



FOCUS

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WHAT'S INSIDE

- > Paradigm Shift In the Appeal Process to the Judicial Committee of the Privy Council
- > Contemplation and Consequence: Trustee Liability After Retirement
- > H&J in the News

A Second Look at Second Appeals 'As of Right':

Privy Council confirms the proper approach in interpreting 'as of right' thresholds

Oscar N. Johnson, Jr., K.C., Keith O. Major, Jr. and Dennise Newton



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The Judicial Committee of the Privy Council ("Privy Council"), sitting in a panel of seven (7) recently delivered their decision on 18th March 2025 upon a preliminary point arising in Rubis Bahamas Ltd. v Lillian Antionette Russell - [2025] UKPC 13, an appeal emanating from the Court of Appeal of the Commonwealth of The Bahamas. The preliminary point in that case was whether the intended appeal raised by the Appellant Rubis Bahamas Ltd ("Rubis") was one which was 'as of right' or rather one which depended upon the exercise of the Court of Appeal's discretion in granting Rubis leave to appeal.

At first instance, Keith Thompson, J. (Ret.) found in favour of the Plaintiff, Lillian Russell ("Ms. Russell") ordering an award in the sum of \$692,825.14. Contending on various bases that the first instance decision was wrong in law, Rubis appealed to the Court of Appeal.

The Court of Appeal embraced some of Rubis' arguments and substituted the initial award of \$692,825.14 for a reduced sum of \$159,450.00. Notwithstanding the significant reduction, unsurprisingly, Rubis however remained dissatisfied because of its central view at first instance and also on its first appeal that there was no evidentiary basis upon which to support Ms. Russell's claim for any damages as her property was shown on the facts to be outside of the affected zone.

Accordingly, Rubis then sought conditional leave from the Court of Appeal to advance its second appeal to the Judicial Committee of the Privy Council, asserting that its appeal far surpassed the statutory 'as of right' threshold of \$4,000.00. In the alternative Rubis submitted that its proposed JCPC grounds (which, *inter alia*, sought a reconsideration of the doctrine of *Rylands v Fletcher*

pertaining to: (i) the non-natural user of land concept and (ii) liability of an owner not in occupation) otherwise raised issues of public importance. Nevertheless, the Court of Appeal instead sided with Ms. Russell (who contested Rubis' application for conditional leave), and rejected Rubis' application for conditional leave on the basis that the claim as pleaded by Ms. Russell was not one where liquidated damages were sought, thereby resulting in Rubis' intended second appeal not being an appeal 'as of right'. The Court of Appeal further found that Rubis' appeal was not one which raised any point(s) of public importance, (in which case the Court of Appeal would otherwise grant discretionary leave). Determined to advance its appeal, Rubis approached the Privy Council directly for special leave to appeal. On 27th January 2025, the Privy Council (Lord Lloyd-Jones, Lord Briggs, Lord Hamblen, Lord Stephens, Lady Rose, Lord Richards and Lady Simler) heard oral arguments from the parties as to whether Rubis' intended second appeal was 'as of right', and in its judgment determined that Rubis' intended second appeal was in fact an appeal 'as of right'.

In examining the central issue in the case at bar, the Privy Council confirmed that in determining whether a statutorily prescribed 'as

of right' threshold was met or otherwise, found that the salient issue for consideration was the value of the appeal to the parties to the proposed appeal to the Board, and not whether the claim was one which sought liquidated or unliquidated damages when initially commenced. In delivering the Board's opinion, Lord Hamblen found as follows:

54. Applying the approach laid down by the authorities to the facts of the present case, the judgment against which Rubis seeks to appeal awarded Ms Russell damages of \$159,450. Rubis appeals against the entirety of the judgment. That judgment affects the interest of Rubis to an extent that is in excess of the value threshold of \$4,000. There is therefore a right to appeal under section 23.

55. The Court of Appeal was wrong to focus on the claim originally made rather than the judgment being appealed. That judgment is for a precise, quantified sum. The fact that the claim originally made was for unliquidated damages is irrelevant. That claim is now merged in a judgment for a liquidated amount. There is no difficulty in identifying or valuing the amount at stake for Rubis on the appeal. It is the judgment sum of \$159,450.

