The Short-form 'Best Interests Duty' – Mad, Bad and Dangerous to Know: Part 1 – Background, Cowan v Scargill and MNRPF

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Overview

Trustees, company directors and others occupy a 'fiduciary' position towards the relevant trust, company or other principal. There is clearly a need for an explanation to be given to the relevant office holder of what this means – and for judges to describe the relevant duties when looking at claims of breach. How should a trustee board actually exercise a relevant power or discretion?

Much of the case law and commentary seeks to encapsulate the essence of the fiduciary duties in a simple phrase: that a trustee owes an overarching duty to 'act in the best interests of the beneficiaries'. In the UK (where private sector pension schemes are established as express trusts), many pension lawyers play 'best interests' bingo in spotting (and condemning) the use of this phrase. It even creeps into legislation (rather worryingly).

But, as this article will seek to demonstrate, this is a very misleading encapsulation of the nature of fiduciary duties. There is a risk that, understandably given its use by judges and sometimes in statutes, trustee boards and directors take the formulation literally. This could easily take them into error. Clearly it does not override the terms of the trust, nor can it be taken literally.

This article is split into two parts. Part 1 ('Background, Cowan v Scargill and MNRPF') looks at:

- the nature of any best interests duty;
- why does the analysis of the supposed duty matter;
- some examples of a best interests duty in official guidance;
- why the test appears in cases about who is a fiduciary (including looking at the decisions of Millett LJ in *Mothew* and *Armitage v Nurse* in this context);
- why a literal duty is both dangerous and imprecise and unworkable;

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- a discussion of the decisions of Megarry V-C in *Cowan v Scargill*, Nicholls V-C in *Harries* and Asplin J in *Merchant Navy Ratings Pension Fund*;[2] and
- a look at two English cases rejecting a literal reading of an express contractual best interests duty (*Fish v Dresdner*) or an express regulatory duty (*IG Index v Ehrentreu*).

Part 2 ('The Problems and a Suggested Better Formulation') will appear in the next issue of *Trust Law International* and will:

- look at the problems with such a supposed best interest duty, if taken literally;
- look at recent case law that holds that there is no such duty – in particular the decision of Asplin J in 2015 in *Merchant Navy Ratings Pension Fund*;
- warn against the use of such a phrase by advisers (and in legislation);
- seek to suggest a better formulation, based on exercise of powers for proper purposes and seeking the success of the trust/company;
- compare the statutory duties on directors under Companies Act 2006, s 172 and in particular note the modified duty for trustee companies under s 172(2); and
- (briefly) look at the Australian position (where Parliament has included statutory 'best interest' duties in legislation with abandon).

This article does not consider the separate issues of how this impacts on ethical or social investment issues (see the recent Law Commission Reports) or how pension trustees should take account of the interests of the employer.

Introduction

Trustees, company directors and others occupy a 'fiduciary' position towards the relevant trust, company or other principal. There is clearly a need for an explanation to be given to the relevant office holder of what this means – and for judges to describe the relevant duties when looking at potential challenges. How should the trustee or director actually exercise a relevant power or discretion?

Much of the case law and commentary seeks to encapsulate the essence of the fiduciary duties in a simple phrase – that a trustee has a 'paramount duty to act in the best interests of the beneficiaries', and (before the Companies Act 2006) that a director has a duty '[T]o act bona fide in the best interests of the company'.

The authority for such a duty is sometimes left unstated or a reference is made to the decision of Megarry V-C in the 1984 case, *Cowan v Scargill*.[3]

Examples of this in the case law are:

(a) In 1994 in *Fulham Football Club Ltd v Cabra Estates plc*[4] the Court of Appeal held: 'It is trite law that directors are under a duty to act bona fide in the interests of their company.'
(b) In 2011, in *F & C Alternative Investments (Holdings) Ltd v Barthelemy (No 2)*[5] Sales J held: 'A fiduciary is required to act in the best interests of his beneficiary'.

2 [2015] EWHC 448 (Ch), [2015] PLR 239 (Asplin J).
3 [1985] Ch 270.
4 [1994] 1 BCLC 363 at 392 (Neill LJ giving the judgment of the court).
5 [2011] EWHC 1731 (Ch), [2012] Ch 613 at [227], summarising the decision of Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1 (see below).

(c) In 2012 in *Foo v Foo*[6] the Singapore Court of Appeal held: 'It is trite law that the [trustee] has the fiduciary duty to act, and to exercise his discretionary powers, in the best interests of the beneficiaries.'

Despite the oft repetition in case law of this short form 'duty', the aim of this article is to say that:

- such a short form duty does not exist – use of the short form phrase should be avoided;
- even in a modified or longer form, the phrase needs to be treated with care; and
- ultimately the phrase qualifies as one which is 'mad, bad and dangerous to know'.[7]

Key cases and articles

The nature of the duty has been discussed in various cases and articles in the UK[8] and Australia.[9] The key UK cases are: *Cowan v Scargill* (1984);[10] *Harries v Church Commissioners* (1993);[11] and *MNRPF* (2015).[12]

The aim of this article is to reflect on the position in the light of those articles and the case law, in particular the decision of Asplin J (as she then was) in *MNRPF*.

Misleading and confusing

This short form 'duty' is misleading and confusing for a variety of reasons:

(a) It implies a free-standing duty – not just one that applies to the exercise of powers and discretions. What is the width of the 'act' when used in the phrase 'duty to act in the best interest …'? Does it give an independent free-standing power to trustees? (No).

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6 *Foo Jee Seng v Foo Jhee Tuang* [2012] SGCA 41, [2012] 4 SLR 339, Sing CA (Chao Hick Tin JA, delivering the judgment of the court) at [79]. The Singapore Court of Appeal cited *Ng Eng Ghee v Mamata Kapildev Dave* [2009] SGCA 14, [2009] 3 SLR(R) 109, itself citing *Cowan v Scargill* [1985] Ch 270.

7 Mad, Bad, and Dangerous to Know' is a phrase attributed to Lady Caroline Lamb to describe Lord Byron in the 1810s. Paul Douglass notes in his biography of Lady Caroline Lamb that there is no contemporary evidence to prove Lady Caroline actually created the famous phrase at the time – see Paul Douglass, *Lady Caroline Lamb: A Biography* (Palgrave Macmillan, 2004) at pp 104 and 164.

8 The key UK articles and papers are: Lord Nicholls (extra judicially), 'Trustees and their broader community: where duty, morality and ethics converge' (1995) 9 TLI 71 and (1996) 70 ALJ 205; Xenia Frostick, 'Is there a duty to act in the best interests of beneficiaries?' (2000) 83 Pension Lawyer 2; SEK Hulme, 'The basic duty of trustees of superannuation trusts – fair to one, fair to all?' (2000) 14 TLI 130; Geraint Thomas, 'The duty of trustees to act in the 'best interest' of their beneficiaries' (2008) 2 J Eq 177 and also *Thomas on Powers,* 2nd edn, (Oxford University Press, 2012) at 10.158 to 10.183; M Scott Donald, '"Best" interests?' (2008) 2 J Eq 245 (2008); the Law Commission report 'Fiduciary Duties of Investment Intermediaries' Law Com No 350 (June 2014); and Nugee J (extra judicially), following the *MNRPF* decision in his lecture 'The Duties of Pension Scheme Trustees to the Employer – Revisited' (2015) 29 TLI 59.

9 From Australia (and therefore to be viewed in the light of the express statutory provisions there): Michael Vrisakis, 'The best test of (or the "bestest") interests of members' (2006) 17(9) Australian Superannuation Law Bulletin 138; Michael Vrisakis, 'The best interests of beneficiaries viewed as a whole' (2009) ASLB 71; Michael Vrisakis, 'Inputs versus outputs – an increased focus on trustee decision making?' (2009) 20 ASLB 126; Daniel Mendoza-Jones, 'Superannuation trustees: governance, best interests, conflicts of interest and the proposed reforms' (2012) 30 C&SLJ 297; and Paul Collins, 'The best interests duty and the standard of care for superannuation trustees' (2014) 88 ALJ 632.
Most recently, see: Nuncio D'Angelo, '"Trustees" rights: when can a trustee act in its own interests?' (2018) Superannuation Conference, Canberra, and Justice Mark Moshinsky. (extra-judicially) 'The continuing evolution of the "best interests" duty for superannuation trustees from *Cowan v Scargill* to the current regulatory framework' (2018) Superannuation Conference, Canberra.

10 [1985] Ch 270 (Megarry V-C).

11 [1993] 2 All ER 300 (Nicholls V-C).

12 *Re Merchant Navy Ratings Pension Fund; Merchant Navy Ratings Pension Trustees Ltd v Stena Line Ltd* [2015] EWHC 448 (Ch), [2015] PLR 239 (Asplin J).

(b) Does it override the terms of the trust? For example. if the trust instrument requires something (eg a payment to a beneficiary), can the trustee refuse to comply citing a countervailing best interests duty? (No.)
(c) Taken literally it has a retrospective objective element – looking at the outcome rather than looking at the process and the decision making itself. As things have actually turned out, was the decision or act in the beneficiary's best interests?
(d) It is clear that any best interests duty does not replace the 'proper purposes' requirement – there are a number of cases holding that an exercise of a discretion or power was invalid because of an improper purpose even though the relevant directors considered the action to be in the best interests of the company.
(e) The test should be subjective – were the trustees acting in good faith? What did the trustees consider to be the proper exercise of the power? This is made clearer in the cases on company directors.
(f) As a literal 'duty' it sets an impossible standard. There is always something more that the trustee could do. Does it require a trustee to rob a bank and give the money to the trust? Even if limited to lawful acts, it would still seem to require a trustee to give all of her money to the trust.
(g) It gives very little guidance as to how the trustee or director decides on a decision that affects beneficiaries differently. For example, if there is a discretionary trust with the trustee having power to choose between beneficiaries, how does a 'best interest of all the beneficiaries' test give any help?

In the UK many pension lawyers play 'best interests' bingo in spotting (and condemning) the use of this phrase. It even creeps into regulatory guidance[13] and legislation[14] (rather worryingly).

However, in its short form it is potentially a very misleading encapsulation of the nature of fiduciary duties. There is a risk that trustees and directors take the formulation literally. Clearly it does not override the terms of the trust, nor (as I shall expand on below) can it otherwise be taken literally.

This article:

- looks at the problems with such a supposed duty;
- looks at the recent case law from England and Wales that holds that there is no such duty (in particular *Re Merchant Navy Ratings Pension Fund* – the *MNRPF case*[15]);
- warns against the use of such a duty by advisers (and in legislation); and
- suggests a better formulation based on powers and proper purposes.

I look at the position under the law of England and Wales but, save for the statutory position (in particular in Australia), it is not thought that there should be any difference in the major common law jurisdictions of Singapore, Hong Kong, New Zealand and Australia.

This article focuses in particular on the duties of trustees of pension trusts, as a clear modern example of commercial trusts. In relation to pension trustees, it reaches the conclusion

13 For example, guidance from the UK Pensions Regulator.
14 Particularly in Australia, where it has been adopted with abandon in legislation. In the UK in the pensions and trusts area its use is limited, see the Occupational Pension Schemes (Investment) Regulations 2005, discussed in Part 2 of this article. Contrast its use in the UK financial services and regulatory areas.
15 *Re Merchant Navy Ratings Pension Fund; Merchant Navy Ratings Pension Trustees Ltd v Stena Line Ltd* [2015] EWHC 448 (Ch), [2015] PLR 239 (Asplin J).

that pension trustees owe no such duty relating to the interest of the beneficiaries (but instead the success of the trust or plan) and are not obliged (for example) to seek to maximise member benefits, but instead their duty to seek to pay the envisaged or 'correct' benefits. This arises as a combination of the following:

(a) The trustee board must act in accordance with the terms of the trust deed and the instrument governing the scheme (and any overriding law).
(b) Where the trustees have a discretion, the trustees are obliged to excise their powers for a proper purpose – this is not necessarily the same as saying that they have to exercise their powers in the 'best interests' of the beneficiaries of the trust.
(c) Subject to the proper purpose test, trustees need to act fairly (which probably means the same as 'impartially' here) between the categories of beneficiaries (this is not to say that benefits must be applied equally[16]).
(d) A better formulation is to refer to exercising powers in what the trustees consider is more likely to be 'in the best interests of *the trust*' or to 'promote the success or purposes of *the trust*'.

Some positives?

In most cases the short form of the 'duty' contains a grain of truth and so may not be totally misleading. But, as with most legal issues, there are exceptions, qualifications and nuances that mean that a brief summary or 'stock phrase' is not accurate in all circumstances and should be treated with caution. Those hearing the advice or reading the phrase may well not appreciate that it is not to be taken absolutely literally.

There are some potential positive aspects of the short form phrase:

(a) It gets across the point that the relevant decision taker must decide things properly – as a fiduciary, the relevant power is not absolute or beneficial. It should not be exercised as the decision maker thinks fit, but must be exercised for proper purposes, with due care, without an unauthorised conflict etc. The phrase can be seen as an attempt to summarise these duties (but many of the times the phrase is used, this point is not made clear – instead the phrase is just stated). To quote Paul Finn,[17] It gets across 'to what end he must bend his exertions'.
(b) It is commendably short. The suggestion has been made to me that it should be considered as the 'Twitter' version of the legal duty (ie a message with less than 140 characters[18]). Framing a more accurate description of the legal duty inevitably takes more space.

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16 See for example *Edge v Pensions Ombudsman* [2000] Ch 603, CA per Chadwick LJ at 627F. In addition, trustees are not generally required when exercising a discretion among a class to allocate at least a nominal amount to each potential beneficiary – see the Illusory Appointments Act 1830 and the Powers of Appointment Act 1874 (now Law of Property Act 1925, s 158), outlined in Paul Matthews, 'The doctrine of fraud on a power' [2007] PCB 131 at 132, fn 7 and discussed in more detail in Geraint Thomas *Thomas on Powers* 2nd Edn, (Oxford University Press, 2012) at 3.102 to 3.112 and by Andrew Lewis, 'Now You see it? The Curious Tale of Illusory Appointments Under English Powers' (2016) 30 TLI 234.

17 Paul Finn, *Fiduciary Obligations* (The Law Book Company, 1977; reprinted in 2016 by The Federation Press) at [27]. See also *KLB v British Columbia* [2003] SCC 51 at [46] to [47] and Matthew Conaglen *Fiduciary Loyalty: protecting the Due Performance on Non-Fiduciary Duties* (Hart Publishing, 2010) at 55.

18 According to Wikipedia, 'Twitter is an online news and social networking service where users post and interact with messages, "tweets", restricted to 140 characters. Registered users can post tweets, but those who are unregistered can only read them.'

(c) It allows us more easily to do computer searches for cases and statutes referring to a 'best interest' duty. Similarly a search of '*Cowan v Scargill*' can bring up useful citations.

But ultimately the short form phrase is potentially misleading and should not be treated as a literal summary of the law. In my view it falls into the 'mad, bad and dangerous to know' category.

Why does this matter?

The short form formulation of a best interests duty is a dangerously seductive statement. It looks like a precise and literal rule of law.

Trustees, directors and others do not realise that it is just a short form – and not to be taken literally (and why should they realise this? In the main the judges and commentators do not expressly point this out).

This can lead to trustees (and directors) thinking that they should act or exercise a discretion in a particular way – but wrongly. They run the risk of a challenge for:

(a) acting outside their powers (express or implied) – eg doing something that they have no power to do.
(b) failing to conform with their duties under the trust instrument or legislation – for example refusing to do something where they have no discretion;
(c) acting for an improper purpose;
(d) considering irrelevant factors; and
(e) being challenged by a beneficiary for doing something that they are allowed to do (eg paying a fee or exercising an indemnity right) or retrospectively deciding that better investments were available.[19]

Regulators and legislators may seek to enact it as a duty, giving rise to the difficult issues discussed below. It is one thing for judges to state a broad general principle, without mentioning any exceptions qualifications or limits. A judge is, of course, just dealing with the case in front of him or her – they are not legislating and the statements must be considered in context. It is quite another for such an unqualified statement to be expressed in legislation (see, eg the Investment Regulations) or guidance (eg by the Pensions Regulator).

In practice referring to a 'best interest of the beneficiaries' also confuses the debate about the nature and extent of trustee's duties. This leads to debates about the need for socially responsible investment. Do trustees owe general duties to society as a whole? Megarry V-C in *Cowan v Scargill*[20] limited this role by referring to the 'financial interest' of beneficiaries. In practice a formulation that refers instead to the interest of the 'trust' or 'pension plan' is much clearer in getting across the limits based on proper purpose. This mirrors the formulation used in relation to charities.[21]

19 The risk of this is discussed below. This would be contrary to the decision in *Nestle v National Westminster Bank PLC* [1994] 1 All ER 118, CA. Interestingly there is no mention of a 'best interests' duty in that case (as noted by Scott Donald in '"Best" interests?' (2008) 2 J Eq 245 at 249).

20 [1985] Ch 270 (Megarry V-C).

21 See *Harries v Church Commissioners* [1993], 2 All ER 300 (Nicholls V-C). and the discussion below.

This article does not cover: social investment and other interests points

This article is already rather long. Space prevents this article from going on to consider the separate issues of how a 'best interest' duty impacts on questions of:

(i) ethical or social investment issues for trustees; or
(ii) how pension trustees should take account of the interests of the employer;[22] or
(iii) whether pension scheme trustees owe duties just to members or to other beneficiaries as well.[23]

Ethical or social investment issues are discussed in depth elsewhere. The Law Commission report 'Fiduciary Duties of Investment Intermediaries' (2014)[24] is a good legal review of the position.

The debate on the duties of trustee boards, or indeed company boards, seems to me to have been led down a misleading path by the case law referring to an interest or a best interests duty without making clear that any such duty is not general, but instead limited to the purposes of the trust or company. The re-formulation suggested in this article would help in making the limits of any relevant duty much clearer.

Trustee, directors and discretions

Trustees, company directors and others occupy a 'fiduciary' position towards the relevant trust, company or other principal. As mentioned above, there is clearly a need for an explanation to be given to the relevant office holder of what this means – and for judges to describe the relevant duties when looking at potential challenges. How should the trustee/director/fiduciary actually exercise a relevant power or discretion?

This article will generally refer to the position of trustees, but the analysis applies equally to directors (subject to any specific points raised – for example, the statutory duty under the Companies Act 2006 only applies to directors). The position of other fiduciaries will depend on the scope of their fiduciary duty (see *Re Coomber;*[25] *Hospital Products;*[26] *Kelly v Cooper*[27]).

The usual fiduciary[28] and other duties will apply to trustees and directors, including:

(a) to comply with the terms of the trust instrument or the company's constitution (and any overriding statute);

22 See 'Trustees' duties to employers', Chapter 10 in Pollard, *The Law of Pension Trusts* (Oxford University Press, 2013) and the recent BA case: *British Airways Plc v Airways Pension Scheme Trustee Ltd* [2017] EWHC 1191 (Ch) (Morgan J).
23 See 'Pension Trusts: The Position of Spouses and Dependants', Chapter 8 in Pollard, *The Law of Pension Trusts* (Oxford University Press, 2013).
24 Law Com No 350 (June 2014). Discussed by Susie Daykin in 'Pension Scheme Investment: Is it always about the money? To what extent can or should trustees take account of ethical or ESG factors when investing?' (2014) 28 TLI 165. See also the later 2017 Law Commission Report on Pension Funds and Social Investment (Law Com No 374, June 2017).
25 [1911] 1 Ch 723, CA at 728–729.
26 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.
27 [1993] AC 205 (PC).
28 Whether a particular duty can be categorised as 'fiduciary' or something else (eg equitable or common law) can raise tricky issues that seem to be confusing commentators (and some of the courts) at the moment. See Sarah Worthington, *Equity* 2nd Edn, (Oxford University Press, 2006) at p 130 and in 'Four Questions on Fiduciaries' (2018) 32 TLI 22 at 28 to 30.

(b) not to have a conflict of interest or of duty (unless authorised);
(c) to exercise powers and discretions for a proper purpose;[29]
(d) to not act arbitrarily, capriciously, or irrationally, that is as no reasonable trustee/director would act;
(e) to consider relevant factors (and not irrelevant factors) when making a decision;[30]
(f) to invest prudently (probably);
(g) to act without remuneration (unless authorised); and
(h) to act with appropriate care and skill.[31]

Describing a power (eg investment) or discretion as absolute, probably only goes to the scope of the power[32] (ie it is not subject to any express limitations on its ambit) and does not exclude the fiduciary duties and constraints (best described as 'fiduciary' in the broad sense) owed by the trustee or director or other fiduciary as to how the power is exercised. See also the Australian judge, Beazeley P, (extra judicially) in a recent article, 'Conflicts in Commercial Trusts',[33] discussing *Wilson v Metro Goldwyn Mayer*[34] on this point.

The conflicts rules mean that trustees (or directors) should not exercise any discretion in their own interest (unless authorised). Does this mean that it is easier to express this rule as saying that they should exercise them in someone else's interests? And that this must be the beneficiaries (or the company in the case of directors)?

Best interests and who is a fiduciary

Commentary and case law repeat references to 'best interests' or just 'interests' of beneficiaries. But in practice very few look to analyse the extent of this as a duty on trustees, directors or other fiduciaries, instead it mainly arises in the context of either:

(i) seeking to decide whether a person is a fiduciary or owes fiduciary duties; or
(ii) looking at the impact of conflicts on a trustee or director.

Of course, deciding that someone is a fiduciary or owes a fiduciary duty should not be the end of the analysis – see, for example, the articles by Matthew Conaglen, 'Interaction between statutory and common law duties concerning company directors'[35] and Sarah Worthington, 'Four Questions on Fiduciaries'.[36]

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cont.
citing Millett LJ in *Mothew*, discussed below. See also Peter Birks, 'The Content of Fiduciary Obligation' (2002) 16 TLI 34 at 35.

29 See David Pollard 'Exercising Powers: Proper Purposes rather than Best Interests: Fiduciaries and Eclairs' (2016) 30 TLI 71 and 'Application of the Proper Purpose Test to Pension Schemes' (2016) 30 TLI 159.

30 The duties at (d) and (e) can be considered the same as the *Wednesbury* test under public law – see *Braganza v BP Shipping Ltd* [2015] UKSC 17 and Part 2 of this article. The *Braganza/Wednesbury* test has been applied to directors (*Watson v Watchfinder* [2017] EWHC 1275 (Comm)) and to employers (*IBM United Kingdom Holdings Ltd v Dalgleish* [2017] EWCA Civ 1212).

31 See, for directors, the Companies Act 2006, s 174 and for trustees, Trustee Act 2000, s 1.

32 'Excessive execution' in the terminology used by Lord Walker in *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 at [80].

33 (2017) 31 TLI 3 at 6.

34 (1980) 18 NSWLR 730 (Kearney J) at 735.

35 (2013) 31 C&SLJ 403.

36 (2018) 32 TLI 22.

Some of the case law and statutes looking at best interest focus on the exercise of powers or discretions by the Court, for example in deciding whether or not to remove or change trustees or when agreeing to an indemnity for trustees.[37]

The case law (and commentary) does not, in the main, look beyond this – to what the nature of the relevant duties on trustees or directors truly are. This was a point made by the Law Commission in its 2014 Report on 'Fiduciary Duties of Investment Intermediaries'[38] referring to a best interest duty:

> 'However, it has no statutory definition. Its meaning is discussed in a small number of cases, of which the most significant is *Cowan v Scargill*. As we discuss below, this is a particularly difficult case which has generated considerable controversy. We also outline the few other cases which interpret its meaning.'

It is helpful to look in this section at some of the commentary and cases when they discuss the issue of who is a fiduciary. 'Best interests' or 'interests' gets a mention in this test, but in a vague and general way, mainly to draw a counterpoint with the decision maker being able to act in what he or she considers to be his or her own interests, which is a strong indicator against the decision maker being a fiduciary or the relevant discretion being of a fiduciary nature (but such an obligation does not determine a fiduciary obligation – something more is needed[39]).

This section starts with Paul Finn's book *Fiduciary Obligations* and then looks at Millett LJ in two key decisions: *Mothew* and *Armitage*.

Finn: 'Fiduciary Obligations'

In his foundational book *Fiduciary Obligations*,[40] Paul Finn attempted to define a fiduciary obligation. Chapter 3 is headed 'The Fiduciary Obligation' and starts with a headnote: 'A fiduciary must act honestly in what he alone considers to be the interests of his beneficiaries.'

He then went on:

> '27 In formulating and in commenting on the fiduciary obligation the courts have spoken only in large and general terms. What is clear is that they have in fact imposed a

37 A *Beddoe* order. The *Beddoe* cases talk about the interests or 'benefit of the fund', rather than the interest (or benefit) of the beneficiaries – see, eg *Blades v Isaac* [2016] EWHC 601 (Ch) (Master Matthews) at [60] citing para 1 of the Practice Direction to Pt 46:

> '1.1 A trustee or personal representative is entitled to an indemnity out of the relevant trust fund or estate for costs properly incurred. Whether costs were properly incurred depends on all the circumstances of the case including whether the trustee or personal representative ('the trustee') … (b) acted in *the interests of the fund or estate* or in substance for a benefit other than that of the estate, including the trustee's own'.

And *Pettigrew v Edwards* [2017] EWHC 8 (Ch) (Master Matthews) at [17]:

> 'The trustees apply to the court, supplying all the relevant information which they then have, including legal advice received, and the court makes a judgment at that stage and on the materials available as to whether the trustees' behaviour is reasonable and for *the benefit of the fund*. In effect the judge "determines what course the interests of justice require to be taken in the proceedings": see *Alsop Wilkinson v Neary* [1996] 1 WLR 1220, 1224F.'

38 Law Com No 350, June 2014 at 4.35.

39 See Sarah Worthington, *Equity* 2nd Edn, (Oxford University Press, 2006) at p 141 and Peter Birks 'The content of fiduciary obligation' (2002) 16 TLI 34 at 47.

40 1977, The Law Book Company. Reprinted in 2016 by The Federation Press. Described by Millett LJ in *Mothew* as 'classic'.

> general obligation on fiduciaries – an obligation to act "in the interests of" or "for the benefit of" their beneficiaries – and that this obligation sets the ring to the fiduciary's freedom of action in his office. The general comments of the judges made equally clear to what end he must bend his exertions – the service of his beneficiaries' interests. But the very generality of the terms used to express the fiduciary obligation has meant that they, themselves, provide no immediate yardstick against which to measure the propriety or impropriety of a fiduciary's actions in a particular case. It is one thing to oblige a fiduciary to act honestly in what he believes to be the interests of his beneficiaries. It is quite another to attempt to use that formula alone as the criterion on which to base judicial review.'

Paul Finn then listed (in para [28]) eight specific duties in two groups:

(1) not to delegate, not to act under direction, not to place fetters on discretion, and to consider whether a discretion should be exercised; and
(2) not to act for his own benefit, to treat beneficiaries equally, to treat beneficiaries fairly, and not to act capriciously.

Paul Finn went on to discuss a duty to act in the interests of the beneficiaries (italics in the original, but my underlining):

> '29. Putting the general obligation and its specific duties together, the following picture presents itself. Both operate upon the fiduciary through his discretions, and for reasons which are not difficult to find. To the extent that he has discretions, he can make choices. Equity's concern is to ensure that if and when choices are to be made, they will be made by the fiduciary, and <u>will be made for and in the beneficiaries' interests</u>.
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> 30. Secondly it should be noted of the obligation itself that it in terms acknowledges the distinctive characteristics of a fiduciary's office. His position leaves it to him to determine how his duties are to be discharged, his powers exercised, for the benefit of his beneficiaries. While the obligation positively requires the fiduciary to act in the interests of the beneficiaries, it does not itself seek to define how these interests are to be served. That is the fiduciary's function. But the specific duties [referred to in [28]] do define what actions a fiduciary must not take if he is properly to serve his beneficiaries. The duties define the points at which a court will be prepared to say that, whatever else the fiduciary might have tried to do, he has *not* acted in the beneficiaries' interests. … As a general rule, it is the province of the fiduciary to determine what actions *are in the interests of his beneficiaries*. The courts are not interested with this decision. On the other hand, it is the province of the courts to determine what actions *are not in the beneficiaries' interest*, and an action will not be in the beneficiaries' interest if they constitute a breach of any of the specific duties.
>
> 31. By approaching a review of a fiduciary's actions through the duties, the courts have been relieved of the impossible task of defining exhaustively what is meant by the "interests of his beneficiaries" in any particular case – though as will be seen in the case of companies, the courts, goaded on by the text writers, have descended into this morass with dubious benefits to company law.'

He then went on to outline some of the issues with an 'interests' test, ultimately saying that this was 'practically impossible to define exhaustively' and therefore should be left to the fiduciary 'to make his own choices', subject to the eight specific duties he had previously outlined in [28]:

> 'In a given relationship it is possible to indicate in a general way what matters are of concern, of interest, to the beneficiaries of that relationship. In an insolvent liquidation, for example, the creditors have a clear interest in having the company's assets realised on the most advantageous terms. Under settlement the tenant for life is interested in the quantum of income that can be obtained, while the remainderman's interest is in capital. But given the variety of discretionary powers which a fiduciary usually has at his disposal to serve such "interests", it is practically impossible to define exhaustively in any relationship what actions will be in the interests of the beneficiaries. So the fiduciary obligation leaves it to the fiduciary to make his own choices. But through the duties it tells him that there are certain specific things that he must or must not do.'

So Paul Finn was clearly envisaging:

- a subjective test – what the fiduciary considers to be in the relevant interest (see [27]);
- looking at exercise of powers or discretions only (see [29]), so not a freestanding power; and
- not something the courts would readily review (aside from the eight specific duties listed in [28]) – see [30] and [31].

He did only refer to the interests of the 'beneficiaries'[41] – not the interest of the trust or company or principal.

Later, as a judge, in *Grimaldi v Chameleon Mining NL (No 2),*[42] Finn J attempted a rough definition of a fiduciary, noticeably not referring to a 'best interests' duty, but instead commenting in the context of excluding his own interest:

> 'As to who is a "fiduciary", while there is no generally agreed and unexceptionable definition, the following description suffices for present purposes: a person will be in a fiduciary relationship with another when and insofar as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of his or her own or a third party's interest'.

This looks at 'interest' but only as a counterpoint to the fiduciary's own interest, so pointing towards the conflicts role, rather than a freestanding duty.

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41 See the discussion on who is a beneficiary at [32].

42 [2012] FCAFC 6 at [177]. Cited by both the Court of Appeal in *Lehtimäki v The Children's Investment Fund Foundation (UK)* [2018] EWCA Civ 1605 at [38] and at first instance by Vos C in *The Children's Investment Fund Foundation (UK) v Attorney General* [2017] EWHC 1379 (Ch) at [143], discussing whether a shareholder in a charitable trustee company was a fiduciary.

Millett LJ: Mothew and Armitage

The question of who is a fiduciary was addressed by Millett LJ in 1996 in *Bristol & West Building Society v Mothew,*[43] a case involving a claim against a solicitor by his client. He did not initially refer to any 'best interests' duty:[44]

> 'A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work Fiduciary Obligations (1977 ed. p. 2), he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.'

But later Millett LJ did refer to the need for a solicitor to act 'in the interests of' his principal, holding (at 19D):

> 'Even if a fiduciary is properly acting for two principals with potentially conflicting interests he must act in good faith in the interests of each and must not act with the intention of furthering the interests of one principal to the prejudice of those of the other …'.

Just under eight months later, in 1997, in *Armitage v Nurse,*[45] Millett LJ dealt with whether an exclusion clause in favour of a trustee was valid, holding:

> 'there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts. But I do not accept the further submission that these core obligations include the duties of skill and care, prudence and diligence. The duty of the trustees to perform the trusts honestly and in good faith *for the benefit of the beneficiaries* is the minimum necessary to give substance to the trusts, but in my opinion it is sufficient.'

Armitage concerned a family trust, not a charity or commercial trust.

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43 [1998] Ch 1 at p 18. Recently cited by Vos C in *The Children's Investment Fund Foundation (UK) v Attorney General* [2017] EWHC 1379 (Ch) at [142].

44 Although referring to a need to 'act in good faith in the interest' of each principal later in the judgment (at 19D) – see Part 2 of this article.

45 [1998] Ch 241 at 253–254.

In *Citibank NA v MBIA Assurance SA,*[46] Arden LJ in the Court of Appeal considered the core obligation argument in *Armitage*, in relation to a trustee of a note facility who was required under the agreements in some circumstances to act on the direction of the guarantor of the notes. Arden LJ held that Citibank remained a trustee:

> 'The trustee continues at all times to have an obligation of good faith, and in addition, as Mr Adkins submits, there are other clauses in the trust deed where the trustee has a real discretion to exercise, for example in cl 8 of the trust deed which also confers a discretion on the trustee to give authorisations or waivers. In my judgment, while it is correct that it would be a surprising interpretation of the documentation, against which the court should lean, if the powers of the trustee were so reduced that it ceases to be a trustee at all, that point has not been reached in the present case and therefore there is no risk of recharacterising the office of trustee as something else.'

Arden LJ here just referred to an 'obligation of good faith' as being sufficient and made no reference in this passage to the interests of the beneficiaries, although this had been an issue raised by counsel for one of the noteholders (see [58] and [59]).

More recently in *Sheikh Tahnoon v Kent,*[47] a case on whether the parties to a joint venture owed each other fiduciary duties, Leggatt LJ considered *Armitage* and *Mothew* (and the later Australian High Court decision in *Hospital Products Ltd v United States Surgical Corp*[48]) holding:

> '[159] Thus, fiduciary duties typically arise where one person undertakes and is entrusted with authority to manage the property or affairs of another and to make discretionary decisions on behalf of that person. (Such duties may also arise where the responsibility undertaken does not directly involve making decisions but involves the giving of advice in a context, for example that of solicitor and client, where the adviser has a substantial degree of power over the other party's decision-making: see Lionel Smith, "Fiduciary relationships: ensuring the loyal exercise of judgement on behalf of another" (2014) 130 LQR 608.) The essential idea is that a person in such a position is not permitted to use their position for their own private advantage but is required <u>to act unselfishly in what they perceive to be the best interests of their principal</u>. This is the core of the obligation of loyalty which Millett LJ in the *Mothew* case [1998] Ch 1 at 18, described as the "distinguishing obligation of a fiduciary". Loyalty in this context means being guided solely by the interests of the principal and not by any consideration of the fiduciary's own interests. To promote such decision-making, fiduciaries are required to act openly and honestly and must not (without the informed consent of their principal) place themselves

46 [2007] EWCA Civ 11, discussed in A Trukhtanov, 'The Irreducible Core of Trust Obligations' (2007) 123 LQR 342 and in Man Yip 'The Commercial Context in Trust Law' [2016] Conv 347. She commented: 'Unsurprisingly, this decision has not been well received by equity lawyers. Surely the duties of good faith and that the trustee is required to act for the benefit of the beneficiaries relate to the performance of all the trustee's functions, and not merely some of them'. But she did not deal further with the extent of any 'benefit of the beneficiaries' issue.
On 'irreducible core', see also *Plan B Trustees Ltd v Parker (No 2)* [2013] WASC 216 (Edelman J) at [232], *Crossman v Sheahan* [2016] NSWCA 200 and *Clayton v Clayton* [2016] NZSC 29. See also James Edelman. 'Four Fiduciary Puzzles' at pp 303 to 305, in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010), and Joel Nitikman 'Life is Change: The Rules for, and tax implications of, using powers of amendment in a non-charitable trust' (2017) 24 JTCP 5 at 16–17.

47 *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Kent (aka John Kent)* [2018] EWHC 333 (Comm) (Leggatt LJ).

48 (1984) 156 CLR 41, 96–97. Discussed further below.

> in a position where their own interests or their duty to another party may conflict with their duty to pursue the interests of their principal. They are also liable to account for any profit obtained for themselves as a result of their position.' (my underlining)

Here Leggatt LJ is referring to the 'best interest of the principal'', but clearly as a subjective test ('what they perceive'). And this is a test as to whether or not fiduciary duties are owed – not the extent of those duties.

UK official guidance

Relevant official reports or guidance in the UK clearly has in the past assumed or adopted a 'best interest' duty, although recent comments from the Law Commission of England and Wales have shown more caution.

