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Talk papers

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Contents

Speakers

John McGhee KC
John maintains a wide and varied practice in the fields of modern commercial chancery work. He is well known for his acute intellectual analysis of problems and mastery of the detailed facts of a case as for his robust, practical and commercially realistic advice. Through his editorship of Snell's Equity (which is the leading textbook on equitable principles in common law jurisdictions) and his experience in multi-jurisdictional disputes John is frequently involved in cases overseas. Recent cases have included acting in the *Shlosberg* litigation for a Liechtenstein foundation in connection with a £200m claim against a wealthy Russian businessman. John is listed in The Lawyer Hot 100 2023 and Chambers & Partners 2023 says John is *"encyclopaedic in his approach"* and describes him as "*a leading light*".

Gilead Cooper KC
Gilead is ranked as a leading silk in various categories of the Legal 500 and Chambers & Partners. He is also featured in Legal Week's Private Client Global Elite and the City Wealth Leaders List of "*Top 10 Trust Litigation Barristers*". Gilead's practice has a strong international element. He has appeared in the courts of Hong Kong, the BVI, Bermuda, Cayman, and Nevis, and is regularly involved in litigation in Jersey, Guernsey, the Isle of Man, and Gibraltar. Gilead specialises in complex, high-value disputes, often involving allegations of fraud, breaches of trust and fiduciary duties, and professional negligence. The Legal 500 2023 described Gilead has *"brilliant"*, with *"an incredibly quick mind, great intellectual powers, and at the same time a wonderful capacity for creative, strategic thinking."* Chambers & Partners 2023 says that *"Gilead's knowledge and attention to detail are second to none"* and that he *"has rapier-like intellect"*, characteristics that make him *"one of the great lateral thinkers of the Chancery Bar"*.

Thomas Lowe KC
Tom's expertise is primarily in insolvency and corporate/shareholder disputes. Although Tom is now based in the Cayman Islands, he continues to be a member of Wilberforce. He has appeared in dozens of landmark cases in England and offshore. As well as substantial trial experience he has always had a strong practice in appellate courts including the Privy Counsel.

Fenner Moeran KC
Fenner has a broad-based chancery/commercial practice, which spans trusts, civil fraud and asset recovery work. With regard to asset recovery cases, Fenner has extensive experience of obtaining and defending freezing, search, disclosure (including third party disclosure) and gagging orders. His clients range from international financial institutions, to regulatory bodies to individual financial traders and customers. The Legal 500 2023 describes Fenner as *"a great advocate who really has the ear of the court"*. Chambers & Partners 2023 notes that *"clients love working with him as he is easy to work with and charming"* and that he is *"able to get quickly to the nub and heart of complex issues, but without losing sight of the big picture"*.

Clare Stanley KC
Clare was awarded 'Chancery Silk of the Year' at the Chambers & Partners UK Bar Awards 2022, and was also nominated in the same category at The Legal 500 Awards 2022. Her practice focuses heavily on three key areas: commercial/business disputes, professional liability, and private client/trust litigation. Clare is usually instructed in highly contentious and often hostile disputes, and provides advice across the range of areas in which she practices, helping clients to achieve their commercial aims without the need to prolong litigation. Praised for her written and oral advocacy, she is often involved in actions brought onshore and offshore in litigation involving claims for breach of trust and fiduciary duty, cross-border insolvency and major fraud cases. The Legal 500 2023 praises Clare as "*a formidable advocate*" whose *"preparation is as thorough as it is possible to be, and her oral presentation is both forceful and compelling"*.

James Bailey KC
James has developed a successful practice focused on commercial chancery, civil fraud, international arbitration, insolvency and company matters. James is said to have *"great attention to detail"* and to be *"very clear in dealing with clients"* and *"not afraid to take the lead in cases* (The Legal 500 2023). He is also noted for his advocacy*:* James is praised for his *"really attractive style in court"* and his *"creative and intelligent"* arguments (Chambers & Partners 2023). James's work has a significant international dimension including cases relating to the Cayman Islands, the Bahamas, the U.S., Switzerland, Slovenia, North Macedonia, Italy, South Korea, Hong Kong and Japan. He has also been instructed as an expert on matters of English law in courts abroad. Chambers & Partner 2023 praises James as *"a barrister who can rescue the client from a tight corner".*

Daniel Lewis
Daniel practises in the fields of restructuring and insolvency, company law and commercial dispute resolution, including arbitration. In both the insolvency and company law fields, he is highly experienced in bringing and defending claims against directors, including claims for misfeasance / breach of duty, asset recovery cases and disqualification proceedings. He regularly acts on claims against directors arising from participation in tax schemes and tax evasion. His insolvency practice has a particular emphasis on cases with an international element, particularly offshore asset recovery cases. Chambers & Partners 2023 says Daniel is *"a fantastic advocate and an expert in his field"*. They added that *"he is excellent with clients and very much at ease in court"* , which makes him *" a pleasure to work with".*

Tom Roscoe
Tom's practice spans commercial, trusts and property disputes in the UK and abroad, frequently raising issues of fraud, insolvency and asset tracing. Tom regularly appears as sole counsel in a range of domestic and international courts and tribunals. He also undertakes a broad range of advisory and drafting work. Tom's practice has an increasingly international focus and he has recent experience on substantial disputes (litigation and arbitration) in the Caribbean, Channel Islands and DIFC. That experience builds upon secondments in Guernsey, Cayman and the BVI. He maintains a practicing certificate in the BVI and is a Registered Part II Legal Practitioner in the DIFC Courts. Chambers & Partners 2023 describes Tom as *"a superb junior and an excellent advocate with a very bright future".* He was also praised for being *"very clever, extremely confident and very well prepared"*, as well as *"a pleasure to work" with "no airs and graces".*

Harriet Holmes
Harriet's practice covers property disputes before the domestic courts and tribunals and other jurisdictions. Harriet has been recommended by the leading directories as a leading practitioner since she was three years into practice. She has been repeatedly noted for being a formidable advocate who brings with her both technical ability and commercial astuteness. In 2021, Harriet was one of three finalists for Real Estate Junior of the Year at the Chambers & Partners Bar Awards. She sits on the Bar Council as part of the Regulatory Review Working Group. The Legal 500 2023 describes Harriet as *"extremely bright and a tenacious advocate", "a silk in the making"*. Chambers & Partners 2023 praises her for being *"extremely thorough"*, as well as *"commercial, down to earth and client-friendly"*.

Rachael Earle
Rachael specialises in insolvency and commercial disputes (with a focus on company and civil fraud work). Her practice encompasses all areas of individual and corporate insolvency and she has extensive experience of complex misfeasance claims (she is due to appear in the BHS trial later this year which is understood to be the highest value insolvency claim of 2023 in England & Wales). Rachael's company and commercial cases typically involve allegations of fraud and dishonesty and she regularly deals with applications for freezing injunctions and other urgent interim relief. Rachael is ranked as a leading junior in both The Legal 500 and Chambers & Partners.

Tara Taylor
Tara has developed a broad commercial chancery practice, with a particular focus on general commercial disputes including civil fraud, insolvency, shareholder disputes and offshore work. She is frequently instructed in high-value commercial matters with significant offshore and multi-jurisdictional dimensions, as well as those involving complex trust structures, claims for breach of fiduciary duty and breach of trust. Tara has previously spent time on secondment in the dispute resolution team at a leading international law firm in the Cayman Islands, where she worked on a number of commercial, company and insolvency related matters. The Legal 500 praises Tara for being *"able to succinctly outline complex legal questions for the court"*.

Jia Wei Lee
Jia Wei is a commercial chancery practitioner, with a particular focus on commercial, fraud, trusts and pensions work. Much of his practice spans across jurisdictions and involves a wide range of both contentious and advisory work, and he is comfortable being instructed as part of a team, or in his own right. What underlies his caseload is its complexity and cross-disciplinary nature. It typically entails the application of novel questions of law, requiring a bold and inventive approach. His work straddles jurisdictions, requires the application of foreign law, and involves the application not just of civil fraud principles but also property and insolvency law. Jia Wei has been admitted to the New York State Bar and is fluent in written and spoken Mandarin Chinese.

Francesca Mitchell
Francesca has a dynamic commercial chancery practice including commercial, property, company, insolvency, trusts and pensions. She is regularly instructed as sole counsel in the High Court and County Court, as well as being a brilliant team player within a larger counsel team. Francesca accepts instructions in all of Chambers' main practice areas. A client of Francesca's describes as *"a tenacious barrister", "extremely intelligent and an absolute pleasure to work with"*. Another said that she is the *"junior-of-choice for disputes work"*.

Daniel Petrides

Daniel already has a thriving commercial chancery practice spanning all of Chambers' core practice areas. He frequently appears as sole counsel in both the High Court and the County Court, as well as retaining a focus on drafting and advisory work. Many of his cases have an international dimension and he has experience of ADR procedures, including arbitration. He is equally comfortable acting alone or as part of a larger team. In the commercial context, he has a particular interest in cases involving allegations of fraud or dishonesty), and in the trusts context, he has assisted on a number of cases involving complex questions of international succession law. The Legal 500 2023 praises Daniel for being *"able to pick up esoteric areas of law very quickly"* and says he *"is happy to get stuck in and assist wherever a job needs to be done."*

Costs out of disputed property: tips for professionals to make sure they get paid

Fenner Moeran KC (with written contribution from Graeme Halkerston)

Trustees' costs and fees out of disputed property

Fenner Moeran KC

The Problem:

1. The problem is a perennial one.
   (i) A trustee is appointed over funds.
   (ii) Sometime after that appointment it discovers that there is a third party making a proprietary claim to the trust funds.
   (iii) And just to make it absolutely clear, the third party is telling the trustee not to do anything, and that it will seek to recover any sums paid out by the trustee from the trustee personally – including costs and expenses.
   (iv) On the other side, the ostensible beneficiaries are telling the trustee to get on with administering the trust fund, and make appointments out to them.

2. What is the trustee to do? Leaving aside the question of distributions, the trustee may well need to perform administrative actions, simply to protect the trust property. And of course, they are going to want to take their fees for such actions. But if they pay their expenses and disbursements, let alone their fees, out of the contested fund then they might turn out to be liable to the third party on one of two bases:
   (i) First – on the basis of constructive trusteeship. They would have to account for the trust property and where the assets are no longer in their hands their duty to reconstitute the trust fund would be a personal liability on them.
   (ii) Secondly – on the basis of the principle set out in the Privy Council case of Guardian Trust and Executors Company of New Zealand Ltd -v- Public Trustee of New Zealand [1942] AC 115.

3. The first basis is no doubt well known and understood to practitioners. Leaving aside personal liability on the basis of knowing assisting in dishonest breach of trust, a trustee can be held liable as a constructive trustee on the basis of knowing receipt if:
   (i) There is property subject to a trust.
   (ii) The property is transferred.
   (iii) The transfer is in breach of trust.
   (iv) The property (or its traceable proceeds) is received by the defendant.
   (v) The receipt is for the defendant's own benefit, or at least in a non-ministerial capacity.
   (vi) The defendant receives the property with knowledge that the property is trust property and has been transferred in breach of trust, or if not a *bona*

fide purchaser of a legal estate without notice, retains the property, or deals with it inconsistently with the trust, after acquiring such knowledge.

4. Three points are worth noting in this respect.

5. First, in relation to the fifth requirement (non-ministerial receipt), some say that El Ajou v Dollar Land Holdings Plc [1993] 3 All ER 717 at 738d is English authority that because trustees do not receive property beneficially this would not apply to them; and see also the Isle of Man decision supporting that in *Savings and Investment Bank Ltd v Fryers [1990–92] M.L.R. 339* at 362. I personally disagree that that is what El Ajou says, but at the very least Lewin on Trusts (20th edition) says this at paragraph 42-061. However, on the other side is re Diplock [1948] Ch 465, which held that charitable trusts could be liable for knowing receipt. And there is both New Zealand and Australian authority that trustees (at least of anything more than a bare trust) are liable to knowing receipt claims on the basis that they are not mere agents, but receive the property as principals; see *Nimmo v Westpac Banking Corporation [1993] 3 N.Z.L.R. 218* at 226, *Springfield Acres Ltd v Abacus (Hong Kong) Ltd [1994] 3 N.Z.L.R. 502*, and *Quince v Varga [2008] QCA 376; 11 I.T.E.L.R. 939* at [2]–[4] and [54]. My personal view is that the point is quite clear – trustees can be liable for knowing receipt.

6. Secondly, this has given rise to seriously difficult questions as to what knowledge is sufficient to ground a claim in knowing receipt. The rule is now well known and understood as that set out in BCCI v Akindele [2001] Ch 437 as "*the recipient's state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt*". But that just begs the question of what knowledge ***is*** sufficient to make it unconscionable for them to hold on to the property?

7. That question is particularly highlighted in the case of solicitors acting for clients where there is a claim of property having been transferred in breach of trust. If the solicitors are paid their fees and disbursements out of those funds, then they are clearly potentially liable for knowing receipt themselves. Probably the leading case on this issue is Carl-Zeiss Stiftung v Herbert Smith & Co (No.2) [1969] 2 Ch 276. This was a case arising out of the partition of Germany into East and West Germany after World War II. The Carl-Zeiss lens business ended up divided between the two geographically. Both East and West German businesses then continued to operate, but under different companies. The East German business sued the West German one, claiming the latter held all its assets and property on trust for the former. This litigation went on for years (ultimately unsuccessfully) but whilst it was ongoing the East German company sought to claim against the West German firm's solicitors – Herbert Smith - for all monies they had received from their client. The argument was that as the firm was acting in the litigation it clearly knew all about the East German company's claim, and was liable on the basis of what would now be called knowing receipt.

8. The claim was struck out at first instance by Pennycuick J on the basis of public policy. East Germany appealed, and lost at the Court of Appeal on different grounds. (It's

worth noting that the public policy decision of first instance was not overturned, with all three judges avoiding making a decision on it – but at least Dankwerts LJ thought that there was "*a good deal to be said for this contention*".) Instead, the CA held that simply knowing about the claims is not enough to base a claim against the solicitors. Dankwerts LJ puts it quite clearly:

> "*[The East German company says…] They [the West German company's solicitors] knew that claims were being made against the West German foundation that all their property and assets belonged to the plaintiffs or were held on trust for them.* ***But claims are not the same thing as facts.*** *Mr. Harman contended that for the purposes of the present issue all the allegations contained in the statements of claim in both the actions must be taken as true. That will not do.* ***What we have to deal with is the state of the defendant solicitors' knowledge (actual or imputed) at the date when they received payments of their costs and disbursements. At that date they cannot have had more than knowledge of the claims above mentioned. It was not possible for them to know whether they were well-founded or not. The claims depended upon most complicated facts still to be proved or disproved, and very difficult questions of German and English law.*** *It is not a case where the West German foundation were holding property upon any express trust. They were denying the existence of any trust or any right of property in the assets claimed by the plaintiffs.* ***Why should the solicitors of the West German foundation assume anything against their clients?***
>
> ***"Consequently, it seems to me that the plaintiffs' claim against the defendant solicitors must fail on the requisite condition of knowledge or notice.***"

9. Of course, that position might change as a matter of fact as more and more evidence piles up. And sometimes, it is pretty obvious that your client is a fraudster. You still represent them – it is not for you to make that decision. But you may well have sufficient knowledge to amount to knowledge of a clear claim.

10. Since Carl-Zeiss there has been BCCI v Akindele, which must set the relevant standard for a solicitor just as much as for anybody else. But it still remains a question as to what level of knowledge of third party claims meets the "unconscionability" test. There is surprisingly little guidance to be found.

11. Lewin on Trusts (20th edition) has suggested that the relevant standard of knowledge that would prevent distributions where there were claims against the property would be that the principal claim is sufficiently clear to have justified the court in preventing the person against whom the claim is made from dealing with the property; see at paragraph 24-031. This is apparently on the basis of comments in Carl-Zeiss. However, those comments to my mind simply amount to this:
    (i) There was not enough certainty in the outcome of the claim overall to allow for an injunction to prevent Herbert Smith representing the West German company. But even if it were possible **at all** it would of course have required something approaching total certainty that the East German claim would succeed; and

(ii) The subject matter was all the West German company's assets, so no injunction preventing it from using those funds to pay legal expenses could have been granted.