60. In principle, what matters is the valuation of the claim, not its label. Every money claim has a value and a

claim for unliquidated damages is a claim for a monetary amount, namely the true value of the claim properly assessed.

61. The exclusion of unliquidated claims from the scope of section 23 would have arbitrary and unjust consequences.

The Privy Council's second look into Rubis' second application for leave to advance its second appeal is most instructive and serves to bring clarity to a point of law (regarding a party's entitlement to appeal 'as of right' from a decision of a Court of Appeal), which had in recent times fallen into a state of flux. Now, it is safe to say that would-be respondents to second appeals have a clear position on the law which obtains, and by which they can be guided in determining the merits in resisting an application for conditional leave, in circumstances where the value of the appeal (properly calculated) is in excess of the statutorily prescribed 'as of right' threshold.

The full judgment is available at: [\[2025\] UKPC 13](#).

Aidan Casey K.C., Oscar N. Johnson, Jr., K.C., Peter Burgess, Keith O. Major, Jr. and Dennise D. Newton (instructed by Sinclair Gibson LLP) for the Appellant.

Krystal D. Rolle K.C. and Darron B. Cash (instructed by Rolle and Rolle) for the Respondent.



Senior Partner, **Oscar N. Johnson, Jr., K.C.** practises a full range of Corporate and Commercial law, specialising in Commercial and Civil Litigation, Admiralty Law, Insurance Law and Employment Law. He frequently appears in the Supreme Court (High Court), the Court of Appeal of the Commonwealth of the Bahamas, and before the Privy Council. ojohnsonkc@higgsjohnson.com



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Paradigm Shift in the Appeal Process to the Judicial Committee of the Privy Council

Tara Archer-Glasgow and Keith O. Major, Jr.



On 2 December 2024, the JCPC Rules 2024 (the “New Rules”) came into force and are now applicable for The Bahamas, as one of 30 jurisdictions that maintain the Judicial Committee of the Privy Council (the “Privy Council” or “JCPC”) as the apex court in its judicial hierarchy.

The New Rules apply to all appeals filed with the Privy Council on or after 2 December 2024, including applications for permission to appeal. They do not apply to appeals filed prior to their introduction.

The main notable changes introduced by the JCPC are in relation to the following:

- Introduction of the JCPC Online Case Management Portal
- Codification of Case Management Procedure Review of all ‘As of Right’ appeals
- New protocol for the service of documents and correspondence by parties
- Earlier Listing of Appeals
- Publication of filed Appeal Documents

Online Case Management Portal

Parties in an appeal will now be required to sign up to the new electronic portal (limited to three

user accounts per party) for filing and service of documents and to track the progress of the case. Litigants should receive notification by e-mail whenever a document is uploaded. This revision appears to be consistent with judicial case management trends globally. This has already been implemented in the domestic courts and tribunals in The Bahamas, which recently introduced online case management portals, and have embraced electronic case filing protocols.

Codification of a Case Management Procedure Review of all ‘As of Right’ appeals

The JCPC has introduced new Practice Directions to complement the New Rules, including the new Practice Direction 4, which is particularly relevant for practitioners seeking leave to appeal to the Privy Council. This direction codifies the Privy Council’s long-standing practice of conducting a summary review of all ‘As of Right’ appeals to determine whether dismissal is appropriate. The case of [Devi v Kumar Ramendra Narayan Roy \(Bengal\) \[1946\] UKPC 1](#) serves as the authoritative precedent for the Board’s approach, and the new Practice Direction 4 reaffirms the Board’s policy of not reviewing concurrent findings of fact from

lower courts, except in exceptional circumstances.

The introduction of the new Practice Direction 4 also dovetails with, and mitigates any floodgate concerns which might arise from the Privy Council’s recent clarification on the interpretation of ‘As of Right’ thresholds in the case of [Rubis Bahamas Ltd. v Lillian Antionette Russell - \[2025\] UKPC 13](#). This topic is further discussed in our firm’s article: [A Second Look at Second Appeals ‘As of Right’](#).

Subject to the new case management review process, which is summarily conducted in the first instance by a single judge of the Privy Council, an appeal is set either: (i) for a substantive hearing before a panel of either three, five or seven judges; or (ii) for a preliminary hearing by a panel of three judges as to why the ‘As of Right’ appeal should not be dismissed.