The report[49] of the Scottish Law Commission, 'Report on Trust Law' proposed some codification of trust law in Scotland, including, at 7.7 and 12.56: 'The Commissions' proposals did not affect the general duties imposed by law that trustees should act in the best interests of the trust'. It also referred to 'best interests of the beneficiaries' in other paragraphs – 12.62 and 12.64. But relevantly, no general best interest duty was proposed in the draft bill attached to the report.

Law Commission: Trustee Exemption Clauses (July 2006)

This report[50] refers to a general best interest duty – in a short form (at 5.81): 'Trustees are under a duty to exercise all their powers properly in the best interests of the beneficiaries'. This version clearly just refers to the exercise of powers, but does not make clear that it is a subjective test (there is no reference to it being 'as considered by the trustee'). Later at B.48, discussing an ability for trustees to take out insurance at the expense of the trust:

> 'B.48 … However, we see difficulties with an extension of the power in the Charities Bill to non-charitable trusts. Outside the charitable sphere it is more difficult to assess objectively whether the purchase of insurance is in the best interests of the trust and whether appropriate care has been taken in making the decision. For example, where trustees have the means to be able to meet most claims for breach of trust personally, beneficiaries would not obtain any financial benefit from the trustees being insured. Permitting trustee indemnity insurance to be purchased might make it easier to obtain skilled trustees, or to obtain them for less cost, but this would in many cases be difficult to establish. Such benefits would have to be in some way balanced against the cost of insuring those particular trustees.
>
> B.49 Assessing what is in the best interests of private beneficiaries would not, therefore, be straightforward. As the validity of the exercise of the power would depend on such an assessment and would be capable of being challenged by an individual beneficiary it could lead to uncertainty and litigation.'

49 Scot Law Com No 239.
50 [2006] EWLC 301 (04 July 2006).

Law Commission: Trustees' Powers and Duties (July 1999)

This report[51] started off citing *Cowan v Scargill* – so referring to the exercise of powers (footnotes excluded):

> 'Duties of trustees generally
>
> 3.2 It is the paramount duty of trustees "to exercise their powers in the best interests of the present and future beneficiaries of the trust".[52] Trustees also have other, more specific, duties. So, for example, trustees are usually under a duty to invest trust funds in their hands. They must not profit from their office or cause loss to the trust as a result of a conflict between their fiduciary duty and self-interest. Trustees obviously have a duty to comply with the terms of the trust and must act impartially between the beneficiaries. They have particular obligations in relation to dealings with trust property as between a tenant for life and remainderman, and as to the treatment of income and capital generally.'

But this quickly changes into a simple 'act':

> '3.11 … It will, for example, remain the paramount duty of trustees to act in the best interests of the present and future beneficiaries of the trust.'

Similar wording appears in the explanatory notes to the Trustee Act 2000 (enacted following the Law Commission report), which state (at [11]), in relation to the duty of care in s 1:

> 'The duty will take effect in addition to the existing fundamental duties of trustees (for example, to act in the best interests of the beneficiaries and to comply with the terms of the trust).'

The term 'best interests' only appears in one place in the 2000 Act – in s 15(3) dealing with the basis on which trustees must formulate a guidance statement to give to asset managers if using the statutory power under s 11 to appoint an agent in relation to asset management functions.

Law Commission: Fiduciary Duties of Investment Intermediaries (June 2014)

This 2014 Report[53] discusses *Cowan v Scargill* extensively and is much more nuanced. The Report referred to best interest at 2.8 and then went on at 3.43:

> 'In Chapter 5 we discuss pension trustees' duties to act in the "best interests" of scheme members. This is best thought of as a combination of existing duties rather than as a duty in its own right.[92] It has been described as "essentially an umbrella duty—one which

51 [1999] EWLC 260 (21 July 1999).

52 *Cowan v Scargill* [1985] Ch 270, 286, 287, per Megarry V-C. The same principle applies to trusts for purposes which are either charitable or are within one of the exceptional categories of non-charitable purpose trusts which are valid.

53 Law Com No 350, June 2014. Discussed by Susie Daykin 'Pension Scheme Investment: Is it always about the money? To what extent can or should trustees take account of ethical or ESG factors when investing?' (2014) 28 TLI 165. See also the later 2017 Law Commission Report on 'Pension Funds and Social Investment' (Law Com No 374, June 2017).

embraces a large number of individual, well-recognised duties". [93] Lord Nicholls, writing extra-judicially, has suggested that to define a trustee's obligation in terms of acting in the best interests of beneficiaries is to do nothing more than formulate, in different words, a trustee's obligation to promote the purpose for which the trust was created.[94] Below we look at trustees' duties to further the purpose of the trust.

[92] J Lehane, '*Delegation of Trustees' Powers and Current Developments in Investment Funds Management*' (1995) 7(1) Bond Law Review 36 at 38.

[93] G Thomas, '*The Duty of Trustees to Act in the 'Best Interests' of their Beneficiaries*' (2008) 2 Journal of Equity 177 at 202.

[94] Lord Nicholls, '*Trustees and their Broader Community: Where Duty, Morality and Ethics Converge*' (1996) 70 Australian Law Journal 205 at 211.'

And at 4.3(2):

'(2) We then set out the broad principles of trust law. It is often said that pension trustees should act "in the best interests of their beneficiaries". There are only a handful of cases which interpret what this means and we discuss each in turn. The leading case is *Cowan v Scargill*, though useful guidance is also found in some other cases, notably *Martin v City of Edinburgh District Council* and *Harries v Church Commissioners*. We also summarise an analysis of these cases by the Manitoba Law Reform Commission.'

There is a good discussion of the case law in the Report at 4.31 to 4.58. In 6.15, the Law Commission summarised the position:

'"Best interests"

6.15 Overall, we think that the requirement on pension trustees to act in the best interests of beneficiaries can be seen as a bundle of duties. It is a short-hand for all the duties we have set out above.'

UK Pensions Regulator

The Pensions Regulator is a statutory body established under the Pensions Act 2004 to monitor and protect occupational pension schemes. It has various powers and issues guidance and codes of practice in various areas. It has a tendency to refer to a duty on pension trustees to 'act in the best interest of scheme members'.

(a) Guidance for pension trustees in 'Understanding your role: Roles and responsibilities: Duties and Powers':[54]

'Act in the best interests of your beneficiaries

You must act in the best interests of the scheme's beneficiaries. A beneficiary is anyone who is entitled to, or who might receive, a benefit from the scheme, now or in the future.'

54 http://www.thepensionsregulator.gov.uk/trustees/role-trustee.aspx [Accessed 31 July 2018]. Similarly the previous guidance issued in 1992 by the Occupational Pensions Board (OPB) in its booklet 'Pension Trust Principles' at paras 7 and 25. Pension trustees used to be obliged to state in their annual report if they had a copy of this available to them for inspection: see reg 17 of SI 1992/1531.

(b) And in its short introductory guide, 'Welcome to pension scheme trusteeship':[55]

> 'As a trustee you have specific duties and responsibilities. Above all, you must act prudently, responsibly and honestly, in the best interests of your members.
>
> … Pension scheme trustees are there to act in the best interests of scheme members.'

A literal best interests duty is dangerous

The courts have used a short form formulation of a general best interests duty owed by trustees and directors. Although this may be acceptable in the context of the particular case – and lawyers know that court judgments are not statutes and context is highly relevant[56] – it remains dangerous to use such a shorthand. A particular danger is that the short form duty will be treated literally and used by trustees or directors or government or agencies.

Such a statement looks precise but is in fact very misleading. Clearly it should not be read literally – to do so would give rise to the problems and issues below and in Part 2.

A trustee or director acting literally on the basis of a short form duty runs a very real risk of:

(i) acting outside his or her powers;
(ii) acting for an improper purpose (and so vulnerable to challenge); and
(iii) acting in breach by considering improper factors.

Literal best interests duty: Imprecise and unworkable

In practice any best interests duty is much better either:

(a) Made clear as being a shorthand[57] (or 'summary' or 'rule of thumb') and not a literal duty; or
(b) reformulated as:
    (i) being part of the proper purposes test;
    (ii) being subjective (what do 'the trustees consider');
    (iii) referring to the *success* of the trust;
    (iv) referring to the interests of the *trust* (and not the beneficiaries).

The only loss of this approach is that the duty looks more complex – it is less easy to say.

The so-called best interests duty has attracted a large amount of criticism:

- 'too simplistic' – Lord Walker;[58]
- 'shorthand' (Law Commission[59]) or a 'portmanteau' (*MNRPF*[60]);

55 http://www.thepensionsregulator.gov.uk/docs/guide-new-trustees.pdf [accessed 31 July 2018] at p 2. Dated September 2013.
56 See 'Interpreting Megarry V-C's Judgment in Cowan v Scargill: Context etc' below.
57 See the Law Commission 2014 Report on *Fiduciary Duties of Financial Intermediaries* mentioned above.
58 Lord Walker (extra judicially) in 'The Changing Face of Trust Law' (2017) 31 TLI 19 at 22 discussing the rise of occupational pension schemes.
59 See the Law Commission 2014 Report on Fiduciary Duties of Financial Intermediaries mentioned above.
60 *Merchant Navy Ratings Pension Fund* per Asplin J at [229]: see '*MNRPF* (2015): There is no literal "best interests" rule' below.

- 'extremely vague' – James Edelman;[61]
- 'vague and imprecise'; 'essentially an umbrella duty – one which embraces a large number of individual, well–recognised duties' – Geraint Thomas;[62]
- needs 'supporting balustrades'; is 'chimerical' and based on an 'unsteady foundation' – Scott Donald;[63]
- 'unhistorical, simplistic, true in part only and misleading' – SEK Hulme;[64]
- 'nebulous' – Lusina Ho;[65]
- *KLB v British Columbia*[66] – not 'a justiciable standard:[67]
  - 'a concertina statement' – Matthew Conaglen;[68]
  - 'oversimplistic' – Jonathan Hilliard.[69]

Xenia Frostick (2000)

In 2000, Xenia Frostick wrote an article for *Pension Lawyer* entitled 'Is there a duty to act in the best interest of beneficiaries'.[70] In this she raised a number of concerns with any 'duty to act in the best interests of the beneficiaries', commenting:

- 'It is an extremely vague duty and ill-defined – what exactly is meant by "best interests" and are the members the only 'beneficiaries'?

61 As an academic (before appointment as a judge in Australia) in 'When do fiduciary duties arise?' (2010) 126 LQR 302 at 321 and 322.

62 Geraint Thomas, 'The duty of trustees to act in the 'best interests' of their beneficiaries' (2008) 2 Journal of Equity 177.

63 M Scott Donald, '"Best" Interests?' (2008) 2 Journal of Equity 245 at 245, 251 and 255.

64 SEK Hulme, 'The basic duty of trustees of superannuation trusts – fair to one, fair to all?' [2000] TLI 130.

65 Lusina Ho, 'Good faith and fiduciary duty in English Law' (2010) 4 J Eq 29 at 43.

66 [2003] 2 SCR 403, 230 DLR (4th) 513 per McLachlin CJ at [47], a case on the potential for a father to owe a fiduciary duty towards his child. See Lionel Smith 'Can we be obliged to be selfless?', at p144 of Chapter 6 in A Gold and P Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014). Also cited by James Edelman in 'When do fiduciary duties arise?'(2010) 126 LQR 302 at 322.

67 Perhaps an echo here of the issues where legislation sets out something that the courts think is too vague to be enforced. See, eg David Feldman, 'Legislation Which Bears No Law' (2016) 37 Statute Law Rev 212.
Similarly in *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC), Carr J considered a contractual provision requiring parties to have regard to various partnering principles including being 'open, honest clear and reliable' and that they should 'work together to achieve a relationship of mutual respect and trust'. She held that such provisions did not imply a fiduciary duty or a general duty of good faith and lacked contractual certainty. She considered them to be 'aspirational and motivational': see [141]. Discussed in I Hewitt, S Howley and J Parkes (eds), *Hewitt on Joint Ventures,* 6th Edn (Sweet & Maxwell, 2016) at 11–16 (fn 40).
Carr J held (at [161]:

> '[161] … The principles in Annex A lack contractual certainty. Objectively construed, they are not intended to be the subject of direct contractual effect. I refer for example to the following principles : "leaders will champion the partnering relationship", "at all times take a reasonable and balanced view of each other's obligations and commitments", "establish mutual ambitions and shared objectives from the outset of the PACT Agreement", "do our best to ensure that work is mutually enjoyable and fulfilling for everyone", "work together to grasp opportunities effectively", "work together to establish a shared commitment to customer focused service delivery".
>
> [162] IBM was obliged to "have regard to" these "principles", including the principle of working together on an "open, honest, clear and reliable" basis, but no more. The parties appear to have chosen deliberately to step back from an express agreement that they would owe each other a duty of good faith. Rather they chose to agree simply to 'have regard to' the principles in Annex A. That choice should be respected.'

68 Matthew Conaglen 'Interaction between statutory and general law duties concerning company director conflicts' (2013) 31 C&SLJ 403, [2014] Sydney Law School legal studies research paper 14/97, at p 6.

69 Jonathan Hilliard 'The flexibility of fiduciary doctrine in trust law: how far does it stretch in practice?' (2009) 23 TLI 119.

70 (2000) 83 Pension Lawyer (Feb) 2. On the APL website. This article was referenced in the later articles by SEK Hulme and Geraint Thomas (see below).

- I have never seen a test for this duty – there is no guidance on how it should be applied.
- If there is a duty, it is a very high duty – it is not a duty just to "consider" the "interests" of the beneficiaries but to "act" in the "best interests" of the beneficiaries. This seems to give the trustees very little room to manoeuvre.
- There is always a danger, when the standard is as high as this, that it will create a confrontational environment for employers, trustees and beneficiaries.
- The duty does not appear to recognise the wider context within which schemes operate today. A context that recognises both the constraints (or freedoms) in the scheme's documents as well as the financial environment.'

Xenia Frostick continued by commenting that the duty seemed to have begun with *Cowan v Scargill* and asked whether the court had created a new duty. She commented that:

> 'Megarry has created a beautiful wrapper for his judgment – but then used traditional trust law principles to decide the outcome for his judgment. I say "beautiful" deliberately as I think the term has an attraction of its own rather like a catchphrase.'

She then considered the concept of the motive of trustees and the fraud on a power doctrine.

SEK Hulme (2000)

SEK Hulme, a QC from Victoria, gave a paper to the Australian Superannuation conference in 2000, 'The basic duty of trustees of superannuation trusts – fair to one, fair to all?'.[71] In this article he looked at the Australian statutory duty in s 52 of the SIS Act,[72] the "best interest" duty in *Cowan v Scargill* and some later Australian cases, summarising that:

> 'It is the burden of this paper that these judicial statements are unhistorical, simplistic, true in part only, and misleading. No doubt one cannot say that a statutory enactment is wrong in the sense that one can say that about a judge. But one can say that a common view of the meaning of s. 52, putting it in line with the judicial statements referred to, merits the same criticism.'

He too went on to look at the purpose test and how it should apply to superannuation schemes.

Geraint Thomas (2008)

The fullest discussion of these issues was in the compendious article by Professor Thomas, now about ten years old: 'The duty of trustees to act in the 'best interests' of their beneficiaries'.[73] It raised many of the issues discussed in this article about how the *Cowan v Scargill* wording is difficult and made the point that the words 'best interests' are 'ambiguous and uncertain'[74] and that there are 'numerous ambiguities in the statement of the duty in *Cowan*'.[75]

71 (2000) 14 TLI 130.
72 The Superannuation Industry (Supervision) Act 1993 (Cth) – see Part 2 of this article.
73 (2008) 2 J Eq 177.
74 *Ibid* at p 180.
75 *Ibid* at p 183.

Ultimately Professor Thomas came to the opposite conclusion to the one in this article, stating that 'we can't simply conclude that the "best interests" concept does not exist'[76] and concluded[77] that:

> 'This may leave us with an imprecise notion, but it is no more vague than the notion of "prudence" or "reasonableness" or "unconscionable". It may actually add very little, if anything, to the range of duties we already know and accept: perhaps it really doesn't say much more than that the trustees are under a duty to act as trustees. Even so, the notion always needs to be unpacked; and it is not meaningless and it cannot be ignored. Ultimately, the duty may simply be a statement of the obvious …'.

Professor Thomas' article of course pre-dated the decision of Asplin J in *MNRPF*. It also seems to damn the short-form version with (very) faint praise. But Professor Thomas still thought it was useful (but it is not clear how, at least if a legally enforceable duty is intended).

Scott Donald (2008)

Scott Donald's article '"Best" Interests?'[78] appeared in the same issue of the Australian journal, Journal of Equity, in 2008 as the article by Geraint Thomas. He was particularly focusing on the meaning of the duty based on the Australian statutory provisions (see below), in particular those relating to superannuation trustees. Scott Donald proposed that the statutory and general law duties should be interpreted broadly.

He also suggested that the inclusion of the superlative 'best' could not be ignored and that some degree of 'optimisation' was required, giving trustees a more intense[79] duty than required under the general law.

Later Australian case law seems to have moved the question further forward in relation to the extent of the statutory duty (holding that the statutory formulation is no wider than that under the general law).

Cowan v Scargill (1984)

Cowan v Scargill[80] is a well-known decision in 1984 of Sir Robert Megarry, the then Vice-Chancellor,[81] dealing with investment powers held by trustees of the Mineworkers'

76 *Ibid* at p 180.

77 *Ibid* at pp 202 and 203.

78 (2008) 2 Journal of Equity 245.

79 Perhaps a precursor of the later finding by the Australian High Court in *Finch v Telstra Super Pty Ltd* [2010] HCA 36, (2010) 242 CLR 254 at [30] that superannuation trustees owe a more 'intense' duty (compared to other trustees) to make enquires and inform themselves when exercising a discretion about a factual matter. in exercising discretions.

80 [1985] Ch 270, [1984] 2 All ER 750. Often called 'the Mineworkers case'. There is a good discussion of *Cowan v Scargill* by M Scott Donald in '"Best" Interests?' (2008) 2 J Eq 245 and Margaret Stone J (extra judicially) in 'The superannuation trustee: Are fiduciary obligations and standards appropriate?' (2007) 1 J Eq 167. See also Paul Matthews, 'The doctrine of fraud on a power' [2007] PCB 131 at 136 and the Law Commission Report 'Fiduciary Duties of Investment Intermediaries' (Law Com No 350, June 2014) – see 'Law Commission: Fiduciary Duties of Investment Intermediaries (June 2014)' above.
Sir Robert Megarry himself discussed the case later in a conference in Vancouver – see Sir Robert Megarry 'Investing Pension Funds: the Mineworkers Case' in TG Youdan (ed) *Equity, Fiduciaries and Trusts* (Carswell, 1989), discussed below.

81 Effectively the head of the Chancery Division of the High Court (then nominally under the Lord Chancellor). The title 'Vice-Chancellor' was replaced in October 2005 by 'Chancellor'.

Pension Scheme, an occupational pension scheme of the National Coal Board. It is often cited as the authority for there being a best interests duty – although it should be noted that it does specifically refer to the exercise of powers and not just to a simple (and potentially wider) duty to 'act' (see further below).

Splitting up Megarry V-C's statement, he expressly held that trustees:

(i) have a duty to exercise their powers;
(ii) in the best interest of;
(iii) the beneficiaries; and that
(iv) this duty is paramount; and that
(v) when the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are normally their best financial interests.

Megarry V-C held (at 286H):

> 'The starting point is the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries. This duty of the trustees towards their beneficiaries is paramount. They must, of course, obey the law; but subject to that, they must put the interests of their beneficiaries first. When the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are normally their best financial interests. In the case of a power of investment, as in the present case, the power must be exercised so as to yield the best return for the beneficiaries, judged in relation to the risks of the investments in question; and the prospects of the yield of income and capital appreciation both have to be considered in judging the return from the investment.'

Megarry V-C pointed out (at 294G):

> 'If trustees make a decision on wholly wrong grounds, and yet it subsequently appears, from matters which they did not express or refer to, that there are in fact good and sufficient reasons for supporting their decision, then I do not think that they would incur any liability for having decided the matter on erroneous grounds; for the decision itself was right.'

As mentioned above, the Law Commission report 'Fiduciary Duties of Intermediaries'[82] in 2014 discusses *Cowan v Scargill,* commenting that it is a difficult case:

> '4.35 It is often said that trustees must act 'in the best interests of members and beneficiaries'. This phrase appears in the case law, in the Investment Regulations, and in the IORP Directive. However, it has no statutory definition. Its meaning is discussed in a small number of cases, of which the most significant is *Cowan v Scargill*. As we discuss below, this is a particularly difficult case which has generated considerable controversy.'

82 LC350, June 2014. See Annex 1 to this paper.

It is worth noting at this stage that *Cowan v Scargill*:

(i) was a case involving a pension scheme; and
(ii) was concerned with the investment power (as are some of the later cases). It has often been considered in the light of issues about whether or not trustees can ethically or socially invest.[83]

Cowan involved an investment power

It can be argued that the 'best interest duty' finding in *Cowan* is in any event limited to investment powers (and for occupational pension schemes it has been transposed into the 2005 Investment Regulations – see Part 2 of this article). But in practice the nature of the duty seems to apply to all powers of fiduciaries, administrative and dispositive[84] – the case law and statutory provisions dealing with directors (see 'Director cases' below) do not draw a distinction (although in relation to the exercise of some powers running into issues of how to work out the 'interests of the company' as a whole[85]).

In relation to the investment power context, in the *British Airways* case,[86] Morgan J noted (at [212]) that Christopher Nugee QC[87] had advised the BA trustees in relation to the exercise of the power of amendment under the BA scheme. Christopher Nugee QC had noted that any reference to 'trustees owing a duty to act in the best financial interest of the beneficiaries' was taken from a case on investment powers. Although not named, this is almost certainly a reference to *Cowan v Scargill*.[88]

Morgan J held:

> '212. Mr Nugee then considered the factors which should be considered by the trustees if they were considering amending the rules to reinstate RPI as the basis for pension increases. Subject to one matter, he generally agreed with the factors which had been identified in his instructions. However, those factors had referred to the trustees owing a duty to act in the best financial interests of the beneficiaries. Mr Nugee explained that that proposition was taken from a case concerning the investment powers of trustees. With the power to amend conferred by clause 18, one had to examine the purpose for which that power had been conferred. In this case, the power to amend was not for the purpose of giving members the best possible benefits so that the trustees should not exercise this power just to benefit members. The note of the consultation then recorded:
>
> > "However, Leading Counsel considered it was a legitimate consideration for the Trustees to take into account that members had an expectation, that had been shared by the Trustees and the company, that pension increases would be in line with RPI."'

83 See the Law Commission reports mentioned above.
84 See eg Geraint Thomas 'The duty of trustees to act in the "best interests" of their beneficiaries' (2008) 2 J Eq 177 at 185.
85 In a trust context, see *Edge v Pensions Ombudsman*, discussed in Part 2 of this article.
86 *British Airways Plc v Airways Pension Scheme Trustee Ltd* [2017] EWHC 1191 (Ch), [2017] PLR 16 (Morgan J).
87 Now Nugee J.
88 *Cowan v Scargill* is not expressly cited in Morgan J's judgment.

Megarry V-C comments (extra judicially) in Vancouver

Nearly four years after the judgment in *Cowan*, Megarry V-C commented extra-judicially[89] in a paper given at a conference in Vancouver entitled 'Investing Pension Funds: the Mineworkers Case' that the judgment in *Cowan v Scargill* did not display 'any great novelty of approach'.[90] From the title of his paper, he seems to have considered it mainly to be a case on investment.

Cowan v Scargill as a purpose test

The decision in *Cowan v Scargill* can be seen as one concerning either the question of the trustees acting for an improper purpose or whether they were acting under a pre-ordained policy without proper consideration.[91]

In my view *Cowan v Scargill* is better seen as applying a proper purposes test.[92] Megarry V-C referred to proper purposes, noting (at 288):

> 'Powers must be exercised fairly and honestly for the purposes for which they are given and not so as to accomplish any ulterior purpose, whether for the benefit of the trustees or otherwise: see *Duke of Portland v Topham* (1864) 11 HL Cas 32, a case on a power of appointment that must apply a fortiori to a power given to trustees as such.'

In *MNRPF*[93], Aspin J considered *Cowan v Scargill* and held: 'In my judgment, it is clear from *Cowan v Scargill* that the purpose of the trust defines what the best interests are and that they are opposite sides of the same coin, …'.

Unfortunately the test stated by Megarry V-C is too wide. It needs to be considered in its context – it is not a statute: see 'Interpreting Megarry V-C's judgment in Cowan v Scargill: context etc' below.

Although it is a case involving a pension scheme, I consider that it would be much better (and more accurate) had it referred to seeking to act 'in the interest of (or for the success of) *the trust* – and not just the beneficiaries: see Part 2 of this article.

It should also usefully follow the clear line of company law cases referring to it being a subjective test, ie to be exercised in good faith and for what the trustees (not the court) consider to be in the best interest of the trust or to promote the success of the trust and for a proper purpose.

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89 Published in 1989 as a book chapter: Sir Robert Megarry, 'Investing Pension Funds: the Mineworkers Case' in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989) at p 159. Noted by Scott Donald in '"Best" Interests?' (2008) 2 J Eq 245 at 248, fn 14.

90 Noted by Margaret Stone J (extra judicially) in 'The superannuation trustee: Are fiduciary obligations and standards appropriate?' (2007) 1 J Eq 167 at 171 and 172 and Geraint Thomas 'The duty of trustees to act in the "best interests" of their beneficiaries' (2008) 2 J Eq 177 at 179. See also Scott Donald '"Best" Interests?' (2008) 2 J Eq 245 at 248 (fn 14), also commenting that 'Megarry V-C himself made no use of the phrase "best interest" in the four editions of *Snell's Equity* (editions 24 to 27) of which he was editor'.

91 See eg Scott Donald '"Best" Interests?' (2008) 2 J Eq 245 at 247 (fn6) and see *Knudsen v Kara Kar Holdings Pty Ltd* [2000] NSWSC 715 (Austin J) at [57].

92 For a similar view that *Cowan v Scargill* is a proper purposes case, see from Australia: *Knudsen v Kara Kar Holdings Pty Ltd* [2000] NSWSC 715 (Austin J) at [60]; *Travel Compensation Fund v Fry* [2002] NSWSC 1044 (Austin J) at [204] and *Hancock v Rinehart* [2015] NSWSC 646 (Brereton J) at [57].

93 *Re Merchant Navy Ratings Pension Fund; Merchant Navy Ratings Pension Trustees Ltd v Stena Line Ltd* [2015] EWHC 448 (Ch), [2015] PLR 239 (Asplin J) at [229].

Interpreting Megarry V-C's judgment in Cowan v Scargill: context etc

Megarry V-C's judgment does contain what looks at first sight to be a fairly clear statement of what he considered the law to be. But for a later court considering whether or not to follow the statement, it is of course clear that:

(a) A first instance judgment, such as *Cowan v Scargill* is not binding as a precedent on later courts, even other first instance courts (although in practice other first instance judges will follow such a judgment unless 'there is a powerful reason for not doing so'[94] or it is 'clearly wrong'[95]). This may depend to a degree on the prior case having been fully argued: see Hobhouse J in *Forsikringsaktieselskapet Vesta v Butcher*[96] In *Cowan v Scargill*, Mr Scargill represented himself[97] and so the judgment is perhaps a weaker authority as a result.
(b) Judgments (even of higher courts) are not formally binding precedent in cases where the point is not argued (or is agreed).[98]
(c) Statements in a judgment should not be treated as though they were statutes.
(d) The context of a judgment (or indeed a statute) is highly relevant.
(e) Arguably any 'best interest' duty is just a shorthand and should not be treated literally in any event, ie subject to exceptions, etc. This is perhaps similar to the treatment of equitable maxims (eg 'equity does not aid a volunteer').

It is helpful to look in more detail at the last three principles.

Judgments are not statutes

It is clear that we must not treat judicial statements as if they were a statute, for example Lord Nicholls in *Royal Brunei:*[99]

> 'What has gone wrong? Their Lordships venture to think that the reason is that, ever since the *Selangor case* [1968] 1 WLR 1555 highlighted the potential uses of equitable remedies in connection with misapplied company funds, there has been a tendency to cite and interpret and apply Lord Selborne LC's formulation in *Barnes v Addy*, LR 9 Ch App 244, 251–252, as though it were a statute. This has particularly been so with the accessory limb of Lord Selborne LC's apothegm. This approach has been inimical to analysis of the underlying concept.'

94 Lord Neuberger in *Willers v Joyce (No 2)* [2016] UKSC 44, [2017] 2 All ER 383 at [9].
95 See for example Warren J in the Pilots case, *PNPF Trust Co Ltd v Taylor* [2010] EWHC 1573 (Ch), [2010] PLR 261 at [474]. Other tests are if the later judge 'is convinced the judgment is wrong' *per* Lord Goddard CJ (in an unreserved judgment in the Divisional Court) in *Huddersfield Police Authority v Watson* [1947] KB 842 at 848 and Robert Goff LJ in *R v Greater Manchester Coroner, ex parte Tal* [1985] 1 QB 67 at 81.
96 [1986] 2 All ER 488 (Hobhouse J) at 507.
97 See Sir Robert Megarry, 'Investing Pension Funds: the Mineworkers Case' in TG Youdan (ed) *Equity, Fiduciaries and Trusts* (Carswell, 1989) at 152.
98 See the Court of Appeal in *R (on the application of Kadhim) v Brent LBC* [2001] QB 955, CA and Browne-Wilkinson V-C in *In re Hetherington decd* [1990] Ch 1. Note that only one party appeared in *Kadhim*, so the authority of that decision is itself lessened: see para 6 of the Practice Direction (Citation of Authorities) [2001] 1 WLR 1001.
99 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, PC.

A clear recent example of this is the decision of the Court of Appeal in the insolvency case *Express Electrical Distributors Limited v Beavis.*[100] Sales LJ considered a comment of Buckley LJ in the 1980 decision, *Re Gray's Inn Construction Co Ltd*[101] in relation to validation of dispositions by a company after a winding-up petition had been presented. In *Express Electrical*, Sales LJ refused to follow this approach, holding:

> '55. As so often with a paraphrase, some nuances in the judgment of Buckley LJ have been lost in these propositions. …
>
> 56. In my judgment, the time has come to recognise that the statement by Buckley LJ … cannot be taken at face value and applied as a rule in itself.'

More colourfully, Munby J in *Beazer Homes Ltd v Stroude*[102] held:

> 'Utterances, even of the demi-gods, are not to be approached as if they were speaking the language of statute.'

The 'demi-gods' in this case were Lord Wilberforce and Lord Hoffmann.

Similarly Cross and Harris in their book '*Precedent in English Law*':[103]

> 'The literal interpretation of a statute may have something to be said for it, but there is nothing to be said for such an interpretation of previous judgments. Our case-law has fared badly on the rare occasions when this approach has been adopted.'

Context

Most of the cases which refer to a best interests duty do so quite briefly and are looking at whether (or not) the trustees (or directors) should exercise a power or discretion that they have. The statements can then be resolved as being, in context, about how the trustees (or directors) actually exercise the relevant power – and no more.[104]

The comments by Megarry V-C seem a good example of a case where, treated literally, a judge has expressed a principle too widely. This is a principle made in many judgments. For example, the comment (albeit in a different context entirely) by Lord Walker in *Pitt v Holt*[105] that a later decision[106] is one that:

> 'can claim to be an application of Buckley LJ's summary statement of principle [in *Hastings-Bass*], but only if that statement is taken out of context and in isolation from the earlier part of the judgment'.

100 [2016] EWCA Civ 765 per Sales LJ at [55] and [56]. Etherton C and Patten LJ agreed with Sales LJ.
101 [1980] 1 WLR 711, CA.
102 [2005] EWCA Civ 265 per Munby J at [29]. Cited in Richard Calnan *Principles of Contractual Interpretation,* 2nd Edn (Oxford University Press, 2017).
103 Rupert Cross and J W Harris *Precedent in English Law*, 4th Edn (Clarendon Press, 1991) at p 195.
104 *Item Software* is perhaps an exception to this analysis. But it is a difficult case – see Part 2 of this article.
105 [2013] UKSC 26 at [32].
106 Warner J in *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513, [1990] 1 WLR 1587.

Similarly Lord Walker in the pensions case, *Bridge Trustees v Houldsworth*:[107] 'apparently wide propositions may have to be read in the context of the particular facts of the case to which they related.'

Lord Steyn, in *R v Secretary of State for the Home Dept, ex p Daly,*[108] commented in a 'famous phrase' that: 'In law, context is everything'.

Lord Nicholls (extra judicially)[109] stated: 'it is always necessary to know the context in which the words were being used,' and:

> 'context is every bit as important when carrying out this objective exercise as when carrying out the everyday exercise of identifying the meaning intended to be conveyed by the writer of a letter or email.'

This context point has been made in relation to *Cowan v Scargill*. In *Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited (No 3),*[110] Beach J commented 'that the observations of the Vice-Chancellor in *Cowan v Scargill* [1985] 1 Ch 270 at 290 to 292 should not be taken out of context.'

An equitable maxim?

Equity has a number of maxims, phrases such as 'equity follows the law' or 'equity looks on that as done which ought to be done'.[111] As such they have been described as 'pithy phrases' or a 'summary statement or … broad theme which underlies equitable concepts and principles'.[112]

In practice, it seems to me that the shortened 'best interests duty' can be considered in the same way as a maxim. Not a strict rule of law, but instead an overall impressionistic statement – a 'rule of thumb'[113] – not meant to be taken strictly literally.

As long ago as 1887, equitable maxims were criticised as being 'invariably misleading'. In *Yarmouth v France,*[114] Lord Esher MR said:

> 'I detest the attempt to fetter the law by maxims. They are almost invariably misleading: they are for the most part so large and general in their language that they always include something which really is not intended to be included in them.'

107 [2011] UKSC 42 at [59].

108 [2001] UKHL 26, [2001] 2 AC 532 at [28]. Cited by Richard Nolan, 'Controlling Fiduciary Power' [2009] CLJ 293 at 295. Described as a 'famous phrase' by Lord Clarke at [114] in *Re JR38's Application for Judicial Review (Northern Ireland)* [2015] UKSC 42, [2015] 4 All ER 90. Cited in many later cases (including *Item Software* – see below).

109 'My kingdom for a horse: The meaning of words' (2005) 121 LQR 577 at 579 and 580.

110 [2018] FCA 990 (Beach J) at [108].

111 This maxim was discussed recently in a pensions context in *HR Trustees Ltd v Wembley Plc* [2011] EWHC 2974 (Ch) at [59] and in *Honda Motor Europe Ltd v Powell* [2014] EWCA Civ 437, [2014] PLR 255 at [42]. See Oliver Hilton, 'Formal defects in scheme documentation – HR Trustees Ltd v Wembley PLC' (APL Annual Conference, November 2016).

112 *Corin v Patton* (1989) 169 CLR 540 at 557 per Mason CJ and McHugh J. Cited in Young, Croft and Smith, *On Equity* (Law Book Co, 2009) at p 157 and John McGhee and others (eds), *Snell's Equity*, 33rd Edn, (Sweet & Maxwell, 2015) at 5-001. Endorsed by Lord Walker in *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 at [136].

113 The expression used by Mark Atkinson in a conversation with the author.

114 (1887) 19 QBD 647, CA at 653. In that case the maxim 'volenti non fit injuria' in relation to a workman continuing to work with a dangerous horse.

In 1940 in *Lissenden v C A V Bosch Ltd,*[115] Lord Wright quoted Lord Esher's words and added:

> 'Indeed these general formulae are found in experience often to distract the court's mind from the actual exigencies of the case, and to induce the court to quote them as offering a ready-made solution.'

Both of these statements were cited last year by Lord Toulson in *Patel v Mirza*.[116]

This caution can be contrasted with the comments of Peter Birks in an article 'The Content of Fiduciary Obligation'[117] that could be seen as in favour of the use of maxims (if seen to be the same as a paraphrase):

> 'It is difficult to paraphrase "fiduciary obligation" and that is in itself a ground for suspicion. … There are patches of law where paraphrase, even approximate paraphrase, is assumed to be and becomes, impossible. When this happens the law is nearly always in trouble.'