Accordingly, I doubt that this test is well founded in authority.

12. Lewin also suggests that the claimant must give some good reason why he had not sought such an order before proceedings against the present defendant, and notes that neither criterion was satisfied in Carl-Zeiss. However, even if the injunction standard applies that raises a different problem – the availability of injunctive relief may well depend in part on the availability of other funds to pay for the litigation.

13. It is also worth remembering that if there is a freezing injunction applied over the funds, with the usual provision for legal expenses (say on notice to the other side), merely complying with the terms of the order does not in itself prevent a solicitor from becoming liable either:

(i) As a constructive trustee of any proprietary funds still held by the solicitor; or

(ii) On the basis of knowing receipt for funds which passed through their hands.

In this respect, see for example United Mizrahi Bank Ltd v Doherty [1998] 1 WLR 435. In the modern world, I have no doubt that merely complying with money laundering and/or sanctions requirements would equally not in and of itself provide a defence to a knowing receipt claim.

14. In Armstrong DLW GmbH v Winnington Networks Ltd [2013] Ch 156 liability for knowing receipt was held to exist where, even without actual knowledge of the fraud in question "*the relevant personnel at Winnington were actually aware that there was a* ***possibility*** *that Zen did not have title to, or authority to sell, the EUAs and that they consciously and deliberately "closed their eyes" to that risk or possibility*" (emphasis added). But was it only because the knowledge of the possibility of the third party claim was in conjunction with deliberately closing their eyes, or would simply the knowledge of a possible claim have sufficed? It is not clear.

15. Overall, therefore, the precise cut off point for where knowledge of a potential claim becomes dangerous is far from clear. The cautious (and I suspect, correct) approach would be to assume that knowledge of facts that would amount to showing a real possibility of the claim being valid is sufficient to trigger the knowing receipt jurisdiction. And quite possibly knowledge of less facts – facts insufficient to prove a real possibility of a claim - if they put one on notice and in the face of such a position one exercised Nelsonian blindness and closed one's eyes to other evidence that would prove that real possibility.

16. The result is that in practice I would be (and am) very cautious before acting in cases of allegations of knowing receipt and taking payment out of the disputed funds in almost any circumstances. And it appears to me that it would be sensible advice to any trustee that anything other than the most spurious of proprietary claims should be dealt with very, very carefully. See below as to practical possible solutions.

17. The third point about knowing receipt claims is that they only work where there is a distribution in breach of trust. But what about other situations where there is a proprietary interest? For example:
    (i) An executor under a will hears that their will might not be valid – say, it might have been superseded by a later will which did not appoint them as executors.
    (ii) If they have obtained possession of estate property using their purportedly valid will, but it turns out that the later will is valid and they were therefore not properly entitled to hold the property / pay out a bequest. In fact, the properly appointed executors had title. And furthermore, the beneficiaries would have a right to have the estate properly administered in accordance with the true will.

18. There is no knowing receipt claim, but even without such a risk the need for caution on the part of trustees arises out of what was described as a "*well established*" principle of equity in Guardian Trust where Lord Romer said (at
    "*… [I]f a trustee or other person in a fiduciary capacity has received notice that a fund in his possession is, or may be, claimed by A, he will be liable to A if he deals with the fund in disregard of that notice should the claim subsequently prove to be well founded*."

19. In the Guardian Trust case, a bank executor paid legacies under a will after it had received notice from the next of kin (in response to a statutory advertisement) that they **possibly** intended to challenge the will, and that they disputed testamentary capacity. The executors paid out (actually after the next of kin had said they would make a decision and inform the executors, but without further warning to the next of kin) and was made personally liable to account for the amount of the legacies so paid after the next of kin's challenge proved successful and the grant to the executor was revoked.

20. The precise origin or basis of this principle is far from clear. It was not explained in either the New Zealand Court of Appeal, nor in the Privy Council. However, it does seem clear that it is an established principle, which has been applied or cited in England in several cases[1], in Australia[2] and now in Cayman in at least one case; re The X Trust and The Y Trust FSD 57 of 2022.

[1] Applied in Lane v Cullens Solicitors [2011] EWCA Civ 547; [2012] Q.B. 693 and in Von Westenholz v Gregson [2022] EWHC 2947, cited in Global Currency Exchange Network Ltd v Osage 1 Ltd [2019] EWHC 1375 (Comm); [2019] 1 W.L.R. 5865 at [79]–[83].

[2] Dickman v Holley [2013] NSWSC 18

21. But what state of knowledge is necessary before the Guardian Trust principle is triggered? In Guardian Trust Lord Romer simply described the state of knowledge as being

    "*... of such a nature that no reasonable man should have disregarded it. The appellants should on its receipt at least have applied to the Court for directions, and, if the facts and circumstances had been placed before it, the Court would certainly have refused to sanction any payment to the legatees for the time being...*"

22. But all they had been told was that **maybe** the next of kin might be making a claim to revoke probate! At most they were aware that others might have taken a different view of testamentary capacity – but I cannot see anything in the report as to why this was claimed, or the merits of or evidence supporting such a claim. Clearly this state of knowledge (or the information supporting it) would not have merited the award of an injunction, as the judge in the case of Von Westenholz v Gregson [2022] EWHC 2947 noted at paragraph 206.

    "*206. This is hardly the sort of material which would justify the granting of an injunction. I therefore reject the suggestion that Lord Romer was somehow implicitly suggesting that any claim of which the fiduciary has notice must be sufficient to justify the granting of an injunction. On the contrary, in my view, he was simply observing that the fiduciary must have clear notice of the potential claim.*"

    "*207. Some support for this can be found in Lord Romer's comment at [122] that:*

    "... however firmly Mr Ward and Mr Harris may have believed that Miss Smith was possessed of full testamentary capacity when she executed the will, these letters show that after her death they had been given ample warning that others who were interested in the matter took a different view."

23. If anything, Guardian Trust tends to indicate that the fact that there has been no evidence to support the claim will not protect the fiduciary, as Von Westenholz says at paragraph 208:

    "208. This certainly indicates that a belief on the part of the fiduciary that the claim is ill-founded will not protect them even though no evidence to support the claim has yet been forthcoming."

24. So Guardian Trust leaves fiduciaries in an unenviable position. Merely knowing about a claim to the property – even if unsupported by evidence – could potentially leave them open to challenges if they distribute funds should that claim prove to be valid.

25. And finally, it is important to note that this principle applies to fiduciaries, not just trustees and executors. In the case of Von Westenholz directors of a company were put on notice that a third party claimed that shares held by the company's founder were actually held on trust for the third party, and that dividends payable on those shares should not be paid to the founder. The company's directors actually retained

those funds in reduction of a debt owed to the company by the founder, and then the company went insolvent. Held: the directors were personally liable for the dividends.

Practical Solutions:

26. The first point to note is that it is at least arguable that even constructive trustees are entitled to an indemnity out of the trust fund for their reasonable expenses. There is long standing authority that somebody who has acted in good faith and believes themselves to have been duly appointed are entitled to the same indemnity for costs and expenses as a validly appointed trustee; Travis v Illingworth [1868] W.N. 206. Furthermore, the maxim that if somebody seeks equity they must do equity has been applied to allow a constructive trustee their costs and expenses incurred in obtaining property and maintaining and improving it; Rowley v Ginnevar [1897] 2 Ch 503.

27. Furthermore, statute law often protects constructive trustees. In England the Trustee Act 1925 s.30 long held that:
    "*(2) A trustee may reimburse himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers.*"

28. The Trustee Act 1925 then defined "*trust*" in s.68(17) as follows:
    "(17) "*Trust*" *does not include the duties incident to an estate conveyed by way of mortgage, but with this exception* ***the expressions "trust" and "trustee" extend to implied and constructive trusts****, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative, and* "*trustee*" *where the context admits, includes a personal representative, and* "*new trustee*" *includes an additional trustee;*" (Emphasis added.)

29. Those provisions are effectively reproduced in both the BVI[3] and the Caymans[4].

30. NB: All these provisions have been interpreted repeatedly to mean proper and reasonable expenses / expenses incurred properly and reasonably.

31. Oddly enough, this statutory indemnity for constructive trustees is no longer quite so clear in England. The Trustee Act 2000 provides for a clear enough indemnity for trustees at s.31,
    (i) "*A trustee–*

[3] BVI Trustee Act (Revised 2020) s.31(2) and 2(5).

[4] Cayman Trusts Act (2021 Revision) s.47(2) and 2

(a) *"(a) is entitled to be reimbursed from the trust funds, or*
(b) *"(b) may pay out of the trust funds,*

(ii) *"expenses properly incurred by him when acting on behalf of the trust."*

32. However, the 2000 Act has lost the 1925 definition provision that makes it clear that this applies to constructive trustees.

33. But how useful is this statutory provision? It clearly only applies to costs and expenses, so fees are not covered. And in respect of litigation costs, it very probably only extends to necessary costs where the trustee is remaining neutral, and the real fight is between rival beneficial claimants. In Alsop Wilkinson (a firm) -v- Neary [1996] 1 WLR 1220 Lightman J held at pg.1224 that:

> "*Trustees (express and constructive) are entitled to an indemnity against all costs, expenses and liabilities properly incurred in administering the trust and have a lien on the trust assets to secure such indemnity. Trustees have a duty to protect and preserve the trust estate for the benefit of the beneficiaries and accordingly to represent the trust in a third party dispute. Accordingly their right to an indemnity and lien extends in the case of a third party dispute to the costs of proceedings properly brought or defended for the benefit of the trust estate.*"

34. But he then went on to say at p.1225:

> "*In a case where the dispute is between rival claimants to a beneficial interest in the subject matter of the trust, rather the duty of the trustee is to remain neutral and (in the absence of any court direction to the contrary and substantially as happened in Merry's case [1898] 1 Ch. 306) offer to submit to the court's directions leaving it to the rivals to fight their battles. If this stance is adopted, in respect of the costs necessarily and properly incurred e.g. in serving a defence agreeing to submit to the courts direction and in making discovery, the trustees will be entitled to an indemnity and lien. If the trustees do actively defend the trust and succeed, e.g. in challenging a claim by the settlor to set aside for undue influence, they may be entitled to their costs out of the trust, for they have preserved the interests of the beneficiaries under the trust: consider In re Holden, Ex parte Official Receiver (1887) 20 Q.B.D. 43 . But if they fail, then in particular in the case of hostile litigation although in an exceptional case the court may consider that the trustees should have their costs (see Bullock v. Lloyds Bank Ltd. [1955] 1 Ch. 317) ordinarily the trustees will not be entitled to any indemnity,* ***for they have incurred expenditure and liabilities in an unsuccessful effort to prefer one class of beneficiaries e.g. the express beneficiaries specified in the trust instrument, over another e.g. the trustees in bankruptcy or creditors, and so have acted unreasonably and otherwise than for the benefit of the trust estate****: consider R.S.C., Ord. 62, r. 6 ; and see National Anti-Vivisection Society v. Duddington, The Times, 23 November 1989 and Snell's Equity , 29th ed. (1990), p. 258.*" (Emphasis added.)

35. This gives the explanation of how this works. If you are simply maintaining the trust estate, then this is a proper trust expense – even if you are a constructive trustee. But

if you are fighting against a true beneficiary, then this is not a property trust expense. A principle which no doubt applies not just to litigation costs, but to all costs and expenses.

36. So *in extremis*, a fiduciary who discovers they were actually a constructive trustee for some reason could probably claim their costs and expenses of maintaining and safeguarding the trust property, or the like. But it is hardly a satisfactory position to have to rely on such limited and uncertain protection. Rather, the sensible thing to do is to apply for what has sometimes been described as a 'quasi-Benjamin order', allowing the (putative) trustee to administer the (disputed) trust fund "*on the footing that*" they are validly appointed / there are no third party proprietary claims.

37. There are multiple examples of this sort of application in respect of making distributions in the face of dubious, or on occasion contingent, claims. For those practitioners who still remember the Lloyd's Names debacle of the 1990's, there was an entire practice direction devoted to applications to distribute the estates of deceased Names who might in theory be liable under insurance policies they underwrote, but where the chances of such a claim were *de minimis*. More generally, the jurisdiction has been used in multiple authorities, covering distributions in such situations as estates of deceased persons (re Benjamin [1902] 1 Ch 723 itself), will trusts (re Green's Will Trusts [1985] 3 All ER 455), statutory trusts imposed under financial services legislation (re MF Global UK Ltd (In special Administration) [2013] 1 WLR 384[5]), solicitors holding client funds (Finers v Miro [1991] 1 WLR 35) and pension schemes (Capita ATL Pension Trustees Ltd v Gellately [2011] Pen LR 153).

38. There is though one limit (or benefit, depending on your view) on the power of such an order was highlighted in re MF Global UK Ltd (supra) – it does not defeat the proprietary tracing claim through to the ultimate recipient, although it does protect the trustee from personal claims:

> "*21 …The order does not purport to vary the beneficial interests of any clients and, accordingly, provides that the exclusion of any claimant from such a distribution is without prejudice to their right to participate in any subsequent distribution from the client money trust, if they duly establish their claim, and is also without prejudice to any tracing or similar remedy that might be available to them.*"

39. The judgment also cites Lewin on Trust (20th edition) at paragraph 30 where it states that "*the court has jurisdiction to permit or direct a trustee to distribute notwithstanding the existence of claims or potential claims from third parties.* ***That will***

[5] Albeit that was not strictly speaking a re Benjamin Order, but permitted the trustee to actually determine the claims before them, and then distribute the assets on that basis.

not have the effect of destroying a proprietary right of third parties, but may afford protection against personal claims against the trustees by third parties".

40. This must be correct. The claimant was not present and has not had their claim determined (at least by a court), so to deny them this claim would be a breach of their human rights to property and fair trial. At the same time, it effectively pre-determines whether equity would impose a personal liability on the trustee for their actions, which the court does have jurisdiction to determine, and also exercises the court's inherent jurisdiction over trusts and trust property, where the claimant is not a necessary party. It is a fair balance of protecting the claimant's rights, whilst allowing for proper administration of assets without excessive or disproportionate litigation.

41. So applications for directions on distributions are well reported. What I have struggled to do is find a reported authority for a quasi-Benjamin order for simply administering a trust fund, and/or paying fees out of it, where there are proprietary claims against it[6]. Perhaps because such applications will often be in private, or because trustees may consider themselves obliged to act in any event. However, that sort of application is precisely what was made in re The X Trust and The Y Trust FSD 57 of 2022.

42. In terms of what the third party claim was in that case, the judgment simply notes that the trustee had received notice of claims pending against the settlor. Somewhat frustratingly it does not give any details of those claims, or the evidence of them or what state of knowledge the trustees might have had of those claims. Presumably this is because of both confidentiality issues, and because in this respect the case was decided on the basis of the Guardian Trust principle, rather than possible constructive trusteeship. However, it is worth noting that the trustee's counsel submitted that for the Guardian Trust principle to apply then at the time of the trustee's inconsistent dealing there should have been a *prima facie* reasonably arguable claim – so presumably there was at least that.

43. In any event, the Cayman Grand Court considered the issue of authorising trustee costs and expenses and the payment of trustee fees out of disputed funds. It noted that there was no direct authority on the point, but held that:

[6] I have applied for them on several occasions where a trustee's appointment was in doubt, but only where there was relief sought in the alternative ensuring that the appointment was either valid or supplemented by the Court exercising its powers to appoint a trustee. In each case the court exercised its powers to appoint, so the question of authorisation of fees and expenses became irrelevant; see, for example, Dalriada Trustees Ltd v Bluefin Trustees Ltd [2017]EWHC 1085 (Ch)[2017] Pens L.R. 12.

(i) There was authority in the Caymans for application of the Berkeley Applegate[7] jurisdiction – i.e. "*the Court has an inherent jurisdiction to order liquidators' fees and expenses to be paid from trust property held by a company in liquidation provided that such fees and expenses were reasonably incurred in returning the trust property to those benefcially entitled to it*"; see, for example, Re Saad Investments Co Ltd, FSD 15 of 2010, and One Tradex Ltd (FSD, 1 October 2020, unreported).

(ii) That dicta was persuasive in the present case, and there was no reason not to apply it here as, in their respective capacities, both liquidators and trustees act as fiduciaries with respect to the assets in question.