New Service of documents and correspondence protocol

The New Rules have removed the requirement for personal service of a court document on a party to an appeal, except for the Notice of Appeal, which is still required to be served in accordance with the established rules of service. All subsequent documents must be served via the Online Case Management Portal and service is deemed effected on the day that the Portal sends an email alert, provided that the email alert is sent during the office hours of the Privy Council Registry. Additionally, moving forward, all communications between the parties and or with the

Privy Council Registry will be facilitated through the JCPC Online Case Management Portal.

Earlier Listing of Appeals

The New Rules allow appeals to be listed earlier in the appeal process, such as upon the filing of Notices of Acknowledgement, Cross-appeals and/or Interventions, and prior to the filing of the Record and Statement of Facts and Issues.

However, the Registry will continue its practice of offering parties a provisional range of dates to allow the parties to earmark any non-convenient dates before the hearing date is finalized and the matter listed by the Registry.

Publication of filed Appeal Documents

Appeal documents, including Written Cases, are now published on the

Privy Council's website unless an approved application prevents their release.

The New Rules and Practice Directions are available for review in full at: [New JCPC Rules](#) and [New JCPC Practice Directions](#).



Tara Archer-Glasgow is a Partner who heads the Firm's Litigation practice and oversees the Asset Recovery Unit. Her multidisciplinary practice encompasses on all aspects of commercial litigation centered primarily upon banking and compliance, employment, company law and admiralty law. tarcher@higgsjohnson.com



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Contemplation & Consequence: Trustee Liability After Retirement

N. Leroy Smith



The role of a trustee is frequently described as onerous—and justifiably so. The duties imposed on a trustee are both extensive and exacting, requiring continuous vigilance, prudence, and strict adherence to fiduciary obligations. Among other responsibilities, trustees must safeguard and properly manage the property entrusted to their care, always acting in the best interests of the beneficiaries.

This duty endures throughout a trustee's tenure and must guide all

actions undertaken in the course of the trusteeship—including the act of retirement. Accordingly, when transferring the trust estate to a successor—whether or not selected by them—the retiring trustee remains bound by their fiduciary duty to protect the trust property.

In this connection, readers may be surprised to know that under principles long established in Head v Gould, a retiring trustee may be held liable for breaches of trust committed by a successor trustee in

circumstances where the breach was within the contemplation of the outgoing trustee at the time of retirement.

This principle was recently revisited by the English Court of Appeal in FS Capital Ltd & Ors v Adams & Ors [2023] EWCA Civ 1230, a decision that reinforces the continuing obligations of outgoing trustees in succession scenarios.

The FS Capital Case

The case concerned the improper exercise of fiduciary power by the trustees of three insolvent Jersey trusts. The trustees had caused the sale of valuable loan assets (referred to as "the Disposal") for the improper purpose of benefiting themselves and excluding the beneficiaries. The Court of Appeal upheld the first-instance finding that this constituted an improper exercise of fiduciary power, rendering the transaction void ab

initio rather than merely voidable.

A separate and significant issue in the case was the liability of a retiring trustee, “Pinotage”, for breaches of trust later committed by its successor, Pinotage PTC. The Court confirmed that such liability may arise where the breach by the successor was within the contemplation of the outgoing trustee at the time of their retirement.

Knowledge or Contemplation Is Sufficient

Delivering the Judgment of the Court, Lady Justice Asplin provided a clear and authoritative statement of the legal test:

“It is clear from Head v Gould that a former trustee is liable for its successor’s breach of trust if it is proved that the former trustee contemplated the breach of trust of its successor at the time of the retirement. As Kekewich J explained, the basis for the principle is that when retiring, a trustee must have due regard to its duties as trustee, and in particular, to its duty to

safeguard the trust fund for the beneficiaries.”

Importantly, the Court rejected the argument that liability only arises where the retirement was for the purpose of facilitating the breach. As Lady Justice Asplin noted:

“Even if the outgoing trustee has legitimate reasons for wanting to retire, it cannot rely upon those reasons as a means of avoiding its duty to safeguard the trust fund. Those legitimate reasons cannot justify a retirement in favour of a trustee who the outgoing trustee contemplates will act in breach of trust—and who does so.”