There is much to be said for a 'maxim' approach to a short-form best interests duty. As *Snell's Equity* commented[118] in a previous edition, the maxims 'are not to be taken as positive laws of equity which will be applied literally and relentlessly in their full width …' The same seems to me to be appropriate for the short-form best interests duty, for the reasons given below.

One issue with this 'maxim' approach is, of course, that the various judges who have put forward the best interest duty have not indicated that they were applying a rough rule of thumb or a maxim, which was not to be taken literally. Instead a simple rule is stated. However, we must consider this in its context (see above).

Not binding

Megarry V-C's comment on a 'best interests' duty is not binding on later judges for three reasons:

(i) First instance judgments are not strictly binding as a matter of precedent even on later first instances judges (see above).

(ii) The point was not argued by the parties – instead both stated that such a duty applied – effectively the point was agreed. See Buxton LJ in *R (on the application of Kadhim) v Brent LBC*:[119]

> 'there is a principle stated in general terms that a subsequent court is not bound by a proposition of law assumed by an earlier court that was not the subject of argument before or consideration by that court.'

(iii) The statement is arguably obiter dicta, ie not necessary for the decision.[120]

115 [1940] AC 412 at 435: 'The principle, rule, or maxim, that one cannot both approbate and reprobate.'
116 [2016] UKSC 42 at [95], discussing 'The maxims ex turpi causa and in pari delicto'.
117 (2002) 16 TLI 34 at 35.
118 In the 31st edition (2005). Not repeated in the latest (33rd) edition. Cited in Young, Croft and Smith, *On Equity* (Law Book Co, 2009) at p 158.
119 [2001] QB 955, CA at [33]. See also *In re Hetherington decd* [1990] Ch 1 (Sir Nicolas Browne-Wilkinson V-C).
120 Scott Donald commented to this effect in '"Best" interests?' (2008) 2 J Eq 245.

In *Cowan*, the full law report includes a summary of the legal arguments raised by both sides and this indicates that in practice the parties agreed that a best interests duty applied. Thus counsel for the board trustees:[121]

> '*Samuel Stamler QC* and *Patrick Howell* for the board trustees. The following points must be considered on the question whether the defendants have been in breach of their fiduciary duties as trustees of the pension scheme's money and investments: (1) A pension fund which is established under a trust like the Mineworkers' Pension Scheme, although it may be bigger and intended to last longer than most private trusts, is still subject to the same well-recognised principles of trust law. (2) The fact that part of the fund may come from employees' contributions does not affect the position: it does not give those contributing to it rights greater than those of other beneficiaries, any more than the employers' contributions give them any special rights. The concept is that all the contributions are made on the footing that the fund is to be administered for the benefit of beneficiaries as a whole and not a particular class of them.
>
> .....
>
> (5) As to the well-established principles of trust law, trustees must always act in the interests of the beneficiaries as a whole and that consideration must override every other. They must exercise their powers "with an entire and single view to the real object and purpose of the powers," a 'single eye.'

And Mr Scargill (acting in person) accepted various of the propositions raised, including the second and the fifth, stating that: 'Their policy was to act in the best interests of the beneficiaries,' thus:[122]

> 'Mr Arthur Scargill in person, on behalf of himself and the four other defendant union trustees: On the general principles of law involved here, the first proposition put for the plaintiffs was that the miners' pension scheme is still subject to the well-recognised principles of trust law. There are no cases covering the particular position of this trust scheme, which might be subject to different rules. On that, it is for the court to decide. The pension scheme for the beneficiaries is constantly changing and should not be looked upon in the same way as an ordinary pension scheme. Whatever is decided will have a wide effect on other pension funds.
>
> On the plaintiffs' second proposition, the union trustees agree that the fund is administered for beneficiaries as a whole. At no time have the union trustees had any other consideration in mind than the benefit of the beneficiaries and it was towards that end that the union trustees have directed all their actions.
>
> ...
>
> As to the fourth proposition, the defendants have never said they pursued a certain line of investment for political or economic reasons. Their policy was to act in the best interests of the beneficiaries.
>
> The defendants agree with the fifth, sixth and seventh propositions of the plaintiffs.'

121 [1985] Ch 270 at 272D and H.
122 [1985] Ch 270 at 274H and 275D.

In effect the dispute in *Cowan* was about whether the 'interests of the beneficiaries' were limited to their interest under the trust (and in its assets) or whether their interests included other matters (such as their interest as employees in protecting their jobs against competing businesses).

What did counsel argue in Cowan?

The report of the argument of counsel (Samuel Stamler QC and Patrick Howell) for the board trustees does not state what authority (if any) was cited for the 'best interests' duty put forward in their fifth proposition as:

> 'As to the well-established principles of trust law, trustees must always act in the interests of the beneficiaries as a whole and that consideration must override every other.'

Note that this refers to the 'interests of the beneficiaries as a whole'. But the comments of Megarry V-C in the judgment does not uses the words 'as a whole'. This is in contrast to the company law cases (referring to the interests of the company – see 'Did Megarry V-C invent the duty for trustees?' below).

But immediately after this, counsel are reported[123] as putting forward the proposition:

> 'They must exercise their powers "with an entire and single view to the real object and purpose of the powers," a "single eye".'

These are reported in the law report as quotations, but the source is not given.[124] They do not (obviously) refer to a 'best interests' duty.

Knox v Mackinnon and Lord Vestey v IRC: 'single eye'

An internet search does reveal a number of cases referring to a 'single eye', including a trust case referring to 'acting with a single eye to the benefit of the trust, and of the persons whom it concerns' and another using a slightly different formulation – 'with a single eye to the benefit of the beneficiaries':

(a) In *Knox v Mackinnon*[125] the House of Lords was dealing with a Scottish trust and the effect of an exclusion clause where the trustees had lent money on a very doubtful security, following through their wish to help the particular family member.[126] Lord Watson held:[127]

> 'I see no reason to doubt that a clause conceived in these or similar terms, will afford a considerable measure of protection to trustees who have bona fide abstained from

123 [1985] Ch 270 at 272H.
124 I note that the solicitors for the board trustees are shown on the report as Freshfields. I hasten to say that I was not involved in this case and have not had access to any of my colleagues who were or the files.
125 (1888) 13 App Cas 753, HL.
126 See (1888) 13 App Cas 753 at 762–763 per Lord Halsbury LC.
127 See (1888) 13 App Cas 753 at 765–766. Lord Watson was called a 'a great authority' on this in the Jersey case, *Midland Bank Trustee (Jersey) Ltd v Federated Pension Services Ltd* [1997] 2 LRC 81 (Jersey CA).

closely superintending the administration of the trust, or who have committed mere errors of judgment whilst acting with a single eye to *the benefit of the trust*, and of the persons whom it concerns.'

(b) In *Lord Vestey's Executor v IRC,*[128] the House of Lords was dealing with a tax claim against the settlors of a trust. One of issues was whether the settlors had 'power to enjoy' any part of the income of the trust given that the trust included a requirement for the trustees to exercise their investment powers at the direction of the 'authorised persons' (initially the two settlors). Lord Simonds held that this right to direct investment 'is a fiduciary power to be exercised with a single eye to the benefit of the beneficiaries'.

It seems likely that either or both of these two cases is the source of the argued 'single eye' quotation. It is noticeable that *Knox v Mackinnon* (but not *Lord Vestey*) uses a formulation referring to the 'benefit of the trust', rather than the 'benefit of the beneficiaries' (see Part 2 of this article). Some of the judges in *Lord Vestey* (eg Lord Morton at p 1132F) refer to the relevant interests as being 'best' interests (see Part 2 of this article), but not others and not in *Knox v Mackinnon*.

Duke of Portland v Topham: 'with an entire and single view to the real object and purpose of the powers'

This was the other quote reported as cited by counsel in *Cowan*.

An internet search reveals that in *Duke of Portland v Topham*[129] Lord Westbury LC stated the fraud on the power rule using this phrase:

> 'that the 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.'

If (as seems likely) *Duke of Portland v Topham* is the (partial) source of the argued 'best interests' duty, then it seems to support the argument that such a duty is really just part of 'proper purposes'.

These three cases seem to be the origin of counsels' submissions. But neither *Knox v MacKinnon* nor *Lord Vestey v IRC* is included in the list of authorities referred to in the judgment nor in the list (contained in the law report[130]) of two further cases cited in argument (*Duke of Portland v Topham* is referred to in the judgment). Perhaps the source of the quotations is the book cited by counsel, *Snell's Principles of Equity* (28th Edn) and this referred to *Knox* or *Vestey*?

Legal advice as a source in Cowan?

It may be that the 'best interest' formulation in Megarry V-C's judgment did not just come from the argument by counsel, but could also be seen in the legal advice given to the trustees and

128 [1949] 1 All ER 1108, HL per Lord Simonds at p 1115D and repeated at p 1116H.

129 (1864) 11 HL Cas 32 at 54. Later cited in many cases on proper purposes, for example, by Lord Sumption in *Eclairs Group Ltd v JKX Oil & Gas plc* [2015] UKSC 71, [2016] 3 All ER 641 at 649.

130 [1985] Ch 270 at 271H.

cited in the judgment (at 280E): 'The committee's duty, Mr Cowles said, was to manage the funds in the best interests of the beneficiaries …'.

Interests or benefit?

In this area the terms 'benefit' and 'interests' or 'best interests' ('best benefit' seems rather odd and is not used) seem to be used interchangeably: see Lord Nicholls' 1995 article and the summary of the amendment cases by Etherton C in *Charthouse Capital* cited below.[131] Indeed, Megarry V-C moved to a 'benefit' terminology later in *Cowan*.[132]

In *Cowan v Scargill,*[133] Megarry V-C held[134] that trustees may have to act dishonourably if the interests of their beneficiaries require it, and that since they were acting in a fiduciary capacity they cannot 'make moral gestures', being bound to use the powers conferred upon them for the legitimate purposes of the trust and for the benefit of the beneficiaries and not so as to accomplish any ulterior purpose. But he went on to note that:

> '"Benefit" is a word with a very wide meaning and there are circumstances in which arrangements which work to the financial disadvantage of a beneficiary may yet be for his benefit.'

Did Megarry V-C invent the duty for trustees?

Cases after *Cowan v Scargill* tend to refer to Megarry V-C's judgment as authority for a 'best interests' duty.[135]

Xenia Frostick in 2000 in her Pension Lawyer article 'Is there a duty to act in the best interests of the beneficiaries?'[136] thought that the 'best interests' duty was not one that had appeared for trustees before the judgment in *Cowan*.

Sir Robert Megarry, commenting extra judicially (see above) considered that the judgment in Cowan did not display 'any great novelty of approach'.[137]

It is clear that the duties on directors and on majority shareholders had long referred to them needing to act in what they thought were the 'interests' or 'best interests' of the company – see the discussion below. And these cases may well have been what Sir Robert Megarry had in mind.

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131 Also making this point, see also Xenia Frostick 'Is there a duty to act in the best interests of beneficiaries?' (2000) 83 Pension Lawyer 2 at 6; SEK Hulme, 'The basic duty of trustees of superannuation trusts – fair to one, fair to all?' (2000) 14 TLI 130 at 130; and Geraint Thomas, 'The duty of trustees to act in the "best interest" of their beneficiaries' (2008) 2 J Eq 177 at 182.

132 *Cowan v Scargill* [1985] Ch 270 at 288G.

133 [1985] Ch 270 at 288B and 288G.

134 Cited by Norris J in *Forstater v Python (Monty) Pictures Ltd* [2013] EWHC 1873 (Ch) at [149].

135 For example the investment cases cited in the 2014 Law Commission report: *Martin v City of Edinburgh* and *Harries v Church Commissioners*.
For example, in England and Wales: *Hawk Recovery Ltd v Hall* [2016] EWHC 3260 (Ch); *Revenue and Customs Commissioners v Knowledgepoint 360 Group Limited* [2011] UKFTT 438 (TC) at [55] and in Singapore, the Court of Appeal in *Foo Jee Seng v Foo Jhee Tuang* [2012] SGCA 41, [2012] 4 SLR 339, Sing CA at [79] and *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR(R) 109; [2009] SGCA 14 at [153]. In New Zealand: *Commissioner of Inland Revenue v Dick* (2001) 4 ITELR 317 (Glazebrook J) at [57].
The various Australian cases noted in Part 2 of this article tend to refer to *Cowan v Scargill* too.

136 (2000) 83(Feb) Pension Lawyer at 2.

137 Geraint Thomas commented in 2008 that the duty 'seems merely to echo earlier cases', referring to *Buttle v Saunders* and *Aberdeen Railway* (discussed below): see 'The duty of trustees to act in the "best interests" of their beneficiaries' (2008) 2 J Eq 177 at 179.

Cases before Cowan

There are some cases before *Cowan* applicable to trustees that use a 'best interests' (or 'interests') of beneficiaries (or of the trust or estate) formulation.

Some of these are not in the context of a trustee discretion, but instead relate to the circumstances when the courts may exercise their power to remove trustees or agree variations (on the grounds that this would be in the best interest of the beneficiaries or the trust).

Other cases look at the exercise of a discretion by trustees. See for example the two cases cited above from 1888 and 1949 referring to exercising powers in the 'interests' of the trust or beneficiaries: *Knox v Mackinnon* and *Lord Vestey v IRC.*[138] In *Vestey* Lord Morton held (at p1132F):

> 'on the true construction of the trust deed, the power of direction is a fiduciary power, and the authorised persons are not entitled to use it for the purpose of obtaining a benefit for themselves. They must exercise it bona fide in what they consider to be the best interests of the beneficiaries.'

In 1884, in *Letterstedt v Broers*,[139] the Privy Council dealing with a claim for the court to remove and replace trustees held that the court's principal duty was 'to see that the trusts are properly executed' (shades here of a primary duty to obey the terms of the trust instrument – see Part 2 of this article) and continued that the court could act to replace a trustee even if charges of misconduct were not made out. It finished that:

> 'It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.'

In 1909 in *Osborne v Amalgamated Society of Railway Servants,*[140] Fletcher Moulton LJ commented (obiter) that trustees must not bind themselves contractually to:

> 'exercise a trust in a specified manner to be decided by considerations other than [their] own conscientious judgment at the time *as to what is best in the interests of those for whom [they are] trustee.*'

This was however in the context of a claim against a trade union in relation to the position of Members of Parliament. Fletcher Moulton LJ was using the analogy of a trustee.

In 1851, the head note to *Harrison v Randall*[141] states that Sir G J Turner V-C held (my underlining):

> 'A trustee is not, in all cases, to be made liable upon the mere ground of his having deviated from the strict letter of his trust. The deviation may be necessary, or may be beneficial <u>to the interests of the cestuis que trust</u>, but when a trustee ventures to deviate from the letter of his trust, he does so under the obligation and at the peril of afterwards satisfying the court that the deviation was necessary or beneficial.'

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138 [1949] 1 All ER 1108, HL per Lord Simonds at p1115D and repeated at p1116H; per Lord Normand at p 1120F. Lord Reid did not rely on this fiduciary point: see p1142D.

139 (1884) 9 AC 371, PC at 386.

140 [1911] 1 Ch 540, CA.

141 (1851) 9 Hare 397, 68 ER 562 (Turner V-C). Cited in Underhill & Hayton, *The Law relating to Trusts and Trustees* 19th Edn (LexisNexis, 2016) at [43.133].

But in fact the words underlined do not appear in the reported judgment (and may have been added by the reporter).

In an emergency and where this is 'essential', the courts can give leave to trustees to act outside the terms of the trust. This is a limited and exceptional 'salvage' jurisdiction (normally amendments to a trust require consent of all the beneficiaries or an express power or use of a statutory power[142]): see *Chapman v Chapman*.[143] Thus in 1901, in *Re New,*[144] the Court of Appeal (in an unreserved judgment) gave leave to trustees to exchange shares under a reconstruction into shares of a new company which they were not authorised to hold. Romer LJ considered (at page 545A) that this was 'essential, *for the benefit of the estate and in the interests of all the cestuis que trust'*. This was in a passage later approved by Lord Morton in *Chapman v Chapman*.[145]

Similarly in 1953 in *Re Downshire Settled Estates*[146] the Court of Appeal referred to a statutory power as being designed 'to secure that trust property should be managed as advantageously as possible in the interests of the beneficiaries'. This was a decision dealing with the court's power under s 57 of the Trustee Act 1925 to validate transactions if this is 'in the opinion of the court expedient'. The Court of Appeal held (in the judgment of Evershed MR and Romer LJ at p 248a):

> 'In our judgment, the object of section 57 was to secure that trust property should be managed as advantageously as possible *in the interests of the beneficiaries* and, with that object in view, to authorise specific dealings with the property which the court might have felt itself unable to sanction under the inherent jurisdiction, either because no actual "emergency" had arisen or because the position which called for intervention was one which the creator of the trust could not reasonably have foreseen; but it was no part of the legislative aim to disturb the rule that the court will not rewrite a trust, or to add to such exceptions to that rule as had already found their way into the inherent jurisdiction.'

In 1932, the Australian High Court had referred to trustees needing to act in the interest of beneficiaries (in that case called 'contributors'). *Metropolitan Gas Company v Federal Commissioner of Taxation*[147] dealt with a staff pension fund established by trust deed. The particular point in question was whether the company was entitled to certain deductions in its income tax assessment. That question depended on the construction of the trust deed. The Commissioner of Taxation had placed particular emphasis on certain powers in the trust deed being exercisable by the trustees in conjunction with the company, stressing that the trustees were the director and secretary of the company. Gavan Duffy CJ and Starke J held that '[t]he trustees are, of course, in a fiduciary position under the trust instrument, and must exercise their powers honestly and reasonably in the interest of the contributors'.

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142 Eg the Variation of Trusts Act 1958 and Pensions Act 1995, s 68. For charities, see Charities Act 2011, s 275.

143 [1954] AC 429, HL.

144 [1901] 2 Ch 534, CA. Cited in Underhill & Hayton, *The Law relating to Trusts and Trustees* 19th Edn (LexisNexis, 2016) at [43.113].

145 [1954] AC 429, HL per Lord Morton at 453.

146 [1953] 1 Ch 216, CA. Cited by Morgan J in *Alexander v Alexander* [2011] EWHC 2721 (Ch), [2011] WTLR 187, Norris J in *Re SMP Trustees Ltd* [2012] EWHC 772 (Ch) at [25] and Master Marsh in *South Downs Trustees Ltd v GH* [2018] EWHC 1064 (Ch) at [37]. And in Australia in relation to the similar provision under the Trustee Act 1958 (Victoria) by Bell AJA in *Royal Melbourne Hospital v Equity Trustees* [2007] VSCA 162, (2007) 18 VR 469 at [157]. See further Part 2 of this article.

147 Noted by Beazley P 'Conflicts in Commercial Trusts' (2017) 31 TLI 3, at 6.

Buttle v Saunders: 'best price'

In 1950 in *Buttle v Saunders*[148] Wynn-Parry J (in an unreserved judgment) held that trustees who were proposing to sell land 'have an overriding duty to obtain the best price which they can for their beneficiaries'. They were in effect under a duty to accept a higher offer received by them before they had entered into a binding contract. They should seek the highest price and not refuse this because they felt honour bound by the original negotiations. This is often referred to as a duty to 'gazump'.

This case is described by the Law Commission in their 2014 report, 'Fiduciary Duties of Intermediaries':[149]

> '4.54 However, the case of *Buttle v Saunders* [86] is a reminder that the duty is to act in the interests of the beneficiaries – not to act morally in a general sense. Trustees under a will had entered into negotiations for the sale of trust property. Draft contracts had been prepared but not concluded. At this stage, the trustees received a higher offer but refused it on the basis that they felt honour-bound not to withdraw from the initial negotiations. The beneficiaries challenged this decision. The court held that there may be legitimate circumstances in which trustees could refuse a higher offer, such as the certainty of the original offer. However, on the facts the trustees had only considered the honour of withdrawing from existing negotiations. This was incorrect.
>
> [86] [1950] 2 All ER 193.
>
> 4.55 The case has proved controversial. In response to our Consultation Paper, the Church of England National Investing Bodies argued that 'it would be unhelpful to give the impression that high standards of behaviour in business and investment are irrelevant'. James Featherby argued that the case may have been correct on its facts but has little relevance to modern pension funds. The case concerned a small private trust which did not engage in regular commercial dealings. By contrast:
>
>> The best financial interests of many pension funds would be damaged if the trustees of those funds, or the funds themselves, were to gain a reputation for acting legally but dishonourably.
>
> 4.56 It would, for example, endanger positive relationships with suppliers and materially increase the cost of doing business with counterparties. *Buttle v Saunders* may be confined to its facts and it is uncertain how it would be applied today. Of course, trustees should not act if it would lead to long-term detriment to the fund.'

Matthew Conaglen in his 2010 book *Fiduciary Loyalty*[150] cited three cases from the 1800s as authority for a 'best interest' duty for trustees:

- *Mortlock v Buller* (1804) 10 Ves 292 (32 ER 857) (Lord Eldon LC). This is a case where specific performance of a contract for sale by trustees was refused (although the contract

148 [1950] 2 All ER 193 (Wynn-Parry J). An unreserved judgment. This was a private trust case and in *MNRPF* Asplin J considered that this meant that it was of little assistance on the best interests duty point: see [2015] EWHC 448 (Ch) at [230].

149 Law Com No 350, June 2014.

150 Conaglen *Fiduciary Loyalty* (Hart Publishing, 2010) at p 57, fn 170.

was not set aside). Lord Eldon at 309 held that the trust allowed the trustees to sell property with the consent of the tenant for life and that 'the trustees, bound to a due attention to the interests of the children, have the power of selling for such price as shall appear to them to be reasonable.'

- *Re Hodges* (1878) 7 ChD 754 (Malins V-C). A father set up a trust for his children with a power for the trustees to advance income for their education. The father asked the trustees to advance money to him for that purpose, but the trustees refused. On application to court, Malins V-C, in an unreserved judgment overruled the trustees and held that the sums should be advanced. He held, at 762:

  > 'I do not think the exercise of the discretion before me proper. I do not think it to the interests of the wards that they should be left uneducated, or that the father should incur debt for the purpose of their education when they have the means of maintaining themselves, …'.

  This looks to be an odd case to modern eyes, with Malins V-C overruling the trustees even though it was their discretion under the trust and no impropriety in process was alleged.

- *Re Medland* (1889) 41 ChD 476, CA. North J held that when mortgaged freehold property, on the security of which trust money has been invested, has fallen in value, so that the mortgage debt has come to exceed two-thirds of the actual value of the mortgaged property, it was not the absolute duty of the trustees at once to call in the mortgage, but they have a discretion which they must exercise as practical men with a due regard to all the circumstances of the case, such as the position and solvency of the mortgagor. He held, at page 481:

  > 'In my opinion it was the duty of the trustees, when they found that one of these appropriated mortgages was becoming insufficient to provide for the whole sum advanced on it, to consider what was best to be done for the estate. Of course trustees may often be in a difficulty in such a case. If the mortgaged property had become of no more value, or of less value, than the amount of the mortgage debt, and the mortgagor was dead insolvent, so that no remedy could be had against him, the question what ought to be done would be very different from what it would be if the mortgagor were alive, and were a solvent wealthy man, who could and would pay the mortgage money at once, if required to do so. The matter must be dealt with by practical men in a practical way. They must consider what is expedient to be done at the time.'

  The case went on appeal on the question of payment of costs. This point was not considered by the Court of Appeal.

None of these three cases refers to 'best interests' of the relevant beneficiaries, and only has a brief reference to any duty.

Director cases

It has long been held that directors owe a duty to exercise their powers in what they consider to be the interest of their company.

The company law cases, dealing with the powers of directors, refer to the interest (or sometimes the best interests) of the company, for example in 1854, Lord Cranworth LC in *Aberdeen Railway Co v Blaikie Bros*:[151]

> 'A corporate body can only act by its agents and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting.'

In 1942, in an often cited passage in *Re Smith and Fawcett Ltd,*[152] Lord Greene MR said that directors must 'exercise their discretion bona fide in what they consider – not what a court may consider – is in the interests of the company, and not for any collateral purpose.'

In 1959 in *Scottish Co-operative Wholesale Society Ltd v Meyer,*[153] Lord Denning said that the duty of directors was 'to do their best to promote its business and to act with complete good faith towards it.'

There is no reason in this context to distinguish the duties on directors from trustees. Directors are not, of course, strictly trustees (directors do not hold title to the company's assets, instead the legal ownership is with the company). But both trustees and directors are the paradigm case of a fiduciary. The duties imposed on directors in case law have borrowed from the duties on trustees – and vice versa.

Matthew Conaglen in *Fiduciary Loyalty* points out that it is extremely difficult to define the fundamental duty of directors other than in terms of acting in the best interest of the company.[154] This is presumably a reflection of the fact that a company can only act through its agents and that the directors effectively control all the actions of the company, but this does not really seem to me to be a distinction in relation to any best interest duty. It is, of course, the case that directors in the main owe their duties to the company (a legal person) whereas a trustee is not a legal person and so trustees owe their duties to the beneficiaries (and future trustees). But this distinction does not, in my view, mean that any test should not point to the 'best interests of the trust', instead of the beneficiaries.

Shareholder power and amendment cases

Shareholders in a company are generally regarded as holding property rights and so they are generally not taken as owing any particular duties to other shareholders or the company, for example in relation to how they exercise votes – see for example Lord Sumption in *Eclairs.*[155]

151 (1854) 2 Eq Rep 1281, (1854) 1 Macq HL 461 at 471–2 (HL). See also *Re Cawley & Co* (1899) 42 Ch D 209 per Cotton LJ at 233 and, in Australia, *Bell Group Ltd v Westpac Banking Corpn (No 9)* (2012) FLR 1 at [902], [1962]. [1969] and [1978], cited in Heydon, Leeming and Turner, *Meagher, Gummow & Lehane's Equity Doctrine & Remedies*, 5th Edn, (LexisNexis Butterworths, 2015) at [5-385].

152 [1942] 1 All ER 542, CA. Discussed further in Part 2 of this article in relation to the subjective nature of any test.

153 [1959] AC 324, HL per Lord Denning at 367.

154 Matthew Conaglen *Fiduciary Loyalty* (Hart Publishing, 2010) at p 57. See 'Harries v Church Commissioners (1993)' below.

155 *Eclairs v JKX Oil* [2015] UKSC 71 per Lord Sumption at [40]. Also *Pender v Lushington* (1877) 6 ChD 70 at 75 and 76, *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656 and *Re Astec (BSR) Plc* [1998] 2 BCLC 556 (Jonathan Parker J) at 584.

But it is well established that shareholders can owe specific duties in relation to their voting powers in some cases:

(a) when voting on amendments to the company's constitution – *Sidebottom v Kershaw Leese and Co Ltd*[156] and *Re Charterhouse Capital Ltd*;[157]
(b) when voting at a meeting to approve a statutory scheme of arrangement under the Companies Act – eg *Re Dee Valley Group Plc*;[158]
(c) when exercising class rights – *British America Nickel Corporation, Limited v M J O'Brien*[159] and *Re Holders Investment Trust Ltd*;[160] and
(d) (less well established) when exercising some approval powers in relation to a charitable company – *Children's Investment Fund Foundation (UK) v Her Majesty's Attorney General*.[161]

The limits on shareholder powers to amend a company's constitution have been held to be similar to those applicable to director (or trustee) powers. This special restriction goes back a number of years and has echoes with director duties (and hence potentially trustee duties).

In 1902, in *Sidebottom v Kershaw Leese and Co Ltd*[162] it was held that any change to the articles of association of the company could only be made if it was exercised in good faith in the interests of the company. Lord Sterndale MR held:

> 'The introduction into an altered article of a power of buying a person out or expelling him can only be held invalid if the alteration is not made *bona fide for the benefit of the company*.'

Etherton C (as he then was) recently summarised the position in *Re Charterhouse Capital Ltd*[163] in seven points:

> '(1) The limitations on the exercise of the power to amend a company's articles arise because, as in the case of all powers, the manner of their exercise is constrained by the purpose of the power and because the framers of the power of a majority to bind a minority will not, in the absence of clear words, have intended the power to be completely without limitation. These principles may be characterised as principles of law and equity or as implied terms: *Allen*;[164] *Assenagon*.[165]

156 [1920] 1 Ch 154, CA.
157 *Re Charterhouse Capital Ltd; Arbuthnott v Bonnyman* [2015] EWCA Civ 536, [2015] 2 BCLC 627, *per* Etherton C at [90] (cited by Vos C in *Dee Valley* [2017] EWHC 184 (Ch) at [27]).
158 [2017] EWHC 184 (Ch), [2018] Ch 55 (Vos C) at [42] to [47].
159 [1927] AC 369, PC.
160 [1971] 1 WLR 583 (Megarry J). Cited by Vos C in *Dee Valley* [2017] EWHC 184 (Ch) at [29] to [31].
161 [2017] EWHC 1379 (Ch), [2018] Ch 55, *per* Vos C at [154]. Overturned on appeal, but not on this point: see *Lehtimaki v Children's Investment Fund Foundation (UK)* [2018] EWCA Civ 1605.
162 [1920] 1 Ch 154, CA *per* Lord Sterndale MR at 163.
163 *Re Charterhouse Capital Ltd; Arbuthnott v Bonnyman* [2015] EWCA Civ 536, [2015] 2 BCLC 627, *per* Etherton C at [90]. Recently cited by Vos C in *Dee Valley* at [27] and by the Privy Council in *Staray Capital Ltd v Cha* [2017] UKPC 43 at [34].
164 *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656, CA at 671.
165 *Assenagon Asset Management SA v Irish Bank Resolution Corp Ltd* [2012] EWHC 2090 (Ch), [2013] 1 All ER 495 (Briggs J) at [41]–[48].

(2) A power to amend will be validly exercised if it is exercised in good faith in the interests of the company: *Sidebottom*.[166]

(3) It is for the shareholders, and not the court, to say whether an alteration of the articles is for the benefit of the company but it will not be for the benefit of the company if no reasonable person would consider it to be such: *Shuttleworth*;[167] *Peters' American Delicacy Co.*[168]

(4) The view of shareholders acting in good faith that a proposed alteration of the articles is for the benefit of the company, and which cannot be said to be a view which no reasonable person could hold, is not impugned by the fact that one or more of the shareholders was actually acting under some mistake of fact or lack of knowledge or understanding: *Peters' American Delicacy Co.*[169] In other words, the court will not investigate the quality of the subjective views of such shareholders.

(5) The mere fact that the amendment adversely affects, and even if it is intended adversely to affect, one or more minority shareholders and benefit others does not, of itself, invalidate the amendment if the amendment is made in good faith in the interests of the company: *Sidebottom*;[170] *Shuttleworth*;[171] *Citco*;[172] *Peters' American Delicacy Co.*[173]

(6) A power to amend will also be validly exercised, even though the amendment is not for the benefit of the company because it relates to a matter in which the company as an entity has no interest but rather is only for the benefit of shareholders as such or some of them, provided that the amendment does not amount to oppression of the minority or is otherwise unjust or is outside the scope of the power: *Peters' American Delicacy Co*;[174] *Assenagon*.[175]

(7) The burden is on the person impugning the validity of the amendment of the articles to satisfy the court that there are grounds for doing so: *Citco*;[176] *Peters' American Delicacy Co.*'[177]

This case law (and Etherton C's summary above) uses the terms 'benefit' and 'interests' of the company interchangeably. Although framed as being based not on a fiduciary duty owed by shareholder, but instead on an implied term or purpose test applicable to the relevant power or vote (see principle (1) above), the analogy with the 'best interests of the trust or beneficiaries' position is clear.

166 *Sidebottom v Kershaw Leese and Co Ltd* [1920] 1 Ch 154 at 163.
167 *Shuttleworth v Cox Bros & Co (Maidenhead) Ltd* [1927] 2 KB 9 at 18–19, 23–24, 26–27.
168 *Peters' American Delicacy Co v Heath* (1939) 61 CLR 457 at 488. *Peters* was discussed in SEK Hulme 'The basic duty of trustees of superannuation trusts – fair to one, fair to all?' (2000) 14 TLI 130 at 140.
169 (1939) 61 CLR 457 at 491.
170 [1920] 1 Ch 154 at 161, 163–167, 170–173.
171 *Shuttleworth v Cox Bros & Co (Maidenhead) Ltd* [1927] 2 KB 9, CA.
172 *Citco Banking Corp NV v Pusser's Ltd* [2007] UKPC 13, [2007] 2 BCLC 483 at 490, 493.
173 (1939) 61 CLR 457 at 480, 486.
174 (1939) 61 CLR 457 at 481, 504, 513, 515.
175 *Assenagon Asset Management SA v Irish Bank Resolution Corp Ltd* [2012] EWHC 2090 (Ch), [2013] 1 All ER 495 (Briggs J).
176 *Citco Banking Corp NV v Pusser's Ltd* [2007] UKPC 13, [2007] 2 BCLC 483 at 491.
177 (1939) 61 CLR 457 at 482.

Lord Nicholls

Harries v Church Commissioners (1993)

In 1993 Nicholls V-C decided *Harries v Church Commissioners.*[178] This was also an investment case, but this time involving a charity. Nicholls V-C (as he then was) referred to the comments in *Cowan v Scargill* about acting in the interests of the trust.

The Law Commission, in its 2014 report on 'Fiduciary Duties of Investment Intermediaries'[179] summarised the decision:

> '4.50 In *Harries v Church Commissioners* [79] the Bishop of Oxford and other members of the clergy challenged the investment policy of the Church Commissioners who managed the substantial trust funds of the Church of England. They claimed the commissioners attached undue importance to financial considerations in making investment decisions and failed to take into account the underlying purpose for which the assets were held – the promotion of the Christian faith.
>
> 4.51 The court held that although the commissioners were in law a charity, the purpose of the trustees' investment powers was to make money: "most charities need money and the more of it there is available, the more the trustees can seek to accomplish". [80] Charitable trustees could restrict investments which conflicted with the work of a charity; for example, a cancer charity could refuse to invest in tobacco. They could also exclude investments which would alienate their supporters. But trustees should not lose sight of the purpose of their investment powers. [81] They should not make financially detrimental investment decisions based on moral concerns where there were differing views among their supporters.
>
> 4.52 On the facts, the commissioners operated an "ethical" policy, which excluded around 13% of listed UK companies (by value), including alcohol, tobacco and armaments firms. The judge, Sir Donald Nicholls VC, found that the trustees did not err in law by adopting this ethical policy. On the other hand, the claimants' proposed plan would have excluded around 37% of listed UK companies. The judge commented:
>
>> Not surprisingly, the commissioners' view is that a portfolio thus restricted would be much less balanced and diversified, and they would not regard it as prudent or in the interest of those for whom they provide.[82]
>
> The judge held that, given the "endless argument and debate" over what Christian ethics require, the commissioners were "right not to prefer one view over the other beyond the point at which they would incur a risk of significant financial detriment".[83]
>
> [79] [1992] 1 WLR 1241.
>
> [80] [1992] 1 WLR 1241 at 1246.
>
> [81] Above, at 1247.

178 [1993] 2 All ER 300 (Nicholls V-C). Timothy Lloyd QC and Launcelot Henderson acted for Rt Rev Richard Douglas Harries, Lord Bishop of Oxford and Robert Walker QC and Christopher Nugee acted for the Church Commissioners. All later became judges.

179 Law Com No 350, June 2014. See also Annex 1 to this paper.

> [82] Above, at 1251.
>
> [83] Above, at 1251.'

It could be argued that the decision in *Harries* did not dispute the generality of the best interest duty comments made by Megarry V-C in *Cowan v Scargill*, but instead applied the investment laws differently in the case of a charity (as compared to a private trust). This purpose approach is discussed further below.

Nicholls V-C defined the primary power of trustees as being to further the purposes of the trust (not the beneficiaries). He held:[180]

> 'Before going further into the criticism made of the commissioners I will consider the general principles applicable to the exercise of powers of investment by charity trustees. It is axiomatic that charity trustees, in common with all other trustees, are concerned to further the purposes of the trust of which they have accepted the office of trustee. That is their duty. To enable them the better to discharge that duty, trustees have powers vested in them. Those powers must be exercised for the purpose for which they have been given: to further the purposes of the trust. That is the guiding principle applicable to the issues in these proceedings. Everything which follows is no more than the reasoned application of that principle in particular contexts.'