44. In particular, the Grand Court held as follows:

> "*21. Looking at these judicial statements as a whole, it is noteworthy that then Chief Justice Smellie explicitly viewed a trustee administering contested trust funds and a liquidator administering funds which either belonged to the company or were held in trust for the benefit of third-parties as parallel but analogous legal spheres: Re Saad Investments Co Ltd, FSD 15 of 2010 (ASCJ), Judgment dated 1 October 2019 (at paragraph 79). I accordingly drew from these dicta strong indirect support for the following proposition. Essentially for reasons of both pragmatism and principle, a trustee holding assets for named beneficiaries which are subject to potential third-party proprietary claims, and invoking this Court's supervisory jurisdiction under section 48 of the Trusts Act[8], will generally be entitled to payment of its reasonable fees and expenses out of the relevant fund in relation to:*
>
> > *"work done in accordance with the terms of the trust instrument before notice was received of the third-party claims; and*
> >
> > *"work done (and to be done) to administer the trust assets after receiving notice of the potential third-party proprietary claims in accordance with the best interests of whomever may ultimately be confirmed to be the true beneficiaries of the express or constructive trusts".*

45. The ultimate conclusion was as follows:

> "*25. **The Court has jurisdiction to permit such payments to be made despite the possibility of third party proprietary claims**, as the cases set out below show. Such jurisdiction is founded in practicality: **a trust fund needs to be administered for the***

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[7] Berkeley Applegate (Investment Consultants) Ltd (No.3) [1989] 5 BCC 803.

[8] NB: The s.48 jurisdiction referred to is the statutory provision allowing trustees (including constructive trustees – see above) to apply to the Court for "*an opinion, advice or direction on any question respecting the management or administration of the trust money or the assets of any testator or intestate, such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application, or such of them as the Court shall think expedient*".

benefit of whoever turns out to be the beneficial owner of it. Where it is being administered by professionals, they need to be paid. They should therefore be allowed to pay the trust's costs and expenses out of the fund in the ordinary way because their administration of the fund redounds to the benefit of the beneficiaries of the fund, whoever those beneficiaries turn out to be…"

46. The Court then made interim orders that:
    (i) The Trustee was entitled to retain its fees and expenses and pay its fees and expenses, both unpaid and imminently due, from "*the assets of the Trusts… on the footing that there are no third-party proprietary claims to any of the assets of the X Trust or the Y Trust*"; and
    (ii) The Plaintiff and Defendant were entitled to their costs of the proceedings out of the assets of the trusts "*on the footing that there are no third party proprietary claims to any of the assets of the X Trust or the Y Trust*".

47. This approach is interesting in at least three respects.

48. First – it allows for approval of fees as well as costs. A particularly welcome result for professional trustees, and well outside the statutory indemnity available to constructive trustees. Whilst one cannot guarantee that other jurisdictions will take the same, real-world view of such matters, one can at least hope, and quote the judgment at paragraph 25 as a good argument for the approach.

49. Secondly – it allows for retrospective approval of costs and fees of work done in accordance with the (putative) trust instrument before notice was received. However, going forward it clearly only allowed for costs and fees of work done "*in accordance with the best interests of whomever may ultimately be confirmed to be the true beneficiaries of the express or constructive trusts*". Since who the true beneficiaries are will not be known at the present time, this clearly limits what can be done to, in effect, holding the ring. The Grand Court went on to make this expressly clear:
    "*If there is any overarching legal policy imperative, in my judgment it must be that the relevant fund should continue to be administered in a way which involves the least possible prejudice to all interested parties, including the actual or contingent rights of the third-party proprietary claimant*".

50. Again, this comes back to the principle set out in Alsop Wilkinson (supra), that it is justifiable to administer trust property so as to preserve it, but going further where it might adversely affect one beneficiary over another cannot be said to **necessarily** be in the beneficiaries' interests, and therefore cannot be guaranteed to be a proper action entitling the trustee to their indemnity and fees.

51. That point then fed into the trustee's application for permission to sell assets at a lower value than their current market value. The Court held that the trustees' decision to sell at this lower price was rational in that there was at that point no alternative suggestion for how to pay the trustees' fees and expenses. However, in light of the

possible third party claims, and in particular given that the third parties were not present (see below) the beneficiaries were given some extra time to come up with an alternative plan (say, involving borrowing).

52. Thirdly – this was all done in the absence of the third party claiming an interest in the property. As far as I can tell, there were not even put on notice of the application for approval of fees and expenses, or of sale of the assets at below market price. Whether that approach would succeed in another court remains to be seen. Certainly in cases of applications for leave to distribute, the English courts' practice has been to not grant such applications in the absence of the putative claimant; see re MF Global UK Ltd (supra) at paragraph 30. Presumably this is justified on the basis that both (i) distribution of assets is more significant that payment of administration costs (or at least, one hopes so), and (ii) the former is also different from the latter in a qualitative manner – namely, distribution is not necessary (from the putative claimant's point of view), but at least limited administration may well be.

53. With re The X Trust and The Y Trust now available as a clear authority on this sort of application, and the principles to be applied, one hopes that trustees will be able to obtain clarity and protection both swiftly and economically. Or at least, swiftly.

Dealing with collapsed investment structures: Sorting out the mess and getting paid for it: *MF Global orders and the Berkeley Applegate* jurisdiction

Graeme Halkerston[9]

(1) General Principles

1. An insolvency office holder is entitled to receive remuneration for services rendered as an office-holder in respect of an insolvent estate payable out of the assets of that insolvency estate, provided that the work concerned was *"dealing with the winding up of the company, involving as it does the getting in of the assets of the company, ascertaining its creditors, paying its liabilities in accordance with the statutory provisions and distributing any surplus … [not with] work administering the trust property held by the company as trustee … [and] limited to … dealing with assets of the company"*.[10]

2. If remuneration was limited to such work, an office holder would not be entitled to remuneration for any work undertaken in realising assets held by a company in which a third party has a beneficial interest, as those assets do not form part of the insolvency estate. Furthermore, the office holder be able to look to the third party assets to fund that work.

3. When it is clear which assets are held on trust and to whom they beneficially belong, normally the office holder's involvement in those assets will be limited to accounting for the assets to the beneficial owner or applying to court for the appointment of a receiver or manager to manage and realise the trust assets for the beneficiaries.

4. However, in many situations, particularly following asset mismanagement, the affairs of the company will be complex. Often it is unclear whether there is a trust in respect of certain assets, which parties have a beneficial interest in the assets and the extent and nature of such interests. In those circumstances the office holder may find themself in a position where factual investigations, legal advice and/or directions of the court are required in order to determine who owns the assets and how they should be distributed. The question then arises how the office holder can be remunerated in undertaking those steps.

[9] This paper is based upon one jointly authored together with James Bailey KC and Tara Taylor.

[10] *Berkeley Applegate (Investment Consultants) Ltd (No.3)* [1989] 5 BCC 803.

5. *Re Berkeley Applegate (Investment Consultants) Ltd*, confirmed that the Court does have the discretionary jurisdiction to authorise an office holder to recover the costs of preserving, realising and dealing with assets that fall outside the insolvent estate and that the work can be funded from those assets.

6. In *Re Berkeley Applegate*, the business of the company in liquidation was to place funds on behalf of individual investors, secured by first mortgages over freehold property which were taken out in the company's name. At the commencement of the winding up, the company's assets included cash in various client accounts, as well as the benefit of loans made to borrowers from the company and secured by mortgages. These assets were ultimately held by the Court to have been held by the company on trust for its investors. However, prior to that, the liquidator had carried out a substantial amount of work including preliminary investigations to determine whether liquidation was appropriate, dealing with inquiries from investors and borrowers, ascertaining the company's free assets, managing the company's investments and conducting general liquidation affairs.

7. The liquidator applied for an order that he was entitled to be paid his proper expenses and remuneration out of the trust assets. The Court held that he was, relying on the general principle that where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property.

8. Having confirmed the existence of the general jurisdiction, the Court noted:

> *"It is a discretion which will be sparingly exercised; but factors which will operate in favour of its being exercised include the fact that, if the work had not been done by the person to whom the allowance is sought to be made, it would have had to be done either by the person entitled to the equitable interest (as in Re Marine Mansions Co. and similar cases) or by a receiver appointed by the court whose fees would have been borne by the trust property (as in Scott v. Nesbitt); and the fact that the work has been of substantial benefit to the trust property and to the persons interested in it in equity (as in Phipps v. Boardman). In my judgment this is a case in which the jurisdiction can properly be exercised."*[11]

9. Care should be taken with the reference to the jurisidiction being "sparingly exercised" in *Berkeley Applegate*. It is a phrase often invoked by parties asserting beneficial interests when seeking to oppose remuneration applications. While the situations in which the principle is engaged are relatively confined, when those situations do arise the Court will readily sanction remuneration, the classic situation being an

[11] *Berkeley Applegate*, at 291.

appointment over a collapsed investment company which held client assets. The reference to "sparingly exercised" is therefore best seen as a reference to the gateway requirements to engage the *Berkeley Applegate* jurisdiction rather than extending also to the exercise of that jurisdiction once the gateway requirements have been established.

10. While the decision in *Re Berkeley Applegate* specifically concerned the remuneration of a liquidator,[12] in principle it is applicable in any situation "*where a person has come otherwise than by officious intermeddling into the position of fiduciaries in relation to the relevant fund and have incurred time and cost in realising the fund and identifying the entitlements of the beneficiaries and paying out to those beneficiaries their entitlements*",[13] including administrators[14], trustees in bankruptcy[15] and specialist offshore office holders[16].

11. In determining whether to exercise its discretion to make a Berkeley Applegate order, the following factors have been held to be relevant:

    11.1. The complexity of issues relating to the trust assets; see McPherson at [9-072].

    11.2. Whether it was prudent from the beneficiaries' viewpoint to undertake the work done, and whether the benefits attributed to the trust's assets were worth the liquidator's efforts; see McPherson at [8-072].

    11.3. Whether the beneficial owners of the trust property required the assistance of the court to secure their rights, so that it would be just to impose on them a condition that they can only enforce their rights if they submit to the burden of bearing the relevant remuneration and expenses (*Bell v Birchall* [2017] WLR 667);

    11.4. Whether the work undertaken by the office holder was for the benefit of the unsecured creditors and adverse to the interests of the beneficiaries under the trust, in which case a Berkeley Applegate order will not be appropriate (*Gillan v HEC Enterprises Ltd* [2016] EWHC 3179 (Ch) at [102]);

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[12] *Berkeley Applegate*, at 284.

[13] *Re Sports Betting Media Ltd (In Administration),* at [10].

[14] *Re HEC*.

[15] *Green v Bramson & Ors* [2010] EWHC 3106 (Ch).

[16] *In the matter of Onetradex Limited* ([2020 (2) CILR Note 20], 1 October 2020, Smellie C.J.), in the Grand Court of the Cayman Islands, approved *Berekely Applegate* remuneration in favour of Controllers appointed by the local regulator.

11.5. Whether the work undertaken by the office holder, although of benefit to the beneficiary of a trust, was work that the office holder would have had to carry out in any event on behalf of the general body of creditors, in which case the Court may refuse to exercise its discretion (*Tom Wise Ltd v Fillimore* [1999] BCC 129).

(2) The Early Bird - Pre-emptive Costs Orders

12. Whilst in *Berkeley Applegate* the liquidator's application was not made before considerable costs had been incurred, it is plainly sensible for an insolvency practitioner faced with a situation where work needs to be carried out on assets which are (or may be) held on trust, to apply to the court in advance for a direction that he is entitled to charge for future work out of those assets. Otherwise, the practitioner runs the risk of then being out of pocket if the court refuses to exercise its discretion in his favour.

13. Edward Nugee QC alluded to this concern in *Berkeley Applegate* itself at 53E:

> *"But the liquidator is entitled to know at this stage that his proper expenses and remuneration will be paid if necessary out of the trust assets, and that he will not be left at the end of the winding up with the possibility of receiving no recompense for his work or having to bear part of the expenses out of his own pocket"*

14. If the administration of the insolvency regime takes one into the territory of *Berkeley Applegate*, the legal issues being confronted are unlikely to be straightforward. Many of the cases in which *Berkeley Applegate* relief has been invoked, the legal issues involved a complex blend of trusts, company and commercial law issues. The Courts have acknowledged the importance of pre-emptive orders in such situations, and the earlier the office holder can identify the potential workstreams and seek approval in principle for the work which must be done the greater the prospects of those costs being recoverable and being recoverable on a cost effective basis,

(3) Potential disputes between office holders and third parties asserting beneficial interests over assets held by the insolvent entity

15. While pre-emptive relief is commonly granted, the Court will exercise caution if the proposed work involves potential disputes between the insolvent company and third parties claiming to be trust beneficiaries. *Re Biddencare,* [1993] B.C.C 757; [1994] 2 BCLC 160 is an example of the refusal to grant broad pre-emptive orders following claims by subsidiaries that funds held by the insolvent parent company were beneficially owned by them.

16. The precise nature of such disputes will define the role of the office holder in their resolution. Bilateral disputes between a third party and the company are very different

to claims asserted by multiple parties over the same assets. Often the number of claims, their value, the issues involved, the proper means of resolving the issues and the funding of the same are not clear at the early stages of an insolvency process. A practical way to deal with such siuations involves the invocation of the jurisdiction identified in *In Re M F Global UK Ltd (in special administration) (No.3).*[17]

17. *MF Global* type orders are particularly useful in the early stages of a collapsed investment vehicle to allow the crafting of directions to quickly and efficiently resolve potential claims, and to allow the accelerated distribution of assets to client beneficiaries when the directions process identifies that no competing claims are made over that client's assets or part of those client's assets.

18. In *MF Global*, a broker dealer collapsed into insolvency and the terms of the CASS 7 trust resulted in the pooling of client monies. There were a large number of claims and potential claims over the trust monies. The Court recognised that the administrators in assessing trust claims were in a similar position to an office holder facing numerous creditor claims (at [9]) and that there was a need for a mechanism to deal with claims they had rejected informally by the administrators and potential claims otherwise there could be no distribution from the estate until all claims had been fully and finally identified and determined (at [13]).

19. The administrators proposed, and the Court approved, a mechanism that mirrored the English proof of debt procedure: submission of written claims by claimants together with supporting evidence, acceptance or rejection of claims by the administrators together with the provision of reasons for the same and the time-limited right of appeal against any rejection (at [17]). The approved mechanism also provided that the administrators should not have any liability for any distribution of assets to any trust claimant who subsequently asserted or established a claim (at [21]). David Richards J. reviewed the inherent jurisdiction of the Court in relation to trusts and considered that this jurisdiction permitted a mechanism for such directions to deal with trust property (see paragraphs [25]-[32]).

20. Directions broadly similar to those approved in *MF Global* can provide a practical means of allowing an office holder to invite, review and provide some initial form of adjudication on proprietary claims over assets held by the insolvent entity. Such directions were ordered in the context of a collapsed online broker dealer in *In the matter of Onetradex,*[18] in which the directions provided for the notification of claims to the provisional liquidator, the preliminary adjudiciation of such claims by the provisional liquidator and the sanctioning of the transfer of trust assets agreed

[17] [2013] 1 WLR 3874, David Richards J.

[18] *In the matter of Onetradex Limited* (unreported, 1 October 2020, Smellie C.J.) at [22].

between the provisional liquidator and the claiming client. Consistent with the principles in *Biddencare*, the directions provided that if the *MF Global* process did not result in an agreed resolution then the management of any remaining disputes would be remitted to the Court for further directions. The process was described by the Court as "*a procedure which properly balanced the interests of established clients to a timely return of their money with the interests of persons with serious but unresolved claims.*"[19]

(4) *Gillan v HEC* : a cautionary tale

21. Finally, any discussion of the application of the *Berkeley Applegate* jurisdiction would not be complete without reference to the position the office holder found himself in in *Gillan v HEC*.

22. In *Gillan*, two companies (HEC and DPO) had contracted with various members of the rock music band Deep Purple to provide certain services and to account for royalties. Those companies were the subject of litigation concerning the beneficial ownership of the copyright in recordings and compositions. Various issues arose in the administration of HEC, partly in the context of the litigation involving the former band members as to the terms of a prior settlement agreement. Some of the issues involved the administration of acknowledged trust assets. However, prior to the administration disputes had arisen between the other participants *inter se* and between HEC and the beneficiaries as to their entitlement, and these disputes had led to litigation pre-dating the administration of HEC.

