pay the arresting creditor to discharge the debtor beneficiaries' debt to him. The debtor beneficiary has a right to compel the trustee to consider from time to time whether or not to do so. That is a right enforceable by that beneficiary against the trustee, and so one capable of arrest by the arresting creditor. However, the trustee must nonetheless consider whether, in all the circumstances it is to the benefit of the beneficiary to do so.

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