Nicholls V-C then discussed the nature of the investment powers held by charity trustees, holding that property held by way of investment was for the purpose of raising money and so 'prima facie the purposes of the trust will be best served by the trustees seeking to obtain therefrom the maximum return, whether by way of income or capital growth, which is consistent with commercial prudence'. He put this in context:

> 'Broadly speaking, property held by charity trustees falls into two categories. First, there is property held by trustees for what may be called functional purposes. The National Trust owns historic houses and open spaces. The Salvation Army owns hostels for the destitute. And many charities need office accommodation in which to carry out essential administrative work. Second, there is property held by trustees for the purpose of generating money, whether from income or capital growth, with which to further the work of the trust. In other words, property held by trustees as an investment. Where property is so held, prima facie the purposes of the trust will be best served by the trustees seeking to obtain therefrom the maximum return, whether by way of income or capital growth, which is consistent with commercial prudence. That is the starting point for all charity trustees when considering the exercise of their investment powers. Most charities need money; and the more of it there is available, the more the trustees can seek to accomplish.
>
> In most cases this prima facie position will govern the trustees' conduct. In most cases the best interests of the charity require that the trustees' choice of investments should be made solely on the basis of well-established investment criteria, having taken expert advice where appropriate and having due regard to such matters as the need to diversify, the need to balance income against capital growth, and the need to balance risk against return.'

180 [1993] 2 All ER 300 at 304.

He referred in these passages to the purposes or best interests of the trust or charity (rather than the beneficiaries):

> 'the *purposes of the trust* will be best served by the trustees seeking to obtain therefrom the maximum return ….';
>
> and
>
> 'In most cases *the best interests of the charity* require that the trustees' choice of investments should be made solely on the basis of well-established investment criteria'.

Nicholls V-C then went on to discuss some circumstances where potential investment may conflict with the aims of the charity, holding:[181]

> 'But I must emphasise that of their very nature, and by definition, investments are held by trustees to aid the work of the charity in a particular way: by generating money. That is the purpose for which they are held. That is their raison d'être. Trustees cannot properly use assets held as an investment for other, viz non-investment, purposes. To the extent that they do they are not properly exercising their powers of investment. This is not to say that trustees who own land may not act as responsible landlords or those who own shares may not act as responsible shareholders. They may. The law is not so cynical as to require trustees to behave in a fashion which would bring them or their charity into disrepute (although their consciences must not be too tender: see *Buttle v Saunders* [1950] 2 All ER 193). On the other hand, trustees must act prudently. They must not use property held by them for investment purposes as a means for making moral statements at the expense of the charity of which they are trustees. Those who wish may do so with their own property, but that is not a proper function of trustees with trust assets held as an investment.
>
> … Trustees may, if they wish, accommodate the views of those who consider that on moral grounds a particular investment would be in conflict with the objects of the charity, so long as the trustees are satisfied that course would not involve a risk of significant financial detriment.'

Nicholls V-C referred to *Cowan v Scargill* and considered what he had said was consistent with the views of Megarry V-C in that case, stating:

> 'I have sought above to consider charity trustees' duties in relation to investment as a matter of basic principle. I was referred to no authority bearing directly on these matters. My attention was drawn to *Cowan v Scargill* [1985] Ch 270, a case concerning a pension fund. I believe the views I have set out accord with those expressed by Megarry V-C in that case, bearing in mind that he was considering trusts for the provision of financial benefits for individuals. In this case I am concerned with trusts of charities, whose purposes are multifarious.'

So it could be said that *Harries* supports the contention that the best interests duty referred to in *Cowan v Scargill* was accepted, but applied differently in the case of a charity. But this may

181 [1993] 2 All ER 300 at 305.

be too narrow an interpretation – Lord Nicholls himself later commented (extra-judicially) on the position. Interestingly, Lord Browne-Wilkinson commented (extra-judicially) in a paper[182] given shortly after the *Harries* judgment, that he considered the investment principles set out in *Harries* to be applicable to all trustee investment powers:

> 'It may be that this decision is applicable only to charity trustees. The Vice-Chancellor regarded his decision as consistent with the Mineworkers Case, bearing in mind that the trusts in the latter case were for individuals. But for myself I find the reasoning and compelling in relation to all trustee investment powers; provided that the ethical and social considerations do not prejudice the proper investment of the fund so as to produce profit, such considerations can properly be taken into account.'

'Trustees and their broader community: Where duty, morality and ethics converge' (1995)

Two years later and Nicholls V-C had become Lord Nicholls (sitting in the House of Lords). In 1995 Lord Nicholls gave a speech to the Superannuation Conference in Australia on 'Trustees and their broader community: Where duty, morality and ethics converge'.[183] This was later published as an article. He made various key points on this issue, including that:

(i) the terms 'benefit' and 'best interests' are really interchangeable;
(ii) both tests need an examination of the purposes of the trust (and what benefits are intended to be received by the beneficiaries; and
(iii) 'to define the trustee's obligation in terms of acting in the best interests of the beneficiaries is to do nothing more than formulate in different words a trustee's obligation to promote the purpose for which the trust was created.'

Lord Nicholls said:[184]

> 'Benefit and best interests are really interchangeable expressions. Both have a wide and elastic but not unlimited meaning. In this context, each requires an examination of the object with which the trust was established. To decide whether a proposed course is for the benefit of the beneficiaries or is in their best interests, it is necessary to decide first what is the purpose of the trust and what benefits were intended to be received by the beneficiaries. Thus, to define the trustee's obligation in terms of acting in the best interests of the beneficiaries is to do nothing more than formulate in different words a trustee's obligation to promote the purpose for which the trust was created.'

182 Lord Browne-Wilkinson, 'Equity and its relevance to superannuation schemes today' (1992) 6 TLI 119. Lord Browne-Wilkinson had himself previously been the Vice Chancellor (after Sir Robert Megarry and before Lord Nicholls).

183 Lord Nicholls, 'Trustees and their broader community: Where duty, morality and ethics converge' (1995) 9 TLI 71 and (1996) 70 ALJ 205. Later cited in *F&C Alternative Investments (Holdings) Ltd v Barthelemy* [2011] EWHC 1731 (Ch), [2012] Ch 613 (Sales J) at [229] and by Asplin J in *MNRPF* (see below).

184 (1995) 9 TLI 71 at 74, (1996) 70 ALJ 205 at 211.

In *F&C Alternative Investments (Holdings) Ltd v Barthelemy*[185] Sales J (as he then was) followed and applied this concept in the context of a case looking at the duties owed by members of a limited liability partnership (LLP):

> '[229] As Lord Nicholls of Birkenhead has suggested, writing extrajudicially, a trustee's duty to act in the best interests of his beneficiary may best be analysed as an obligation to act for the proper purposes for which the trustee has agreed to act ('*Trustees and Their Broader Community: Where Duty, Morality and Ethics Converge*' [1995] TLI 71, 74; Edelman, 126 LQR 302, 322–323; and see *Vatcher v Paull* [1915] AC 372, 378, per Lord Parker of Waddington – the court will intervene if a power in a trust instrument is "exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power"). This is a formulation which I think is particularly appropriate for application in the context of this case, where it is difficult to regard the interests of the LLP as an entity as wholly distinct from those of its members. It is a formulation which allows for a degree of variation in the content of the duty depending on the particular circumstances which give rise to the duty, as one would expect.'

MNRPF (2015): There is no literal 'best interests' rule

Even if it was not clear before, it is now much clearer (at least in England and Wales) following the decision of Asplin J (as she then was) in *Re Merchant Navy Ratings Pension Fund*[186] (the *MNRPF* case) in 2015. She held that there is no general overriding or paramount duty on trustees (including pension trustees) to act (or exercise their powers) in the 'best interests' of the beneficiaries of the trust (or even the sub-class of beneficiaries, the members of the scheme).

It is true that much case law refers to a form of 'best interest' duty,[187] in particular (in a trust context) *Cowan v Scargill*.[188] But as discussed above, it has become clear that (at best) this should be seen as merely a 'shorthand'[189] or a 'portmanteau'[190] covering a variety of duties owed by trustees.

This issue was fully argued before Asplin J and comprehensively dealt with (at least in relation to UK pension trusts) by her in 2015 in the *MNRPF* case.[191]

185 [2011] EWHC 1731 (Ch), [2012] Ch 613 (Sales J) at [229].

186 *Re Merchant Navy Ratings Pension Fund; Merchant Navy Ratings Pension Trustees Ltd v Stena Line Ltd* [2015] EWHC 448 (Ch), [2015] PLR 239 (Asplin J). Discussed by Stuart Pickford and Andrew Block 'The Merchant Navy Ratings Pension Fund' (2015) 29 TLI 49 and by Mark Smith 'Pension Schemes: Looking after members' best interests: does anyone have to?' (2015) 29 TLI 161.

187 There is also a rather unhelpful statutory 'best interests' obligation in reg 4(2)(a) of the Occupational Pension Schemes (Investment) Regulations 2005 (SI 2005/3378): see Part 2 of this article.
In Australia, legislation also includes a best interest duty on trustees of superannuation schemes (and other trustees and directors), but this has been interpreted as not changing the position from the common law see *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd (No 3)* [2013] FCA 1342 (Murphy J) and *Manglicmont* and *Beck*, discussed in Part 2 of this article.

188 [1985] Ch 270 (Megarry V-C).

189 Christopher Nugee QC's previous advice to the trustee quoted in *MNRPF* at [70] and counsel (Brian Green QC) in *MNRPF* at [220].

190 Counsel (Andrew Simmonds QC) in *MNRPF* at [211] and discussed by Asplin J at [229] (see below). They both cite Murphy J in *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd (No 3)* [2013] FCA 1342, but he does not use this term (although referring to use by others of an 'umbrella duty').

191 *Re Merchant Navy Ratings Pension Fund; Merchant Navy Ratings Pension Trustees Ltd v Stena Line Ltd* [2015] EWHC 448 (Ch), [2015] PLR 239 (Asplin J). See also to the same effect *F&C Alternative Investments (Holdings) Ltd v Barthelemy* [2011] EWHC 1731 (Ch), [2012] Ch 613 (Sales J) at [229].

Nugee J (speaking extra-judicially) subsequently commented on the position in his 2015 lecture 'The Duties of Pension Scheme Trustees to the Employer – Revisited',[192] given to the Association of Pension Lawyers (APL).

In the *MNRPF* case, the trustees of a large multi-employer pension fund applied to court for approval of their proposals to amend the trust to deal with future funding obligations. Asplin J ultimately approved the proposals put forward by the pension trustees involved. The objections of the representative beneficiary that a better proposal could be formulated was rejected by Asplin J. The beneficiary had argued that the 'best interests' duty meant that the trustee should amend the trust (and so make the ultimate provision of its benefits more secure) by making all the employers jointly and severally liable or looking for the strongest employers to contribute any deficit in advance.

Asplin J held that the trustee was not under a positive overriding duty to act in the best interests of the members – for example, by seeking to maximise the funding within the pension scheme (as additional security). She rejected the submission that the 'best interests' duty is a paramount, stand-alone duty, holding that it is instead part of the proper purposes principle.

Asplin J agreed with the way it was put by Lord Nicholls, writing extra-judicially, in his 1995 article discussed above 'Trustees and their broader community: where duty, morality and ethics converge'[193] that:

> 'to define the trustee's obligation in terms of acting in the best interests of the beneficiaries is to do nothing more than formulate in different words a trustee's obligation to promote the purpose for which the trust was created'.

She held that 'it is clear from *Cowan v Scargill* that the purpose of the trust defines what the best interests are and that they are opposite sides of the same coin.'

Asplin J held:

> '*(i) "Best Interests" Principle*
>
> [228] In this regard, I agree with [three of the counsel] that the "best interests of the beneficiaries" should not be viewed as a paramount stand-alone duty. In my judgment, it should not be treated as if it were separate from the proper purposes principle. In fact, it seems to me that the way in which the matter was put by Lord Nicholls extra judicially sums up the status of the best interests principle and the way it fits in to the duties of a trustee. It is necessary first to decide what is the purpose of the trust and what benefits were intended to be received by the beneficiaries before being in a position to decide whether a proposed course is for the benefit of the beneficiaries or in their best interests. As a result, I agree with his conclusion that "… to define the trustee's obligation in terms of acting in the best interests of the beneficiaries is to do nothing more than formulate in different words a trustee's obligation to promote the purpose for which the trust was created".[194]

192 (2015) 29 TLI 59.

193 Lord Nicholls (1995) 9 TLI 71 and (1996) 70 ALJ 205. See 14.9 above. Also cited in *F&C Alternative Investments (Holdings) Ltd v Barthelemy* [2011] EWHC 1731 (Ch), [2012] Ch 613 (Sales J) at [229].

194 Asplin J's comment at [228] was cited by Morgan J in the *BA case: British Airways PLC v Airways Pension Scheme Trustee Ltd* [2017] EWHC 1191 (Ch) at [490].

> [229] In my judgment, it is clear from *Cowan v Scargill* that the purpose of the trust defines what the best interests are and that they are opposite sides of the same coin, an approach which is supported by the way in which the matter is dealt with in *Harries v Church Commissioners*, another case concerning investment policy and in *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd (No 3)* in which Murphy J made comments which were obiter in which he described the principle as a "portmanteau". The learned Judge's comments were made in the context of his consideration of a statutory duty to act in the best interests of the members of a trust. He explored the common law and equity in some depth and concluded that the statute did not extend beyond the general law. If by his conclusion that the "best interest duty" operates "in combination with other duties" he meant that it flows from and is moulded by the trustee's obligation to promote the purpose for which the trust was created, I agree. As Lord Nicholls pointed out, first it is necessary to determine the purpose of the trust itself and the benefits which the beneficiaries are intended to receive before being in a position to decide whether a proposed course is in the best interests of those beneficiaries.
>
> […]
>
> [231] I also agree with [Counsel] in relation to the relevance of the principles in *Edge v Pensions Ombudsman* and that there is no indicator in that case that the Employer's financial interests are only relevant to the extent that the members are interested in the Employer's financial health. Although that case involved the manner in which an actuarial surplus should be dealt with, it should also be borne in mind that the Employer was not an express object of the power relating to surplus. Nevertheless, it is quite clear from the extracts from the judgment of Chadwick LJ to which I have referred, that it was considered perfectly legitimate to consider the interests of the Employers in that case and that the continued viability of the Employers was something which the trustees were entitled to promote.'

Nugee J lecture

Christopher Nugee[195] commented (extra-judicially) in his 2015 APL lecture 'The Duties of Pension Scheme Trustees to the Employer – Revisited':[196]

> 'First, although (as pointed out by my father) the primary duty of pension fund trustees, as it is of all trustees, is to obey the trust deed, or in other words to make the payments due under the rules to the beneficiaries entitled to them, pension trusts inevitably confer on the trustees a large number of powers (and statute confers some more). When asking how trustees should exercise their powers, the starting point is to ask for what purpose the powers were conferred, as it is "trite law" that powers must be exercised for the purposes for which they were conferred, and not for any extraneous or ulterior purpose.[197] That may require quite a careful analysis in the particular case of what the purposes are for which the particular power was conferred.'

195 The son of Edward Nugee QC.

196 (2015) 29 TLI 59.

197 *Re Courage Group's Pension Schemes* [1987] 1 WLR 495 at 505E per Millett J.

Nugee J went on to look at the cases and in particular Asplin J's judgment in *MNRPF*, finishing:

> 'Needless to say this is an approach which I entirely agree with. I suggest that it finally puts to rest (at any rate at the High Court level – I do not believe there is any intention to appeal) the notion that pension scheme trustees have no business concerning themselves with the interests of employers, or have a paramount duty to act in the best interests of the members which would make any such attempt to take the employers' interests into account improper. I hope you will agree that it is also a neat vindication of many of the views articulated by my father 17 years ago.'

Not prescriptive duty?

In Australia, we can sometimes see what looks like a similar approach: for example, in *Pilmer v The Duke Group (in Liq)*[198] McHugh, Gummow, Hayne and Callinan JJ held that 'there is not imposed upon fiduciaries a quasi-tortious duty to act solely in the best interests of their principals'.

But this may well reflect a desire by the Australian courts to limit the ambit of general fiduciary duties (ie to be prescriptive and not proscriptive and so limited by duties not to act with a conflict of interest etc[199]). But this cannot be thought to remove all positive duties on all fiduciaries. For example, trustees and directors can have a positive duty to act in some cases (whether this is then categorised as a fiduciary duty instead of a general trust or equitable duty is a different issue).

In *Sharp v Blank*[200] Nugee J struck out claims made by shareholders against directors of a bank that those directors owed fiduciary duties to the shareholder in relation to their vote to approve a take-over by the bank. Nugee J held that directors only owe fiduciary duties to shareholders in special circumstances (at [9]):

> 'The general principles are well established:
>
> (1) The directors of a company owe fiduciary duties to the company. …
>
> (2) But in general the directors do not, solely by virtue of their office of director, owe fiduciary duties to the shareholders, collectively or individually: *Peskin v Anderson* at [29] and Handley JA in the New South Wales Court of Appeal in *Brunninghausen v Glavanics* (1999) 32 ACSR 294 at [40]'.

But it was admitted in this case (see [6]) that the directors did owe some limited duties in relation to provision of information to the shareholders (called the 'sufficient information duty').

Nugee J referred to an element of the claim that there was 'a duty to act in the best interests of the Claimants and to prevent them from suffering loss', holding that: 'That duty

198 [2001] HCA 31, (2001) 207 CLR 165 at [74].
199 See Kelvin F K Low 'Fiduciary Duties: the Case for Prescription' (2016) 30 TLI 3.
200 [2015] EWHC 3220 (Ch) (Nugee J).

cannot in my judgment be derived from the sufficient information duty.' Nugee J held (at [23]):

> '[counsel] also objected to this duty on the basis that fiduciary duties are always proscriptive not prescriptive, citing *Breen v Williams* [1997] 1 LRC 2121 at 250–1 and *Pilmer v Duke Group Ltd (in liquidation)* [2001] 2 BCLC 773 at [69]–[83], both decisions of the High Court of Australia. I do not intend to embark on a discussion of this point, which seems to me to raise quite difficult issues – for example express trustees (who are certainly fiduciaries) are in some respects under a positive duty to act in the best interests of their beneficiaries, and one would have thought this was an example of a prescriptive fiduciary duty; it is sufficient to say, as I have, that whatever the scope of the sufficient information duty it does not extend to a positive duty to act in the best interests of the shareholders or prevent them from suffering loss.'

In Canada, the Supreme Court of Canada has held that a duty to act in the best interests of the beneficiary 'does not provide a workable basis for assigning legal liability and instead formulated loyalty as requiring that the fiduciary not put his own or others' interests ahead of those of the beneficiary': *KLB v British Columbia.*[201]

This seems to me to be the right approach, for the reasons stated in those cases. Indeed, a number of other reasons can be given (see Part 2 of this article).

Express contractual or statutory duty – some English cases

In some English cases the judges have grappled with the issues caused by an express duty to act in another's 'best interest' – either contractual (*Fish v Dresdner Kleinwort*) or regulatory (*IG Index Ltd v Ehrentreu*[202]). In both cases the judge interpreted the provision, in the factual context, as not actually affecting the issue.

Fish v Dresdner Kleinwort (2009)

In *Fish v Dresdner Kleinwort Ltd,*[203] Jack J considered a claim where there was an express 'best interests' duty in the contract between the employer and a director. Generally, it was treated as being the same as the implied fiduciary duty that a director owes anyway.

The employees were claiming that the employer should pay bonuses that had been included in the contract:

> '[1] The five claimants are former employees of the defendants. … They have each brought actions to recover bonus payments and severance payments totalling €12.6 million, which the defendants agreed to pay them. They seek summary judgment under Part 24 of the CPR. The sole defence that is raised is that, in short, it is contrary to duties of good faith owed by the claimants to the defendants for them to insist on

201 [2003] 2 SCR 403; 230 DLR (4th) 513 at [46] and [49] – see 37 below. This case was cited by Lionel Smith 'Fiduciary relationships: ensuring the loyal exercise of judgement on behalf of another' (2014) 130 LQR 608. See also Lionel Smith's chapter 'Can we be obliged to be selfless' in Gold and Miller (eds) *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014).

202 [2015] EWHC 3390 (QB), [2015] All ER (D) 255 (Nov).

203 [2009] EWHC 2246 (QB), [2009] IRLR 1035 (Jack J).

> payment of the sums in question in the context of the recent financial history of the defendants' group.'

One clause (in the termination agreement signed by the employees) provided that the arrangements were conditional upon (my underlining):

> '[11] … Mr Stratis Hatzistefanis' continued employment with the employer and secondment with the secondment company until the termination date and Mr Stratis Hatzistefanis <u>at all times acting in the best interests of the secondment company and the employer</u> and in accordance with the express and implied duties of his contract of employment and secondment agreement to the satisfaction of the secondment company and the employer;'.

The employer's defence to the employee's claim for the agreed sums under the contract was that the best interests duty required the employees to agree to waive their right to relevant bonuses:

> '15 The crucial provision on which the defendants rely drawn from the term sheets and made a condition of the right to severance pay in the termination agreements is that in condition 3, that the employee 'shall at all times act in the best interests of' Dresdner Kleinwort Ltd.
>
> […]
>
> '18 Following the realisation in January 2009 of the dire position of Dresdner Bank AG its new management decided that the bonuses for 2008 should be very substantially reduced. The bonus pool was cut by 90%. Mr Guetter and Mr Iberrakene had been put on garden leave on 12 January. Mr Hatzistefanis's employment had been terminated on 13 January. Mr Taleghani had also been put on garden leave on 12 January. On 20 February a letter was sent to each claimant asking them to give up their bonuses. It read:
>
>> "I am sure that you are by now aware that the bank has decided it is in the best interests of DKIB, Dresdner and Commerzbank AG that no 2008 bonuses, whether contractual or discretionary, will be paid to 2008/2009 ExCo members. In current circumstances the bank considers that is an appropriate and necessary step, and in accordance with the express and implied duties of employment in such roles. The bank is writing to confirm that you are also bound to act in the best interests of DKIB, and that this affects the 2008 bonus of which you were informed by letter dated 18 August 2008 and the provisional discretionary bonus for 2008 of which you were informed on 19 December 2008, which will not be paid. Please confirm your understanding and acceptance of this position by signing and returning the enclosed copy of this letter by no later than 3 March 2009.
>>
>> Given the scale of losses made by DKIB, the bank expects all current and former ExCo members to act responsibly, to take responsibility and to exhibit leadership, regardless of individual interest."
>
> The letters provided for them to be countersigned in acceptance by their recipients. The claimants did not do so.'

Jack J rejected this defence and gave summary judgment against the employer. Jack J held that the express 'best interests' provision and any similar fiduciary duty did not require the fiduciary to give up benefits properly contracted for. He held:

> '[27] … What is alleged here is that having made bargains which the claimants could properly make, in the changed circumstances they should give up the benefits of those bargains because it is in the best interests of the defendants that they do so and it is allegedly their duty as fiduciaries to do all that is in the best interests of the defendants regardless of their own interests.
>
> [28] It is clear that a fiduciary may contract with his principal, and specifically an employee who is in the position of a fiduciary may contract with his employer provided he makes full disclosure and does not place himself in breach of any fiduciary duty. He is then entitled to the benefit of the contract and there is no principle that provides that if subsequent events make the bargain one which the employer would not have made had he foreseen those events, he may require the fiduciary employee to release him. No case cited by [Counsel for the bank] came anywhere near supporting such a proposition.'

Jack J cited Elias J in *Nottingham University v Fishel,*[204] who himself quoted the passage already cited above from Mason J in the High Court of Australia in *Hospital Products Ltd v United States Surgical Corporation*:[205]

> 'That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.'

Jack J held that the fiduciary duty of the claimants must be moulded by the relevant contracts, holding, at [31]:

> '31 The quotation from the judgment of Mason J is of particular relevance here. The fiduciary relationship must accommodate itself to the terms of the contract.'

The employer also claimed that the employees were bound by the implied duty of trust and confidence to give up their bonuses. This was also dismissed by Jack J.

204 [2000] IRLR 471 (Elias J).
205 [1984] 156 CLR 41 at 97.

IG Index Ltd v Ehrentreu (2015)

In *IG Index Ltd v Ehrentreu,*[206] Supperstone J held that the 'best interests' rule in the Financial Services Authority (FSA) conduct of business sourcebook ('COBS') did not result in a regulated entity (a spread betting firm) being in breach when it failed in September 2008 to close out a position of a sophisticated investor who at the time had specifically asked the firm not to do this.

The firm did not close out the position at that time, but the position worsened and ultimately it did close out the position (in October 2008) and sued the investor for the relevant amount (over £1.2m) based on the (worsened) position in October. One of the investor's counter-claims was based on a breach of the 'best interests' rule in COBS.

Supperstone J noted (at [17]) that the firm was bound by the FSA Conduct of Business Rules ('COBS'). The relevant rule in force at the material time was Rule 2.1.1[207] which states:

> 'A *firm* must act honestly, fairly and professionally in accordance with the best interests of its *client*. (*The client best interests rule*)'.

Section 5 of the Financial Services and Markets Act 2000 provides:

> '(1) The protection of consumers objective is: securing the appropriate degree of protection for consumers.
>
> (2) In considering what degree of protection may be appropriate, the Authority must have regard to—
>
> (a) the differing degrees of risk involved in different kinds of investment or other transaction;
> (b) the differing degrees of experience and expertise that different consumers may have in relation to different kinds of regulated activity;
> (c) the needs that consumers may have for advice and accurate information; and
> (d) the general principle that consumers should take responsibility for their decisions.'

Section 150 of the 2000 Act provides:

> 'A contravention by an authorised person of a rule is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.'

Supperstone J held (at [99]) that the firm was not in breach of its statutory duty under COBS 2.1.1R to act in the customer's best interests by not closing out his bets in the relevant period between 15 September and 14 October 2008. He said that in reaching that conclusion he had regard to:

> '(1) the fact that it is clear from the evidence that after 7 years the Defendant was a sophisticated and experienced trader, (2) he had made payments in the past when

206 [2015] EWHC 3390 (QB), [2015] All ER (D) 255 (Nov).
207 See now to the same effect Rule 2.1.1(1) of the Financial Conduct Authority (FCA) Conduct of Business Rule at https://www.handbook.fca.org.uk/handbook/COBS.pdf (accessed 1 August 2018).

> requested to do so: (3) he promised to make the payments requested during this period and in making those promises he intended the Claimant to accept them; and (4) the general principle behind the rules is that consumers should take responsibility for their decisions.'

The decision was upheld on appeal: *Ehrentreu v IG Index Ltd*.[208] This point was mentioned, but not appealed: see at [17].

[*Part 2 of this article ('The Problems and a Suggested Better Formulation') will appear in the next issue of Trust Law International*.]

208 [2018] EWCA Civ 79.

The Short-form 'Best Interests Duty' – Mad, Bad and Dangerous to Know: Part 2 – The Problems and a Suggested Better Formulation

*David Pollard**

Overview

Trustees, company directors and others occupy a 'fiduciary' position towards the relevant trust, company or other principal. There is clearly a need for an explanation to be given to the relevant office holder of what this means – and for judges to describe the relevant duties when looking at claims of breach. How should the trustee board actually exercise a relevant power or discretion?

Much of the case law and commentary seeks to encapsulate the essence of the fiduciary duties in a simple phrase: that a trustee owes an overarching duty to 'act in the best interests of the beneficiaries'. In the UK (where private sector pension schemes are established as express trusts), many pension lawyers play 'best interests' bingo in spotting (and condemning) the use of this phrase. It even – rather worryingly – creeps into legislation.

But, as this article will seek to demonstrate, this is a very misleading encapsulation of the nature of fiduciary duties. There is a risk, understandable given its use by judges and sometimes in statutes, that trustee boards and directors take the formulation literally. This could easily take them into error. Clearly it does not override the terms of the trust, nor can it be taken literally.

This article is split into two parts. Part 1 ('Background, Cowan v Scargill and MNRPF') appeared in the previous issue of *Trust Law International* at (2018) 32 TLI 106 and looked at:

- the nature of any 'best interests' duty;
- why does the analysis of the supposed duty matter;
- some examples of a best interests duty in official guidance;
- why the test appears in cases about who is a fiduciary (including looking at the decisions of Millett LJ in *Mothew* and *Armitage v Nurse* in this context);

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* Barrister, Wilberforce Chambers, Lincoln's Inn. This article is a revised (and shorter) version of the papers given at the Conference 'The Use and Abuse of Trusts & Other Wealth Management Devices' (Singapore Management University and University of York, Singapore, July 2017) and to a seminar of the Association of Pension Lawyers (APL) in September 2017. I am grateful for comments and thoughts on an earlier draft from Tim Cox, Isobel Carruthers, Sara Chambers, Vanessa Knapp, Tharusha Rajapakse, Marcus Symonds and Li(lly) Yuan. The errors remain my own.

- why a literal duty is both dangerous and imprecise and unworkable;
- a discussion of the decisions of Megarry V-C in *Cowan v Scargill*, Nicholls V-C in *Harries* and Asplin J in *Merchant Navy Ratings Pension Fund*;[1] and
- two English cases rejecting a literal reading of an express contractual best interests duty (*Fish v Dresdner*) or an express regulatory duty (*IG Index v Ehrentreu*).

This Part 2 ('The problems and a suggested better formulation'):

- looks at the problems with such a supposed best interest duty, if taken literally;
- warns against the use of such a phrase by advisers (and in legislation);
- seeks to suggest a better formulation, based on exercise of powers for proper purposes and in the interests of the success of the trust/company;
- compares the statutory duties on directors under Companies Act 2006, s 172 and in particular notes the modified duty for trustee companies under s 172(2); and
- looks at (briefly) the Australian position (where Parliament has scattered statutory 'best interest' duties with abandon).

Problems with a literal 'best interests' duty

Aside from being very vague,[2] any purported 'best interests' duty does not work, if taken literally. For the reasons given in Part 1 of this article, it is probably never appropriate to view such a statement literally[3] or outside its context. But having said that, the words used are the starting point and would normally be expected to be applied, absent some problem.[4]

If, for a trustee board, there was literally a 'duty to act in the best interests of the beneficiaries', and this was taken literally then it could be used to:

(a) argue that it is a freestanding power, ie the trustee could take any action, provided it could be supported by a 'best interests' claim; or
(b) argue that it overrides any limitations in the trust instrument (this seems obviously wrong); or
(c) argue that it overrides any proper purpose limitation; or
(d) argue that a separate objective duty of care arises (rather than a subjective duty – what did the trustees or directors consider at the time would be likely to promote the relevant purpose or success of the trust or company?); or

1 [2015] EWHC 448 (Ch), [2015] PLR 239 (Asplin J).

2 See *KLB v British Columbia* [2003] 2 SCR 403, 230 DLR (4th) 513 per McLachlin CJ at [46] (discussed below) and James Edelman, 'When Do Fiduciary Duties Arise?' (2010) 126 LQR 302 at 322. Also, Geraint Thomas, 'The duty of trustees to act in the "best interests" of their beneficiaries' (2008) 2 J Eq 177 at 178.

3 Geraint Thomas, *ibid*, at 185 (fn 33) notes: 'It must be said that many commentators have approached the decision in *Cowan* almost as if it were a biblical text and have dwelt on the literal meaning of each word used, irrespective of context.' This article could be said to fall within such a 'biblical' approach but does this in order to show the context and that a literal meaning is not appropriate. It also counters the 'trite law' statements appearing in some later judgments (see above).

4 This is perhaps similar to the rules on construction of contracts and trust instruments in the recent line of Supreme Court decisions, including *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2012] 1 All ER 1137, *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173.

(e) impose a duty that was impossible to meet – there would always be more that a trustee could do; and
(f) impose a retrospective objective standard of whether or not the trustee board has produced an outcome which objectively turns out (in retrospect) to be in the best interests of the trust or beneficiaries.

I discuss these in turn.

(1) Is not a freestanding duty 'to act', but instead a limit on powers

The caselaw referring to a 'best interests duty' often shortens this into a simple 'duty to act'. For example, the cases cited in Part 1 of this article including *Fulham Football Club Ltd v Cabra Estates plc*,[5] where the Court of Appeal held: 'It is trite law that directors are under a duty to act bona fide in the interests of their company.'

This shortens even the statement of Megarry V-C in *Cowan v Scargill*,[6] where he did refer to the duty of trustees to 'exercise their powers'. Omitting these words (and perhaps any good faith wording) operates, as a literal matter, to extend the 'duty'. No longer is it limited by reference to existing powers or to limits in the trust instrument (see '(2) Does not override limitations in the trust instrument' below) but seems to allow a trustee to do whatever act he or she wants (provided it meets the remaining best interests test).

The exercise of powers or discretions formulation is also clear in relation to director duties from the oft cited statement by Lord Greene MR in *Re Smith and Fawcett Ltd*.[7] Lord Greene MR said that directors must (emphasis added) '*exercise their discretion* bona fide in what they consider – not what a court may consider – is in the interests of the company, and not for any collateral purpose.'

There is no 'exercise powers' wording in the equivalent Companies Act provision (CA 2006, s 172 – see below), but it does appear in most of the Australian legislation (see below).

The test arises in most cases in relation to the exercise of a power. This means that often, in context, this limitation (to the exercise of a power or discretion) is implied.

Exercise of powers or discretion limits apply in other statutes. For example, the Charities Act provisions (eg Charities Act 2011, ss 105 and 280) containing a requirement on trustees to be 'satisfied that it is expedient in the interests of the charity' are referring to use of a specific power under the 2011 Act. Similar limits apply under the Pensions Act 1995: for example, s 37 restricts payment of surplus out of a pension scheme to an employer. This can take place only if exercised by the trustees (s 37(2)(a)) and if 'the trustees are satisfied that it is in the interests of the members that the power is exercised in the manner proposed' (s 37(3)(d)).

5 [1994] 1 BCLC 363 at 392 (Neill LJ giving the judgment of the court).
6 [1985] Ch 27. See Part 1 of this Article.
7 [1942] 1 All ER 542, CA. See also Part 1 of this article.

It is worth repeating what Paul Finn said in *Fiduciary Obligations*[8] that the fiduciary obligation looks to be how (subjectively) powers are exercised (emphasis addded):

> '27 In formulating and in commenting on the fiduciary obligation the courts have spoken only in large and general terms. What is clear is that they have in fact imposed a general obligation on fiduciaries - an obligation to act "in the interests of" or "for the benefit of" their beneficiaries – and that this obligation sets the ring to the fiduciary's freedom of action in his office. The general comments of the judges made equally clear *to what end he must bend his exertions* – the service of his beneficiaries' interests. But the very generality of the terms used to express the fiduciary obligation has meant that they, themselves, provide no immediate yardstick against which to measure the propriety or impropriety of a fiduciary's actions in a particular case. *It is one thing to oblige a fiduciary to act honestly in what he believes to be the interests of his beneficiaries. It is quite another to attempt to use that formula alone as the criterion on which to base judicial review.*'

(2) Does not override limitations in the trust instrument

A literal short-form best interests duty would seem to confer a general power on the trustee or director and to override any limitations in the trust instrument (or company constitution). But this is obviously wrong – for example there is no 'paramount' best interests duty which would allow a trustee to invest in land if the investment power in the trust instrument prohibited such investment. Nor can the trustee board use such an implied duty to not perform a non-discretionary obligation under the trust or scheme – for example to:

- prevent a beneficiary exercising an option or right under the trust, for example to exercise a statutory transfer right – *Hughes v Royal London Mutual Insurance Society Ltd*;[9] or
- not call a meeting as required under the terms of the trust: *Pikos v Territory Homes*;[10] or
- not pay UK tax;[11] or
- allow the trustee to carry out an action not authorised by the trust instrument or statute – see for example the Halcrow case, *Pollock v Reed*.[12]

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8 The Law Book Company (1977), at [81].

9 [2016] EWHC 319 (Ch) (Morgan J).