23. The Court was quick to recognise that in such circumstances, it is often appropriate for an administrator to apply to court for directions as to what is to be done, and that it is often appropriate for the court to permit the administrators to administer funds held on trust, *Re M F Global UK Ltd (No.3)* being such an example.

24. Unfortunately the administrators, having professed their intended neutrality in the litigation between the other parties, had already proceeded on an assumption that there would be no question as to whether they would be paid in respect of the work they chose to do, whether out of the company's assets or the trust assets. As the learned judge observed (at [40]): "*The administrators' attitude was that they knew best and, in addition, they were entitled to be paid for the work they chose to do out of the assets owned by the Claimants.*"

[19] At [22].

25. Ultimately the court was not prepared to grant broad *Berkeley Applegate* relief. It considered carefully the categories of work that were said to have been done, and concluded that the sums claimed by the administrators in relation to the litigation should be dealt with under the court's jurisdiction as to the costs of litigation and not under *Berkeley Applegate*. It also refused to allow the costs for work that was beneficial to the unsecured creditors and adverse to the interests of the beneficiaries. The learned judge observed (at [104]):

> "*There are features of this case which distinguish it from Berkeley Applegate and Allanfield, relied upon by the administrators, and, indeed, from the type of case considered in Re Lehman Bros International (Europe) Ltd (No. 2) and in Re M F Global UK Ltd (No. 3) . This was not a case where a company in administration held substantial funds on trust for a large number of beneficiaries where the obviously most convenient course was for the administrators to administer the trusts and distribute to the beneficiaries. This is a case of two companies which had failed to perform their contract with the Claimants and had been sued as a result. At an early point, following the companies entering into administration, the Claimants sought the administrators' consent to continue the proceedings. I consider that the administrators ought to have given that consent. It would then have been for the Claimants and the estates of the managers and any other rival claimant to sort out the dispute, by pursuing the litigation and/or by attempting to settle it. The administrators did not give the consent they should have given. Further, they did not seek directions as to what they should do. They decided that matter for themselves. Part of the time, they acted in the interests of the unsecured creditors and not in the interests of the beneficiaries, as described above. The administrators also seemed to think that they could appoint themselves as mediators of a settlement between various parties but without the consent of those parties. They seemed to think that if they acted in that way they would be entitled to charge the beneficiaries remuneration for so acting. In the event, insofar as the administrators took on the role of mediators between beneficiaries, they did not bring about a settlement of the issues between them and conferred no real benefit on them. The administrators have spent considerable time and incurred considerable costs in opposing the Claimants' applications for consent to continue the litigation and in pursuing their own applications for orders that they be paid their remuneration and charges.*"

26. *HEC* shows the value in the early identification of issues and the prompt seeking of directions. The Court will generally be sympathetic to an office holder finding themself in control of third party assets, and if it is sensible for them to administer it, and they ask first, they will most likely be permitted to take the costs of so doing from the trust fund. But if they make assumptions as to entitlements and proceed without directions, or become entangled in litigation pertaining to the trust, those costs are unlikely to be payable from the trust fund.

The mysteries of equitable compensation

Thomas Lowe KC, Tara Taylor and Jia Wei Lee (with written contribution from Rachael Earle)

1. There have always been two competing schools of thought when it comes to equitable compensation.

2. The **Traditionalist** believes that equitable compensation is all about restoring the trust fund. The trustee has misapplied an asset, their job is to put it back, and if they cannot do that *in specie*, then they must make financial restitution of the value of that asset. This is done by the taking of an account, which is falsified to disallow the misapplication. That in turn places the trustee under an obligation to make good the deficit by the payment of money.

3. The **Modernist**, by contrast, takes a causative approach. Equitable compensation, they say, is reparative, and designed to place the beneficiary in the position that they would have been but for the breach of trust. One therefore asks, using hindsight and common sense, what loss was caused to the trust fund by the breach.

4. In many cases, the differences between the Traditionalist and the Modernist are immaterial, and the same result is achieved either way. Sometimes, however, the introduction of a causative analysis makes an enormous difference. The classic example is where a bank's solicitor pays out purchase money held on escrow before having obtained a charge over the property in respect of which this money is being advanced. The charge is eventually obtained, but not before another party obtains a prior security, meaning that the bank's security ranks second. The borrower defaults, and the property is sold, but because of a market downturn the property is worth considerably less than when it was first purchased. The bank is out of pocket, and sues the solicitors for breach of trust.

5. These were the basic facts of *AIB v Mark Redler* [2014] UKSC 58, now the leading authority on equitable compensation. Lord Reed affirmed the proposition that equitable compensation was about restoring the trust fund to the position it would have been in had the trustee performed their obligation, and that the measure of compensation should be "*assessed at the date of trial, with the benefit of hindsight*". He found that that loss must be "*caused by the breach of trust, in the sense that it must flow directly from it*", and that it was essential to determine if causation was interrupted by the acts of third parties or the claimant. Lord Toulson, agreed, and memorably rejected as a "*fairy tale*" the process of falsifying the trust account in order to decide what amount a trustee was required to repay. On these bases, the Supreme Court unanimously concluded that the solicitor only needed to pay the difference

between what the bank actually received, and what it would have received had a first ranking charge been obtained.

6. So, it appeared in 2014, that the Supreme Court had ended the war and declared victory for the Modernists. However, in the years following, through a carefully staged series of reprisals, the Traditionalists have slowly crept back into relevance.

Substitutive vs reparative measures of damage

7. The way the Traditionalists have staged a revival, it seems, is to rely upon a distinction between "reparative" and "substitutive" measures of equitable compensation.

8. The distinction was expressed thus at [16] of *ITC v Ferster* [2018] EWCA Civ 1594*:*

> *""Equitable compensation is apt to include a payment made to restore to a claimant the value of assets or funds removed without authority by a trustee or other fiduciary, such as a director. It may also include reparation for losses suffered by the claimant, such as in this case any tax penalties and interest resulting from the payment of the unauthorised remuneration. But, it is not restricted to reparation for losses…"*

9. *Ferster* was a somewhat unusual case, however. The claimant, ITC, had brought proceedings against a former director, Mr Ferster, for breach of fiduciary duty, arising out of his procurement of unauthorised remuneration to himself in the amount of £120,000 per annum. At first instance, Morgan J gave judgment in favour of ITC and ordered that "*Judgment be entered for ITC for equitable compensation to be assessed*." ITC then wrote to the Court, seeking an alteration to the order which would provide and confirm that Mr Ferster be liable for all payments made out of the assets of the company in connection with the payments. Morgan J declined to do so, finding that equitable compensation was a purely loss-based remedy, and did not therefore include a gains-based remedy. The Court of Appeal concluded that this analysis was wrong, and that claims for equitable compensation were apt to include payments to restore the value of misapplied assets.

10. It follows that *Ferster* was *not* in fact an affirmation of the Traditionalist approach. It was clear that Morgan J's distinction between loss-based and gains-based remedies in the context of equitable compensation missed the point. Clearly, the misappropriation of an asset can, itself, be a "loss" to the trust fund, which a trustee must be expected to make good. This is not a gains-based remedy, and indeed, repayment of the misapplied payments could have been sought from Mr Ferster even if they had been directed at some third party, and even if Mr Ferster did not thereby "gain" from his breach of duty. Importantly, no mention was made in the Court of Appeal about

whether ITC needed to prove that the company had been caused loss by the misapplication of its assets.

11. But the Traditionalist approach gained new ground in *Auden McKenzie v Patel* [2020] BCC 316. The defendants' argument in that case was quite extraordinary – a Mr Patel had, as company director, caused the claimant company to pay out over £13m on sham invoices, raised by companies which he controlled. When the company sued for equitable compensation, however, Mr Patel argued that had he not procured the payments unlawfully, he could and would have made the same amounts to be paid to him lawfully. The company sought summary judgment, which was granted at first instance. On appeal, David Richards LJ said as follows:

> *31. Equitable compensation is the personal remedy (as opposed to a tracing or proprietary remedy) available against trustees, or others in a fiduciary position, whose acts or omissions amount to a breach of trust or fiduciary duty. Breaches of duty may take many forms, but in broad terms they are often with good reason analysed as falling within one of three main categories: first, transactions involving the unauthorised payment or disposal of or damage to trust assets, causing loss to the trust; second, breaches of duties of loyalty, involving the trustee in making profits at the expense of the trust or by the use of information or opportunities available to the trustee in that capacity; third, breaches of duties of skill and care, resulting in loss to the trust. In the case of breaches in the second category, an account of profits may be the appropriate remedy, and is the only remedy where the trust could not itself have made the profit.*
>
> *32. The present case clearly falls within the first category. Using his fiduciary powers as a director, Mr Patel dishonestly caused the company to make the payments for the personal benefit of himself and his sister. On the face of it, the loss to the company was the amount of the payments, being the amount by which its cash assets were depleted. If an account in common form were ordered to be taken, the payments would be disallowed (or "falsified") as legitimate expenditure and Mr Patel would be ordered to make good the loss. Subject to any question that might be relevant to the ascertainment of that loss, which lies at the heart of the present appeal, and assuming no other expenditure was falsified, the order would be to pay a sum equal to the payments plus interest. 33. This order to make good the loss would be a form of equitable compensation…*
>
> *35. The use of the phrase "equitable compensation" in this context has attracted some controversy, principally because it has been suggested that it detracts from the basic purpose of the remedy to make good the deficit in the fund…*
>
> *36. The present appeal is concerned with equitable compensation in this sense. It is not a case concerned with compensation for loss caused by a breach of duties of skill and care. Nor is it a case involving a claim to profits made by Mr Patel and his sister…*

37. The issue that therefore arises on this appeal is whether, in a case of equitable compensation of this kind, the loss to the company resulting from the payments stands to be reduced or eliminated by reference to the hypothetical payments of lawful dividends or other benefits to the shareholders.

12. And subsequently, he added:

58. Where a director causes a company to make unauthorised payments for which the company receives no value, the director is liable to the company to pay compensation equal in amount to the payments…

59. The above analysis provides grounds for concluding that Mr Patel is not entitled to rely on the assumed fact that dividends equal to the payments would have been paid to his sister and himself in response to the claim for equitable compensation. However, the order below was for summary judgment, not judgment on a preliminary issue, and we must be satisfied that Mr Patel's defence is unsustainable in law.

13. David Richards LJ's decision takes matters further than *Ferster*, in that he explicitly acknowledges that in cases of involving the unauthorised disposal of assets, a defendant is not entitled to plead reliance on counterfactuals. The defendant is required to restore the misapplied asset, and no causative analysis is appropriate. Indeed, at [32], David Richards LJ explicitly reaffirms the remedy of an account and falsification in such cases, appearing thereby to restore the Traditionalist orthodoxy. However, he and the rest of the Court of Appeal allowed the appeal on the grounds that it could not be said, on an application for summary judgment, that the director's argument was unsustainable as matter of law. These findings in *Auden McKenzie* are therefore, strictly speaking, *obiter*.

14. Despite this, David Richards LJ's reasoning has been approved in a number of subsequent decisions, notably, in the Court of Appeal in *Davies v Ford* [2023] EWCA Civ 167 and in *Mitchell v Al-Jaber* [2023] EWHC 364 (Ch).

15. In *Davies v Ford*, having reviewed the above authorities, the judge at first instance [2021] EWHC 2550 (Ch) (with whom the Court of Appeal agreed) drew a clear distinction between substitutive and reparative claims:

[106] … equitable compensation for breaches of fiduciary duty which involve the misappropriation of existing trust property is generally assessed on the substitutive basis. In such instances, the aim is to restore to the trust what has wrongfully been paid away and it is not open to the trustee or fiduciary who has been in breach to argue the counterfactual, that is that the trust property would have been lost or paid away even if he or she had not been in breach. AIB V REDLER, INTERACTIVE

TECHNOLOGY CORPORATION V FERSTER, and AUDEN MCKENZIE V PATEL were all cases of this type.

[107] However, in cases of breach of trust or fiduciary duty which do not involve the misappropriation of existing trust property, such as (per David Richards LJ in the PATEL case) breaches of duties of loyalty, and those which involve the trustee in making profits at the expense of the trust or the use of information or opportunities available to the trustee in that capacity or breaches of duties of skill and care, resulting in loss to the trust, equitable compensation will be assessed on the reparative basis. This requires the court to determine what would have happened but for the breach of fiduciary duty. The breaching trustee or fiduciary is entitled to argue the counterfactual. The court can be asked to consider how the principal or company would have acted if the trustee or fiduciary had not acted in breach of duty.

16. Similarly in *Mitchell v Al-Jaber*, the director's argument that no loss was caused as a result of the misapplication of certain shares, because the shares had collapsed in value and the liquidators had taken no steps to realise their value before that happened, was rejected on the basis that the Liquidators' claim was a substitutive claim and hypothetical events should not therefore be taken into account in determining the quantum of compensation.

17. This hybrid approach has also taken root outside of England and Wales, where courts are not formally bound by *AIB* or *Target Holdings*. In Singapore, for example, a very similar distinction has been drawn between custodial and non-custodial breaches of fiduciary duty, and causative principles are relevant only in the latter case (see *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] SGCA 35, in which Phang JA also provides a magisterial overview of the law as it developed in England, New Zealand, Australia and Singapore).

18. It seems to us, however that the distinction between substitutive performance and reparative claims is hard to square with the decision in *AIB*. The Supreme Court did, in fact, distinguish between substitutive and reparative claims, but made it very clear that there was no material difference between them. Lord Toulson, at [66], said:

"I would reiterate Lord Browne-Wilkinson's statement, echoing McLachlin J's judgment in Canson, about the object of an equitable monetary remedy for breach of trust, whether it be sub-classified as substitutive or reparative. As the beneficiary is entitled to have the trust properly administered, so he is entitled to have made good any loss suffered by reason of a breach of the duty." (emphasis added)

19. And again, at [73]:

> *"This argument constricts too narrowly Lord Browne-Wilkinson's essential reasoning. Monetary compensation, whether classified as restitutive or reparative, is intended to make good a loss. The basic equitable principle applicable to breach of trust, as Lord Browne-Wilkinson stated, is that the beneficiary is entitled to be compensated for any loss he would not have suffered but for the breach. In this case, proper performance of the obligations of which the trust formed part would have resulted in the solicitors paying to Barclays the full amount required to redeem the Barclays mortgage, and, as Patten LJ said, the bank would have had security for an extra £300,000 or thereabouts of its loan."* (emphasis added)

20. And, of course, the claim in *AIB* was a strictly substitutive one, in that the bank was seeking the restoration of misapplied funds. Causative principles were nonetheless applied.

21. The position we are left in is unsatisfactory. The leading authority appears to endorse wholeheartedly the Modernist take; but subsequent judgments have clearly adopted a hybrid position: confining the Modernist approach to "reparative" claims, and reviving the Traditionalist approach in claims which are "substitutive" in nature.

Where do we go from here?

22. The question is this – does the doctrinal confusion matter? Or is it merely a matter of academic interest? Our view is that the *practical* difference between the Modernist and Traditionalist views may not be quite as wide as it seems.

23. Firstly, where the potential causation question has to do with the effect of extraneous events on the value of the asset over time, it actually makes little difference whether the Modernist or Traditionalist approach is adopted. This is because, in both cases, causative issues will rear their head. Suppose that a trustee, in breach of trust, misapplies certain shares in 2018. As at the date of the misapplication, they were worth £100. However, the company in question is restructured in 2021, and the share value falls to £50. There is then an economic downturn in 2023, so the shares are worth £10 as at the date of trial. The trustee proves that, but for his misapplication of the shares, the trust would only have sold the shares in 2022. The Modernist would conclude that but for the trustee's breach, the company would have realised £50 from the sale of the shares, and its loss is therefore £50. This was what was decided by the Court of Appeal in *Re Ahmed* (curiously, not referred to in *Auden McKenzie* or *Davies v Ford*), where Gloster LJ applied a decidedly Modernist approach and concluded that loss "*flowed from, the date at which the trustee in bankruptcy would have actually sold the shares*."