The Court found on the evidence that Pinotage had “very clearly contemplated” the Disposal and that the purpose of appointing Pinotage PTC as successor was to permit that improper sale to proceed. The appeal was dismissed.

Key Takeaways

The FS Capital decision affirms and clarifies a trustee’s residual duty at the point of retirement. A trustee

cannot absolve itself of future liability by simply stepping aside if it knows—or reasonably foresees—that its successor will act improperly.

In practice, trustees contemplating retirement must take particular care, especially where:

- There is disagreement among fiduciaries or beneficiaries;
- A contentious or high-value transaction is pending; or
- There is any reason to doubt the propriety or capacity of the incoming trustee.

Where doubts arise, the appropriate course may be to seek directions from the court rather than resign and risk exposure to liability. The overarching duty remains to preserve and protect the trust property for the beneficiaries.

In short, a trustee’s duties do not cease upon retirement—they follow the officeholder out the door if the breach by their successor was foreseeable at the time they handed over the reins.



N. Leroy Smith is a Litigation Partner and leads the Firm’s Private Client & Wealth Management practice with a robust traditional chancery practice (covering trusts, probate, and real property disputes) alongside a commercial chancery litigation practice (covering business and finance disputes). lsmith@higgsjohnson.com

Gloria Bastian Excel Award (Winter 2024)



Congratulations to **Ms. Patricia Dames**, Messenger, for being honored with the Gloria Bastian Excel Award (Winter 2024). As a valuable part of our Operations team, her dedication, and outstanding performance have not gone unnoticed.

Known for her unwavering commitment and readiness to assist wherever necessary, Patricia exemplifies true teamwork. With an impressive tenure of 25 years at the Firm, Ms. Pat, as she is affectionately known, truly embodies the spirit of loyalty and excellence and is a deserving recipient of this prestigious accolade.

TerraLex Global Meeting, Toronto



Partner & Chair of Real Estate & Development **Stephen J. Melvin**, Regional Co-Vice Chair of TerraLex for the Caribbean & Central America, along with Senior Associate **Andre W. Hill**, participated in the TerraLex Global Meeting held in Toronto. The Firm is honored to be a founding member of TerraLex, an award-winning legal network. TerraLex hosts two annual Global meetings to encourage collaboration and provide numerous opportunities for member firms to strengthen their relationships. The Toronto meeting featured sessions with global thought leaders who shared valuable insights on managing reputational risk in today's regulatory and public affairs landscape, the importance of client feedback, and an interactive discussion on client expectations from law firms in the rapidly evolving world of AI-driven legal services. The Firm looks forward to continuing its active participation in TerraLex and leveraging these insights to enhance its services.



C5 Asset Tracing & Recovery, Geneva



Partner, and Litigation Chair **Tara Archer-Glasgow** (c) spoke at the C5 Fraud, Asset Tracing & Recovery Conference in Geneva. She joined a distinguished panel to discuss how high-net-worth individuals hide their wealth in complex structures to evade creditors and how experts can use advanced legal, forensic, and investigative tools to trace and recover these hidden assets. The two-day conference offered extensive networking opportunities, enabling delegates to benefit from informative discussions while also enjoying the chance to network. The Firm is excited to apply these new insights and connections to further enhance its services and client relationships.

Community Legal Aid Clinic Project



Attorneys **Alexandra T. Hall** (r) **Knijah A. Knowles** (l) and **Glenn Curry** (c), volunteered their services for the Community Legal Aid Clinic Project. This initiative is a collaboration between the Eugene Dupuch Law School Legal Aid Clinic, the Office of the Attorney-General of The Bahamas, The Bahamas Bar Association, and the Caribbean Association for Justice Solutions. The project's goal is to enhance access to legal aid across The Bahamas and to connect the public with legal advice. The Firm is committed to supporting such initiatives to ensure that legal assistance is accessible to all.

Sworn In as Justice of the Peace



We are thrilled to congratulate **Rekell Williams**, Personal Assistant, on her becoming a Justice of the Peace. Rekell's successful completion of the rigorous ten-week Professional Development Program at the University of The Bahamas is a testament to her hard work and commitment. This achievement will undoubtedly enhance her professional skills and competence. A recipient of the Excel Award (Winter 2022), we are incredibly proud of her and excited to see her continue to thrive in her career.