10 *Pikos Holdings (Northern Territory) Pty Ltd v Territory Homes Pty Ltd* [1997] NTSC 30 (KearneyJ), noted in (1998) 12 TLI 44. KearneyJ (in the Supreme Court of the Northern Territory of Australia) held the trustee of a unit trust to be in breach of trust when it failed to call a meeting of unit holders following a requisition by the 20 per cent required under the trust deed. It was no defence that the trustee considered that a meeting would not be in the best interests of the unit holders.

11 There are analogies here with the duties of insolvency practitioners in an insolvency context. Lord Hoffmann commented on a liquidator's obligation to pay (as an expense) tax as required by the Insolvency Rules 1986 in *Re Toshoku Finance UK plc, Kahn v IRC* [2002] UKHL 6, [2002] 3 All ER 961 at [17] and [30]. Payment of tax required under the laws of another jurisdiction than that of the trust may be more problematic: see Christopher Sly and Marcus Parker 'Payment by Trustees of Foreign Taxes', Ch 8 in D Hayton (Ed), *The International Trust* 3rd ed (Jordan Publishing, 2011).

12 [2015] EWHC 3685 (Ch), [2016] Pens LR 129 (Asplin J): proposal to transfer benefits would have been approved as being reasonable and proper, but not allowed as being contrary to the restrictions in the pensions legislation (Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, reg 12, (SI 1991/167)).

This point is reinforced by the discussion in various cases of there being almost a need for trustees to 'commit a judicious breach of trust'; see for example *Armitage v Nurse*[13] where Millett LJ commented that a trustee acting beyond its powers may not be fraudulent:

> 'By consciously acting beyond their powers (as, for example, by making an investment which they know to be unauthorised) the trustees may deliberately commit a breach of trust; but if they do so in good faith and in the honest belief that they are acting in the interest of the beneficiaries their conduct is not fraudulent.'
>
> 'So a deliberate breach of trust is not necessarily fraudulent. Hence the remark famously attributed to Selwyn LJ by Sir Nathaniel Lindley MR in the course of argument in *Perrins v Bellamy* [1899] 1 Ch 797, 798: "My old master, the late Selwyn LJ, used to say, 'The main duty of a trustee is to commit *judicious* breaches of trust'".'

This is said almost ironically. If there were a paramount duty to act in the best interests of beneficiaries and this were overriding, there would be no breach of trust in the first place.

Australian cases on need to follow trust instrument

The Australian cases are clear that trustees must obey the terms of the trust. In *Youyang Pty Ltd v Minter Ellison Morris Fletcher*[14] the High Court held that:

> 'Perhaps the most important duty of a trustee is to obey the terms of the trust. … The rigour of the rule, as Augustine Birrell QC[5] put it, that it is the duty of a trustee "to adhere to the terms of his trust in all things great and small, important, and seemingly unimportant"
>
> [5] *The Duties and Liabilities of Trustees*, (1896) at 22. Birrell was Quain Professor of Law at University College, London, 1896–1899.'

In *Re S & D International Pty Ltd*,[15] dealing with the duties of directors of a trustee company, Robson J held that the best interests of a company acting as a trustee of a unit trust were to 'act properly in accordance with the Trust Deed and in the interest of the Unit Trust.' He went on to equate this to a 'best interests of the beneficiaries' test – namely that the director should ensure that the trustee company exercised its powers honestly and in the best interests of the beneficiaries of the trust. He held:

> '[283] … The basic common law duty of a director is that he or she must act bona fide in what he or she believes is in the best interests of the company as a whole. This duty is encompassed in s 181. In this instance, S&D acted as a trustee of the Unit Trust and the best interests of the company were clearly to act properly in accordance with the

13 [1998] Ch 241, CA *per* Millett LJ at 251.

14 [2003] HCA 15, 212 CLR 484 at [32] and [33]. Discussed on the issue of whether this duty is a fiduciary duty in Dyson Heydon 'Modern fiduciary liability: the sick man of equity?' (2014) 20 Trusts & Trustees 1006 at 1013.

15 (2010) 79 ACSR 595 (Robson J) at [283].

> Trust Deed and in the interests of the Unit Trust. In other words to ensure that the trustee exercised its powers honestly and in the best interests of the beneficiaries of the trust.'

This was followed by the Victorian Court of Appeal in *Australasian Annuities*,[16] holding that in circumstances where the company involved is a corporate trustee, 'a director acting in the best interests of the company as a whole must act in good faith to ensure that the company administers the trust in accordance with the trust deed having regard to the rights and interests of the beneficiaries of the trust'. Warren CJ referred to Robson J's decision in *Re S&D International* and held:[17]

> '[228] I agree with the statement by Robson J of the duties of a director of a company that acts as a corporate trustee. In circumstances where a company is a corporate trustee, a director acting in the best interests of the company as a whole must act in good faith to ensure that the company administers the trust in accordance with the trust deed having regard to the rights and interests of the beneficiaries of the trust. The best interests of the company as a corporate trustee are to act properly in accordance with the trust deed in managing the business of the trust and in dealing with the assets and liabilities of the trust. A director of a corporate trustee must act in good faith to ensure that the company complies with its obligations as a trustee, and properly discharges the duties imposed on it by the trust deed and by trust law generally. It is not in the best interests of the company for it to act in breach of its duties of a trustee, for the company has assumed the responsibilities of that office and must see to it that they are fulfilled.'

It is noticeable that both of these cases first refer to the 'interest of the unit trust', rather than just the interest of the beneficiaries, although Robson J did go on to treat these two concepts as being 'in other words' the same test. In *Australasian Annuities* Warren CJ noticeably just referred a need to 'have regard to' the interests of the beneficiaries, stating that the trustee company needs to administer the trust 'in accordance with the trust deed *having regard to* the rights and interests of the beneficiaries of the trust'.

Oceanic Steam Navigation Co (1880)

A quite old example of a 'best interest' duty not overcoming a lack of power appears from the decision of the Court of Appeal in 1880 in *Oceanic Steam Navigation Co v Sutherberry.*[18] The administrator of the estate of his intestate father, granted in 1873 to Oceanic an underlease of some leasehold property within the estate (grant of an underlease was allowed under the terms of the estate). As part of the underlease, the son also granted Oceanic an option (right of first refusal) to buy the leasehold interest over a seven-year period. Oceanic erected some buildings on the land and then, in 1878 tried to exercise the option.

16 *Australasian Annuities Pty Ltd (in liq) v Rowley Super Fund Pty Ltd* [2015] VSCA 9, (2015) 318 ALR 302 at 350 [228]. Cited in *Ying Mui v Frank Kiang Ngan Hoh (No 6)* [2017] VSC 730 (Vickery J) at [128].

17 Citing *Hurley v BGH Nominees Pty Ltd (No 2)* (1984) 37 SASR 499, 510 (Walters J); *Re S & D International Pty Ltd* (2010) ACSR 595 at 657 [283] (Robson J); *Bell Group v Westpac* (2008) 39 WAR 1 at 1194 [4619] (Owen J).

18 (1880) 16 Ch D 236, CA. An unreserved judgment. Discussed in David Pollard 'Trustees and fiduciaries: the limits on any "no fetter" rule' (2014) 28 TLI 105 at 114.

The Court of Appeal, in an unreserved judgment, upheld the first instance decision that the option was not binding on the estate and was made in breach of trust, so a claim by Oceanic for specific performance of the agreement failed. Jessel MR held (at p 243):

> 'but the question is not whether this was a proper rent, but whether it was right to insert an option of purchase so as to fetter the exercise of the trust for sale by preventing the administrator from selling the property to anyone but the Plaintiffs for a period of seven years at a price then fixed. It appears to me that it would be dangerous to hold that an administrator could do this, a mere trustee whose duty was to sell within a reasonable time'.

James LJ held (at p 245):

> 'In my opinion it would be most dangerous if a trustee could enter into a contract for sale binding the estate for some years afterwards, whatever might be the alteration in the value of the property.'

It is noticeable that the Court of Appeal considered this a 'hard case'[19] and one decided 'with reluctance'.[20] The Court of Appeal cited no authority, and did not even need to call on counsel for the next of kin in reaching its decision. The Court of Appeal considered that it was not relevant that 'the price fixed was a fair one at the time'[21] or that the bargain that the son/administrator had made 'was the best that could have been made under the circumstances'[22] or that Oceanic would lose the benefit of the buildings that it had put up on the land.

A similar position arises for solicitors and barristers acting for clients. They may consider and advise that a particular course of action is, in their view, likely to be in the client's best interests (for example a compromise). But if the client refuses to authorise the action, they will be in breach of duty if they go ahead with it anyway.[23]

We can contrast this general position with the statutory power in s 105 of the Charities Act 2011 for charity trustees to be able to act outside their powers if this is 'expedient in the interests of the charity' and the Charity Commission agrees.[24] This is an express statutory power for charities only (and noticeably refers to the 'interests of the charity' and not the beneficiaries: see further the discussion at 'Best interests/success of the trust is better' below).

19 (1880) 16 ChD 236, James LJ at p244.
20 *Ibid*.
21 *Ibid*.
22 *Ibid* at CA per Lush LJ at p245.
23 *Bowstead & Reynolds on Agency* (Peter Watts ed, 21st Ed, 2017) at 6-004, citing *Fray v Voules* (1859) 1 E&E 839; *Butler v Knight* (1867) LR 2 Ex 109; *The Hermione* [1922] P 162; *Apatu v Peach Prescott & Jamieson* [1985] 1 NZLR 50 at 64; *Amalgamated Metal Corp Plc v Wragge & Co (A Firm)* [2011] EWHC 887 (Comm), *Swinfen v Lord Chelmsford* (1860) 5 H & N 890; *Neale v Gordon Lennox* [1902] AC 465; *Harvey v Phillips* (1956) 95 CLR 235 and *Kendirjian v Lepore* [2017] HCA 13 at [15].
24 See the Law Commission Report '*Technical Issues in Charity Law*' (Law Com No 375, September 2017) at 10.54. Also the paper by Mark Atkinson '*Goalkeepers are different. What about pension scheme trustees?*' (APL conference November 2002) (2003) 17 TLI 25 at 32, contrasting the position of pension scheme trustees with charity trustees in the light of the Charity Commissioners' power to sanction actions 'that the charity trustees believe are in the best interests of their beneficiaries' under the previous provisions in sections 26 and 29, Charities Act 1993.

Paul Finn commented in *Fiduciary Obligations*[25] that the fiduciary obligation does not act to enlarge the relevant powers, instead it imposes constraints on them:

> 'The fiduciary's obligation is not itself an overriding and independent source of power. If a fiduciary acts beyond the powers of his office he cannot justify his actions by saying that he was in fact acting in his beneficiaries' interests, even though he has acted with perfectly good intention and with a desire to do his best for them.[26] The obligation helps to mark off the boundaries to his freedom within his powers – it does not enlarge them.'

(3) Does not override the proper purposes test

A best interests duty[27] clearly does not override or replace any proper purpose limitation.[28] For example in the 2015 Supreme Court decision on proper purposes, *Eclairs*,[29] Lord Sumption cited *Hogg v Cramphorn Ltd*[30] and noted that in that case:

> 'Buckley J held that the directors' powers to issue shares could not properly be exercised for the purpose of defeating an unwelcome takeover bid, even if the board was genuinely convinced, as the current management of a company commonly is, that the continuance of its own stewardship was in the company's interest. The company's interest was an additional and not an alternative test for the propriety of a board resolution.'

Similarly, in *Howard Smith Ltd v Ampol Ltd*,[31] the directors argued that the issue of shares was in the company's best interests, but the Privy Council invalidated the share issue on the proper purpose ground.

In a pension scheme trust context, both Knox J in *Hillsdown* and Henderson J in *ITS v Hope* made the same point. In *Hillsdown Holdings plc v Pensions Ombudsman*,[32] Knox J held:

> 'In my view, the Pensions Ombudsman had ample material before him upon which to conclude that to transfer the entire assets of the fund to another set of trustees by a transaction which was ineffectual because it amounted to an exercise of a power at

25 1977, The Law Book Company, at [81].

26 See *Re Wreck Recovery & Salvage Co* (1888) 15 ChD 353 (Liquidator), *Ellis v Barker* (1871) LR 7 Ch App 104 (Trustee), *Niemann v Niemann* (1879) 43 ChD 198 (Receiver), *Irvine v Union Bank of Australia* (1877) 2 App Cas 366 (Directors) and *Vacuum Oil Co v Wilshire* (1945) 72 CLR 319 (Executor).

27 In 'An Analysis of the Proper Purpose Rule' (1998) 10 Bond LR 164, Saul Fridman argued (at 167 and 182) that the proper purpose test was not necessary but could instead be subsumed within a best interests test. This seems to have been superseded by the express statutory duties (at least in the UK) and the clear statements in *Eclairs* and *Howard Smith v Ampol* to the effect that the proper purposes test applies even where the trustees/board of directors think they are acting in the best interest of the company. If anything, following *MNRPF*, any best interest test now seems to be part of the proper purposes test.
The position may differ in Canada, where a best interests test is preferred: *Teck Corpn Ltd v Millar* (1972) 33 DLR (3d) 288. Cited for this in Marcus Haywood, 'Duty to act within powers', Ch 11 in Simon Mortimore (Ed), *Company Directors: Duties, Liabilities and Remedies* 2nd Edn, (Oxford University Press, 2013) at p 249.

28 On proper purposes, see David Pollard, 'Exercising powers: Proper purposes rather than best interests: Fiduciaries and Eclairs' (2016) 30 TLI 71.

29 *Eclairs Group Ltd v JKX Oil & Gas plc* [2015] UKSC 71, [2016] 3 All ER 641 at [16].

30 [1967] 1 Ch 254 (Buckley J).

31 [1974] AC 821 at 834G, PC.

32 [1997] 1 All ER 862 (Knox J) at 884.

> least in part for a collateral and unauthorised purpose was an act of maladministration although it was done with the advice and concurrence of an appropriately experienced solicitor. I do not consider that there is a conflict between that conclusion of the Pensions Ombudsman and his finding that the FMC trustee acted in the best interests of the members of the FMC scheme because that latter finding was in my view directed at an appreciation of what the FMC trustee was trying to do.'

Similarly Henderson J (as he then was) in *ITS v Hope*:[33]

> 'Nor is it a good answer to an allegation of improper purpose that the donee is acting in what he or she believes to be the best interests of those affected by the exercise of the power, or even that the proposed exercise would demonstrably be for their benefit. As Lord Wilberforce said in *Howard Smith Ltd v Ampol Ltd*, at 834G:
>
> > "pleas to this effect have invariably been rejected … – just as trustees who buy trust property are not permitted to assert that they paid a good price".'

(4) Should be seen as subjective – what did the trustee board consider at the time would be likely to promote the success of the trust?

It seems clear that any best interests duty is not meant to be objective in its outcome – ie that a best outcome must be achieved. If this did apply, it would amount to a retrospective standard of care (see (6) below) and would be inconsistent with the equivalent line of caselaw on director's duties.

This subjective nature of the duty in relation to directors was made clear in *Re Smith and Fawcett Ltd*[34] where Lord Greene MR said that directors must 'exercise their discretion bona fide in what they consider – not what a court may consider – is in the interests of the company, and not for any collateral purpose.'

More recently, in *Regentcrest plc (in liq) v Cohen*,[35] Jonathan Parker J followed this approach and held:

> '*The nature of a director's fiduciary duty*
>
> [120] The duty imposed on directors to act bona fide in the interests of the company is a subjective one (see Palmer's Company Law para 8.508). The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where

33 *Independent Trustee Services Ltd v Hope* [2009] EWHC 2810 (Ch), [2010] ICR 553 (Henderson J) at [79]. Noted by David Fox at [2010] CLJ 240.

34 [1942] 1 All ER 542, CA. See also Part 1 of this article.

35 [2001] 2 BCLC 80 (Jonathan Parker J). Applied on this subjective test point in *Madoff Securities International Ltd (in liq) v Raven* [2013] EWHC 3147 (Comm) (Popplewell J) at [190]; *GHLM Trading Ltd v Maroo* [2012] EWHC 61 (Ch), [2012] 2 BCLC 369 (Newey J) at [194]; *Roberts v Frohlich* [2011] EWHC 257 (Ch), [2011] 2 BCLC 625 (Norris J) at [84]; and *Extrasure Travel Insurances Ltd v Scattergood* [2002] EWHC 3093 (Ch), [2003] 1 BCLC 598 (Jonathan Crow sitting as deputy judge) at [90].

it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test.

[121] As Lord Greene MR put it in *Re Smith & Fawcett Ltd* [1942] Ch 304 at 306:

> "The principles to be applied in cases where the articles of association of a company confer a discretion on directors … are, for present purposes, free from doubt. *They must exercise their discretion bona fide in what they consider—not what a court may consider—to be in the interests of the company, and not for any collateral purpose*." (emphasis added)

'[122] To similar effect is the following passage from the judgment of Millett LJ in *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1998] Ch 1 at 18:

> "The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty."

'[123] The position is different where a power conferred on a director is used for a collateral purpose. In such circumstances it matters not whether the director honestly believed that in exercising the power as he did he was acting in the interests of the company; the power having been exercised for an improper purpose, its exercise will be liable to be set aside (see, eg, *Hogg v Cramphorn Ltd* [1967] Ch 254). However, it has not been contended that that principle applies in the instant case.'

Regentcrest was followed in *GHLM Trading Ltd v Maroo*[36] by Newey J (as he then was) commenting:

> '[194] Two points of relevance seem to me to flow from the Court of Appeal's analysis in *Item Software v Fassihi*. The first derives from the fact that the duty of good faith focuses on a fiduciary's subjective intentions.'

Newey J then quoted Jonathan Parker J in *Regentcrest plc v Cohen* at [120] (cited above) and continued:

> 'Accordingly, a company complaining of a director's failure to disclose a matter must, I think, establish that the fiduciary subjectively concluded that disclosure was in his company's interests or, at least, that the director would have so concluded had he been acting in good faith.'

Regentcrest was recently approved by the Court of Appeal in *Lehtimäki v The Children's Investment Fund Foundation (UK)*.[37] The Court of Appeal held that a member of a company limited by guarantee, CIFF, which is a trustee of a charity, owes fiduciary duties when exercising shareholder powers. This was to be contrasted with shareholders in a non-charitable company (see [36]).

36 [2012] EWHC 61 (Ch), [2012] 2 BCLC 369 (Newey J).
37 [2018] EWCA Civ 1605.

The Court of Appeal did not seek to define the precise scope of such a fiduciary duty. Vos C at first instance[38] mentioned it being 'an obligation to use their rights and exercise their votes in the best interests of the charity for which they are a member'. The Court of Appeal did not use this 'best interests' terminology, but instead referred to the fiduciary duty as being 'to further the purposes of CIFF', referring by analogy to the statutory duty[39] on charitable incorporated organisations (CIOs). It held (at [48]):

> '48 Like the Chancellor, we do not think it necessary to rule on the precise scope of the fiduciary duties owed by members of CIFF. It is sufficient to say that a member of CIFF owes, in our view, a duty corresponding to that specifically imposed on members of CIOs by section 220 of the Charities Act 2011. In other words, the member must exercise the powers that he has in that capacity in the way that *he* decides, in good faith, would be most likely to further the purposes of CIFF. It should be stressed that this duty is subjective: in other words, that what matters is the member's state of mind (compare eg *Regentcrest plc v Cohen* [2001] 2 BCLC 80, at paragraph 120, dealing with company directors).'

Such a subjective approach must be right. Issues on best outcome, etc are best left to the usual duty of care, subject to the usual residual objective standard of whether the trustee is considering all relevant factors or acting perversely or irrationally in a way that no reasonable trustee would act, ie the equivalent of the public law *Wednesbury* test.[40]

In *Re Charterhouse Capital Ltd*,[41] the Court of Appeal dealt with a case on the limits of shareholder power when amending articles of association (see Part 1 of this article). Etherton C (as he then was) included a largely subjective test in his points (3) and (4):

> '(3) It is for the shareholders, and not the court, to say whether an alteration of the articles is for the benefit of the company but it will not be for the benefit of the company if no reasonable person would consider it to be such: *Shuttleworth* [1927] 2 KB 9 at 18–19, 23–24, 26–27; *Peters' American Delicacy Co* (1939) 61 CLR 457 at 488.
>
> (4) The view of shareholders acting in good faith that a proposed alteration of the articles is for the benefit of the company, and which cannot be said to be a view which no reasonable person could hold, is not impugned by the fact that one or more of the shareholders was actually acting under some mistake of fact or lack of knowledge or understanding: *Peters' American Delicacy Co* (1939) 61 CLR 457 at 491. In other words, the court will not investigate the quality of the subjective views of such shareholders.'

38 *Children's Investment Fund Foundation (UK) v Attorney General* [2017] EWHC 1379 (Ch), [2018] Ch 371 (Vos C) at [145].

39 See Charities Act 2011, s 220, cited at [34]. Under s 210: 'Each member of a CIO must exercise the powers that the member has in that capacity in the way that the member decides, in good faith, would be most likely to further the purposes of the CIO.'

40 See *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 4 All ER 639 per Lady Hale at [18] (a decision looking at a decision by an employer) and the earlier discussion by Newey J (as he then was) extra-judicially in 'Constraints on the exercise of trustees' powers', Ch 2 in P G Turner (ed), *Equity and Administration* (Cambridge University Press), 2016); and Richard Nolan, 'Controlling Fiduciary Power' [2009] CLJ 293.

41 *Re Charterhouse Capital Ltd; Arbuthnott v Bonnyman* [2015] EWCA Civ 536, [2015] 2 BCLC 627, *per* Etherton C at [90] (cited by Vos C in *Dee Valley* [2017] EWHC 184 (Ch) at [27]).

The statutory powers in Charities Act 2011, s 105 for charity trustees to be able to act outside their powers if both (a) this is 'expedient in the interests of the charity', and (b) the Charity Commission agrees,[42] is also relevant here.

In Australia there is a statutory best interests duty on directors as well (s181, Corporations Act). In the case *In the matter of Central Management (NSW) Pty Ltd*,[43] Black J recently commented that are differing views in Australia as to whether this duty is subject to a subjective standard. He held:

> '44. The Plaintiffs also plead breach of s 181(1) of the Corporations Act and a fiduciary duty to exercise Mr Henderson's powers in good faith in the Company's best interests and for a proper purpose (PC [21]). Section 181 of the Corporations Act requires a director or officer of a corporation to exercise his or her powers and discharge his or her duties in good faith in the best interests of the corporation and for a proper purpose. That section overlaps with a director's general law duties to act for proper purposes and in good faith and in the company's interests. It is not necessary here to address the differing views as to whether any part of that duty is to be assessed by a subjective standard: *Re Colorado Products Pty Ltd (in prov liq)* [2014] NSWSC 789; (2014) 101 ACSR 233 at [421]; *Australian Securities and Investments Commission v Drake (No 2)* [2016] FCA 1552; (2016) 340 ALR 75; 118 ACSR 184; 117 ACSR 408 at [494]; *Hart Security Australia Pty Ltd v Boucousis* [2016] NSWCA 307; (2016) 339 ALR 659; 117 ACSR 408 at [75]; *Australian Securities and Investments Commission v Flugge* [2016] VSC 779; (2016) 342 ALR 1 at [1980]ff.'

In my view a subjective test is right here – it helps avoid the potential for a very onerous best outcome duty and focuses on what the trustee or director (or shareholder in an amendment case) should be aiming for. It is consistent with the subjective test used in the proper purpose limit (at least in England and Wales).

Objective unreasonableness equals separate test?

A purely subjective test can be met with the criticism that (rather like a good faith limit) it leaves the actions of trustees and directors too far outside judicial control. Someone could be acting in good faith for what they consider to be the success of the trust or company, but still acting totally unreasonably.[44]

This is a powerful argument, but in my view the other controls available (eg points (3) and (4) of Etherton C in *Charterhouse* cited in Part 1 of this article and also referred to above) based on *Wednesbury* unreasonableness, are becoming better settled (following *Braganza*[45]) and are appropriate to apply here, but are better seen as separate from (and additional to) any subjective proper purpose (or best interest or equivalent) duty.

42 See the Law Commission Report 'Technical Issues in Charity Law' (Law Com No 375, September 2017) at 10.54. Also, the paper by Mark Atkinson 'Goalkeepers are different. What about pension scheme trustees?' (APL Conference November 2002), published at (2003) 17 TLI 25 at 32, contrasting the position of pension scheme trustees with charity trustees in the light of the Charity Commissioners' power to sanction actions 'that the charity trustees believe are in the best interests of their beneficiaries' under the previous provisions in Charities Act 1993, ss 26 and 29.

43 [2017] NSWSC 1258 (Black J) at [44].

44 See eg *Cowan v Scargill* [1985] Ch 270 at 289A: 'this requirement is not discharged merely by showing that the trustee has acted in good faith and with sincerity'.

45 *Braganza*, *supra* n 40.

In *Re HLC Environmental Projects Ltd*,[46] deputy judge John Randall QC held that the general principle of subjectivity is subject to qualifications arising from other cases, including that, where there is no evidence of actual consideration of the best interests of the company, the test is an objective one based on whether an intelligent and honest man in the position of the director could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company, citing *Charterbridge Corporation Ltd v Lloyd's Bank Ltd*.[47] Randall QC held:

> '[92](b) … the subjective test only applies where there is evidence of actual consideration of the best interests of the company. Where there is no such evidence, the proper test is objective, namely whether an intelligent and honest man in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company (*Charterbridge Corpn Ltd v Lloyds Bank Ltd* [1970] Ch 62 at 74E–F, obiter, per Pennycuick J; *Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 BCLC 598 at [138] per Mr Jonathan Crow);
>
> (c) Building on (b), I consider that it also follows that where a very material interest, such as that of a large creditor (in a company of doubtful solvency, where creditors' interests must be taken into account), is unreasonably (ie without objective justification) overlooked and not taken into account, the objective test must equally be applied. Failing to take into account a material factor is something which goes to the validity of the directors' decision making process. This is not the court substituting its own judgment on the relevant facts (with the inevitable element of hindsight) for that of the directors made at the time; rather it is the court making an (objective) judgment taking into account all the relevant facts known or which ought to have been known at the time, the directors not having made such a judgment in the first place. I reject the Respondent's contrary submission of law.'

This was followed in *Wessely v White*,[48] although on the facts in that case HHJ Matthews held that there had been consideration and so a subjective test applied.

In practice this seems to me to be straying into the perversity tests similar to public law (consideration of relevant factors and not a decision that no reasonable decision maker could make) and better dealt with under those tests (following *Braganza*[49]) rather than by trying to extend any best interests or proper purposes test.

In addition, if a director or trustee is himself or herself the recipient of a benefit or payment from the company or trust, the burden of proof falls upon him or her to prove that the payment was proper: see *Re HLC Environmental Projects Ltd*; *Idessa (UK) Ltd (in liquidation) v Morrison*;[50] *GHLM Trading Ltd v Maroo*;[51] *Caley Oils Ltd v Wood*.[52] This is part of the general duty on a fiduciary (including a director) to account for property he or she receives. It can also be considered a part of the general rule against conflicts of interest (or, if authorised, requiring the fiduciary to show that the action was proper: see *Bristol & West Building Society v Mothew*[53]).

46 [2013] EWHC 2876 (Ch) (John Randall QC). Cited in *Caley Oils Ltd v Wood* [2018] CSOH 42 (Lord Clark).
47 [1970] Ch 62 (Pennycuick J) at 74E–F, *obiter*.
48 *Wessely (Joint Liquidators of Laishley Ltd, in Liquidation) v White* [2018] EWHC 1499 (Ch) (HHJ Matthews).
49 *Braganza*, *supra* n 40.
50 [2011] EWHC 804 (Ch), [2012] 1 BCLC 80 (Lesley Anderson QC) at [28].
51 [2012] EWHC 61 (Ch), [2012] 2 BCLC 369 (Newey J) at [149].
52 [2018] CSOH 42 (Lord Clark).
53 [1998] Ch 1, CA *per* Millett LJ at p19D.

(5) There is always more that the trustee could do

Lionel Smith has pointed out that a literal best interest duty would be impossible to comply with fully – there could always be more that the trustee board could do. He commented in a 2014 article[54] (footnotes included):

> 'It is common to formulate the requirement of loyalty as a duty to act in the best interests of the beneficiary.[55] But this immediately raises serious difficulties. An open-ended duty to act in furtherance of the interests of another could not be a legal duty; it would be impossible to say that it had been fulfilled, because a person could always do more to further the interests of that other person. Faced with this difficulty, one commentator has suggested that while the fiduciary duty to act in another's best interests is "foundational", it is at the same time an "imprecise notion" which embraces, but is not exhausted by, other duties.[56] Another has concluded that there is no duty of loyalty as such; loyalty "is best understood as the summation of the various doctrines that are applied peculiarly to fiduciaries, rather than as a legal duty that is directly enforceable in its own right".[57]'

Instead it is clear that a proper purpose test can apply. This has its own uncertainties,[58] but seems to me to be a much more logical and workable test.

A duty to 'act in the best interests' of the beneficiaries seems to me to require (if construed literally) a trustee to (say) rob a bank and give the money to the trust. This is, of course absurd. Megarry V-C seems to have had this in mind to a degree in *Cowan v Scargill* as he specifically held that the trustees 'must of course obey the law'.

But even if what the trustees are to do is to be limited to lawful acts (and usually to acts connected with the trust or company or on exercise of relevant powers), it would still seem to require a trustee to give all of her money to the trust or a solicitor to mow his client's lawn. That is lawful and within the relevant fiduciary's powers.

It may be thought that I am going too far – no one would argue that any duty extends beyond the scope of the relevant fiduciary role. And yet there are cases in which it has been argued that a fiduciary owes a best interest duty and so this must modify other rights or duties. Usually this argument fails – see for example:

(a) *Fish v Dresdner Kleinwort*[59] (discussed in Part 1 of this article), where the bank argued that the 'best interests' duty meant that relevant directors should give up their contractual claims;

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54 Lionel Smith 'Fiduciary relationships: ensuring the loyal exercise of judgement on behalf of another' (2014) 130 LQR 608. See also his chapter 'Can we be obliged to be selfless' in Gold and Miller (Eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014,). See also Lusina Ho 'Good faith and fiduciary duty in English law' (2010) 4 J Eq 29 at 39 (a solicitor or estate agent with multiple clients would breach a best interests duty to a particular client if he or she does not devote themselves solely to that client).

55 R Sitkoff, 'The Economic Structure of Fiduciary Law' (2011) 91 BUL Rev 1039 at 1043; *BCE Inc v 1976 Debentureholders* 2008 SCC 69; [2008] 3 SCR 560 at [37]. Note however that in another case, the Supreme Court of Canada held that a duty to act in the best interests of the beneficiary '… does not provide a workable basis for assigning legal liability …' and instead formulated loyalty as requiring that the fiduciary not put his own or others' interests ahead of those of the beneficiary: *KLB v British Columbia* [2003] 2 SCR 403; 230 DLR (4th) 513 at [46] and [49].

56 Thomas, *supra* n 2 at 202–203.

57 *Supra* n 11 at p 269.

58 See Pollard, *supra* n 28.

59 [2009] EWHC 2246 (QB), [2009] IRLR 1035 (Jack J).

(b) *Sargeant v National Westminster Bank*,[60] where three executors (who were the children of the testator) held the freehold of a farm and wanted to sell it. Two of them also held (in the personal capacity) agricultural tenancies and the farm would realise more if these were given up. The Court of Appeal held that they did not have to give up the existing tenancies. The case was mainly argued on conflict issues, but if there had been a general 'best interests' duty, why did it not apply?

(c) How could trustees ever charge fees (even if authorised by the trust) or exercise an indemnity or lien for liabilities they have incurred (which are within the terms of the indemnity)?

Intriguingly a version of the last point has been raised in Australia by reference to the statutory duties. Joseph Campbell (extra-judicially) commented in a 2017 paper '*Some aspects of the civil liability arising from a breach of duty by a superannuation trustee*'[61] on the inter-relation of the statutory indemnity for liabilities incurred in good faith with the statutory best interest duty and queried if this would be allowed under the statutory best interest duty. He came to the conclusion that 'on balance I do not think so'. This all looks odd to English eyes (where in general we do not have the statutory complications applicable in Australia).

It could be argued that:

(a) it would be difficult to get trustees to serve if they could not charge fees or exercise the indemnity[62] and so allowing this would be in the beneficiaries' best interest (but this seems unduly difficult to show); or

(b) the trustee board counts as a beneficiary when exercising such express powers,[63] so the issue is not one of acting in the best interest of the beneficiaries as a whole, but instead of rights as between beneficiaries (where any best interests duty looks to have less to say – see below). But again, this seems artificial.

In England and Wales (where the statutory best interest obligations are very limited), this all points to why a literal best interest duty does not work.[64] In Australia, it seems best to try to resolve the position by statutory interpretation (for potentially conflicting statutory

60 (1990) 61 P & CR 518, CA.

61 Joe Campbell, Sydney Law School Legal Studies Research Paper (no 17/31), April 2017 (2017) 44 ABR 24, at 3.2.6.1 'Breach of section 52(2)(c) by claiming indemnity'. A paper delivered at the 2017 Superannuation Conference in Australia.

62 Eg the decision of Lord Hope in *Governors of Dollar Academy v Lord Advocate* 1995 SLT 596 (Lord Hope, CSOH) allowing an amendment to a trust to allow the trust to pay for trustee insurance.

63 Eg the decisions of the Australian High Court in *Chief Commissioner of Stamp Duties v Buckle* [1998] HCA 4, (1998) 192 CLR 226 and *CPT Custodian Pty v Commissioner of State Revenue* [2005] HCA 52, (2005) 224 CLR 98 treating the trust fund as being one net of liabilities recoverable from it, referred to as the 'trustee's superior beneficial interest'.

64 See also the decision of the Privy Council in the disclosure case, *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709. The Privy Council judgment (given by Lord Walker) refers to the need to balance the interests of beneficiaries, trustees and third parties, which could be seen as confirming the absence of an overriding 'best interests of the beneficiaries' duty. The judgment in *Schmidt* does not refer to 'best interests', but includes, at [67], the comment that: 'Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place.'

provisions) or by construing the 'best interests' duty as just meaning no more than the common law duty (even though within a statute).[65]

(6) Literally would impose a retrospective best outcome standard

A literal 'best interests' duty would impose an objective standard requiring the trustee or company board to make a decision that had an outcome which, it objectively turns out (in retrospect), to have been in the best interests of the trust or company or beneficiaries. This would clearly impose too great a standard on trustees and directors. It would be fundamentally in conflict with the usual business judgment test.

As an example:

(i) A duty to act (literally) in the best interests of beneficiaries of the trust would mean that trustees, when (say) choosing investments could later be measured as to how the investments have turned out.
(ii) So if the trustees were deciding to invest in shares and it later transpired that Share A performed better than Share B, on a literal best interests test this would mean that the trustees would be in breach of duty – they have not in fact, as it later turned out, acted in the best interests of the beneficiaries in that they have not achieved the desired maximum financial return.
(iii) This is clearly much too strict a standard – it would transform trustees in effect into guarantors. But it would, as a matter of logic, be the necessary outcome of an overriding literal 'best interests' duty. It is a telling reason why there is no such overriding duty.

Caselaw has been consistently clear about the standard of care expected of trustees and the time at which it is fixed. Thus in *Re Chapman*[66] Lindley LJ held that, 'a trustee is not a surety, nor is he an insurer'. And Lopes LJ held:[67]

> 'A trustee who is honest and reasonably competent is not to be held responsible for a mere error in judgment when the question which he has to consider is whether a security of a class authorized, but depreciated in value, should be retained or realized, provided he acts with reasonable care, prudence, and circumspection.'

This passage from Lopes LJ in *Chapman* was cited by Brightman J (as he then was) in *Bartlett v Barclays Bank Trust Co Ltd*,[68] going on:

> 'Nor must the court be astute to fix liability on a trustee who has committed no more than an error of judgment, from which no business man, however prudent, can expect to be immune.'