24. The beneficiary might try, at this point, to appeal to the Judge's Traditionalist instincts, and argue that this is a substitutive performance claim to which no causative principle

should apply. But the beneficiary would come unstuck at this point – the general rule is that the amount of the award is the objective value of the property lost, valued at the date when the account is taken (i.e. the date of trial) – see *Libertarian Investments v Hall*, at [168], *Target Holdings v Redfern* at p439, and *AIB* at [135]. If this strict rule is applied, theoretically, what the beneficiary should receive is compensation worth only £10, since that is the share value as at the date of trial.

25. In one sense, this is a completely logical outcome. The heart of the Traditionalist contention is that equitable compensation is easy – you took it, so put it back. If the trustee had misappropriated a tangible asset like a car, his obligation would be to return the car as at the date of trial. If one were trying to value the car in money's terms, it makes no sense to use any other date. And yet, this outcome nonetheless feels unjust. And it is for that reason that each of the leading authorities add a caveat – compensation can be adjusted using "*the benefit of hindsight*" and "*common sense*".

26. But how can "*hindsight*" and "*common sense*" operate in a principled way? The only logically coherent way of arguing for a different valuation date is to say that the beneficiary *would otherwise have had shares worth more than £10*. That is nothing if not a causative analysis, and on these hypothetical facts, the Traditionalist would be compelled to reach the conclusion that compensation is valued at £50, i.e. their value when the trust *would have* sold the shares. The Modernist and Traditionalist approaches therefore reach exactly the same conclusion, by the same means. Valuation is thus causation by another name.

27. Secondly, there are cases where the causation question has nothing to do with extraneous events. Instead, it is the wrongdoer claiming that he would have done things in a way which minimised loss. *Auden McKenzie* is an example of such a case, and the Modernist and Traditionalist approaches would yield different answers. Assuming Mr Forster would have lawfully transferred the £13m to himself anyway, the Modernist would say that no loss has actually been caused. By contrast, the Traditionalist would say that he is required to simply restore the fund, and it is irrelevant what he would otherwise have done with those monies.

28. On its face, then, this is a case where there is a stark difference in approach. Indeed, the Traditionalist view seems to have much to recommend about it – Mr Patel's case is deeply unattractive, and it seems highly unjust that he has been able to effectively defraud his company out of £13m with no consequences. But when we look a little closer, one can reach the same, ostensibly just, answer as the Traditionalist without necessarily adopting a strict, non-causative approach to equitable compensation. There are a few ways to do so:

    a. Most obviously, a Court could simply conclude that Mr Patel is wrong, and he would not have lawfully paid himself £13m. This is obviously a matter for trial,

but it certainly seems unlikely that Mr Patel would have resorted to raising false invoices if he was able to pay himself an 8-figure sum legitimately.[20]

b. Even assuming Mr Patel's case was right, it is likely that he would be exposed to liability in other ways. Richards LJ rejected, at [54], the remedy of an account of profits, on the basis that money taken from a company without authority is not a profit in the directors' hands. This seems a dubious assertion, but even then, Mr Patel, as a recipient of funds paid out in breach of trust, would clearly be a knowing recipient of misapplied funds, and would be liable to account for them in the usual way.

29. Clearly, equitable compensation on its own does not provide the Modernist with the full answer to the dilemma presented by *Auden McKenzie*. But *equity more generally* comes close – clearly, there will be scenarios where a wrongdoer may nonetheless avoid liability, notably, if the misapplied funds never passed through the directors' hands but were instead passed on to some unconnected third party. But in those cases, one might wonder if there is any obvious injustice in requiring the claimant to pursue the third party, rather than the director himself, particularly if it is in fact true that the funds would lawfully have found their way into the third party's hands anyway.

30. What practical lessons can we draw from this? It seems to us there are three:

a. One – depending on whether one acts for the defendant or the claimant, the current state of flux in which the law finds itself offers fertile ground for parties to either augment or reduce the scope of damages owed. The uncertainty in this regard may not be welcome, but it is essential to bear in mind.

b. Two – while there are apparently major doctrinal differences between the Modernists and Traditionalists, upon closer scrutiny, those differences sometimes break down. This is most obvious when Traditionalists try to value the misapplied asset which they seek restitution of. It is also why those advising their clients as to the remedial outcomes of their equitable claims should be careful to follow their logic through to the end – if the starting point for valuation is the trial date, what is the value of the asset at that date, and is there a coherent argument that can be applied for adopting a date which results in a better valuation for the client?

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[20] We note, in this regard, that the possibility of arguing that there is a "fraud" exception that precludes dishonest defendants from denying the amount of loss caused has been foreclosed by the Court of Appeal in *Gwembe Valley*.

c. Three – the distinction between substitutive and reparative measures of damages is slippery, but that is because they are fundamentally looking to achieve the same goal – to place the trust back in the position it should have been. But that is the broad aim of *all* equitable remedies, and it suggests that even if equitable compensation is not, on its own, an adequate remedy in a given case, there will be some other means of clawing back the misapplied sum. Those pleading their client's case should be fully aware of the importance of exploring every nook and cranny of equity's arsenal.

Powers part 1

Tom Roscoe, Harriet Holmes and Francesca Mitchell

Introduction

1. This paper supports the first half of the double-header of talks about powers at this year's Wilberforce Caribbean conferences. Our first half has two aims:

    1.1. To recap the key principles of the law of powers and explain how different powers can be categorised (and why that categorisation matters). This provides the framework for the second half, which looks at improper purposes following *Grand View v Wong*.

    1.2. To try to explain the relevance (or potential relevance and application) of these principles, outside of the usual trusts sphere, in a commercial or insolvency context.

The Taxonomy of Powers

2. A power is a legal authority conferred on a person to dispose of property which is not their own.[21] There are various ways in which powers can be classified, and some attempt to categorise powers into different groups is needed in order to understand the limits placed on their exercise.

3. One method of classifying powers is to focus on the function of the power. Viewing powers through this lens, they can be divided into dispositive powers and administrative powers. In outline:

    3.1. Dispositive powers *"enable the donee [...] to change the beneficial entitlements under the trusts and powers"*, e.g. powers of appointment or maintenance.

    3.2. Administrative (or managerial) powers *"enable the donee to safeguard and enhance the trust property"*, e.g. powers to enter into contracts or invest.[22]

[21] *Freme v Clement* (1881) 18 Ch.D. 499, at 504

[22] Lewin on Trusts (20th Ed.), at [28-009]

4. Another method of classifying powers is to focus on the relevant duties and restrictions on their exercise.[23] The following three-fold classification applies:[24]

   4.1. Beneficial powers: these are powers which may be exercised in any way for the benefit or purposes of the holder of the power without any restrictions. An example of such is a general power of appointment with the person holding the power being included as an object of the power.

   4.2. Limited powers (sometimes, when not fiduciary, referred to as limited *personal* powers): these are powers that are subject to the restrictions that they must be exercised in good faith for the purposes for which they are given. As such, they are subject to the doctrine of fraud on a power, i.e. the power cannot be exercised for a purpose foreign to that of the original purpose(s) for the creation of the power.

   4.3. Fiduciary powers: these are a sub-class within limited powers such that they must still be exercised in good faith and for the purposes they are given. A donee of a fiduciary power, however, further owes a duty to the objects of the power to consider from time to time whether and how to exercise it.

5. Although the distinction between these three types of power is well established, the terminology to describe them is not. *'Beneficial'* is not in particularly widespread use,[25] '*limited'* is used, but often within the context of powers of appointment only, where it is also used interchangeably with '*special'* (as opposed to '*general*' powers).[26] '*Fiduciary in the full sense'* is sometimes used instead of '*fiduciary powers'*, as '*fiduciary'* is sometimes used to indicate simply that the power is subject to the doctrine of fraud on a power.

6. A further division exists within the class of fiduciary powers: (i) mere powers; and (ii) trust powers. In the former, the donee is under no obligation to exercise the power whereas in the latter, the donee is under a duty to exercise the power in due time.

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[23] Lewin on Trusts (20th Ed.), at [28-015]ff

[24] Adopted in *Re HHH Employee Trust* [2012] JRC 127B, at [21]

[25] But is used in Lewin and is adopted here for convenience

[26] As in Thomas on Powers (2nd Ed.), at [1.16]ff

How to classify powers in practice?

7. Whilst there are trust instruments which specify expressly whether the powers they contain are to be regarded as beneficial, limited or fiduciary, they are far from common.[27] Instead, classifying the power will be a matter of construction of the particular instrument creating it. But there are certain general rules that have been adopted by the courts which assist when it comes to classifying a power, for example:

8. The general rule is that every power conferred on trustees in virtue of their office as trustee is a fiduciary power.[28] There may be cases where, upon the true construction of the trust instrument, the power is given to the trustees as designated individuals (and not in virtue of their office), however, this is unusual, and it must be expressed in clear and apt language.[29]

9. A power to appoint a new or additional trustee is generally acknowledged to be a fiduciary power, but one which need not be conferred on trustees or the holders of any office.[30]

10. Similarly, a power to appoint a protector is itself a fiduciary power.[31] A 'protector' is not a term of art, but is typically the holder of a group of powers or requirements of consent, and so, if the protector holds an office under the trust, it will usually be impossible to construe the power(s) as beneficial, as the protector will be there for the protection of the beneficiaries and so his/her powers will be fiduciary.[32]

11. Where a power of veto is conferred on a beneficiary, it is more likely to be intended to be a beneficial power than where it is conferred on a trustee. For example, where the consent of the adult beneficiaries was required for both major and minor

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[27] E.g. *Centre Trustees Ltd v Pabst* [2009] JRC 109; 12 ITELR 720

[28] *Whishaw v Stephens (the Gulbenkian case*) [1970] AC 508 at [518]; *McPhail v Doulton* [1971] AC 424 at [449], [456]–[457]; *Re Hay's Settlement Trusts* [1982] 1WLR 202

[29] *Re Smith* [1904] 1 Ch 139 at [144]

[30] *Re Skeats' Settlement* (1889) 42 Ch D 522 at [527]; *Bridge Trustees Ltd* [2008] EWHC 2054 (Ch)

[31] E.g. *Re Bird Charitable Trust* [2008] WTLR 1505

[32] *Lord Vestey's Executors v IRC* [1949] 1 All ER 1108 (where the protectors were termed '*authorised persons*')

decisions of the trustees, it has been held that they were given the veto for their own protection and were therefore not in a fiduciary position. [33]

Why do the distinctions matter?

12. Administrative vs dispositive powers: while a trustee's exercise of dispositive power can be reviewed on the basis that s/he has failed to take into account relevant factors that s/he ought to have, there is some uncertainty as to whether or not the same limit applies to the exercise of an administrative power:

    12.1. In *Donaldson v Smith*,[34] DHCJ Donaldson QC made the obiter remark that the Hasting-Bass (i.e. adequate deliberation) principles do not apply to the exercise of the power of a trustee to conclude a contract with a third party:

    > "*[T]he Hasting-Bass principles are concerned with the exercise of a discretionary power under a trust instrument, typically a power of appointment or advancement, and with the conditions impliedly imposed by the instrument as to the matters to which the trustee must or may have regard in exercising the discretion. A contract is different: the power of the trustee to conclude a contract with a third party derives from the general law*".

    12.2. This obiter remark, however, runs contrary to the view taken by both the Jersey and Cayman Courts. In *Re Howe Family Trust*,[35] which concerned the trustees' exercise of power of investment and to advance a loan under the trust instrument, the Royal Court of Jersey had no difficulty applying the principles in *Hastings-Bass* in reviewing the exercise of the power of investment. Similarly, the Grand Court of the Cayman Islands applied the 'relevant factors' test to a power of investment in *Barclays Private Bank & Trust (Cayman) Ltd v Chamberlain*.[36]

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[33] *Rawson Trust Co. Ltd v Perlman* (1996) 1 BOCM 31, Bah SC; *Blenkinsop v Herbert* [2017] WASCA 87; 51 WAR 264.

[34] [2006] EWHC B9 (Ch); [2007] WTLR 421, at [54]

[35] [2007] JRC 248

[36] (2005) 9 ITELR 302

12.3. Given the broad enunciation of the *Hastings-Bass* rule in *Pitt v Holt*,[37] and the fact that the rule has now been applied to the exercise of unilateral contractual powers in *Braganza* (discussed below), it is difficult to see why the distinction drawn in *Donaldson* should be maintained.

13. As to fiduciary powers, mere powers and trust powers, their differences were considered in *in re Hay's ST*[38]:

13.1. Unlike a donee of a trust power, a donee of a mere power is not bound to exercise it, and the court will not compel him to do so. On the other hand, if a donee of a trust power fails to exercise the power in due time (the timeframe of the exercise of the power is a matter of construction of the trust instrument), he will either be permitted to do so late or the court will supervise the exercise of that power.[39]

13.2. However, a donee of a mere power is a trustee who is still subject to fiduciary duties or in other words, a mere power is still a fiduciary power. Thus, he cannot *"simply fold his hands and ignore it, for normally he must from time to time consider whether or not to exercise the power, and the court may direct him to do this"*. It is incumbent on the trustee to *"make a survey of the range of objects or possible beneficiaries […]"*[40] so as to consider if a particular advancement was appropriate.

13.3. As to limited powers which are not fiduciary powers, the donee is under no obligation to consider exercising it. However, if the donee does decide to exercise it, he must do so for a proper purpose.[41]

14. Finally, as to the distinction between beneficial and limited powers, one of the key distinctions (aside from the fact that the donee can be the object of a beneficial power) relates to the applicability of the doctrine of fraud on a power (or, in modern parlance, the improper purpose rule):

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[37] [2013] UKSC 26

[38] [1982] 1 WLR 202, 209ff

[39] Lewin on Trusts (20th Ed.), at [28-023]

[40] *In re Baden (No. 1)* [1971] AC 424 per Lord Wilberforce

[41] Lewin on Trusts (20th Ed.), at [30-066]

14.1. In *Kain v Hutton*,[42] the Supreme Court of New Zealand considered a general power of appointment which entitled the donee to appoint in favour of anyone, including himself under the trust instrument. The highest court of New Zealand concluded that "*[t]here cannot, therefore, be excessive execution of, or a fraud on, such a power because it is logically impossible for the donee/appointor to exceed the donor's mandate*".

14.2. In *Clayton v Clayton*,[43] the New Zealand Court of Appeal adopted the same approach and arguably took the exercise of beneficial power even further away from the reach of the court's supervisory function. The court reasoned that since both the 'good faith' test and 'proper purpose' test fall under the same doctrine of 'fraud on power' umbrella, neither test would apply to a beneficial power. Again, the New Zealand Court of Appeal ruled that it would be *"logically impossible for Mr Clayton to exceed his own mandate"*.[44]

14.3. It is apparent from the reasoning in the two New Zealand authorities that the courts of that jurisdiction were (at least in these cases) not distinguishing the doctrine of fraud on a power as distinct from the question of the scope of the power and trustee's mandate under the trust instrument.

14.4. That approach is, at best, questionable. As Lord Sumption has stated in *Eclairs Group Ltd v JKX Oil & Gas plc*,[45] the *"proper purpose rule is a principle by which equity controls the exercise of a fiduciary's powers in respects which are not, or not necessarily, determined by the instrument*". The doctrine of fraud on a power (or improper purpose) is thus separate from the question of the scope of power.

14.5. That said, in the case of beneficial powers, the question of control of the exercise of a *fiduciary's* powers does not arise (because the donee of the power is not a fiduciary).

14.6. The question of whether there are *any* restrictions on the exercise of a beneficial power (as distinct from a limited power), as to the purposes on which it can be exercised, will be touched upon in Part 2 (in the context of *Grand View*).

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[42] [2008] NZSC 61, at [47]

[43] [2015] NZCA 30, at [89]-[92]

[44] *Ibid*, at [91]; the decision was reversed in part on appeal [2016] NZSC 29 but not on this point.

[45] [2015] UKSC 71, at [15] and [30]

15. While it will undoubtedly be more difficult to set aside the exercise of a beneficial power, it may still be arguable that restraints as to rationality and capriciousness should still apply to beneficial powers. This is so especially since the court has not recoiled from policing the exercise of contractual powers on the basis of rationality and capriciousness, even if the contractual power/discretion is phrased in seemingly absolute terms.[46]

Good faith and rationality

16. A trustee's exercise of a power can generally be reviewed on broadly the following two grounds:[47] (i) a failure to act honestly or in good faith – this ground commonly also encompasses the rationality test;[48] or (ii) acting for an improper purpose (also known as the doctrine of fraud on a power; although its operation does not depend on any fraud/dishonesty being shown).[49] The focus of this part is on the former.