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65 See Scott Donald, '"Best" Interests?' (2008) 2 J Eq 245 at 257 (presumption of legal meaning) and 260 (legislative context), taken with the later case law in Australia (discussed below).
66 [1896] 2 Ch 763, CA *per* Lindley LJ at 775.
67 *Ibid* at 778.
68 [1980] Ch 515, [1980] 1 All ER 139 at 150d. In a slightly different context, more recently, see also Lord Walker in *Progress Property Company Ltd v Moorgarth Group Ltd* [2010] UKSC 55, [2011] 2 All ER 432 looking at whether a sale amounted to an improper return of capital or a dividend. He held at [29]:
'If the conclusion is that it was a genuine arm's length transaction then it will stand, even if it may, with hindsight, appear to have been a bad bargain. If it was an improper attempt to extract value by the pretence of an arm's length sale,

At first instance in *Nestle v National Westminster Bank Plc*,[69] Hoffmann J (as he then was) held:

> 'But in reviewing the conduct of trustees over a period of more than 60 years, one must be careful not to endow the prudent trustee with prophetic vision or expect him to have ignored the received wisdom of his time.'

Hoffmann J was upheld by the Court of Appeal.[70] No actionable loss even where trustee bank failed properly to understand the scope of the investment power and more equities would have done better than bonds.[71]

A similar rule against the use of hindsight applies for company directors – *Re Living Images Ltd*.[72]

In 2013 in *Pitt v Holt*[73] Lord Walker discussed the argument that trustees have a duty to rely only on correct advice (otherwise they would not be considering a relevant factor). He dismissed this forthrightly as being a 'last-ditch argument' involving 'taking the principle of strict liability for ultra vires acts out of context' and requiring 'trustees to show infallibility of judgment' which is 'quite unrealistic':

> '[88] Finally, on this part of the case, there is the submission that the trustees' duty to take account of relevant considerations is to be interpreted as a duty to act on advice only if it is correct—in effect, a duty to come to the right conclusion in every case. I have left this submission until the end because it is to my mind truly a last-ditch argument. It involves taking the principle of strict liability for ultra vires acts (see [81] to [84], above) out of context and applying it in a different area, so as to require trustees to show infallibility of judgment. Such a requirement is quite unrealistic. It would tip the balance much too far in making beneficiaries a special favoured class, at the expense of both legal certainty and fairness. It is contrary to the well-known saying of Lord Truro LC in *Re Beloved Wilkes's Charity* (1851) 3 Mac & G 440 at 448, (1851) 42 ER 330 at 333:

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cont.

it will be held unlawful. But either conclusion will depend on a realistic assessment of all the relevant facts, not simply a retrospective valuation exercise in isolation from all other inquiries.'

69 (1988) 29 June, (1996) 10 TLI 113 (Hoffmann J) at 115. Decision affirmed on appeal: [1994] 1 WLR 1260, CA. Scott Donald commented in '"Best" interest?' (2008) J Eq 245 at 249 that the *Nestle* case, although being perhaps the leading modern case on trustee investment duties, does not mention any 'best interests' duty.
Similarly neither did the Supreme Court in the later case on review of the exercise of trustee or fiduciary powers, *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 and neither did the Australian High Court in *Finch v Telstra Super Pty Ltd* [2010] HCA 36, (2010) 242 CLR 254 when finding (at [30]) that superannuation trustees owe a more 'intense' duty (compared to other trustees) to make enquires and inform themselves when making a decision about a factual matter (forming the opinion that the Member is unlikely ever to engage in 'gainful Work').

70 *Nestle v National Westminster Bank plc* [1994] 1 All ER 118, [1994] 1 WLR 1260, CA. Hoffmann J was followed on this point in *Re Mulligan; Hampton v PGG Trust Ltd* [1998] 1 NZLR 481 (Panckhurst J) at 501.
See also *Jones v AMP Perpetual Trust Co Ltd* [1994] 1 NZLR 690 (Thomas J) at 707 citing *Stark v United States Trust Company of New York* (1978) 445 F Supp 670.

71 It looks to be difficult to find trustees in breach of their investment power, particularly where they have taken advice: see, eg *Daniel v Tee* [2016] EWHC 1538 (Ch), [2016] 4 WLR 115 (Richard Spearman QC).
For an example of a finding of breach by a professional trustee, see the New Zealand decision, *Re Mulligan; Hampton v PGG Trust Ltd* [1998] 1 NZLR 481 (Panckhurst J). This is another example of an investment case not mentioning *Cowan v Scargill* or a 'best interest' duty.

72 [1996] BCC 112 (Laddie J) at 116H. Cited in *Ball v Hughes* [2017] EWCH 3228 (Ch) at [85] and *Wessely v White* [2018] EWCH 1499 (Ch) at [43].

73 [2013] UKSC 26, [2013] 2 AC 108 at [88]. The other six members of the Supreme Court involved all agreed with Lord Walker.

> "… that in such cases as I have mentioned it is to the discretion of the trustees that the execution of the trust is confided, that discretion being exercised with an entire absence of indirect motive, with honesty of intention, and with a fair consideration of the subject. The duty of supervision on the part of this court will thus be confined to the question of the honesty, integrity, and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrived at, except in particular cases."

The trustees' duty does not extend to being right ("the accuracy of the conclusion arrived at") on every occasion. The "particular cases" that the Lord Chancellor had in mind may have included cases concerned with the maintenance of minor beneficiaries. They may also have included cases (such as *Kerr v British Leyland (Staff) Trustees Ltd* [2001] WTLR 1071) in which the trustees have to make a particular factual judgment, rather than exercise a wide discretion.'

The Law Commission commented to the same effect in its 2014 report on Fiduciary Duties,[74] 'It is tempting to judge trustees' decisions with the benefit of hindsight. However, it is clear that this is the wrong approach – the conduct of trustees is to be judged by reference to the facts and circumstances existing at the time when the trustees had to act, and which were known or ought to have been known by them at the time'.

Best price duty: mortgagees and receivers

There are similarities here with the duty on a mortgagor or receiver exercising a power of sale over charged property. There is a duty to take reasonable care to obtain the best price reasonably obtainable[75] or a proper price (the two terms seem synonymous[76]).

This is not an absolute duty to get the highest price available, instead it is limited to applying in light of the circumstances at the time of sale. Thus, Patten J in the receivership case, *Bell v Long*[77] expressly held that the test could not be absolute nor applied retrospectively:

> 'The characterisation of the duty in terms of obtaining a proper price is sometimes put in terms of an obligation to obtain the best price reasonably obtainable at the time of sale. But it is clear from the relevant authorities that this is not an adequate or accurate description of the duty if applied retrospectively as an absolute test of liability

74 'Fiduciary Duties of Investment Intermediaries' (Law Com no 350, June 2014) at 3.81 and 3,82, citing Lindley LJ in *Re Hurst* (1892) 67 LT 96 at 99, Megarry J in *Duchess of Argyll v Beuselinck* [1972] 2 Lloyd's Rep 172 at 185 (a case on negligence by a solicitor) and Hoffmann J in *Nestle v National Westminster Bank* (1996) 10(4) TLI 112 at 115. See also the Privy Council holding that the test was on whether a liability was reasonably incurred involved looking at the time the liability was incurred, not at the time that it was sought to be discharged: Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd [2018] UKPC 7, [2018] 2 WLR 1465 at [111] to [116].

75 *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349, PC per Lord Templeman at 1356 (and see also at 1355).

76 See Salmon LJ in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949, [1971] Ch 949 at 966 and Jonathan Parker LJ in *Michael v Miller* [2004] EWCA Civ 282 at [131]. See also *Mortgage Express v Mardner* [2004] EWCA Civ 1859 at [5]–[12]. There is a helpful discussion by Richard Hooley in 'Release Provisions in Intercreditor Agreements' [2012] JBL 213 at 229 to 230.

77 [2008] EWHC 1273 (Ch), [2008] 2 BCLC 706 at [14]. Discussed by Richard Hooley in 'Release Provisions in Intercreditor Agreements' [2012] JBL 213 at 230.

regardless of the circumstances prevailing when the decision was taken to sell and the marketing of the property was embarked upon.'

Canada: KLB v British Columbia (2003)

In the 2003 Canadian case *KLB v British Columbia*,[78] the Supreme Court discussed a best interest duty in the context of a parent looking after a child.[79] It held that a best interests test could not be an independent ground of liability, both because it would be an outcomes test, regardless of fault at the time and because it does not provide a workable standard to operate. Despite the difference in context, the reasoning resonates for trustees and other decision makers. McLachlin CJ held:

> '[44] Parents <u>should</u> try to act in the best interests of their children. This goal underlies a variety of doctrines in family law and liability law. However, thus far, failure to meet this goal has not itself been elevated to an independent ground of liability at common law or equity. There are good reasons for this.
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> [45] First, an obligation to do what is in the best interests of one's child would seem to be a form of result based liability, rather than liability based on faulty actions and omissions: such an obligation would be breached whenever the result was that the best interests of the child were not promoted, regardless of what steps had or had not been taken by the parent. Breach of fiduciary duty, however, requires fault. It is not result-based liability, and the duty is not breached simply because the best interests of a child have not in fact been promoted. Moreover, a wrong of this type would not be ascertainable at the time that it was committed; and a wrong must be so ascertainable if it is to found legal liability.
>
> [46] Second, the simple injunction to act in the best interests of the child does not provide parents with a workable standard by which to regulate conduct. It does not recommend particular courses of conduct that they must engage in or not engage in, to avoid legal liability. It is often unclear at the time which, among all of the possible actions that a parent could perform, will best advance a child's best interests. Different parents have different ideas of what particular actions or long-term strategies will accomplish this, all of which may be reasonable. And even once parents do sort this out, they may face the practical difficulty that what they can do for their children is limited by their resources, their energy, their abilities and the competing needs of their other children. All this suggests that a simple injunction to act in the best interests of the child, however laudable, does not provide a workable basis for assigning legal liability, whether in negligence or for breach of fiduciary duty. It simply does not provide a legal or justiciable standard.'

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78 [2003] 2 SCR 403, 230 DLR (4th) 513 *per* McLachlin CJ at [44].

79 Family law includes a number of statutory best interests provisions. For example the Mental Capacity Act 2005, s 1(5) requires that 'An act done, or a decision made, under this Act for and on behalf of a person who lacks capacity must be done, or made, in his best interests'. Section 4 then goes on to prescribes the approach to be taken when making a 'best interests' decision. Such family law provisions are broad and cause interpretation issues – for a recent example, see *Wesley v Chantler* [2018] EWHC 21 (Ch) (HHJ Simon Barker QC).

ASIC v Australian Property Custodian Holdings (2013)

More recently, in 2013, *ASIC v Australian Property Custodian Holdings*[80] dealt with a statutory 'best interest' duty in Australia imposed by legislation[81] on a relevant entity (RE) of a managed investment scheme.[82] Murphy J held:

> '[463] It is difficult to discern the outer boundaries of the best interests duty from the text of the provisions alone. For example, the expression may be argued to indicate a requirement that the RE meet the 'highest' standard rather than just a high standard. It may also be argued to set a requirement for the RE to obtain an objectively determined "best" outcome rather than requiring the best efforts of the RE. I am disinclined to such a view because such meanings may cause real difficulties for a trustee in performing his or her role. It is not clear to me how in many common circumstances the "highest" standard is to be determined let alone met, or how any requirement to achieve an objectively determined "best" outcome sits with the general law obligation on a trustee to act with care, competence and caution. The language of the statute alone does not make clear where the boundary lies and it is appropriate to consider the meaning of the term under general law.
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> […]
>
> [488] I do not though wish to be seen as accepting the proposition that to act in the members' best interests a trustee must actually achieve the best outcome. A trustee is not required to be prescient: *Re Chapman* [1896] 2 Ch 763 at 778; *De Bruyne v Equitable Life Assurance Society of the US* [1990] USCA7 1116; 920 F 2d 457 (7th Cir. 1990) at 465; *Nestle v National Westminster Bank Plc* [1994] 1 WLR 1260 at 1282.'

There are echoes of this in the 2015 *Braganza*[83] decision in the Supreme Court. Thus, Baroness Hale at [29]:

> 'It is of the essence of "*Wednesbury* reasonableness" (or "*GCHQ* rationality") review to consider the rationality of the decision-making process rather than to concentrate on the outcome. Concentrating on the outcome runs the risk that the court will substitute its own decision for that of the primary decision-maker.'

Not a 'paramount' duty

Megarry V-C referred, in *Cowan v Scargill*,[84] to the relevant best interest duty as being 'paramount'. Similarly, the duty of a director to act in what he considers in good faith to be

80 *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd (No 3)* [2013] FCA 1342 (Murphy J). A statutory best interest duty does not extend the common law duty on trustees: see *Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd* [2011] NSWCA 204; 282 ALR 167 *per* Giles AJ at [121] and *Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Beck* [2016] NSWCA 218 *per* Bathurst CJ at [136].

81 Part 5C of the Corporations Act 2001 (Cth), as prescribed in s 601FC.

82 Seemingly similar to a unit trust or OEIC in the UK.

83 *Braganza*, *supra* n 40. Followed by the Court of Appeal in *IBM United Kingdom Holdings Ltd v Dalgleish* [2017] EWCA Civ 1212, [2018] IRLR 4 at [38] and [226].

84 [1985] Ch 270 at 286H.

in the best interests of the company was described by Etherton J as the 'single and overriding touchstone' – *Shepherds Investments Ltd v Walters.*[85]

It seems clear from the discussion above that, despite the apparent wide words used, this is best seen as not being that such a duty operates to override any inconsistent duty or obligation. Instead, where the trustee is exercising a power, it operates to qualify how that power is to be exercised.

The 'paramount' reference is misleading. Instead it is better thought of as an implied limitation (giving way to an express provision in suitable cases). The other descriptions used (eg 'concertina' or needing 'supporting balustrades') are better.

It is the case that a power or discretion may be unqualified in the relevant trust instrument or constitution. It may even be expressed as being 'absolute'. But it is clear that this does not displace the usual implied fiduciary constraints – instead the terms of the power go to the width or scope of the power (ie what investments can be made) rather than how it is exercised.[86]

Nor does acting in the best interests of the relevant trust or company operate as a defence to a breach of the duty to act for proper purposes (see *Howard Smith v Ampol*[87] and *Eclairs*[88] and the pensions cases *ITS v Hope*[89] and *Hillsdown*[90]) or where there is a conflict of interest (see *Regal (Hastings) Ltd v Gulliver*[91] and *Boardman v Phipps*[92]). So, to that extent the duty is not 'paramount'.

It seems that the proper approach is that carrying out the terms of the trust is in the best interest of the beneficiaries. In the Australian statutory context this seems to be a way of making sense of some of the problems raised by the statute, but it does seem to be another argument why statements of a common law best interests duty does not have a literal meaning.

Gives no guidance on who is a beneficiary/how to decide between beneficiaries

A duty to act in the best interests of the beneficiaries – even if as a whole – gives no guidance to trustees about what to do where their decision impacts on some beneficiaries more than others. A simple example is a discretionary family trust where the trustees have a power of advancement or choice between beneficiaries among a class. Obviously they are not obliged to treat each beneficiary equally – that would negate the very purpose of the discretion. An early example of the courts allowing this approach is *Re Charteris*[93] (discussed further below).

Similar issues arise for pension trustees where the trustees make a decision which benefits some beneficiaries of the scheme more than others. For example, *Edge v The Pensions Ombudsman*[94] involved a case where the trustees agreed with the employer to make amendments that would increase benefits for some members more than others. The Pensions Ombudsman

85 [2006] EWHC 836 (Ch), [2007] 2 BCLC 202, at [132]. Cited by Newey J in *GHLM Trading Ltd v Maroo* [2012] EWHC 61 (Ch), [2012] 2 BCLC 369 at [195].

86 See, eg Margaret Beazley P in 'Conflicts in Commercial Trusts' (2017) 31 TLI 3 at 6 (cited in Part 1 of this article), citing *Wilson v Metro Goldwyn Mayer* (1980) 18 NSWLR 730 (Kearney J).

87 *Howard Smith Ltd v Ampol Ltd* [1974] AC 821, PC at 834G.

88 *Eclairs Group Ltd v JKX Oil & Gas plc* [2015] UKSC 71, [2016] 3 All ER 641.

89 *Independent Trustee Services Ltd v Hope* [2009] EWHC 2810 (Ch), [2010] ICR 553 (Henderson J) at [50], citing *Howard Smith v Ampol.*

90 *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862 (Knox J) at 884.

91 [1967] 2 AC 134n, [1942] 1 All ER 378, HL at 137 and 143–5.

92 [1967] 2 AC 46, HL at 104, 105 and 123.

93 [1917] 2 Ch 379, CA.

94 *Edge v Pensions Ombudsman* [2000] Ch 602, CA, upholding [1998] Ch 512 (Scott V-C).

made a determination against the change but was robustly overturned first by Scott V-C and by the Court of Appeal.

Scott V-C commented:[95]

> 'In *Cowan v Scargill* [1985] Ch 270 at 286–287 Megarry V-C referred to "the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries". This passage was cited by the Pensions Ombudsman in para 39 of his determination. But Megarry V-C was dealing with an issue regarding the exercise by pension fund trustees of an investment power. He was not dealing with the exercise of a discretionary power to choose which beneficiaries, or which classes of beneficiaries, should be the recipients of trust benefits. In relation to a discretionary power of that character it is, in my opinion, meaningless to speak of a duty on the trustees to act impartially. Trustees, when exercising a discretionary power to choose, must of course not take into account irrelevant, irrational or improper factors. But, provided they avoid doing so, they are entitled to choose and to prefer some beneficiaries over others.'

See also *Gra-Ham Australia Pty Ltd v Perpetual Trustees WA Ltd*,[96] a West Australian decision in relation to a unit trust upholding a balanced approach between beneficiaries.[97]

Generally, the formulation that refers to the best interest (or success) of the trust (or estate or plan) is better in allowing individual beneficiaries to be preferred (as part of the success of the trust). Ultimately, it is in the best interest of the trust that the trustees pay the benefits and comply with the trust instrument – see 'Best interests/success <u>of the trust</u> is better' below.

Some cases after Cowan v Scargill

The issue of trustees exercising powers in a best interests way was boosted by the decision in *Cowan v Scargill*. I mention four cases below as ones which do contain some references to an 'interests of the beneficiaries' rule, but not referring to *Cowan v Scargill* and dealing with any relevant duty in a very loose way.

Hayim v Citibank (1987)

The Privy Council in *Hayim v Citibank NA*[98] held that a Hong Kong trustee was not in breach of duty when it delayed sale of a house on the basis of a clause in the will (cl 10) allowing this in favour of the testator's brother and sister, even though they were not beneficiaries under the main US will.

Lord Templeman did comment (at 744B) that:

> 'Without clause 10 the [Hong Kong trustee] would have owed a duty to the beneficiaries to decide whether the house should be sold or retained in the interests of the beneficiaries.'

95 *Edge v Pensions Ombudsman* [1998] 2 All ER 547 (Scott V-C) at 567. Upheld on appeal.

96 (1989) 1 WAR 65 at 92, [1992] PLR 193 (WA CA). Cited by Scott Donald '"Best" interests?' (2008) 2 J Eq 245 at 268 (fn 124).

97 There are also echoes here of the comment in *Iwanuszezak v General Municipal Boilermakers and Allied Trades Union* [1988] IRLR 219, CA by Lloyd LJ at [8]: 'it is the primary function of a union to look after the collective interests of its members. Of course, it also looks after individual members in all sorts of different ways. But where the collective interests of the union conflict with the interests of an individual member it only makes sense … that the collective interests of the members as a whole should prevail.'

98 [1987] 1 AC 730, PC.

So it seems that cl 10 was enough to negate such a duty – perhaps making the brother and sister into de facto beneficiaries?

It is noteworthy that the Privy Council did not refer to 'best interests', as opposed to just 'interests', and nor was *Cowan v Scargill* cited.

Bristol and West Building Society v Mothew (1996)

As already mentioned (see Part 1 of this article), the question of who is a fiduciary was addressed by Millett LJ (as he then was) in *Bristol & West Building Society v Mothew*,[99] a case involving a claim against a solicitor by his client. He did not initially refer to any duty to act in the 'interests' of the principal:

> 'A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr Finn pointed out in his classic work Fiduciary Obligations (1977 ed p 2), he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.'

But later Millett LJ did refer to the need for a solicitor to act 'in the interests of' his principal. He held (at 19D):

> 'Even if a fiduciary is properly acting for two principals with potentially conflicting interests he must act in good faith in the interests of each and must not act with the intention of furthering the interests of one principal to the prejudice of those of the other …'.

It is noticeable that this comment is in the context of a potential conflict of interests (and also refers to a requisite intention – so pointing to a subjective test).

It is noteworthy that Millett LJ did not refer in his judgment to 'best interests',[100] as opposed to just 'interests', nor was *Cowan v Scargill* cited.

In the recent Supreme Court decision (on agents holding bribes on trust), *FHR European Ventures LLP v Mankarious*,[101] Lord Neuberger summarised the decision of Millett LJ in *Mothew*, but did not mention any 'best interest' requirement:

> '[5] The following three principles are not in doubt, and they are taken from the classic summary of the law in the judgment of Millett LJ (as he then was) in *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18. First, an agent owes a fiduciary duty to his principal because he is "someone who has undertaken to act for or on behalf of

99 [1998] Ch 1 at p18. Recently cited by Vos C in *The Children's Investment Fund Foundation (UK) v Attorney General* [2017] EWHC 1379 (Ch) at [142].

100 Counsel had referred to a best interests duty on a solicitor: see p 5F.

101 *FHR European Ventures LLP v Mankarious* [2014] UKSC 45, [2015] AC 250.

> [his principal] in a particular matter in circumstances which give rise to a relationship of trust and confidence". Secondly, as a result, an agent "must not make a profit out of his trust" and "must not place himself in a position in which his duty and his interest may conflict"—and, as Lord Upjohn pointed out in *Boardman v Phipps* [1967] 2 AC 46 at 123, the former proposition is "part of the [latter] wider rule". Thirdly, "[a] fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty; he puts himself in a position where his duty to one principal may conflict with his duty to the other". Because of the importance which equity attaches to fiduciary duties, such 'informed consent' is only effective if it is given after 'full disclosure', to quote Sir George Jessel MR in *Dunne v English* (1874) LR 18 Eq 524 at 533.'

This does not include any reference to a 'best interests' duty.

Similarly, Ramsey J in *John Youngs Insurance Services Ltd v Aviva Insurance Service UK Ltd*[102] identified the various principles, including, in relation to *Mothew* that:

> '(2) Not every breach of duty by a fiduciary is a breach of fiduciary duty: see *Bristol and West Building Society v Mothew* at 16D;
>
> (3) A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal: see *Bristol and West Building Society v Mothew* at 18B'.

Again, there is no mention here of a best interests duty, instead a need to avoid conflict and not act for his own benefit.

Armitage v Nurse (1997)

Armitage v Nurse[103] was a case on the effect of an exclusion clause. The claim was by family members against trustees of a family trust, containing an exclusion clause absolving the trustees from liability save for 'actual fraud'. Millett LJ in the Court of Appeal gave the only judgment and held that this was effective to exclude all liability save for dishonesty. This included a discussion of the 'irreducible core' set of duties which cannot be excluded.[104]

Armitage is cited quite a lot on irreducible core issues in other cases[105] including in the Privy Council[106] and Australia.[107]

102 [2011] EWHC 1515 (TCC) (Ramsey J) at [94]. Cited as 'A useful short summary of the authorities' by Carr J in *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC) at [132].

103 *Armitage v Nurse* [1998] Ch 241, CA. Mentioned above.

104 See Man Yip 'The Commercial Context in Trust Law' [2016] Conv 347, discussing *Armitage v Nurse* and *Citibank NA v MBIA Assurance SA* [2007] EWCA Civ 11. See also *Plan B Trustees Ltd v Parker (No 2)* [2013] WASC 216 (Edelman J) at [232] on 'irreducible core'.

105 Eg *Barnsley v Noble* [2016] EWCA Civ 799, 19 ITELR 532.

106 *Spread Trustee Co Ltd v Hutcheson* [2011] UKPC 13, [2012] 2 AC 194 (Lady Hale and Lord Kerr dissenting).

107 Eg *ASIC v Citigroup Global Markets Australia Pty Ltd* [2007] FCA 963 at [280]; *Plan B Trustees Ltd v Parker (No 2)* [2013] WASC 216 (Edelman J) at [232] on 'irreducible core'; *Themis Holdings Pty Ltd v Canehire Pty Ltd* [2014] QSC 38, 17 ITELR 75 (Philippides J) at [217].

Millett LJ (as he then was) gave the only reasoned judgment (with which Hutchison and Hirst LJJ agreed). In some places he referred to 'the interests of the beneficiaries' – see the extracts below (emphasis added):

At page 241E:

> '*It is the duty of a trustee to manage the trust property and deal with it in the interests of the beneficiaries.* If he acts in a way which he does not honestly believe is in their interests then he is acting dishonestly. It does not matter whether he stands or thinks he stands to gain personally from his actions. A trustee who acts with the intention of benefiting persons who are not the objects of the trust is not the less dishonest because he does not intend to benefit himself.'

At 252G:

> 'A trustee who is guilty of such conduct either consciously takes a risk that loss will result, or is recklessly indifferent whether it will or not. If the risk eventuates he is personally liable. But if he consciously takes the risk in good faith and with the best intentions, honestly believing that the risk is one which ought to be taken in the interests of the beneficiaries, there is no reason why he should not be protected by an exemption clause which excludes liability for wilful default.'

And later at 253H:

> 'I accept the submission made on behalf of Paula [the appellant beneficiary] that there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts. But I do not accept the further submission that these core obligations include the duties of skill and care, prudence and diligence. *The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts, but in my opinion it is sufficient*. As Mr Hill [Counsel for the trustees] pertinently pointed out in his able argument, a trustee who relied on the presence of a trustee exemption clause to justify what he proposed to do would thereby lose its protection: he would be acting recklessly in the proper sense of the term.'

It is noteworthy that Millett LJ did not refer in his judgment to 'best interests',[108] as opposed to just 'interests', nor was *Cowan v Scargill* cited.

In *Walker v Stones*,[109] Sir Christopher Slade commented on a point raised in relation to *Armitage v Nurse*:

> 'This third proposition, though not expressly repeated, is reflected by necessary inference at pp 49–52, 56 of the judgment, from which it is clear that Rattee J took the view that Mr Stones could not be held to have acted dishonestly in relation to any of his conduct

108 Save when quoting a pleading (at p 259C) in relation to a claim based on fraud and considering the pleading to be 'embarrassing'.

109 [2001] QB 902, CA at 938H.

> for which he is attacked in these proceedings if he genuinely believed it to have been in the best interests of the Bacchus trust beneficiaries.
>
> This third proposition, which is a crucially important feature of Mr Purle's argument on this appeal, at first sight derives strong support from Millett LJ's dictum [1998] Ch 241, 251 that "if they do so in good faith and in the honest belief that they are acting in the interests of the beneficiaries their conduct is not fraudulent".'

In a later book chapter '*Four Fiduciary Puzzles*',[110] James Edelman (still at that stage an academic) was considering the irreducible core issues raised by Millett LJ in *Armitage v Nurse*.[111] He cited (at 304) Millett LJ's comment (at 253–4) that 'the duties of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts'.

James Edelman went on (at 304):

> '[Millett LJ] did not suggest that there was any separate loyalty duty of "honesty" or "acting in the beneficiary's best interests"; indeed to have suggested so would have been contrary both to authority and principle. (Fn)'
>
> Fn: As to the lack of any precise duty encompassed in the vague formulation "best interests", see Edelman ['When do Fiduciary Duties Arise?' (2010) 126 LQR 302].
>
> 'As to authority see *Hayim v Citibank NA* [1987] AC 730. It is also well established that a trust power to add to a class of fixed beneficiaries is valid, even though the exercise of the power would often be plainly contrary to the best interests of existing beneficiaries: *Re Manisty's Settlement* [1974] Ch 17.'

The comment in the footnote about changing beneficial interests illustrates the problem with any 'best interests' duty in distinguishing between beneficiaries, for example in exercising a discretion from among beneficiaries as to who should benefit. Megarry V-C in *Cowan v Scargill* did include a reference to the relevant duty applying to present and future beneficiaries.

Barthelemy (2011)

Sales J in *F & C Alternative Investments (Holdings) Ltd v Barthelemy (No 2)*[112] referred to a best interest duty (citing *Mothew*[113]), but went on to hold that '[T]he precise content of this duty in this particular context requires careful assessment':

> '[227] … A fiduciary is required to act in the best interests of his beneficiary (Millett LJ in *Mothew* called this 'the duty of good faith': [1998] Ch at 18D). It is in relation to this requirement that I have found the practical working through of the accommodation to be achieved between the Defendants' self-interest and the interests of the LLP, on the one hand, and the F&C representatives' role to promote and protect the interests of F&C and the interests of the LLP, on the other, more difficult. The precise content of this duty in this particular context <u>requires careful assessment</u>.'

110 Chapter 13 in Elise Bant and Matthew Harding (Eds), *Exploring Private Law* (Cambridge University Press, 2010).
111 [1998] Ch 241, CA.
112 [2011] EWHC 1731 (Ch), [2012] Ch 613 (Sales J) at [227].
113 *Bristol and West Building Society v Mothew* [1998] Ch 1, CA.

It is noteworthy that Millett LJ did not in fact use the term 'best interests' in his judgment in *Mothew*.

'Best interests' or just 'interests'?

Many judgments just refer to acting in the 'interests' of beneficiaries and do not say 'best interests'. Examples (as noted above) are the decisions of Millett LJ in both *Mothew* and *Armitage v Nurse*.

More recent examples are:

(a) Newey J in *Brudenell-Bruce v Moore*:[114] 'It is incumbent on trustees to exercise their administrative powers in the interests of the trust's beneficiaries.'; and
(b) similarly, Newey J in *Breakspear v Ackland*,[115] dealing with disclosure of a settlor's letter of wishes and deciding that disclosure was in the discretion conferred on the trustees, but was exercisable, 'in the interests of the beneficiaries and the sound administration of the trust'.

So why was the term 'best' used in *Cowan v Scargill* and repeated in other cases (and some legislation[116])? If the relevant duty is (as I argue above) based on a subjective test and looking at proper purposes, then it seems likely to be no more than an attempt to require the trustee or director to at least aim for what is thought to be the best outcome (and not the second best one[117]).

Some of the older cases do refer to 'best'. For example, Lord Cranworth LC in *Aberdeen Railway Co v Blaikie Bros*:[118]

> 'A corporate body can only act by its agents and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting.'

But by 1942 in *Re Smith and Fawcett Ltd*[119] this had become just 'interests', with no mention of 'best'. Lord Greene MR held that directors must act:

> 'Bona fide in what they consider – not what a court may consider – is in the interests of the company, and not for any collateral purpose.'

114 [2014] EWHC 3679 (Ch) (Newey J) at [88]. Much of the argument or correspondence cited in the rest of the judgment refers to a 'best interest' duty: see, eg [45], [62], [107] and [222].

115 [2008] EWHC 220 (Ch), [2009] Ch 32 (Newey J) at [62]. The Privy Council in *Schmidt v Rosewood* [2003] UKPC 26, [2003] 2 AC 709 had stated at [67]: 'Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves and third parties' Followed in New Zealand in *Erceg v Erceg* [2017] NZSC 28 at [33].

116 Including the 2005 Occupational Pension Schemes (Investment) Regulations: see below.

117 Compare the cases on 'best endeavours'. In *Sheffield District Railway Co v Great Central Railway Co.* (1911) 27 TLR 451 at 452 A T Lawrence J held that a contractual commitment to use 'best endeavours' meant what it said: 'We think "best endeavours" means what the words say: they do not mean second-best endeavours.' See also *Jet2.com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417 per Moore-Bick LJ at [31]: 'In my view the obligation to use best endeavours to promote Jet2's business obliged BAL to do all that it reasonably could to enable that business to succeed and grow and I do not think the object of the best endeavours is too uncertain to be capable of giving rise to a legally binding obligation.' A 'best endeavours' obligation is probably indistinguishable from 'all reasonable' endeavours: see *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [54]–[62], where the Singapore Court of Appeal reviewed the key English cases.

118 (1854) 2 Eq Rep 1281, (1854) 1 Macq HL 461 at 471–2 (HL). Noted in Part 1 of this article.

119 [1942] 1 All ER 542, CA. Discussed above in relation to the subjective nature of any test.

Should not override other duty of care standards

But the use of 'best' runs the risk of confusion. It must not be used as an entry into imposing a retrospective outcome test or to replace the usual duty of care that applies, for example to directors under Companies Act 2006, s 174 (duty to exercise reasonable care, skill and diligence) and to trustees under Trustee Act 2000, s 1 (the duty of care).[120] This can too easily be argued: see for example the discussion in *Cuckmere Brick* of the former statutory duty on building societies to get the 'best price' when selling, discussed below.

Lusina Ho in her article 'Good faith and fiduciary duty in English law'[121] used the example of a solicitor or estate agent with multiple clients. They would breach a *best* interests duty to a particular client if he or she does not devote themselves solely to that client. This would be an 'unrealistically onerous standard' if applied strictly and literally.

Limited view is taken in Australia

In 2003 in *Charlton v Baber*,[122] a case on the duties of directors, Barrett J noted:

> 'The expression "best interests", taken literally, is apt to create a false impression that some absolute or superlative is in its contemplation. Its true meaning emerges from the context in which it is used.'

Scott Donald, in his 2008 article '"Best" Interests'[123] argued that the insertion of the word 'best' in the statutory provisions in Australia means that the statutory duty is 'probably broader than the meaning it has acquired in trust law' and later that 'the use of the adjective 'best' in the phrase 'best interest' is not benign'.

But later, in 2013, in the 'Prime Trust' case, *ASIC v Australian Property Custodian Holdings*,[124] Murphy J considered the statutory 'best interest' duty in Australia imposed by legislation[125] on a relevant entity (RE) of a managed investment scheme. Murphy J was 'disinclined' to accept the arguments that this meant that the RE was obliged to meet the highest standard or to attain an objectively determined best outcome. He held:

> '[463] It is difficult to discern the outer boundaries of the best interests duty from the text of the provisions alone. For example, the expression may be argued to indicate a requirement that the RE meet the "highest" standard rather than just a high standard. It may also be argued to set a requirement for the RE to obtain an objectively determined "best" outcome rather than requiring the best efforts of the RE. I am disinclined to such a view because such meanings may cause real difficulties for a trustee in performing his or her role. It is not clear to me how in many common circumstances the "highest"

120 Sections 1 and 2 are modified in relation to the trustees of an occupational pension scheme – see s 36.

121 (2010) 4 J Eq 29 at 39.

122 [2003] NSWSC 745, (2003) 47 ACSR 31 (Barrett J) at [46]. Cited in Paul Collins 'The best interests duty and the standard care for superannuation trustees' (2014) 88 ALJ 632 at 635.

123 (2008) 2 J Eq 245 at 255 and 273. See also J R F Lehane 'Delegation of Trustees' powers and current developments in Investment Funds Management' (1995) 7 Bond LR 36 at 37 arguing that the use of 'best interests' in the Australian statutes looks 'much more like a positive obligation to act in what are, objectively, their interests' and 'raises the intriguing question of what, if anything, "best" adds to "interests" …'. See also Michael Vrisakis 'The best test of (or the bestest) interests of members' (2006) 17 ASLB 138.

124 *Supra* n 80. Discussed by Simun Soijo in his paper 'Case Law review' given to the 2014 Superannuation Conference (Law Council of Australia).

125 Part 5C of the Corporations Act 2001 (Cth), as prescribed in s 601FC.

standard is to be determined let alone met, or how any requirement to achieve an objectively determined "best" outcome sits with the general law obligation on a trustee to act with care, competence and caution. The language of the statute alone does not make clear where the boundary lies and it is appropriate to consider the meaning of the term under general law.

[…]

[488] I do not though wish to be seen as accepting the proposition that to act in the members' best interests a trustee must actually achieve the best outcome. A trustee is not required to be prescient: *Re Chapman* [1896] 2 Ch 763 at 778; *De Bruyne v Equitable Life Assurance Society of the US* [1990] USCA7 1116; 920 F 2d 457 (7th Cir. 1990) at 465; *Nestle v National Westminster Bank Plc* [1994] 1 WLR 1260 at 1282.'

Cuckmere Brick: limit on statutory duty on a mortgagee's power of sale

There are similarities between the duties on trustees or directors, particularly when selling assets (see eg *Buttle v Saunders*[126]), with the duty on a mortgagee or receiver exercising a power of sale over charged property. There is a duty on mortgagees to take reasonable care to obtain a proper price,[127] sometimes referring to the best price, reasonably obtainable.[128]

In the mortgage context, the case law holds that the two terms 'proper price' and 'best price' are synonymous.[129] There seems to me little reason for this approach not to apply to duties on trustees and directors as well.

In *Cuckmere Brick Co Ltd v Mutual Finance Ltd*[130] Salmon LJ held that there was not 'any real difference' between a 'best price' and a 'proper price':

'Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take reasonable care to obtain what I call the true market value at the date of the sale. Some of the textbooks refer to the "proper price," others to the "best price." Vaisey J in *Reliance Permanent Building Society v Harwood-Stamper* [1944] Ch. 362, 364, 365, seems to have attached great importance to the difference between these two descriptions of "price." My difficulty is that I cannot see any real difference between them. "Proper price" is perhaps a little nebulous, and "the best price" may suggest an exceptionally high price. That is why I prefer to call it "the true market value".'

It is noteworthy that Salmon LJ took the view that the two terms had the same meaning, particularly given that, as Richard Hooley has pointed out,[131] in 1944 in *Reliance Permanent*,[132]

126 [1950] 2 All ER 193 (Wynn-Parry J). Discussed above and by the Law Commission in their 2014 Report, 'Fiduciary Duties of Intermediaries' (Law Com No 350).

127 *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295 per Lord Templeman at 315 (discussing *Cuckmere Brick*). See also Robert Walker LJ in *Yorkshire Bank Plc v Hall* [1999] 1 WLR 1713 at 1728. Discussed in Richard Hooley, 'Release Provisions in Intercreditor Agreements' [2012] JBL 213 at 229.

128 *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349, PC per Lord Templeman at 1356 (and see also at 1355).

129 See Salmon LJ in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 at 966 and Jonathan Parker LJ in *Michael v Miller* [2004] EWCA Civ 282 at [131]. See also *Mortgage Express v Mardner* [2004] EWCA Civ 1859 at [5]–[12]. There is a helpful discussion by Richard Hooley in 'Release Provisions in Intercreditor Agreements' [2012] JBL 213 at 229 to 230.

130 [1971] Ch 949, CA per Salmon LJ at 966.

131 Richard Hooley 'Release Provisions in Intercreditor Agreements' [2012] JBL 213 at 229, fn103.

132 *Reliance Permanent Building Society v. Harwood-Stamper* [1944] Ch 362 (Vaisey J).

Vaisey J had been considering a building society which was under a statutory duty under s 10 of the Building Society Act 1939[133] to 'to obtain the best price reasonably obtainable'.

In an unreserved judgment,[134] Vaisey J had considered the implications of this duty:

> 'Two views on this enactment have been submitted to me. Mr Harman, for the building society, asks me to say that the section has no particular meaning or effect. He puts forward the view that the section is a mere reminder to building societies of their pre-existing responsibilities and a mere reassuring resumé for the comfort of mortgagors of what their rights in this matter are. Mr Guthrie, for the defendant, on the other hand, submits that the section imposes on building societies an even higher liability than that which is laid on fiduciary vendors generally, such as trustees for sale or tenants for life, and involves the building society in responsibility for the consequences of even honest mistakes or errors of judgment, and he contends that the section introduces the conception of negligence as understood at common law and in these ways imposes on building societies what he repeatedly described as a very onerous and responsible duty. A middle view may well be that the building society when exercising its power of sale as mortgagee is by this section merely added to the list of fiduciary vendors, and that the same considerations apply to the exercise of a society's power of sale as would apply to an ordinary trustee for sale or trustee with a power of sale or to a tenant for life or other limited owner exercising a power of sale under the Settled Land Act, 1925.'

The defendant's view, that a negligence duty can be implied from a 'best' requirement resonates here.

Ultimately, Vaisey J had decided (at 372) that the statutory duty was no more that the duty that applied to fiduciary vendors, holding (at 372):

> 'What is the measure of responsibility which lies on the building society as mortgagee? Is it that which lies on the ordinary mortgagee? Is it that which lies on the ordinary fiduciary vendor? Or is it some other, and if so what, measure? I have come to the conclusion that the obligation which lies on a building society mortgagee selling under its power of sale is similar to that of a fiduciary vendor. I think that s. 10 of the Act of 1939 was intended to add the building society mortgagee to the class of persons who are counted as fiduciary vendors. That, however, must be qualified in three ways.'

So the net effect of the decisions in *Cuckmere Brick* and *Reliance Permanent* is that even a statutory 'best price' duty really only amounts to the same as a 'proper price'.

In 2004 in *Michael v Miller*[135] Jonathan Parker LJ held that this was 'well settled':

> 'It is well settled that in exercising his power of sale over mortgaged property a mortgagee is under a general duty to take reasonable care to obtain the best price reasonably obtainable

133 Richard Hooley points out that the same requirement was later found in the Building Society Act 1986, s 13(7) and Sch 4 and that the Building Society Act 1997, s 12(2) provides that with effect from 1 December 1997 any rule of law requiring a mortgagee to take reasonable care to obtain a proper price or true market value has effect as if that and corresponding earlier enactments had not been enacted.

134 Handed down on 7 June 1944, the day after D Day.

135 [2004] EWCA Civ 282 at [131]. Scott Baker and Auld LJJ agreed with Jonathan Parker LJ. Cited and followed by Pill LJ in *Mortgage Express v Mardner* [2004] EWCA Civ 1859 at [5].

at the time (see *Fisher and Lightwood's Law of Mortgage* 11th edn. Paragraph 20.23). In this context, 'the best price reasonably obtainable' is synonymous with "a proper price" (the expression used by Lord Templeman in *Downsview Nominees* at p 315 and by Robert Walker LJ in the *Yorkshire Bank* case at p 1728F) and with "the true market value of the mortgaged property" (the expression used by Salmon LJ in *Cuckmere Brick* at p 966).'

Best interests/success of the trust is better

The company law cases, dealing with the powers of directors, refer to the interest (or sometimes the best interests) of the company – see the example already quoted of Lord Cranworth LC in *Aberdeen Railway Co v Blaikie Bros*:[136]

> 'A corporate body can only act by its agents and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting.'

It is possible to surmise that judges transferring this test to the trustee context involved a shift from 'interests of the company'[137] to 'interests of the beneficiaries', probably on the basis that the directors owe their duties to the company and trustees owe their duties to the beneficiaries individually and as a whole (the trust not being a body with legal personality).

But this formulation ignores the proper purposes test (see above) and also is unhelpful and confusing where:

(a) the trustee is required by the trust instrument to do something and does not have a discretion (eg *Pikos*[138] and *Pollock v Reed and Halcrow*[139]); or
(b) is required to choose between the beneficiaries (eg to exercise a discretion under a discretionary trust)[140] – see above.

In my view a much better formulation is to refer to the 'interests' or, even better, 'success' of the trust (or pension plan) itself (the term 'success has the dual advantage of tracking the statutory duty on directors in s172, CA 206 and also being more nebulous and vague than 'interests').

Such a formulation more clearly requires the trustee board to comply with its duties where it has no discretion (ie to obey the terms of the trust) – it cannot be in the interests of the trust (as compared to the individual beneficiaries) for the trustee board not to obey the trust instrument. In my view there is no reason to ignore the trust itself.

Indeed, in *Cowan v Scargill*, the test proposed by counsel referred to the interests of the beneficiaries *as a whole*. This looks more like a test involving the success or interests of the trust (ie the beneficiaries as a whole). But the words 'as a whole' were not later used by Megarry V-C in the judgment when adopting what had been agreed by the parties in that case – see Part 1 of this article.

136 (1854) 2 Eq Rep 1281, (1854) 1 Macq HL 461 at 471–2 (HL).
137 Although note that the statutory formulation in s 172(1) of the Companies Act 2006 (but not s 172(2) for a company with a purpose) refers to the benefit of the company's members. See below.
138 *Pikos Holdings (Northern Territory) Pty Ltd v Territory Homes Pty Ltd* [1997] NTSC 30 (Kearney J).
139 [2015] EWHC 3685 (Ch), [2016] PLR 129 (Asplin J). Sometimes called the *Halcrow* case.
140 A similar point is discussed in the shareholder amendment power cases – see *Charterbridge Capital*, discussed above.

Interestingly, the Law Commission in its 2014 Report on 'Fiduciary Duties of Financial Intermediaries'[141] seems to share this 'success of the trust' view, stating (at 3.43): 'Below we look at trustees' duties to further the purpose of the trust.'

Purpose of a trust

A trust can clearly have a purpose – and different types of trusts will usually have different purposes:

- a family wealth trust – to hold the assets for the benefit of the relevant beneficiaries and to distribute to them;
- a unit trust – to hold and invest the assets in the appropriate assets;
- a DB pension trust – to hold and invest the assets and seek to pay the stated benefits (at a cost acceptable to the employer).

Pension trusts

Defined benefit pension schemes also have a purpose – to pay the relevant benefits at a cost acceptable to the employer.[142] Unlike a settlor in a family wealth trust, the employer has an interest and makes contributions. It is appropriate to reflect this in the relevant obligation.

In *MNRPF*,[143] Asplin J referred to promotion of the trust (in a passage quoted in Part 1 of this article):

> 'In fact, it seems to me that the way in which the matter was put by Lord Nicholls extra judicially sums up the status of the best interests principle and the way it fits in to the duties of a trustee. It is necessary first to decide what is the purpose of the trust and what benefits were intended to be received by the beneficiaries before being in a position to decide whether a proposed course is for the benefit of the beneficiaries or in their best interests. As a result, I agree with his conclusion that "… to define the trustee's obligation in terms of acting in the best interests of the beneficiaries is to do nothing more than formulate in different words a trustee's obligation to promote the purpose for which the trust was created".'

Nugee J (extra-judicially) put this clearly in his 2015 article 'The duties of pension scheme trustees to the employer – Revisited':[144]

> 'Pension trusts are different from traditional family settlements
>
> And second, pension trusts are not like a traditional family settlement. A family settlement usually consists of the settlor transferring funds to the trustees for the benefit of the

141 Law Com No 350. See Part 1 of this article.

142 See Ch 9 in Pollard, *supra* n 3, and *British Airways PLC v Airways Pension Scheme Trustee Ltd* [2018] EWCA Civ 1533, Lewison and Peter Jackson LJJ (Patten LJ dissenting), overturning Morgan J at first instance: *British Airways PLC v Airways Pension Scheme Trustee Ltd* [2017] EWHC 1191 (Ch), [2017] Pens LR 16.

143 *Re Merchant Navy Ratings Pension Fund; Merchant Navy Ratings Pension Trustees Ltd v Stena Line Ltd* [2015] EWHC 448 (Ch), [2015] PLR 239 (Asplin J) at [228].

144 (2015) 29 TLI 59. See also Asplin J in *MNRPF* at [230] distinguishing *Re Charteris* [1917] 2 Ch 397 (see [184] and below) and *Buttle v Saunders* [1950] 2 All ER 193 as private trust cases dealing with a duty to obtain a best price and where it was not necessary to 'analyses the more complex issues' arising in *MNRPF*.

beneficiaries, with the settlor having no further obligation to the trust. Since the purpose of the settlement is to benefit the beneficiaries to the greatest degree possible, and since the settlor has no further rights in or obligations to the fund, it is easy to see that the trustees' duty is to act in such a way as to maximise the benefits for the beneficiaries without regard to the interests of the settlor. The purposes of the trust and the maximisation of the interests of the beneficiaries are one and the same.'

Charities

In the case of a charitable trust, it seems to be clear that the success of the trust is the right test. A duty for a charity trustee to act in the best interests of the beneficiaries of a charity looks incompatible with the purposes of the trust.

Thus, the Charities Act 2011 refers in a number of places to 'the interest of the charity'. For example, the statutory power in s 105 of the Charities Act 2011 for charity trustees to be able to act outside their powers if this is 'expedient in the interests of the charity' and the Charity Commission agrees.[145] This is an express statutory power for charities only and refers to the 'interests of the charity' and *not* the beneficiaries.

It is noticeable that in the investment case following *Cowan*, involving a charity, *Harries v Church Commissioners*[146], Sir Donald Nicholls V-C (as he then was) referred to acting in the interests of the trust. He referred to *Cowan v Scargill*, but considered that charities were different, stating 'In this case I am concerned with trusts of charities, whose purposes are multifarious'.

Nicholls V-C held (emphasis added):

'*Charity trustees and investment powers*

Before going further into the criticism made of the commissioners I will consider the general principles applicable to the exercise of powers of investment by charity trustees. It is axiomatic that charity trustees, in common with all other trustees, are concerned to further the purposes of the trust of which they have accepted the office of trustee. That is their duty. To enable them the better to discharge that duty, trustees have powers vested in them. <u>Those powers must be exercised for the purpose for which they have been given: to further the purposes of the trust.</u>[147] That is the guiding principle applicable to the issues in these proceedings. Everything which follows is no more than the reasoned application of that principle in particular contexts.

[…]

Second, there is property held by trustees for the purpose of generating money, whether from income or capital growth, with which to further the work of the trust. In other words, property held by trustees as an investment. Where property is so held, prima facie the purposes of the trust will be best served by the trustees seeking to obtain therefrom the

145 See the Law Commission Report 'Technical Issues in Charity Law' (Law Com No 375, September 2017) at 10.54. Also, Mark Atkinson 'Goalkeepers are different. What about pension scheme trustees?' (2003) 17 TLI 25 at 32, contrasting the position of pension scheme trustees with charity trustees in the light of the Charity Commissioners' power to sanction actions 'that the charity trustees believe are in the best interests of their beneficiaries' under the previous provisions in ss 26 and 29 of the Charities Act 1993.

146 [1993] 2 All ER 300 at 303/4. See Part 1 of this article.

147 Cited for charity trusts in Henderson, Fowles and Smith, *Tudor on Charities*, 10th Ed (Sweet & Maxwell, 2015) at p 777 [17-010].

> maximum return, whether by way of income or capital growth, which is consistent with commercial prudence. That is the starting point for all charity trustees when considering the exercise of their investment powers. Most charities need money; and the more of it there is available, the more the trustees can seek to accomplish.
>
> In most cases this prima facie position will govern the trustees' conduct. In most cases the best interests of the charity require that the trustees' choice of investments should be made solely on the basis of well-established investment criteria, having taken expert advice where appropriate and having due regard to such matters as the need to diversify, the need to balance income against capital growth, and the need to balance risk against return.
>
> [. . .]
>
> I have sought above to consider charity trustees' duties in relation to investment as a matter of basic principle. I was referred to no authority bearing directly on these matters. My attention was drawn to *Cowan v Scargill* [1985] Ch 270, a case concerning a pension fund. I believe the views I have set out accord with those expressed by Megarry V-C in that case, bearing in mind that he was considering trusts for the provision of financial benefits for individuals. In this case I am concerned with trusts of charities, whose purposes are multifarious.'

Nicholls V-C was drawing out a distinction between a charitable trust and a private trust. But it seems to me that a distinction also arises between a pension trust and a private family wealth trust – see Nugee J's (extra judicial) comments quoted above.

Lord Walker (extra judicially) seems to agree with this. In 'The Changing Face of Trust Law'[148] he discussed the rise of occupational pension schemes, stating that an occupational pension scheme:

> 'is an arrangement for deferred pay as part of the commercial bargain between an employer and its workforce – what an Australian pensions expert[149] has called a reconciliation of competing economic interests. In those circumstances it is too simplistic, as David Pollard of Freshfields says in his admirable book,[150] to invoke the mantra of the best interests of the beneficiaries. The members have interests that often conflict with one another (those with pensions in payment are usually preferred on winding-up). There are also widows and widowers and other dependants to consider. The contributing employer may also be regarded as a beneficiary of sorts, because of the possibility of a surplus; and even the Pension Protection Fund may be regarded as an interested party. So the requirement for fiduciary powers to be used for their proper purpose is in play as well.'

Cases on interest of the trust

I referred in Part 1 of this article to the decision of the House of Lords in *Knox v Mackinnon*[151] as a potential source for counsels' 'best interests duty' argument put forward in *Cowan v Scargill*.

148 (2017) 31 TLI 19 at 22.
149 SEK Hulme QC, 'The basic duty of trustees of superannuation trusts – fair to one, fair to all?' (2000) 14 TLI 130.
150 Pollard, *supra* n 3 at 9.18.
151 (1888) 13 App Cas 753.

Lord Watson referred to trustees being protected by an exoneration clause where they were 'acting with a single eye to the benefit of the trust, and of the persons whom it concerns'. It is relevant that this refers to the 'benefit of the trust'.[152]

There are comments in other cases that refer to the interests of the trust rather than the beneficiaries, eg the Privy Council in *Marley v Mutual Security Merchant Bank and Trust Co Ltd*,[153] from Australia *Re Chambeyron Pty Ltd (No 2)*,[154] and from New Zealand *Fenwick v Naera*,[155] or that refer to the 'beneficiaries as a whole', eg *Rouse v IOOF Australia Trustees Ltd*[156] and, more recently, the pensions case *British Telecommunications.*[157]

Generally these cases just make the statement and do not discuss the distinction between the interests of the 'beneficiaries' and those of the 'trust'. In effect the impression is given that the concepts are interchangeable.

As already mentioned (see above), in Australia, both *Re S&D International*[158] and *Australasian Annuities*[159] refer to the 'interest of the unit trust', rather than just the interest of the beneficiaries. In *S&D International*, Robson J went on to treat these two concepts as being 'in other words' the same test. In *Australasian Annuities*, Warren CJ noticeably just referred a need to 'have regard to' the interests of the beneficiaries rather than a more forceful 'act' in those interests, stating that the trustee company needs to administer the trust 'in accordance with the trust deed *having regard to* the rights and interests of the beneficiaries of the trust'.

There are other examples of this 'interest of the trust' approach. For example, in 1917 in *Re Charteris*[160] the Court of Appeal upheld a decision by trustees of a will trust to delay a sale. All three members of the Court of Appeal referred to trustees needing to consider the interest of the whole estate/trust. Swinfen Eady LJ held:

> 'It has often been said that the position of the trustees of an estate is to hold an even hand, and to do the best for the estate, looking upon it as a whole.'

152 In this area the terms 'benefit' and 'interests' or 'best interests' ('best benefit' seems rather odd and presumably this is why it is not used) seem to be used interchangeably: see Lord Nicholls' 1995 article 'Trustees and their broader community'(1995) 9 TLI 71 and the summary of the amendment cases by Etherton C in *Re Charterhouse Capital* [2015] EWCA Civ 536 (see above).

153 [1991] 3 All ER 198, PC. There are one or two references in this judgment to 'the interests of the trust', but also many references to 'the interests of the beneficiaries'. The two formulations seem to be used inter-changeably with no distinction in meaning envisaged (this case involved a family trust).

154 [2017] VSC 410 (Robson J) at [27].

155 [2015] NZSC 68, 18 ITELR 133. This is a decision of the New Zealand Supreme Court looking at conflicts issues: the judgment refers to the best interests of the beneficiaries in some places (eg at [97]), but the best interests of the trust in others (eg [131] and [144] fn172).

156 [1999] SASC 181, (1999) 73 SASR 484 per Doyle CJ at [100]. *IOOF* was cited by the Privy Council in the disclosure case, *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709, but not on this point. As mentioned at fn 64 above, the Privy Council judgment (given by Lord Walker) did refer to balancing the interests of beneficiaries, trustees and third parties, which could be seen as confirming the absence of an overriding 'best interests of the beneficiaries' duty.

157 *British Telecommunications Plc v BT Pension Scheme Trustees Ltd* [2018] EWHC 69 (Ch) (Zacaroli J) at [38].

158 *Re S & D International Pty Ltd* (2010) 79 ACSR 595 (Robson J) at [283].

159 *Australasian Annuities Pty Ltd (in liq) v Rowley Super Fund Pty Ltd* [2015] VSCA 9, (2015) 318 ALR 302 at [228].

160 [1917] 2 Ch 379, CA *per* Swinfen Eady at 388, Bankes LJ at 397 and Warrington LJ at 398–99. This was an unreserved judgment unanimously upholding the exercise of discretion by the trustees and overturning Younger J at first instance. This was a private trust case and in *MNRPF* Asplin J considered that this meant that it was of little assistance on the best interests duty point: see [2015] EWHC 448 (Ch) at [230].

Bankes LJ held:

> 'I do not agree that the trustees are entitled to consider the interest of either beneficiary in this matter as paramount. It is quite true that Colonel Richard Charteris's legacy must be paid before anything can be paid out of residue, but when the trustees have to consider whether or not they shall exercise the discretion given them under the will their duty is not to consider the interest either of the one beneficiary or of the other beneficiary as paramount, but to consider the interest of the estate as a whole. It is obvious that a decision which is considered to be for the ultimate benefit of the estate may be for the immediate advantage of one beneficiary and to the disadvantage of the other, and that is the case here, …'.

Warrington LJ held:

> 'The duty of trustees entrusted with a discretionary power of this kind is not to have regard to the interests of one person or of another interested in the estate, but to have regard to the interests of the estate as a whole, and I take it that in such a case as the present this means that they are to exercise their discretion in the way that will, in their opinion, tend to produce ultimately the largest In re-amount of money for distribution amongst the several persons interested. That, in my judgment, is what they have done.'

In 1901 in *Re New*,[161] the Court of Appeal referred to the salvage jurisdiction for the courts applying if this was 'essential for the benefit of the estate'. The Court of Appeal (in an unreserved judgment) gave leave to trustees to exchange shares under a reconstruction into shares of a new company which they were not authorised to hold. Romer LJ considered (at p 545A) that this was 'essential, *for the benefit of the estate and in the interests of all the cestuis que trust*'. This was in a passage later approved by Lord Morton in *Chapman v Chapman*.[162]

In 2011 in *Alexander v Alexander*,[163] Morgan J was considering an application under s 57 of the Trustee Act 1925[164] to allow a power of sale. He cited the Court of Appeal in *In re Downshire Settled Estates*[165] which had held that 'the object of section 57 was to secure that trust property should be managed as advantageously as possible in the interests of the beneficiaries'. Morgan J considered that the section required him to look at the 'interests of the trust as a whole', holding at [23]:

> 'I next need to consider whether the proposed sale and purchase, or a sale of the cottage but without the purchase of a replacement property, would be "expedient" within the meaning of section 57(1). This requires me to look at the interests of the trust as a whole, that is, the interests of the beneficiaries collectively. Where beneficial interests may be affected in different ways by what is proposed, all interests must still be considered. I should attempt to hold the scales fairly between the various interests. This is how matters were described by BellAJA in *Royal Melbourne Hospital v Equity Trustees*.'

161 [1901] 2 Ch 534, CA. Cited in Underhill & Hayton at [43.113]. Previously mentioned in Part 1 of this article.
162 [1954] AC 429, HL per Lord Morton at 453.
163 [2011] EWHC 2721 (Ch), [2011] WTLR 187 (Morgan J).
164 See Part 1 of this article.
165 [1953] 1 Ch 216, CA. Cited by Morgan J in *Alexander v Alexander* [2011] EWHC 2721 (Ch), Norris J in *Re SMP Trustees Ltd* [2012] EWHC 772 (Ch) at [25] and Master Marsh in *South Downs Trustees Ltd v GH* [2018] EWHC 1064 (Ch) at [37].

In the Australian case *Royal Melbourne Hospital v Equity Trustees*,[166] BellAJA dealt with the Victorian equivalent to s 57. He referred to the English cases and went on to refer to various Australian decisions which refer to the interests of the trust:

> '[157] In Australia, Dixon J said in *Riddle v Riddle*: "Expediency means expediency in the interests of the beneficiaries …" [74] Williams J said: "The sole question is whether it is expedient in the interests of the trust property as a whole …" [75] As he saw it, this included the interests of the life tenants and the remaindermen. [76] Of course this approach has been widely followed. For example, in *Re Sykes* [77] Helsham J said the touchstone was "expediency for the trust as a whole, that is to say expediency in the interests of the beneficiaries." Similarly, in *Perpetual Trustee Co Ltd v Godsall* [78] Rath J said the transaction must "be expedient, not for the benefit of one beneficiary only, but for the benefit of the whole trust." In the Victorian case of *Hornsby v Playoust* [79] Mandie J made orders to allow a major trust restructure because it was expedient in the interests of all the beneficiaries.
>
> [74] (1952) 85 CLR 202, 214.
>
> [75] Ibid 220, see also at 222 – whether "the trust property as a whole will in fact benefit …"
>
> [76] Ibid 224 and see above.
>
> [77] [1974] 1 NSWLR 597, 600.
>
> [78] [1979] 2 NSWLR 785, 790.
>
> [79] (2005) 11 VR 522, 525, 527.'

More recently in 2016 in *Daniel v Tee*,[167] a case on the investment duties of trustees, the judge, Richard Spearman QC, referred to *Cowan v Scargill*, but not on the 'best interests' point. He held that the trustees in *Daniel* had:

> 'adopted an approach which they believed to be permissible and in the best interests of the Trust.'

In 2015, in Australia in *Hancock v Rinehart*,[168] Brereton J referred to the relevant test as being that trustees should not do something that was 'not bona fide in the interests of the trust'.

Some other cases look through the meaning 'interests of the company' to take account of the interests of the shareholders: see, eg Megarry J in *Gaiman v National Association for Mental Health*.[169] It is noticeable that the statutory formulation in s 172(1) of the Companies Act 2006 (but not s 172(2) for a company with a purpose) refers to the benefit of the company's members *as a whole* (see below).

166 [2007] VSCA 162, (2007) 18 VR 469.
167 [2016] EWHC 1538 (Ch) (Richard Spearman QC sitting as a Deputy Judge) at [185] and [188] (in the context of a claim for relief under the Trustee Act 1925, s 61).
168 [2015] NSWSC 646 (Brereton J) at [62].
169 [1971] Ch 317 (Megarry J) at 330.

Not a panacea

I consider that a test that refers to the 'interest of the trust' rather than the 'interest of the beneficiaries' is a much clearer statement of the law for the reasons given above, in particular that it makes the test closer to the 'proper purposes' test and that it more clearly allows the trustees or directors to comply with their primary duty – to comply with the terms of the trust (or constitution of the company).

In effect it relies less on needing to interpret 'interests of the beneficiaries' as meaning 'interests of the beneficiaries under the terms of the trust'. It may also reduce the debate on whether beneficiaries' interests means their general wellbeing (as members of society) rather than just under the trust.

Success of the trust?

But this interests of the trust or success of the trust formulation is not a panacea. It leads on to the question as to what constitutes the success of the trust. A similar issue has emerged in the caselaw on majority shareholder powers, where the courts imply a restriction on amending articles of association if the change is not 'bona fide for the benefit of the company as a whole' – *Allen v Gold Reefs of West Africa Ltd*.[170]

This requirement has proved difficult over the years. Do changes that benefit the majority at the expense of the minority or which do not affect the trading or business prospects of the company pass the test? David Chilvers (and his co-authors) summarised it in their book *The Law of Majority Shareholder Power*:[171]

> 'The "bona fide for the benefit of the company as a whole" test is difficult to apply, and notoriously difficult to apply in circumstances where a proposed amendment to a company's articles do not affect the company's own interests as a commercial entity but, instead, merely affects the interests of different groups of shareholders differently.'

Guidance has been given in the shareholder cases by the decision of the Court of Appeal in *Re Charterhouse Capital Ltd*:[172] see the seven principles listed by Etherton C and quoted in Part 1 of this article.

As noted above (see above), the same difficulties can apply in relation to trusts, when deciding between interest of beneficiaries – a 'best interests of the beneficiaries' formulation is no better than the company law test here.

Interests of the trusts does not make pension trust into an unlawful non-charitable purpose trust

That there is a distinction between pension trusts and family trusts seems clear. But it must not be thought that this is an argument that pension trusts are converted into what are called 'purpose trusts', which are generally void[173] (unless charitable), as there is no beneficiary to

170 [1900] 1 Ch 656 and see Part 1 of this article.

171 David Chilvers, Ben Shaw, Ceri Bryant and Chantelle Staynings *The Law of Majority Shareholder Power*, 2nd Ed (Oxford University Press, 2017), at 1.05.

172 *Re Charterhouse Capital Ltd; Arbuthnott v Bonnyman* [2015] EWCA Civ 536, [2015] 2 BCLC 627, *per* Etherton C at [90].

173 See Alistair Hudson, 'Rethinking the use and abuse of trusts in the 21st century: tax dodgers, financiers and conscience', Paper at the Conference 'The Use and Abuse of Trusts & Other Wealth Management Devices' (Singapore, July 2017).

enforce the trust. Pension funds are not purpose trusts in that pure sense – they clearly have beneficiaries (ie the members and the employers and usually, as secondary beneficiaries,[174] the spouse, civil partner and dependants of the member). This is enough to bring them outside the purpose trust class – better called the beneficiary test. See for example:

(a) *Re Denley's Trust Deed*[175] where Goff J held:

> 'Where, then, the trust, though expressed as a purpose, is directly or indirectly for the benefit of an individual or individuals, it seems to me that it is in general outside the mischief of the beneficiary principle'.

(b) *Re Lipinski's WT*[176] where Oliver J held:

> 'There would seem to me to be, as a matter of common sense, a clear distinction between the case where a purpose is prescribed which is clearly intended for the benefit of ascertained or ascertainable beneficiaries, particularly where those beneficiaries have the power to make the capital their own, and the case where no beneficiary at all is intended (for instance, a memorial to a favourite pet) or where the beneficiaries are unascertainable.'

In *MNRPF*,[177] Asplin J considered these cases and held that the pension scheme there was not a pure purpose trust.

In Canada, the comment was made by the Supreme Court in *Schmidt v Air Products Canada Ltd*[178] that pension trusts are not purpose trusts. Thus Cory J:

> '53 Trusts for a purpose are a rare species. They constitute an exception to the general rule that trusts for a purpose are void. (See DWM Waters, Law of Trusts in Canada (2nd ed 1984), at pp 127–28). The pension trust is much more akin to the classic trust than to the trust for a purpose.'

The decision in *Schmidt* clearly does not mean that pension trusts do not have a purpose (clearly the proper purpose test applies). Cory J was making the point that in Canada any reversion of surplus at the end of the trust's life to the employer would need to be expressly reserved in the trust instrument (this point about reversion to the employer is different in England and Wales – see eg *Air Jamaica v Charlton*[179] and *National Grid v Lawes and Mayes*[180]).

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cont.

Hudson cites *Morice v Bishop of Durham* (1804) 9 Ves. 399; (1805) 10 Ves 522: 'There can be no trust, over the exercise of which this court will not assume control … If there be a clear trust, but for uncertain objects, the property … is undisposed of … Every … [non-charitable] trust must have a definite object. There must be somebody in whose favour the court can decree performance', *per* Lord Grant MR. *Re Nottage* [1885] 2 Ch 649; *Leahy v Att-Gen for New South Wales* [1959] AC 457; *Re Grant's WT* [1979] 3 All ER 359.

174 See Pollard 'Pension Trusts: The Position of Spouses and Dependants', Ch 8 in *The Law of Pension Trusts* (Oxford University Press, 2013).

175 [1969] 1 Ch 373 (Goff J).

176 [1976] Ch 235 (Oliver J).

177 *Re Merchant Navy Ratings Pension Fund; Merchant Navy Ratings Pension Trustees Ltd v Stena Line Ltd* [2015] EWHC 448 (Ch), [2015] PLR 239 (Asplin J) at [241].

178 [1994] 2 SCR 611, [1995] PLR 75, [1995] OPLR 283 per Cory J (giving the majority judgment) at [53].

179 [1999] 1 WLR 1399, PC.

180 [2001] UKHL 20, [2001] 2 All ER 417, HL.

Proper purposes even better?

Tellingly, the latest (2016) edition of *Underhill and Hayton: Law Relating to Trusts and Trustees*[181] does not include a 'best interests of beneficiaries' test. Instead it states the purpose test. It states[182] the general principle applicable to powers of trustees:

> 'a trustee
>
> (a) must consider from time to time the exercise of his distributive and managerial discretions;
>
> […]
>
> (c) must exercise his discretions only within the scope of the terms of the relevant power and, then, only for the purposes for which the discretions were conferred on him by the settlor and not perverse to any sensible expectation of the settlor …'.[183]

In a pensions context, the reference to 'settlor' should be considered as being to the person who set up the trust and decided what powers should be given to the trustees ie the employer. There are cases where the members have been considered to be the settlor,[184] but the better view is to regard both the employer and the members as settlors for different purposes.[185]

Given the comments by Lord Nicholls (extra-judicially) and Asplin J in *MNRPF*,[186] a proper purpose test is a better way of looking at the duties of trustees and directors than a 'best interest' duty. This needs to be combined with a positive duty to exercise powers and discretions in some circumstances (eg investment).

In some (but not all) cases the proper purpose will generally involve exercising the power or discretion in what the trustee or director considers is most likely to promote the success of the trust or carry out the relevant purpose. This then goes to define the relevant factors that the trustee or director should consider.

This does raise the question of why the statutory duties on directors under the Companies Act 2006 include both a proper purposes test (s 171) and a 'success of the company' test (although for purpose companies this is modified to a purpose test under s 172(2) – see below).

The answer seems to me to be that the proper purpose test still has the difficulty that defining the relevant proper purpose for a particular discretion can often itself be quite difficult.[187] Having said this, where the decision taker holds a fiduciary position (eg a trustee

181 Hayton, Matthews and Mitchell (Eds), 19th Ed (LexisNexis, 2016).

182 Article 57, p 925.

183 Citing (see 57.10 at p 930): *McPhail v Doulton* [1971] AC 424 at 449, HL, *Re Hay's Settlement Trust* [1981] 3 All ER 786 (Megarry V-C) at 792; *Hayim v Citibank* [1987] AC 730, PC at 746; *Re Beatty's Will Trust* [1990] 3 All ER 844 (Hoffmann J) at 846 and *Edge v Pensions Ombudsman* [1998] Ch 512 at 535 (Scott V-C) and on appeal [2000] Ch 602 at 627 (Chadwick LJ).

184 *Brooks v Brooks* [1996] AC 375, HL, *Air Jamaica v Charlton* [1999] 1 WLR 1399, PC.

185 In the United States, this is also the view of Daniel Fischel and John H Longbein in 'ERISA's Fundamental Contradiction: The Exclusive Benefit Rule' (1983) 55 University of Chicago Law Review 1105 at p 1118.

186 *Re Merchant Navy Ratings Pension Fund; Merchant Navy Ratings Pension Trustees Ltd v Stena Line Ltd* [2015] EWHC 448 (Ch), [2015] PLR 239 (Asplin J).

187 Although see Lord Sumption in *Eclairs* at [30], 'it is usually obvious from its context and effect why a power has been conferred', discussed in David Pollard 'Exercising powers: Proper purposes rather than best interests: Fiduciaries and Eclairs' (2016) 30 TLI 71 at 90.

or director), the purpose will often involve exercising the power to seek to advance the success of the trust. As outlined above, an 'interest of the beneficiaries' formulation is too simplistic and does not deal properly with issues such as trustee indemnities or the purposes of a charity or pension trust (see 'Best interests/success of the trust is better' above).

Sarah Worthington pointed out in '*Four Questions on Fiduciaries*':[188]

> 'What the fiduciary context adds, if it applies, is that the purpose of the exercise of the powers is unequivocally to advance the principal's interests, and any considerations which call into play the fiduciary's interests are either "irrelevant considerations" or reflect "improper purposes".'

I would modify this to refer to the success of the trust or company rather than the principal's interests.

Silence is louder than words: cases that do not mention a 'best interest' duty when they should

There are various cases looking at the duties on trustee boards where the judgment does not refer to a best interest duty on trustees, even though this might have been expected. In a number of them *Cowan v Scargill* is cited, but not for a best interest duty. This it seems to me is a telling omission.[189] If there were really an overriding or paramount duty on those lines, then they would need to be referred to in these judgments.

In *Nestle v National Westminster Bank plc*,[190] the judgment in *Cowan* is referred to by the CA, but not in relation to any best interests duty only on the potential liability of trustees if they make a decision on the wrong grounds but:

> 'that there are in fact good and sufficient reasons for supporting their decision, then I do not think that they would incur any liability for having decided the matter on erroneous grounds; for the decision itself was right.'