17. It is instructive, first, to consider the similar principles which apply to the exercise of contractual powers – which will then be compared with the constraints on the exercise of a trustee's powers.

<u>Rationality test in a contractual context</u>

18. In *Paragon Finance Plc v Nash*,[50] the Court of Appeal considered a mortgagee's contractual power to fix the level of interest rates. Dyson LJ held that the mortgagee's power was subject to the implied limitation that it must not be done for a capricious reason, for instance where the lender decided to raise the rate of interest because its manager did not like the colour of the borrower's hair.

19. *Paragron Finance* put limits on capricious behaviour – being at one end of a spectrum of culpably irrational behaviour. In *Braganza*, however, the court went further in laying the groundwork for the introduction of the public law *Wednesbury* rationality framework to private law powers and decision-making processes. The

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[46] *Paragon Finance plc v Nash* [2001] EWCA Civ 1466, at [31]

[47] *Re Londonderry's Settlements* [1965] 1 Ch 918, CA

[48] Lewin on Trusts (20th Ed.), at [29-034]ff

[49] *Eclairs*, at [15]

[50] [2001] EWCA Civ 1466, [31]

decision concerned Mr Braganza's employment contract which included a specific lump-sum death in service benefit payable by his employer BP. The contractual term provided that the lump sum

> *"[S]hall not be payable if, in the opinion of the Company or its insurers, the death…resulted from amongst other things, the Officer's wilful act, default or misconduct whether at sea or ashore…."*

20. Mr Braganza disappeared at sea between 1am and 7am on 11 May 2009 while working for BP. BP formed the opinion, on the basis of one single report, that Mr Braganza had indeed committed suicide and refused to make a lump sum under the clause. Mr Braganza's widow challenged the conclusion and brought a claim under the contract for the payment of the death lump sum.

21. The Supreme Court unanimously decided that the court can imply a term into the contract that the decision-making process must be rational. There are two limbs to the test:

    21.1. Fist limb: *"whether the right matters have been taken into account in reaching the decision"*; this limb focuses on the decision-making process.

    21.2. Second limb: '*whether even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it*'; this limb focuses on the outcome of the decision-making process.[51]

22. Importantly, the Supreme Court also endorsed the helpful enunciation in *Hayes v Willoughby*[52] by Lord Sumption of the difference between a reasonableness and rationality review:

> *"Rationality is not the same as reasonableness. Reasonableness is an external objective standard applied to the outcome of a person's thoughts or intentions. A test of rationality, by comparison, applies a minimum objective standard to the relevant person's mental process. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and […] an absence of arbitrariness, of*

[51] *Braganza v BP Shipping Ltd* [2015] UKSC 17, at [23]-[30] (Lady Hale); at [103] (Lord Neuberger).

[52] [2013] UKSC 17, at [14]

capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse."[53]

23. By a majority (three to two), the Supreme Court concluded that BP had acted irrationally in reaching its decision; it had further failed to consider all relevant factors in arriving at the decision in that BP had failed to take into account the real possibility that Mr Braganza had suffered an accident.

24. More recently, in *Pa Sam Nang v HSBC Ltd*,[54] the Hong Kong Court of First Instance noted that the decision in *Braganza* represented a willingness for a court, as a matter of necessary implication, imply a term that a decision-maker's discretion is limited by concepts of *"honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality"*.

25. The decision in *Braganza* has also recently been applied by the English High Court in *CMC Spreadbet plc v Tchenguiz*,[55] to a company's decision to close-out a trading account of a professional customer under spread betting contract under the FCA's Conduct of Business Sourcebook Rules ("COBS"). The court and the parties accepted that the *Braganza* duty applied in the context[56] but ruled on the facts that there was no breach of the duty.

Comparison of *Braganza* with irrationality control in a trust context

26. The first limb of *Braganza* (concerning the decision-making process) is very similar to the test formulated by Lightman J and approved by Lord Walker in *Pitt v Holt* on the requirement of adequate deliberation by a trustee when exercising powers:

> *"What has to be established is that the trustee in making his decision has [...] failed to consider what he was under a duty to consider. If the trustee has in accordance with his duty identified the relevant considerations and used all proper care and diligence in obtaining the relevant information and advice relating to those considerations, the trustee can be in no breach of duty [...]*".

[53] Accepted in *Braganza*, at [23] (Lady Hale); [102] (Lord Neuberger)

[54] [2016] HKCFI 409, at [45]

[55] [2022] EWHC 1640 (Comm)

[56] *Ibid*, at [138]-[139]

27. The only wrinkle in applying *Braganza* alongside *Pitt v Holt* is the requirement that the failure to take into account relevant considerations "*must be sufficiently serious as to amount to a breach of fiduciary duty*" in order for a beneficiary to challenge a trustee's decision.[57] "*Fiduciary duty*" in this case likely refers to a duty owed by a fiduciary, as opposed to the narrow sense of the duty peculiar to fiduciaries as envisaged by Lord Millett, i.e. the duty of loyalty.[58]

28. The second limb of the *Braganza* test (focussing on the outcome) echoes the test of rationality as established by a long line of trust authorities which stems from the classic formulation a 'good faith' test.[59]

    28.1. In *IBM*, the Court of Appeal applied the second limb in *Braganza* to an exercise of power of an employer under an occupational pension scheme:

    > *"[W]as the decision […] so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it, or is it completely lacking in any logical connection between the relevant circumstances and the ostensible reasons for the decision?"*[60]

    28.2. Another issue that may arise under this limb is whether the fact that the power is couched in the contract as an absolute power would prevent the court from exercising the rationality review. Analogous difficulties arise in seeking to determine whether trust powers drafted in ostensibly wide terms are in fact beneficial, limited personal or fiduciary powers.

    28.3. The answer in both scenarios is ultimately a question of construction, to be carried out applying usual principles of construction. We suggest that Courts will generally be reluctant to find that a discretion or power can be exercised capriciously or in bad faith unless there is clear language to support such a conclusion.

    28.4. This principle is well established in the context of a contractual discretion.[61]

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[57] *Pitt v Holt*, at [73]; similarly in *Gany Holdings (PTC) SA v Khan* [2018] UKPC 21, at [54]

[58] Lewin on Trusts (20th Ed.), at [30-045]; *Bristol and West Building Society v Mothew* [1998] Ch 1 at 16

[59] *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896; *TJH and Sons Consultancy Ltd v CPP Grou plc* [2017] EWCA Civ 46, at [16]

[60] *IBM United Kingdom holdings Ltd v Dalgleish* [2017] EWCA Civ 1212

[61] See: *British Telecommunications plc vv Telefonica O2 UK Ltd* [2014] UKSC 42, at [37] (per Lord Sumption).

28.5. In *Dundee General Hospital*, the exercise of a trust power couched in seemingly absolute terms was held reviewable on the basis of irrationality.[62]

29. The two-stage *Braganza*-approach has also been applied by the New Zealand High Court to a commercial trustee's exercise of power in *Wellington City Council v Local Government Mutual Funds Trustee Ltd*.[63]

29.1. The case concerned a commercial trust to which local authorities contributed, called 'Riskpool'. Under the trust, the trustee had the discretion to use the funds to meet claims made by individuals on the local authority for damages for 'water ingress' in buildings. Wellington Council made a claim and the claim was rejected by the trustees. Wellington Council applied to challenge the decision. Wellington Council brought both a claim for breach of contract and fiduciary duties.

29.2. Collins J reasoned that the *"principles enunciated in [...] Braganza are consistent with the discharge of any fiduciary duties owed by the Board to the Council"*; in his view, the analysis under both the contractual and breach of fiduciary duties claim led to the same result and that no material differences could be identified between the two claims. Either way, the discretion must not be exercised *"arbitrarily, capriciously or irrationally"*.[64]

29.3. Collins J further applied the first limb of the *Braganza*-test in considering whether or not the trustees have taken into account irrelevant considerations. While Collins J accepted that irrelevant considerations were taken into account – namely that the Council had left Riskpool and that the Council had received more benefits than it had contributed to Riskpool – he ultimately came to the conclusion that these considerations were minor considerations and did not influence the Board's decision in any meaningful way.[65]

29.4. Even though Collins J did not explicitly refer to the breach of fiduciary duty requirement in *Pitt v Holt*, the seriousness and severity of the trustee's consideration of irrelevant matters must be relevant. In *Wellington*, even though the trustees may have considered irrelevant matters, it was not

[62] See fn 28.

[63] [2017] NZHC 2901 (Collins J)

[64] *Ibid*, at [168]-[170]

[65] *Ibid*, at [172] and [178]

sufficiently serious so as to amount to a breach of fiduciary duty; it follows that their decision cannot be challenged.

Braganza control in the company/insolvency context

30. Outside of the contractual and trust contexts, the *Braganza* rationality control is often applied in the context of company, insolvency and land law.

Company context

31. For example, the test in *Pitt v Holt* was applied by the High Court in *Power Adhesives Ltd v Sweeney* on a director's exercise of power to issue shares.[66]

    31.1. Mr Sweeny, a director of the relevant company, was terminally ill. He had previously extended a loan to the company of £490,000 and the company was concerned that the loan would become immediately payable upon his death. On advice, it decided to issue 490,000 £1 shares in settlement of the loan. Following the death of Mr Sweeney, it transpired that the share issuance had the effect of causing an unintended transfer of value which triggered various adverse IHT and CGT consequences.

    31.2. The High Court applied the *Hastings-Bass* rule and held that since the directors had failed to take into account the adverse tax consequences, they had breached their duties.[67] Most notably, in applying *Hastings-Bass*, Chief Master Marsh made the observation that the principle is very similar to the *Wednesbury* principles although he did not refer to *Braganza* explicitly.[68]

Shareholder voting

32. A similar version of the test under the second-limb of the *Braganza* test can also be readily found in cases regarding what is known to be the *Allen* jurisdiction[69] which

[66] [2017] EWHC 676 (Ch), at [11]-[17]

[67] *Ibid*, at [28]

[68] *Ibid*, at [11]

[69] Named after the decision in *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656

polices the shareholders' exercise of voting rights to amend a company's articles of association.

33. In *Arbuthnott v Bonnyman*,[70] Etherton C stated that while it is generally for the shareholders to decide whether an alteration of the articles is for the benefit of the company, the court may intervene if *"no reasonable person would consider it to be such*". A similar limitation will equally apply to members and creditors voting in a class meeting in a scheme of arrangement,[71] loan instrument,[72] and in the variation of class rights.[73]

Insolvency practitioners

34. The rationality review standard is also applied to the exercise of powers by/decision-making process of insolvency practitioners.

35. In *Re Edennote Ltd*,[74] Nourse J rejected the application of the 'relevant factors' test to the exercise of discretion by a liquidator but endorsed the application of the 'rationality' test: *"it is certainly possible for a liquidator to do something so utterly unreasonable and absurd that no reasonable man would have done it"*.

36. More recently, the test in *Re Edennote Ltd* was applied by the Court of Appeal in *Re Edengate Homes*.[75] The decision involved a challenge of a decision to assign a claim against Mrs Lock, which was the only valuable asset of the company, to a litigation funder. The Court of Appeal rejected counsel's submission that the liquidator's failure to offer an opportunity to Mrs Lock to purchase the cause of action rendered the decision perverse. The test as laid down in *Re Edennote* was said to be a formidable one, which was not met on the facts of the case.[76]

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[70] [2015] EWCA Civ 536, [90]-[96]

[71] *Re Dee Valley Group plc* [2017[EWHC 184 (Ch)

[72] *Assenagon Asset Management SA v Irish Bank Resolution Corp Ltd* [2012] EWHC 2090 (Ch)

[73] S. 630 of CA 2006; Gower on Principles of Company Law (10th Ed.), at [19-12]

[74] [1996] 2 BCLC 389, 394

[75] [2022] EWCA Civ 626, at [43]

[76] *Ibid*, at [46]-[49]

37. The High Court also recently considered the obligations of an administrator under para 3 of Sch B1 of the English Insolvency Act 1986 in *Davey v Money*;[77] under the schedule, the administrator could choose from amongst three options as to the objective of the administration, e.g. rescuing the company as a going concern. In the same vein, the court applied a rationality-based test: "*Parliament intended a degree of latitude to be given to an administrator in deciding upon the objective to be pursued [...] the appropriate standard of review by the court should be one of good faith and rationality*".[78]

Landlord and tenant

38. In *No 1 West India Quay Ltd v East Tower Apartments Ltd,*[79] the Court of Appeal considered the exercise of a contractual discretion (held by the landlord) to decide whether to consent to assign two underleases, such consent not to be unreasonably withheld.

39. When the tenant sought the landlord's consent, the landlord had sought to impose a number of conditions (the tenant was to pay landlord's administration fees, the properties to be inspected by a surveyor and bank references for the prospective assignees was to be provided). The tenant refused to meet the conditions, and the landlord accordingly refused to grant its consent.

40. The High Court found that, although the administrative fees sought by the landlord had been excessive and that, although the landlord's other two reasons for refusing to grant consent had been good, they were vitiated by the single 'bad' reason.

41. That approach did not find favour with the Court of Appeal, which held that where there are multiple reasons for a decision refusing consent to assign, the fact that one of those reasons was bad would not normally render the refusal unreasonable.

42. The Court reached the conclusion by noting that since *Braganza*, the courts have recognised that the exercise of a contractual discretion is to be judged by the same principles as the exercise of public law decisions. There have since been cases in where a decision-maker gives good and bad reasons for a decision, but the good reason is enough to support the decision. When explaining that view, Lewison LJ referred to *Eclairs* (and other cases concerning the exercise of contractual and

[77] [2018] EWHC 766 (Ch)

[78] *Ibid*, at [252]-[256]

[79] [2018] 1 WLR 5682

directors powers) and said the following: "*The theme running through all these cases is that if the decision would have been the same without reliance on the bad reason, then the decision (looked at overall) is good. In that situation, the bad reason will not have vitiated or infected the good one.*"

Conclusion

43. There is, therefore, an emerging consistency in the approach to the rationality of decision making the exercise of powers across the trust, company, insolvency and other commercial contexts (such as landlord and tenant).

Powers part 2: Improper purposes

John McGhee KC, Gilead Cooper KC and Daniel Petrides

'IT'S THE VIBE OF THE THING': IMPROPER PURPOSES AFTER *GRAND VIEW v WONG*

Introduction

1. Over the centuries, the courts have developed an extensive arsenal for controlling the exercise of powers (both fiduciary and non-fiduciary) by their donees. A number of these have already been explored in Part 1. The subject of this paper and accompanying talk is one of the most far-reaching – and most controversial – weapons in that arsenal: the improper purpose rule.

2. The rule will be familiar to all trusts practitioners, and can be stated with deceptive simplicity: a power "*may be exercised only for a purpose for which the power has been conferred*".[80] The *locus classicus* is perhaps those cases in which an *intra vires* exercise of the power is made with the intention of benefiting a non-object of the power pursuant to some collateral agreement between the object and the non-object. However, as it has extended into different legal contexts and encountered the full spectrum of human behaviour in both family and commercial life, the precise rationale for, and application of, the doctrine has become an increasingly vexed question for lawyers and judges alike.

3. The decision of the Privy Council in *Grand View Private Trust Co Ltd v Wong* [2022] UKPC 47 is the most recent consideration of the doctrine at commonwealth appellate level. It provides a useful – and, for the time being, definitive – guide to some aspects of the rules application. (Although only strictly binding authority in Bermuda, the speech of Lord Richards purports to be of general application, and is expected to be treated as extremely persuasive authority in all other jurisdictions). However, it leaves some questions unanswered, and has not escaped criticism.

4. This paper considers (i) the conceptual basis for the doctrine; (ii) the decision in *Wong* itself; (iii) some remaining ambiguities in the law; and (iv) its application of the rule beyond the private trusts sphere.

[80] *Grand View Private Trust Co Ltd v Wong* [2022] UKPC 47 at [1]; cf. numerous other statements to similar effect in *Vatcher v Paull* [1915] AC 372 at 378; *In re Courage Group's Pension Scheme* [1987] 1 WLR 495 at 505; *Pitt v Holt* [2013] UKSC 26.

The basis for the doctrine

5. It is perhaps easiest to begin by setting out what the improper purpose rule is not.

6. First, despite the historical nomenclature of 'fraud on the power', it is not a necessary perquisite to the doctrine's operation that the donee's motivation in exercising the power was dishonest or otherwise morally nefarious (although it may well have been). Indeed, there are many cases where it appears that the donee genuinely believed the impugned course of action to be in the best interests of the objects of the trust or the company towards whom they stood as a fiduciary.[81] In *Wong* itself, the Privy Council noted that here is "*much to be said*" for discarding the old language of 'fraud on the power' so as to avoid confusion as to the ingredients of the rule.[82]

7. Secondly, equity's intervention is not explicable on the basis of inadequate deliberation. While an improper purpose will almost invariably be an irrelevant factor for a donee to take into account, this flaw in the deliberations is not the reason for law's response. Instead, it is the mere fact that the purpose of the power has been exceeded which renders its exercise invalid; the decision-making process via which that outcome was achieved forms no substantive part of the court's enquiry. Indeed, the difference between the two doctrines becomes clear at the remedial level: whereas the practical consequence of inadequate deliberation is that the exercise of the power is merely voidable, if a power has been exercised for an improper purpose it will be void *ab initio.*[83]

8. Finally, despite some contrary *dicta*,[84] an exercise of a power for an improper purpose is not a species of excessive execution. This was the view of the Supreme Court in *Pitt v Holt* [2013] UKSC 26, where Lord Walker suggested that the rule "*may need a separate pigeon-hole somewhere between the categories of excessive execution and inadequate deliberation*"[85], and in *Eclairs Group Ltd v JKX Oil & Gas Plc* [2015] UKSC 71 where Lord Sumption emphasised the distinction between the rule and the construction of the instrument in the following terms:

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[81] See for example *Eclairs Group Ltd v JKX Oil & Gas Plc* [2015] UKSC 71 where a power in a company's articles of association to exclude shareholders from a meeting was exercised to prevent a hostile takeover of a company.

[82] At [56].

[83] *Re Marsden's Trust* (1859) 4 Drew 594.

[84] E.g. *Duke of Portland v Topham* (1869-70) LR 5 Ch App 40 at 55; *Wong v Burt* [2004] NZCA 174 at [27]; cf. also Lord Sales writing extra-judicially in 'Fraud on a power: the interface between contract and equity' (2019). However, interestingly Lord Sales was part of the Board in *Wong* which appeared to favour the view that the doctrine is distinct from the exercise of construction.

[85] [62].

"15. *...[T]he proper purpose rule is not concerned with excess of power by doing an act which is beyond the scope of the instrument creating it as a matter of construction or implication. It is concerned with abuse of power, by doing acts which are within its scope but done for an improper reason.*

...

30. *The rule is not a term of the contract and does not necessarily depend on any limitation on the scope of the power as a matter of construction. The proper purpose rule is a principle by which equity controls the exercise of a fiduciary's powers in respects which are not, or not necessarily, determined by the instrument*".

9. It is true some of the classic fraud on the power cases can credibly be described as cases of "*clandestine excessive execution*".[86] So, for example, in *Clouette v Storey* [1911] 1 Ch 18 (CA) a father who held assets on trust for his children could not use a power in the trust instrument to make an appointment to one of the children pursuant to a covert agreement that the child would pay the money received back to father. Similarly, in *Hillsdown Holdings Plc v Pemsions Ombudsman* [1997] 1 All ER 862 it was held to be improper for the trustees of a pension scheme, whose instrument contained a fetter on returning surplus sums to the employer, to transfer sums to a newly established scheme with no such fetter which then immediately paid over £14m to the employer. These may be explicable as cases in which it was the avoidance of an express or implied limitation within the trust instrument which the doctrine was reversing.

10. However, such an explanation cannot cover more the more diffuse species of improper purpose which not infrequently trouble the courts. To give a few somewhat colourful examples:

    (1) In *Calder and Hebble Navigation Co v Pilling* (1845) 14 M & W 76, it was held that a canal company, which had a general power to close the waterways, had acted for an improper purpose when it used that power to prevent sailing on Sundays on the basis that this was an inappropriate activity on the Lord's day; it was no part of its functions to enforce religious observance.

    (2) In the leading case of *Duke of Portland v Topham* (1864) 11 HL Cas 32, the exercise of a power for the purpose of preventing a woman from marrying a man whom her family considered undesirable was held to be improper.

[86] As per Tipping J in *Kain v Hutton* [2008] 3 NZLR 589 at [47].

(3) In *D'Abbadie v Bizoin* (1871) 5 IR Eq 205, it was held to be an improper purpose to exercise a power in a manner calculated to pressure its object into moving to live in France.

(4) In *Vatcher v Paull* [1915] AC 372 the rule was used to prevent a power from being used to circumvent the forced heirship rules under Jersey law.

(5) In *Cochrane v Cochrane* [1922] 2 Ch 230 an appointment to a child of a first marriage in order to incentivise the appointor's first wife to have a decree *nisi* made absolute (such that the appointor would be free to re-marry) was held to be for an improper purpose.

11. None of these were cases where the formal limitations on the power in the instruments would have prohibited the mischief in question; indeed, in some of them the intended objects of the powers obtained significant benefits of the type intended by the instrument. Nor (importantly) might the instruments have reasonably been expected to cater for with such eventualities. As Lord Wilberforce explained in *Howard Smith v Ampol Petroleum Ltd* [1974] AC 821 at 835, when dealing with a complex legal instrument such as a company's articles of association, which is designed to respond to the infinitely unpredictable vicissitudes of commercial life, "*to define in advance exact limits beyond which directors must not pass is, in their Lordships' view, impossible*". Much the same is true of a positive power to deal with trust property in a deed of trust under a family settlement: every unhappy family is, after all, unhappy in its own way.

12. Instead, the improper purpose rule should be understood as occupying a place at the limits of construction. A legal instrument is a paradigmatic example of what the linguistic philosopher J.L. Austin (building on Wittgenstein's theories) called a 'performative utterance'[87]: it does not purport merely to describe the world, but to act in and upon it. (Indeed, Austin's own paradigmatic example of such an utterance was a marriage contract). And as Wittgenstein showed, if words are understood as deeds then it is futile to speak in isolation about the 'meaning' of words; instead it must be recognised that all words partake of language-games bounded by rules (both spoken and unspoken), and that there will be dimensions of these language-games which are not merely reducible to the definitional confluence of vocabulary and grammar.[88] That being so, in order fully to understand a given proposition, one must also have an understanding of the context in which it arose.[89] The improper purposes rule recognises that there are

[87] Austin, J.L, *How To Do Things With Words* (2nd ed.), (Oxford, 1976), pp.6-7.

[88] Wittgenstein, L., *Philosophical Investigations* (4th ed.), (Blackwell, 2009), paras. 69-70; 138-139; 189-199; 241; 546.

[89] Cf. Collingwood, R.G., *An Autobiography and Other Writings*, (Oxford, 2013), p.55.

important contexts which traditional canons of construction cannot reach. It exists *sui generis*.

13. If the rule is therefore best understood as giving voice to a factual matrix not immediately apparent on the face of the instrument, how widely can the net be cast to find the 'purpose' of a particular power? This was one of the central issues before the Privy Council in *Wong*.

The decision in *Grand View v Wong*

14. The case concerned a Bermudan irrevocable discretionary trust, called the Global Resource Trust No. 1 ("the GRT"), which had been established in 2001 by two Taiwanese businessmen, known as the Wang brothers, to benefit their children and remoter issue. The trustee of the GRT was a specially-incorporated company called the Global Resource Private Trust Co Ltd ("GRPT").

15. On precisely the same day that the GRT was established, the brothers had established a further non-charitable purpose trust, the Wang Family Trust ("the WFT"), whose trustee was the Grand View Private Trust Company ("Grand View").

16. The trust instrument of the GRT gave the trustee widely drawn powers of appointment in favour of the objects of the trust as follows:

> "*8.1 The Trustees may, at any time before the expiration of the Trust Period by deed revocable during the Trust Period or irrevocable, declare that:*
>
> > *8.1.1 any person or class or description of persons shall, as from either the date of such deed or such later date as is therein specified and permanently or for such period as is therein mentioned, be included as a Beneficiary for the purposes of this Declaration, and any such declaration may be expressed to refer either to the whole or to some part or share only of the Trust Fund and shall have effect accordingly; and*
> >
> > *8.1.2 any person or class or description of persons then included as a Beneficiary shall, as from either the date of such deed or such later date as is therein specified and either permanently or for such period as is therein mentioned, cease to be a Beneficiary for the purposes of this Declaration, and any such declaration may be expressed to refer either to the whole or to some part or share only of the Trust Fund and shall have effect accordingly*."

17. In 2005, GRPT purported to exercise this power to change the objects of the GRT by excluding the named beneficiaries and transferring the assets of the GRT to Grand View, to hold on trust for the WFT. The GRT was then wound up.

18. The excluded beneficiaries brought a challenge against the decision. This succeeded at first instance on the basis of the *substratum* rule. The Bermuda Court

of Appeal reversed that decision – in a detailed judgment Sir Christopher Clarke P held that Clause 8 was so widely drawn as to have (effectively) no limiting purpose.

19. The beneficiaries then brought a further appeal to the Privy Council.

20. Lord Richards, giving the sole speech on behalf of the whole Board, began by providing a helpful checklist for the application of the improper proper rule:

    (1) The proper purpose rule only arises for consideration once the scope of the power has been determined, applying the ordinary principles of construction, and once it has been determined that the impugned exercise of the power was within that scope.[90]

    (2) The proper purpose of the power falls to be determined as at the date of the instrument conferring the power, and is to be determined objectively.[91]

    (3) The matters to be taken into account in determined the purpose of the power at the relevant date include not only the text of the instrument conferring the power, but also extraneous documents which "*objectively inform the context of the instrument in question*", including "substantially contemporaneous documents which are intended to be read with the trust deed, such as a letter of wishes…".[92]

21. Applying those principles to the facts of the case, the Privy Council allowed the appeal.

    (1) First, it was held that the transfer to Grand View had been *intra vires*.[93] Accordingly, the question of whether the transfer had nonetheless been for an improper purpose arose.

    (2) It was accepted by the parties (which arose on a summary judgment application) that, for the purposes of the appeal, the court should proceed on the basis that the purpose of GRT trustees in making the transfer to Grand View had been to exclude the children and remoter issue of the settlors and substitute a purpose trust.[94]

    (3) Taking into account all of the relevant materials, the objectively ascertainable purpose of the settlors establishing the GRT had been to

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[90] [54] – [55]; [57].

[91] [61].

[92] [62] - [63].

[93] [66] – [71].

[94] [72] – [73].

create a family trust for the benefit of their direct descendants. Although Clause 8 itself was very broadly drafted, the other terms of the trust, the terms of the WFT (which had been incorporated on the same date as part of a suite of settlements), and contemporaneous statements of the founders' wishes said to have been made to a witness (Mrs Wang) who provided a statement to the court, all supported this understanding of the GRT's purpose.[95] That being so, it would be contrary to this purpose for Clause 8 to be used to deprive all the children and future descendants of the settlors of any benefit under the trust, and to substitute a trust which was incapable of benefiting them.

External evidence of the purpose

22. *Wong* was not the first case in which extraneous evidence was held to be admissible for the purpose of ascertaining the purpose of the trust. However, the use of hearsay evidence of the Founders' wishes does appear to be a somewhat novel extension which suggests that the net may be cast wider than previously thought.

23. Letters of wishes were considered by Briggs J (as he then was) in *Breakspear v Ackland* [2008] EWHC 220 (Ch), where he defined them as follows as [5]:

> "*The essential characteristic of a wish letter…is that it is a mechanism for the communication by a settlor to trustees of the settlement of non-binding requests by him to take stated matters into account when exercising their discretionary powers. Typically, wish letters are concerned with the exercise of dispositive discretions, but they may include wishes in relation to the exercise of powers of investment, or of other purely administrative powers. For present purposes I am concerned with a wish letter which is substantially contemporaneous with the settlement itself. The question whether later wish letters have the same status is beyond the scope of this judgment.*"

24. It is now well-established that, despite their quintessentially non-binding nature, letters of wishes *ought* to be taken into account as part of trustees' deliberations when exercising fiduciary powers.[96] And given the contextual nature of the exercise which a court is being asked to undertake when applying the improper purpose rule, the implication in *Wong* that a contemporaneous letter of wishes could be taken into account when ascertaining the purpose of a power seems unobjectionable.

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[95] [76] – [87].

[96] See *Pitt v Holt* at [66].

25. The position of later letters of wishes is less more controversial.

26. As is clear from the passage of Briggs J's judgment quoted above, the relevance of letters of wishes post-dating the settlement of the trust was not one which arose in *Breakspear*. Nevertheless, the principle that a trustee may take account of wishes of the settlor express over time is now well-established by the caselaw.[97] Indeed, it has recently been suggested in New Zealand that later letters of wishes should be given preference over earlier ones to the extent that there is any inconsistency.[98]

27. Because the evidential material before the Board in *Wong* only consisted of contemporaneous documents/statements, which it was common ground could legitimately be considered in ascertaining the purpose of the trust/power, the question of whether subsequent materials could be used did not strictly arise for consideration.

28. In the Bermuda Court of Appeal, Sir Christopher Clarke P had suggested at [195] that the wishes of a settlor expressed *after* the creation of a trust could be of relevance:

> "*the natural assumption as to what the economic settlors contemplated as the purpose of the conferment of the power was that the GRT Trustee would, if it thought it right, exercise the power having regard to the economic settlors' known intentions and wishes when setting up the trust and from time to time thereafter…*"

29. But the Board, (albeit in *obiter*, and on the basis of a concession by the parties), cast doubt on this at [63]:

> "*It was common ground that, while trustees could legitimately have regard to wishes later expressed by the settlor, or in this case the Founders, as to how the trustees should exercise their dispositive powers, such wishes were not admissible in determining the purpose of those powers*".

30. At first blush, there is much to commend this view. After all, a settlor who has settled assets on trust should not be able to retrospectively re-write the terms of the trust through the back door, and the courts should be slow to permit a trust's purpose to become ambulatory in nature.

31. However, there are *dicta* suggesting otherwise. In *In re Courage Group's Pension Scheme* [1987] 1 WLR 495 Millet J (as he then was) appeared to suggest, in the

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[97] *Re Esteem Settlement* [2003] JLR 092 at [166];

[98] *Kain v Public Trust* [2021] NZCA 685.

context of a challenge to a power of amendment, that the purpose of certain types of instrument could change over time:

> "*…in the case of an institution of long duration and gradually changing membership like a club or a pension scheme, each alteration to the rules must be tested by reference to the situation at the time of the proposed alteration, and not by reference to the original rules at its inception. By changes made gradually over a long period, alterations may be made which would not be acceptable if introduced all at once. Even the main purpose may be changed by degrees*".[99]

32. There is, of course, a distinction between the alteration of purposes via a power of amendment conferred precisely for the purpose of allowing the trustees to respond to unforeseen changes over the lifetime of the trust, and mere expressions of wishes by a settlor at a later date. But if as a matter of principle (i) contemporaneous letters of wishes can be relevant to understanding the purpose of a trust, and (ii) both the content of letters of wishes and the purpose of the trust can be updated over time, it seems to be well arguable that subsequent letters of wishes should in principle be capable of altering the purpose of a power/trust. This may be a question which needs to be revisited in an appropriate future case.

Ascertaining the improper purpose

33. One issue which did not arise for consideration in *Wong* (because there was no dispute as to the purpose for which the power had been exercised) was whether the purpose in question was in fact imporper. However, in many cases this will be a central battleground.

34. It is now well-established that it is the subjective intention of the donee which matters. An innocent exercise of a power which has an unforeseen collateral consequence which would have amounted to an improper purpose if intended will not be captured by the rule.

35. In cases involving single decision makers this is a straightforward question of fact. In cases involving multiple decision makers, the exercise is less straightforward. There are two broad possibilities:

    (1) Where the terms of the instrument require a unanimous joint decision to be reached, then it seems that any impropriety in the purpose of any one of the joint holders will vitiate its exercise.[100]

[99] At 536.