Scott Donald commented in '"Best" interest?'[191] that the *Nestle* case, although being perhaps the leading modern case on trustee investment duties, does not mention any 'best interests' duty.

As already mentioned (see Part 1 of this article), *Cowan v Scargill* is not mentioned in the judgments in *Mothew* or *Armitage v Nurse* and neither is a 'best interests' duty (as opposed to some 'interests of the beneficiaries' comments) in:

- *ITS v Hope* (other than to say that a best interests belief is not a defence); and
- *Power v Open Text (UK) Ltd Group Life Assurance Scheme Trustees*[192] (case on trustee suggesting scheme amendments).

188 (2018) 32 TLI 22 at 25.

189 Although of course this means the decisions are not binding precedents on a 'best interests duty' point, the point not being argued: see Part 1 of this article.

190 [1994] 1 All ER 118, CA at 128.

191 (2008) J Eq 245 at 249.

192 [2009] EWHC 3064 (Ch), [2010] PLR 89 (John Baldwin QC, sitting as a Deputy Judge).

The Supreme Court in the leading case on review of the exercise of trustee or fiduciary powers, *Pitt v Holt*,[193] did not mention a best interest duty or indeed refer to the 'interest of the beneficiaries'.

Neither did the Australian High Court in *Finch v Telstra Super Pty Ltd*[194] when finding that superannuation trustees owe a more 'intense' duty (compared to other trustees) to make enquires and inform themselves when making a decision about a factual matter (forming the opinion that the member is unlikely ever to engage in 'gainful work').

Cowan v Scargill was not mentioned in *Alitalia-Linee Aeree Italiane SPA v Rotunno.*[195] The trustees had the power to fix the rate of employer contributions. Henderson J held that this did not require funding to the buy-out level, instead:

> 'The funding objective is not to guarantee the members' benefits in all circumstances, and still less to do so on the assumption (which may be wholly unrealistic) that a winding up is always imminent, or even that it is likely to occur in the foreseeable future. The objective is rather to safeguard or protect the members' benefits by adopting whatever funding method is best suited to the changing circumstances of the scheme. It is impossible to be dogmatic in advance about what this method will be, and no particular method is prescribed, either expressly or implicitly, by the rule. The appropriate method will be that which the Trustees, in the light of the Actuary's advice and their consultation with Alitalia, consider best suited to achieve the stated objective.'

Pollock v Reed and Halcrow[196] concerned the discretion of pension trustees to make a bulk transfer out of the scheme to a new scheme in which the members would be credited with smaller benefits (but these were felt to be more secure that the benefits in the transferring scheme as it and the sponsoring employer were in financial difficulties). There is no mention of *Cowan v Scargill*. In *Pollock v Reed*, the trustees argued that a transfer without consent was in the members' best interests and Asplin J held[197] that she would on the evidence have upheld the propriety of their decision to make a transfer, but held that it was not allowed by the relevant legislation (ie the Occupational Pension Schemes (Preservation) Regulations).

Directors' Duties: Companies Act 2006, s 172

Section 172 of the Companies Act 2006 partially codifies the duties of directors. Section 172[198] states:

> *'172 Duty to promote the success of the company*
>
> (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
>
> (a) the likely consequences of any decision in the long term,

193 [2013] UKSC 26, [2013] 2 AC 108.
194 [2010] HCA 36, (2010) 242 CLR 254 at [30].
195 [2008] EWHC 185 (Ch), [2008] PLR 175 (Henderson J) at [88].
196 [2015] EWHC 3685 (Ch), [2016] PLR 129 (Asplin J).
197 In a judgment given just under ten months after her judgment in *MNRPF*.
198 Generally on section 172, see Ernest Lim 'Judicial intervention in directors' decision-making process: section 172 of the Companies Act' [2018] JBL 169.

(b) the interests of the company's employees,
(c) the need to foster the company's business relationships with suppliers, customers and others,
(d) the impact of the company's operations on the community and the environment,
(e) the desirability of the company maintaining a reputation for high standards of business conduct, and
(f) the need to act fairly as between members of the company.

(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.'

This is meant to be a partial codification of the existing common law, ie the test in *Re Smith and Fawcett*.[199] This is made clear in sections 170(3) and (4):

170 Scope and nature of general duties

(1) The general duties specified in sections 171 to 177 are owed by a director of a company to the company.

[…]

(3) The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director.

(4) The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties.'

In *Towers v Premier Waste Management Ltd*,[200] Mummery LJ noted that the codified duties extract and express the essence of the rules and principles which they have replaced:

'[3] I have described the equitable principles and duties in the past tense because, under codification measures in Ch 2 of the Companies Act 2006, a director's general duties to the company are now statutory. The codified duties are expressly derived from common law rules and equitable principles as they apply to directors. The relevant events in this litigation occurred in 2003, well before those provisions of the 2006 Act were brought into force. Although the pre-2006 Act common law rules and equitable principles continue to apply to a pre-2006 Act case, it is unrealistic to ignore the terms in which the general statutory duties have been framed for post-2006 Act cases. They extract and express the essence of the rules and principles which they have replaced.'

199 [1942] 1 All ER 542, CA. See Part 1 of this article.
200 [2011] EWCA Civ 923 at [3].

Remedies for breach of the statutory duties also follow the corresponding common law rules – see s 178.

There are comments in various cases to this effect, ie that the nature of the duties owed by directors does not depend on whether the relevant act was before or after s 172 came into force.[201]

Subjective test

The section 172(1) duty is clearly subjective – a director of a company must 'act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole'.

The good faith[202] requirement reinforces the subjective nature of the duty and seems to make it clear that this is not a retrospective outcome test, ie did it turn out that the director in fact got the best outcome. Instead this formulation seems to imply the relevant business judgment rule (combined with the statutory duty of care and skill in s 174).

Companies for a purpose: s 172(2)

The modifier in s 172(2) is important. If 'the purposes of the company consist of or include purposes other than the benefit of its members',[203] then the s 172(1) duty is modified so that 'the reference to promoting the success of the company for the benefit of its members' is changed to refer instead to 'achieving those purposes'.

This would mean that the s 172(1) test becomes, for a company with such purposes (eg a charity or, in my view, a trustee company):

> 'A director of a company (whose purposes consist of or include purposes other than the benefit of its members) must act in the way he considers, in good faith, would be most likely to achieve those purposes'.

The analogy for the test for other fiduciaries is clear. The Companies Act does not require 'best interests' or 'success' duty test where the company is acting for a purpose. The same should apply to the trustees of a trust with a primary purpose, such as a pension scheme.

201 See, for example, *Cobden Investments Ltd v RWM Langport Ltd* [2008] EWHC 2810 (Ch) (Warren J) at [52] and *Madoff Securities International Ltd (in liq) v Raven* [2013] EWHC 3147 (Comm) (Popplewell J) at [188].

202 Good faith in this context probably means the same as not in bad faith, ie honestly. See, eg Newey J in *GHLM Trading Ltd v Maroo* [2012] EWHC 61 (Ch), [2012] 2 BCLC 369 at [203], 'the complaint of non-disclosure involves an allegation of breach of the duty of good faith and, hence, of dishonesty' citing *Armitage v Nurse* [1998] Ch 241 at 251, where Millett LJ said that a trustee who 'acts in a way which he does not honestly believe is in [the] interests [of the beneficiaries] then he is acting dishonestly'. See also *Karger v Paul* [1984] VR 161 at 164, (citing *R v Holl* (1881) 7 QBD 575 at 580) and the public law case, *Cannock Chase District Council v Kelly* [1978] 1 All ER 152, CA per Megaw LJ at p156.
For a discussion of good faith see Richard Nolan and Matthew Conaglen 'Good faith: What does it mean for fiduciaries and what does it tell us about them?', Ch 14 in Elise Bant and Matthew Harding (Eds), *Exploring Private Law* (2010, Cambridge University Press); Lusina Hof, 'Good Faith and Fiduciary Duty In English Law' (2010) 4 J Eq 19; and Charles Mitchell 'Good faith, self-denial and mandatory trustee duties' (2018) 32 TLI 96.

203 It can be analysed that a major purpose of a commercial company is to benefit its members by paying dividends. Thus in a case concerned with a claim based on unfairly prejudicial conduct, *Re a company (No 00370 of 1987), ex parte Glossop* [1988] BCLC 570, Harman J held: 'It seems to me that it is important to remember that a company is simply a vehicle for carrying on a business for the benefit of all members. One of the major benefits to shareholders, ie members, in a company is, or ought to be, the payment of dividends.'

There is little guidance in the legislation or the relevant discussion documents or debates on the Companies Bill as to when a company will fall within section 172(2) as being one with a relevant purpose. The explanatory notes to the Act state:

> '330. Subsection (2) addresses the question of altruistic, or partly altruistic, companies. Examples of such companies include charitable companies and community interest companies, but it is possible for any company to have 'unselfish' objectives which prevail over the 'selfish' interests of members. Where the purpose of the company is something other than the benefit of its members, the directors must act in the way they consider, in good faith, would be most likely to achieve that purpose. It is a matter for the good faith judgment of the director as to what those purposes are, and, where the company is partially for the benefit of its members and partly for other purposes, the extent to which those other purposes apply in place of the benefit of the members.'

These notes do not refer to trustee companies, but they seem to be of a similar nature to the two categories mentioned (ie charitable companies and community interest companies).

The explanatory notes state that it is a matter for the directors' 'good faith judgment' as to what the purposes of a company are. It is not made express in s 172(2) whether the test as to whether a company does or does not fall into the modified s172(2) category is:

(a) just a factual test – for example does the company act as a trustee; or
(b) whether some express statement or purpose is needed in the relevant corporate documents. For example its memorandum or articles state that the relevant purpose of the company is to act as a trustee.

It seems to me that there is no need for the restrictive approach in (b) to be required, but that instead the factual position should be considered. In practice, most pension trustee companies (save for professional trustees) have a single purpose to act as a trustee of the scheme (or schemes) of a particular employer (or group) and this is usually obvious from the name of the trustee company.[204]

White Paper on Corporate Governance Reform (August 2017)

In its recent White Paper on Corporate Governance Reform (August 2017), the Government announced that it does not intend there to be any change to the duty in s 172 of the Companies Act 2006 to promote the success of the company for the benefit of its members, which requires directors to have regard to employees' interests and the need to foster business relationships with suppliers, customers and others, amongst other things.

But the Government will ask the GC100 to develop guidance (building on its existing guidance) as to how directors should in practice go about discharging that duty and satisfying themselves that they have done so.

The Government intends to promote legislation which will require companies also to have to explain in their strategic report (and possibly on their websites too) how the directors have complied with the duty. This new statutory requirement will apply to public and large privately-owned companies – the Government's initial view is that the threshold should be 1,000 employees.

204 See 'Corporate Trustees', Ch 4 in Pollard, *supra* n 3.

A positive duty to disclose? Item Software

In 2004 in *Item Software (UK) Ltd*, Arden LJ (as she then was) held that there is a fiduciary duty on directors to disclose their own breach of duty to the board of directors. She based this on the implied duty to act in the best interests of the company (the duty now codified, in different terms, in s 172 of the Companies Act 2006). Arden LJ held:

> 'I prefer to base my conclusion in this case on the fundamental duty to which a director is subject, that is the duty to act in what he in good faith considers to be in the best interest of his company.'

In 2012 in *GHLM Trading Ltd v Maroo*,[205] Newey J summarised the decision in *Item Software*:

> 'Recent authority establishes that it can be incumbent on a director to reveal his own wrongdoing. The leading case is *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, where Arden LJ (with whom Mummery LJ and Holman J expressed agreement) said that a fiduciary does not owe a separate and independent duty to disclose misconduct (para [41]). She concluded, however, that a director's 'fundamental' duty 'to act in what he in good faith considers to be the best interests of his company' could mean that a director has to disclose misconduct on his part (paras [41] and [44]). On the facts, Arden LJ considered that the director in question 'could not fulfil his duty of loyalty' except by telling his company of steps he had taken to divert business to himself (para [44]).'

This looks as though this could be a positive duty – to disclose wrongdoing or even information that the rest of the board of directors needs to know.[206] If so, it is difficult to categorise it as fitting within a proper purpose rule (what power or discretion as a director is being exercised?) and so it could be seen as supporting a more general best interests duty.[207]

The decision in *Item Software* is controversial.[208] It has not been followed in Australia.[209] Generally a disclosure 'duty' only applies to fiduciaries where there is already a conflict of interest. For example, Finkelstein J in *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)*[210] said:

> 'that which is often regarded as a fiduciary obligation of disclosure should not be seen as a positive duty resting on a fiduciary, but a means by which the fiduciary obtains the release or forgiveness of a negative duty; such as the duty to avoid a conflict of interest, or the duty not to make a secret profit'

205 *GHLM Trading Ltd v Maroo* [2012] EWHC 61 (Ch), [2012] 2 BCLC 369 (Newey J) at [192].

206 In a different context, this would be analogous to the obligation on a school headteacher (under an express contractual duty to 'advise, assist and inform' the governors in the fulfilment of their responsibilities) to disclose her friendship with a potentially dangerous third party: *Reilly v Sandwell MBC* [2018] UKSC 16, [2018] 3 All ER 477.

207 Lusina Ho commented in 2010 that *Item Software* is a 'clear point of departure': 'Good Faith and Fiduciary duty in English Law' (2010) 4 J Eq 29 at 31.

208 See, eg Newey J in *Maroo* at [193] and *Brandeaux Advisers (UK) Ltd v Chadwick* [2010] EWHC 3241 (QB), [2011] IRLR 224 at [47].

209 See eg *P & V Industries Pty Ltd v Porto* [2006] VSC 131, (2006) 14 VR 1 (Hollingworth J) at [26] to [34]. Cited in Heydon, Leeming and Turner (Eds) *Meagher, Gummow & Lehane's Equity Doctrine & Remedies*, 5th Ed (Lexis Nexis Butterworths, 2015) at [5-385].

210 [2001] FCA 1628 (Fed Ct) at [14] citing Nolan R, 'A Fiduciary Duty to Disclose' (1997) 113 LQR 220 at 224.

Sarah Worthington in her book *Equity*[211] also raised doubts on the decision in *Item Software*. She stated that *Item Software* 'suggests that it is a further breach of the duty of loyalty not to disclose … disloyal breaches to the fiduciary's principal. The logic in this is not compelling.'

Newey J (as he then was) in *GHLM Trading Ltd v Maroo*[212] discussed this point:

> '[193] As was mentioned in *Brandeaux Advisers (UK) Ltd v Chadwick* [2011] IRLR 224 at [47], *Item Software v Fassihi* is a somewhat controversial decision. Arguably, it breaks new ground in treating a fiduciary duty as prescriptive rather than merely proscriptive. Its result can perhaps now be justified also by reference to s 172 of the Companies Act 2006, which came into force on 1 October 2007. The duty to promote the success of a company which that provision imposes can be said to be expressed in prescriptive terms (a director "must act in the way he considers, in good faith, would be most likely to promote the success of the company"; my emphasis). Be that as it may, *Item Software v Fassihi* is clearly binding on me. I therefore proceed on the basis that a director's duty of good faith can potentially require him to disclose misconduct.'

Newey J continued:

> '[195] … it can be incumbent on a fiduciary to disclose matters other than wrongdoing. The "single and overriding touchstone" being the duty of a director to act in what he considers in good faith to be in the best interests of the company (to quote from Etherton J in *Shepherds Investments Ltd v Walters* [2007] 2 BCLC 202 at [132]), there is no reason to restrict the disclosure that can be necessary to misconduct. Were a director subjectively to consider that it was in the company's interests for something other than misconduct to be disclosed, he would, it appears, commit a breach of his duty of good faith if he failed to do so.'

It may be that this is a question of categorisation:

(a) Is there a positive a duty to disclose?
(b) If so, is it a fiduciary duty or just a trust or equitable duty or a statutory duty (with different remedies for breach)?[213]

This analysis on disclosure is amplified by Matthew Conaglen in 'Interaction between Statutory and Common Law Duties concerning Company Directors'.[214]

Ultimately it seems to me to be arguable that any disclosure duty on directors (whether of wrongdoing or generally) is connected with the duties on employees (and executive directors) rather than a general disclosure duty based on a 'best interests' duty. It would be better to leave any such duty to the usual care and skill provisions applicable to directors or where there is a conflict of interest already, for example as in *Item Software* itself, where the director was planning to start competing.

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211 2nd Ed, (Oxford University Press, 2006), at p 134 (fn 14).

212 [2012] EWHC 61 (Ch), [2012] 2 BCLC 369 (Newey J).

213 See Worthington, *supra* n 3 at p 130 and in 'Four Questions on Fiduciaries' (2018) 32 TLI 22 at 28 citing Millett LJ in *Mothew*, discussed above. See also Richard Nolan 'A Fiduciary duty to disclose?' (1997) 113 LQR 220, discussing *Breen v Williams* (1996) 186 CLR 71; and Kelvin Low 'Fiduciary duties: the case for prescription' (2016) 30 TLI 3. Arguing that any duty to act in the best interests of the beneficiaries is not a fiduciary duty, see Matthew Conaglen 'Fiduciary Loyalty' and Lusina Ho at p 12 in her paper 'Re-defining Trust for the 21st Century' given at the (2017) Singapore conference on 'The Use and Abuse of Trusts and other Wealth Management devices'.

214 (2013) 31 C&SLJ 403.

UK statutory duties for trusts and directors

There are few express statutory best interests duties under UK legislation applicable to trustees or directors as such (there are a number of duties in the family law context, eg in relation to children or mental capacity). There is, for example, no substantial express reference to best interests in the Trustee Acts[215] nor in the Companies Act 2006.

The Pensions Acts and subordinate legislation contain a major reference to 'best interests', in the 2005 Investment Regulations (see below). There are also some minor references to 'best interests' and some limited references to the 'interests' of members or beneficiaries.[216]

OPS Investment regulations/IORP Directive

There is also a rather unclear statutory 'best interests' obligation in reg 4(2)(a) of the Occupational Pension Schemes (Investment) Regulations 2005.[217]

For investment matters, art 18 of the EU Directive on Institutions for Occupational Retirement Provision[218] (commonly called the 'IORP Directive') deals with investment rules and states:

> '1. Member States shall require institutions located in their territories to invest in accordance with the "prudent person" rule and in particular in accordance with the following rules:
>
> (a) the assets shall be invested in the best interests of members and beneficiaries. In the case of a potential conflict of interest, the institution, or the entity which manages its portfolio, shall ensure that the investment is made in the sole interest of members and beneficiaries …'.

Article 6 defines a member as 'a person whose occupational activities entitle or will entitle him/her to retirement benefits in accordance with the provisions of a pension scheme' and beneficiary as 'a person receiving retirement benefits'. This looks to mean that the term beneficiary is arguably defined in the IORP Directive to exclude the employer.

This has been enacted in the UK by the 2005 OPS Investment Regulations,[219] which provide:

> '4. —(1) The trustees of a trust scheme must exercise their powers of investment, and any fund manager to whom any discretion has been delegated under section 34 of the 1995

215 The Trustee Act 2000 includes in s 15 some special restrictions if trustees use the implied power to appoint agents to exercise any investment management functions. One of these requires the trustees to prepare a policy statement giving guidance to the agent. The trustees must 'formulate any guidance given in the policy statement with a view to ensuring that the functions will be exercised in the best interests of the trust' – s 15(3).
Seemingly a subjective process test ('with a view to ensuring') and not an objective outcome test and noticeable for referring to the 'best interests of the trust' (and not the 'best interests of the beneficiaries').

216 See, eg s 37(3)(d) of the Pensions Act 1995 as one of the conditions before a payment is made to an employer: '(d) the trustees are satisfied that it is in the interests of the members that the power is exercised in the manner proposed'.

217 SI 2005/3378.

218 Directive on Institutions for Occupational Retirement Provision (2003/41/EC).

219 Regulations 4(1) and 4(2) of the Occupational Pension Schemes (Investment) Regulations 2005 (SI 2005/3378). Made under s 245 of the Pensions Act 2004.
Regulation 2A of the same regulations (inserted from 6 April 2015 by reg 20(b) of the Occupational Pension Schemes (Charges and Governance) Regulations 2015, SI 2015/879) now requires trustees to include aims and objectives and

Act (power of investment and delegation) must exercise the discretion, in accordance with the following provisions of this regulation.

(2) The assets must be invested—

(a) in the best interests of members and beneficiaries; and
(b) in the case of a potential conflict of interest, in the sole interest of members and beneficiaries.'

Regulation 4(11) then defines beneficiary in a way that seems intended to exclude an employer:[220]

'"beneficiary", in relation to a scheme, means a person, other than a member of the scheme, who is entitled to the payment of benefits under the scheme.'

It remains to be seen how this will be interpreted by the courts. It raises issues similar to those discussed above in relation to a literal 'best interests' duty:

(a) Is it a subjective or objective test? Does it impose a statutory duty of care?
(b) Does it look back in retrospect as to what in fact turns out to be the right investment? Or will a court construe the obligation to relate to the knowledge of the trustees or fund manager at the time of the decision? Perhaps the term 'must be invested' can be construed to reflect that?
(c) What remedies apply? Is a breach of the statutory duty actionable by a beneficiary?
(d) Are the interests and view of the employer relevant? Increasingly the level of risk being undertaken by a pension scheme is a matter in which the employer has a great interest. This is outside this article.[221]

It may be that this limitation (not reflected in any other material pensions statutory provision – see above) allows the interest of the employer still to be something that the trustees should take into account in a similar manner to Lightman J in *Fuller v Evans* in relation to a 'no benefit' provision in a private trust.

In *Fuller v Evans*[222] a private family trust included an express provision (in clause 12) that there should be no benefit for the settlor. The settlor was obliged to pay the school fees of his children (who were beneficiaries under the trust). Could the trustees meet that obligation by making an advance out of the trust? Lightman J held that this was proper and would not infringe the 'no benefit for the settlor' clause in the trust. Lightman J held:[223]

'The first stage is to consider what the position would have been if the settlement had not included cl 12. In that situation in the exercise of the power in question in

cont.
policies in relation to any default arrangement within their statement of investment principles (SIP) and to include 'an explanation of how the aims and objectives … and policies … (together 'the default strategy') are intended to ensure that assets are invested in the best interests of the group of persons consisting of relevant members and relevant beneficiaries.' This is obviously a cross reference to reg 4.

220 Although query if it does so. Employers can directly benefit by way of payment from occupational pension schemes, for example surplus on a winding-up or under lien rules.

221 See Pollard, *supra* n 3 at Ch 10.

222 [2000] 1 All ER 636 (Lightman J).

223 At para 5.

this case (as in the exercise of all other powers) the trustees would be required to have regard exclusively to the interests of the beneficiaries, and could not seek by the exercise or non-exercise of the power to promote the interests of anyone else, and most particularly the settlor. It would be open to the trustees to decide that the power be exercised though the effect would be to relieve the settlor in whole or in part of his obligations under the consent order, but they could not set out to benefit the settlor by affording him relief in this way. If the exercise of the power was in the best interests of the beneficiaries, the trustees might exercise the power though the exercise incidentally relieved the settlor in whole or in part from his obligations, but they could not allow the perceived advantage to the settlor to be a factor favouring its exercise.'

Reading this passage with 'employer' instead of 'settlor' is enough to show that the position of pension trusts looks very different from those of private trusts.[224]

Australia statutory intervention and case law

I am not an Australian lawyer and therefore feel diffident about interpretation of Australian statute law. But generally the tests for interpretation look to me from the cases to be broadly similar between the UK and Australia.

There are various statutory best interests duties under Australian law. An example is in s 52(2)(c) of the Superannuation Industry (Supervision) Act ('SIS Act'):

'SIS Act, s52

(1) Governing rules taken to contain covenants
If the governing rules of a superannuation entity do not contain covenants to the effect of the covenants set out in subsection (2), those governing rules are taken to contain covenants to that effect.

(2) The covenants
The covenants referred to in subsection (1) are the following covenants by each trustee of the entity:

- (a) to act honestly in all matters concerning the entity;
- (b) to exercise, in relation to all matters affecting the entity, the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide;
- (c) <u>to ensure that the trustee's duties and powers are performed and exercised in the best interests of the beneficiaries</u> ;
- (d) to keep the money and other assets of the entity separate from any money and assets, respectively:
  - (i) that are held by the trustee personally; or
  - (ii) that are money or assets, as the case may be, of a standard employer sponsor, or an associate of a standard employer-sponsor, of the entity;

224 See similarly Asplin J in *MNRPF* [2015] EWHC 448 (Ch) at [230].

(e) not to enter into any contract, or do anything else, that would prevent the trustee from, or hinder the trustee in, properly performing or exercising the trustee's functions and powers;

(f) to formulate and give effect to an investment strategy that has regard to the whole of the circumstances of the entity including, but not limited to, the following:

  (i) the risk involved in making, holding and realising, and the likely return from, the entity's investments having regard to its objectives and its expected cash flow requirements;

  (ii) the composition of the entity's investments as a whole including the extent to which the investments are diverse or involve the entity in being exposed to risks from inadequate diversification;

  (iii) the liquidity of the entity's investments having regard to its expected cash flow requirements;

  (iv) the ability of the entity to discharge its existing and prospective liabilities;

(g) if there are any reserves of the entity-to formulate and to give effect to a strategy for their prudential management, consistent with the entity's investment strategy and its capacity to discharge its liabilities (whether actual or contingent) as and when they fall due;

(h) to allow a beneficiary access to any prescribed information or any prescribed documents.'

This statutory provision is extensively discussed by Scott Donald in '"Best" Interests'[225] and by Joseph Campbell (extra-judicially[226]) in 'Some Aspects of the Civil Liability Arising from Breach of Duty by a Superannuation Trustee'.[227] Joseph Campbell points out that the statutory SIS provisions were substantially amended in 2013, but to me the new version of s 52(2)(c) seems very similar.[228]

A statutory best interest duty does not extend the common law duty on trustees: see *Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd*[229] per Giles AJ at [121]. This was followed in *Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Beck*[230] per Bathurst CJ at [136].

225 (2008) 2 Journal of Equity 245. See also Paul Collins 'The best interests duty and the standard of care for superannuation trustees' (2014) 88 ALJ 632 and Roland Sackville 'Duties of superannuation trustees: from equity to statute' (2013) 37 ABR 1.

226 J C Campbell is a former judge of the New South Wales Court of Appeal.

227 (April 2017) Sydney Law School Research Paper No 17/31, (2017) 44 ABR 24. Based on a paper given at the conference of the Superannuation Committee of the Law Council of Australia in March 2017. See also Justice Mark Moshinsky (extra-judicially) in 'The continuing evolution of the "best interests" duty for superannuation trustees from Cowan v Scargill to the current regulatory framework', a paper given at the Superannuation Committee conference in March 2018. On the Federal Court website at http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-moshinsky/moshinsky-j-20180309.

228 The words 'to ensure' have been deleted, but it seems that they were not considered to add very much: *Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd* [2011] NSWCA 204; 282 ALR 167 per Giles AJ at [121]. See *Jacobs' Law of Trusts in Australia,* 8th Ed (LexisNexis, 2016) at [29-21].

229 [2011] NSWCA 204; 282 ALR 167.

230 [2016] NSWCA 218.

Invensys (2006)

In 2006 in *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd*[231] Byrne J dealt with a proposal to amend the trust deed of a superannuation fund in a way permitting distribution of part of a surplus to non-beneficiaries. Byrne J held that s 52(2)(c) of the SIS Act would not prevent the amendment. In *Manglicmot*, Giles AJ summarised the case that Byrne J held that the amendment would not be a failure to perform and exercise the trustee's duties and powers in the best interests of the beneficiaries, essentially because in the circumstances distribution to the non-beneficiaries could reasonably be regarded as in the interests of beneficiaries.

Byrne J held, as to s 52(2)(c):

> '[102] The scheme of s 52 is to insert in the trust deed eight covenants. It was not suggested that the trust deed already contained a covenant such as that in para (c). The Parliamentary Secretary to the Treasurer informed the House of Representatives in the course of the second reading debate of the SIS Bill that these provisions were intended as codification of the existing law: 'to make nice and clear the way in which we expect these people [presumably trustees of superannuation funds] to act'. The difficulty with this brave statement, in so far as it concerns para (c), is that it is not altogether clear what is here being codified and whether the drafter of the code has accurately stated the existing law.
>
> [103] Unlike the surrounding paragraphs, para (c) is introduced by the words 'to ensure that'. This means that the statute is inserting into the trust deed a covenant whereby 'the Trustee agrees to ensure that the Trustee's duties and powers are performed and exercised in the best interests of the beneficiaries'. Elsewhere in the SIS Act, the word 'ensure' is employed to impose an obligation upon a director to cause a company to act in a particular way or upon a person or company to achieve a stipulated objective. It is difficult to see how these words add anything to a covenant by a trustee simply to perform and exercise its duties and powers in the best interests of the beneficiaries.
>
> [104] This becomes even more obscure when the covenant is read as extended by s 52(8) to the directors. This has the consequence that the director covenants 'to exercise a reasonable degree of care and diligence for the purpose of ensuring that the Trustee ensures that the Trustee's duties and powers are performed and exercised in the best interests of the beneficiaries'.
>
> [105] Perhaps the best that can be made of these apparently superfluous words 'to ensure that' in para (c) is that Parliament intended that they emphasise the seriousness of this covenant and the requirement that it be strictly observed.
>
> [106] It is worth noting at the outset that the insertion by s 52(2) of particular covenants into the trust deed does not affect the other obligations imposed upon trustees whether by the deed of trust or by the general principles of law except, perhaps, to the extent of some inconsistency.
>
> [107] The covenant inserted into the trust deed appears to be an amalgam of two distinct obligations said to be imposed by law upon trustees of a superannuation fund. The first,

231 [2006] 15 VR 87 (Byrne J).

which is sometimes referred to as the duty of loyalty or the duty of fidelity to the trust, is that to act in the interests of the beneficiaries; that their interests are paramount and must certainly be placed ahead of the trustee's own interests. Nor may the trustee have regard to considerations which are extraneous to the trust. The second is to pursue to the utmost with appropriate diligence and prudence the interests of the beneficiaries. This will commonly come into play where it is a question whether the trustee of a trust whose objective is to confer financial benefits on beneficiaries has sufficiently pursued these financial interests. And so, in *Cowan v Scargill*, Megarry V-C said this:

> "… The starting point is the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries."

and later:

> "Trustees must do the best they can for the benefit of their beneficiaries and not merely avoid harming them."

It is not altogether clear whether para (c) is intended as a codification of one or other or both of these principles. As will appear, it is not necessary that I unravel this.'

Manglicmot (2011)

In 2011 in *Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd*,[232] Giles JA held that the statutory covenant in s 52(1)(c) did not 'materially add to breach by the respondent of its general law duty to act in the best interests of members of the Fund'. He held:

> '[121] Nor in my opinion does s 52(2)(c) materially add to breach by the respondent of its general law duty to act in the best interests of members of the Fund. The respondent's general law obligation could be expressed, in the language of s 52(2)(c), as an obligation to perform and exercise its duties and powers in the best interests of the beneficiaries. The words "to ensure" add nothing; an obligation is an obligation. Again, the respondent was exercising a discretionary power, and "to ensure" does not turn the question of exercise of a discretionary power into one of strict liability. There is liability if the discretionary power is exercised improperly, but otherwise there is not.'

Prime Trust: ASIC v Australian Property Custodian Holdings (2013)

From 2013, *ASIC v Australian Property Custodian Holdings*[233] is a decision of the Australian Federal Court discussing the statutory 'best interest' duty in Australia imposed by legislation[234] on a relevant entity (RE) of a managed investment scheme. Murphy J held:

> '[463] It is difficult to discern the outer boundaries of the best interests duty from the text of the provisions alone. For example, the expression may be argued to indicate a requirement

232 [2011] NSWCA 204; 282 ALR 167 *per* Giles JA at [121].

233 *Supra* n 80 at (Murphy J). Discussed by Simun Soijo in his paper 'Case law review' given to the 2014 Superannuation Conference (Law Council of Australia).

234 Part 5C of the Corporations Act 2001 (Cth), as prescribed in s 601FC.

> that the RE meet the "highest" standard rather than just a high standard. It may also be argued to set a requirement for the RE to obtain an objectively determined "best" outcome rather than requiring the best efforts of the RE. I am disinclined to such a view because such meanings may cause real difficulties for a trustee in performing his or her role. It is not clear to me how in many common circumstances the "highest" standard is to be determined let alone met, or how any requirement to achieve an objectively determined "best" outcome sits with the general law obligation on a trustee to act with care, competence and caution. The language of the statute alone does not make clear where the boundary lies and it is appropriate to consider the meaning of the term under general law.
>
> […]
>
> [488] I do not though wish to be seen as accepting the proposition that to act in the members' best interests a trustee must actually achieve the best outcome. A trustee is not required to be prescient: *Re Chapman* [1896] 2 Ch 763 at 778; *De Bruyne v Equitable Life Assurance Society of the US* [1990] USCA7 1116; 920 F 2d 457 (7th Cir 1990) at 465; *Nestle v National Westminster Bank Plc* [1994] 1 WLR 1260 at 1282.'

Murphy J's decision was cited by counsel in *MNRPF* and discussed by AsplinJ in that case. As noted above, Asplin J held (at [229]) that a purpose test is the right test following *Cowan v Scargill* and *Harries v Church Commissioners* and that this was supported by the decision of Murphy J:[235]

> 'in *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd (No 3)* in which Murphy J made comments which were obiter in which he described the principle as a "portmanteau". The learned Judge's comments were made in the context of his consideration of a statutory duty to act in the best interests of the members of a trust. He explored the common law and equity in some depth and concluded that the statute did not extend beyond the general law. If by his conclusion that the "best interest duty" operates "in combination with other duties" he meant that it flows from and is moulded by the trustee's obligation to promote the purpose for which the trust was created, I agree.'

Beck (2016)

Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Beck[236] per Bathurst CJ:

> '126. The appellants submitted that the trustee's duty to act in the best interests of the beneficiaries was not an unqualified duty always to do what is financially best for a member or group of members. It pointed out that if that was the case, it would always be necessary for a trustee to ensure its discretion under cl A11.3 be exercised in favour of the member in question. They submitted that an amendment does not fail to be in the best interests simply because it removes a beneficial discretion which is only to be exercised in exceptional circumstances.'

235 Asplin J had (at [185]) previously cited the extract from para [484] of the decision of MurphyJ in *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd (No 3)*.

236 [2016] NSWCA 218 per Bathurst CJ at [126].

In *Beck*, it was common ground that the covenants in s52(2)(c) of the SIS Act did not expand the general law. Bathurst CJ held:

> '136. It was common ground between the parties, both on the appeal and in the Court below, that the covenants in s 52(2)(c) of the SIS Act did not expand the general law. It should be noted that there was no allegation that, in exercising its discretion to make the amendment, the trustee of the Old Colonial Fund contravened s 52(2)(b) of that Act. In *Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd* [2011] NSWCA 204; 282 ALR 167, Giles JA with whom Young and Whealy JJA agreed, stated that s 52(2)(c) does not materially add to the general law duty of the trustees to act in the best interests of the fund. He stated that, in dealing with the discretionary power, liability arises if the discretionary power is exercised improperly but otherwise it does not: at [121]. In *Karger v Paul* [1984] VicRp 13; [1984] VR 161, McGarvie J stated that the exercise of a discretion by a trustee will not be reviewed if the discretion is exercised in good faith upon real or genuine consideration and in accordance with the purposes for which the discretion was conferred: at 163.'

Conclusion

This article has sought to explain the difficulties that arise when the duties on a fiduciary, such as a trustee or director, are encapsulated in the seductively simple formulation that he or she must 'act in the best interests of the beneficiaries'. This formulation has been used in many judgments, but runs the risk that it will (understandably) be taken literally and used out of context, by beneficiaries, in legislation or by advisers.

A better formulation is to expand the wording (to bring it more into line with company law) on the following lines:

> 'Trustees (or directors) must:
>
> > Broadly, exercise their powers within the terms of the trust/company constitution and for a proper purpose and for what they consider, in good faith, to be most likely to promote the success of the trust/company.'

A bit longer than the simple formulation, and a bit over the Twitter 140-character limit. But much less likely to mislead and confuse.