[100] *Lawrie v Bankes* (1857) 4 K & J 142.

(2) However, where a majority decision is permitted, and the improper purpose is held only by the minority, or by only some of those in the majority, the exercise of the power will only be bad if it can be shown that the decision would not have been reached without the concurrence with those whose purposes were impure.[101]

36. One question which remains unresolved is the correct approach in cases involving multiple purposes. While it has never been the law that the improper purpose must be the sole purpose (because it is very rare for a person's acts to be straightforwardly motivated by a single purpose), the law's traditional approach has been to vitiate an exercise of a power where the 'predominant' purpose was improper. So, in *Howard Smith Ltd* Lord Wilberforce referred to the need for the improper purpose to be "*the substantial or primary purpose*".[102]

37. However, in *Eclairs* Lord Sumption (with whom Lord Hodge agreed) posited an alternative 'but for' approach to causation. Such an approach is already firmly entrenched in the Australian jurisprudence.[103] Lord Sumption expressed what he saw as the logic of this approach as follows:

> "*[The directors'] duty is broken if they allow themselves to be influenced by any improper purpose. If equity nevertheless allows the decision to stand in some cases, it is not because it condones a minor improper purpose where it would condemn a major one. It is because the law distinguishes between some breaches of duty and others. The only rational basis for such a distinction is that some improprieties may not have resulted in any injustice to the interests which equity seeks to protect. Here, we are necessarily in the realms of causation.*
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> ….
>
> *If the answer is that without the improper purpose(s) the decision impugned would never have been made, then it would be irrational to allow it to stand simply because the directors had other, proper considerations in mind as well, to which perhaps they attached greater importance…Correspondingly, if there were proper reasons for exercising the power and it would still have been exercised for those reasons even in the absence of improper ones, it is difficult to see why justice should require the decision to be set aside*".

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[101] *Roadchef (Employee Benefit Trustees) Ltd v Hill* [2014] EWHC 109 (Ch) at [129].

[102] At 823. Although, cf. Lord Sumption's valiant effort to explain this as really an application of a 'but for' test in *Eclairs* at [24].

[103] See e.g. *Whitehouse v Carlton Hotel Property Ltd* (1987) 162 CLR 285 at 294.

38. However, Lord Mance (with whom Lord Neuberger agreed), whilst noting that he had originally agreed with Lord Sumption's judgment when it was circulated in draft to the parties, declined to express a firm conclusion on the matter because it had not been the subject of full argument and was not necessary to the decision in the case. Lord Clarke (with whom Lord Neuberger also agreed) stated that while he was "*inclined to agree*" with Lord Sumption, he saw the "*force*" in the reservations expressed by Lord Mance.

39. There are practical uncertainties around the use of a 'but for' test in this context. In particular, it will require detailed enquiries to be carried out into the balancing of different factors in the subjective decision of the donee. But much the same could be said for a 'dominant purpose' test, which also requires the court to attribute weight to each the various purposes. Only a brightline rule that the presence of *any* improper purpose invalidates the exercise of the power would circumvent the need for such an exercise.

40. It is also unclear whether the rules on 'but for' causation in this context would be borrowed from the law of torts (with their dizzying hypotheticals and rules around remoteness), the restrictive approach adopted in public law, or mirror the more flexible approach which seems to prevail in cases of inadequate deliberation.[104] This is not, however, an insuperable problem.

Beyond trusts

41. As will be apparent from some of the cases already discussed, the improper purpose rule is not confined to the traditional trusts context. Indeed, public law has long had a functionally equivalent doctrine of the same name which controls the exercise of powers by public bodies: see for example *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 and *R v Somerset County Council, ex parte Fewings* [1995] 1 All ER 513 at 524. In this final section, a number of other private law applications are considered.

42. Company law has been a fruitful home for the rule. In addition to applying to all fiduciary powers as a matter of common law, it has also been put on a statutory footing in most jurisdictions: s.171(2) of the Companies Act 2006 in England and Wales and s.121 of the British Virgin Islands Companies Act 2004.

43. This is to some extent inherent in the latitude necessarily given to directors of a company to manage its affairs. As Lord Sumption noted in *Eclairs* at [31], while "*the purpose of a power conferred by a company's articles is rarely expressed in the instrument itself*" but "*it is usually obvious from its context and effect why a power has been conferred*". As such, the rule provides an important mechanism for

[104] See *Pitt v Holt* at [92].

ensuring that the balance of roles struck by the company's constitution is protected.

44. Prior to *Eclairs* the majority of the cases had involved decisions to issue shares, often for the purpose of defeating hostile takeover bids. So, in one of the earliest cases, *Fraser v Whalley* (1864) 2 H & M 10, the directors of a statutory railway company, who expected to be removed from office at the next shareholders' meeting, were prevented by the doctrine from issuing shares to dilute the shareholdings of the existing shareholders so as to defeat the resolution for their removal. Similarly in *Howard Smith* the Privy Council held that it was improper to have issued new shares so as to favour a takeover by one prospective purchaser rather than another.

45. An interesting counterpoint to these decisions provided by *CAS (Nominees Ltd v Nottingham Forest Plc* [2002] BCC 145. The claimant held the entire issued share capital in Nottingham Forest FC. By 1999 the club was in dire need of investment, but under the statutory framework in force at the time it was not possible for the claimant to issue new shares without also issuing a rateable proportion to its existing shareholders. As such, the directors procured the issue of new shares by Nottingham Forest Plc itself to a new investor, who became the majority owner of the club. Upon a challenge to this decision by the pre-existing shareholders in the Claimant, it was held that although the *effect* had been to bring about the takeover against the wishes of the existing shareholders, the *purpose* of the directors had been the entirely proper one of raising capital. This illustrates how finely balanced the fact-patterns in these cases can be.

46. Another context in which it has long been recognised that there are external constraints on those given quasi-fiduciary powers is insolvency law. While office-holders in insolvency/bankruptcy are creatures of statute, the common law has always subjected the wide-ranging powers conferred upon them to additional controls. The most famous of these is the rule in *Ex Parte James* [1874] LR 9 Ch App 609, described by David Richards LJ in *Lehman Brothers Australia Limited v MacNamara* [2020] EWCA Civ 321 at [35] as the principle that "*the standards which right-thinking people…would think should govern the Court or its officers*". As such, whilst *intra vires*, an act or decision of an office-holder which offends those standards may be liable to challenge.

47. This is a free-standing principle of insolvency law which appears to partake of elements of both the rule in *Re Hastings-Bass* and the type of *Braganza* features referred to in Part 1. However, it also speaks to separate freestanding and wide controls existing over the exercise of far-reaching powers which are functionally similar to the improper purpose rule as described in this paper.

48. An interesting illustration, in which an improper purpose challenge ultimately failed, is provided by the decision of the House of Lords in *Re Pantmaenog Timber Co Ltd* [2004] 1 AC 158. In that case, the House of Lords had to consider the question

of whether the Official Receiver could use its powers under s.236 of the Insolvency Act 1986 to obtain information in circumstances where the sole purpose of doing so would be to pursue separate disqualification proceedings against a former director. Lord Millett, in allowing Official Receiver's appeal against the Court of Appeal's decision that it could not do so, was critical of "*the unspoken assumption [in the CA judgment] that a liquidator's 'functions in the winding up' are limited to the collection and distribution of the company's assets…*". Instead, he held that "*the liquidator's functions in relation to the company which is being wound up are not and never have been limited to the recovery and distribution of the company's assets.*".[105] He continued:

> *"64. … I reject the unspoken assumption that the functions of a liquidator are limited to the administration of the insolvent estate. This is only one aspect of an insolvency proceeding; the investigation of the causes of the company's failure and the conduct of those concerned in its management are another. Furthermore such an investigation is not undertaken as an end in itself, but in the wider public interest with a view to enabling the authorities to take appropriate action against those who are found to be guilty of misconduct in relation to the company.*

49. Similarly, Lord Walker in his speech noted at [78] that "*what I might call the public element in winding up has changed a good deal in the course of a century and a half*" and, having reviewed the old cases on the OR's role in direct disqualification proceedings, observed at [86] that "*although the court has always been concerned to see that its extraordinary powers should not be exercised oppressively, the 19th century and early 20th century cases do not show any inclination to limit investigation to matters of direct concern to creditors and shareholders.*"

50. There are corners of private law where the rule does not reach. For example, in *Reda v Flag Ltd* [2002] UKPC 38 the Privy Council held that an express contractual right for the employer to terminate an employment contract without cause was not liable to challenge on the basis that it had been exercised for an improper purpose. Lord Millet, giving the judgment of the Board, explained that

> "*The principal ground on which this was disputed by the appellants at trial was that the decision of Flag's directors to bring their contracts to an end was vitiated by their "collateral purpose' in seeking to avoid having to grant the appellants stock options. But in the present context there is no such thing as a "collateral' or improper purpose; a power to dismiss without cause is a power to dismiss for any cause or none.*"

[105] [63].

51. In *Doherty v Birmingham City Council* [2009] 1 AC 367, Lord Scott similarly held that a private landlord's right to terminate a tenancy was wholly unfettered and could be exercised for any reason:

> "*69…. If private owners are entitled to recover possession of their property under the ordinary domestic law, whether common law, statute or a combination, their reasons for deciding to recover possession are irrelevant. Private owners are entitled to take decisions about their own property to suit themselves unless and to the extent that statute has fettered that entitlement.*"

Reflections on *Marex* and *Primeo*

James Bailey KC and Daniel Lewis

Introduction

1. A great deal has been written and debated with respect to reflective loss, or the "rule in *Prudential*"[106] as it should perhaps now be known. The doctrine was the subject of a considerable overhaul in the Supreme Court decision in *Sevillja v Marex Financial Limited* [2020] UKSC 31, and was considered yet further by the Privy Council in *Primeo Fund (in official liq) v Bank of Bermuda (Cayman) Ltd* [2021] UKPC 22. The purpose of this talk is to consider these cases from a different perspective.

2. First, we seek to consider how to circumvent the obstacles thrown up by these decisions, looking at what can be learnt from the more recent decisions (both successful and unsuccessful) and the potential exceptions left open for future argument.

3. Second, we explore a part of the first instance decision in *Marex* which is often overlooked, and which has given rise not only to a new line of cases unconnected with the Supreme Court decision, but it would appear a whole new tort.

Developing Workarounds

(i) How we got here

4. The history of the *Prudential v Newman* line of authority has been very controversial. The biggest reason is that where and to the extent that it applies, the claimant is denied recovery of damages notwithstanding it has proved (a) duty (b) breach (c) causation (d) foreseeability and (e) damage; correspondingly, the wrongdoer defendant can be cheerful all the way to the bank because, for whatever reason, the damaged company has not brought an effective claim even though it apparently had a good cause of action. The law makes a policy choice that in certain cases there will be just such an outcome.

5. It is in the nature of a common law doctrine such as reflective loss that parties will attempt to find exceptions to manoeuvre the facts of their particular case through. The decision of the Supreme Court in *Marex* was intended as a correction to a trend

[106] *Prudential Assurance Co. Ltd v Newman Industries Ltd (No.2)* [1982] Ch. 204.

that had emerged since *Prudential v Newman*, whereby the principle of reflective loss was said to have broken from its moorings in company law.[107] That correction was in fact designed to restrict the application of the principle to the "shareholder cases" and was opposed to its expansion to the "creditor cases". However, a side-effect has been to introduce a refreshed rigour to the application of the rule in the "shareholder cases", where once a more permissive approach might have been adopted.

(ii) Where we are now

6. *Marex* emphasised the nature of the loss as being central to the application of the principle, to which the identity of the claimant is incidental. Lord Reed encapsulated the consequences of that distinction at [89]:

> *"The rule in Prudential is limited to claims by shareholders that, as a result of actionable loss suffered by their company, the value of their shares, or of the distributions they receive as shareholders, has been diminished. Other claims, whether by shareholders or anyone else, should be dealt with in the ordinary way."*

It is not the claimant's status as shareholder that bars relief but the fact that its loss is reflected in the value of its shares or distributions.

7. Attempts to circumvent the full rigour of *Marex* very often focus on the identification of a different loss from that of the company (although sometimes such distinctions have been seen as more artificial than real). This is the starting point for the potential exceptions we identify below. In view of the renewed strictness of the application of the rule they might be said to range from the tricky to the very difficult.

8. We do not include within the workarounds the claims that might be brought by way of a derivative action or an unfair prejudice petition. They are very far from a panacea to the pain caused to the shareholder claimant: on the contrary, they present a convoluted and expensive solution (as recognised by Lord Denning MR, the shareholder who brings a derivative claim "has nothing to gain, but much to lose"[108]).

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[107] Per Lord Hodge at [95].

[108] *Wallersteiner v Moir (No. 2)* [1975] Q.B. 373 at p.395.

Some Ways Around the Rule against Reflective Loss

(i) A loss which is the shareholder's alone

9. The decision of the majority in *Marex* was that the rule against reflective loss had nothing to do with damages: it was the status of (and loss suffered by) the claimant as shareholder that barred the claims. From this it follows that the shareholder claimant who can formulate a claim for losses which are not reflected in a depreciation of share value or a loss of distributions is free to do so.

10. There are three potential ways in which such a claim might be formulated.

11. **First**, there are losses which were suffered by the shareholder and which were not suffered by the company. The difficulty with such claims is that they may often be a small part of the true damage caused by the defendant's actions.

12. In *Marex*, for example, the Court of Appeal held that the claimant creditor (to whom the rule against reflective loss was held to apply) was able to recover for the costs of enforcement.[109] These represented a small percentage of the total losses.

13. Similarly, in *Naibu Global International Co Plc v Daniel Stewart and Co Plc* [2021] P.N.L.R. 4, although the direct losses sustained as a result of the fraud were held to be reflective, the parent company shareholder had nonetheless sustained certain losses of its own in investigating and seeking to obtain control of its subsidiaries in China. Again, as a small percentage of a whole, these damages provided cold comfort.

14. **Secondly**, it may be possible to identify a loss in time which precedes that of the company. The argument would be that the relevant date (following *Primeo*) for assessing the application of the rule is when the loss is sustained. In *Naibu* (decided before *Primeo*) it was argued that the loss was sustained before any loss to the subsidiaries. This was because it was alleged that in setting up the group structure, the professional advisors had failed to put in place sufficient control over the subsidiaries, such that structurally the parent's investments in its subsidiaries were of less value. This was before any fraud by the CEO of the Chinese subsidiaries (frauds which he was given a free-hand to commit by the defective structure). That argument was not successful, but might perhaps be revisited in the future.

[109] At [64].

15. **Thirdly**, the principle of reflective loss was, pre-*Marex*, being applied as a matter of course to claims brought by employees or creditors who also happened to be shareholders (see Neuberger L.J. in *Gardner v Parker* [2005] B.C.C. 46, at [70]:

> "It is clear from those observations, and indeed from that aspect of the decision, in Johnson that the rule against reflective loss is not limited to claims brought by a shareholder in his capacity as such; it would also apply to him in his capacity as an employee of the company with a right (or even an expectation) of receiving contributions to his pension fund. On that basis, there is no logical reason why it should not apply to a shareholder in his capacity as a creditor of the company expecting repayment of his debt.").

16. Post-*Marex* (and given the significance given by the majority to the claimant's status as shareholder) it may well be possible to bring claims in another capacity even if also a shareholder (e.g. as a shareholder director who is a creditor by reason of director's loans advanced to the company).

(ii) Do not claim damages

17. This workaround is the corollary of the "not claiming as a shareholder" exception above. If the shareholder is also a party to an agreement which provides that the defendant is to do something for the company (most usefully, to pay) he or she might be permitted to bring a claim for specific performance. Again, this is not straightforward and an issue which remains to be resolved.

18. In *Latin American Investments Ltd v Maroil Trading Inc* [2017] EWHC 1254 (Comm) Teare J held (citing *Peak Hotels and Resorts Ltd v Tarek Investments Ltd* [2015] EWHC 3048 (Ch)) that it was arguable that specific performance might be awarded in circumstances where shareholders were barred from claiming damages because their loss was merely reflective of that of the company. Since such an order would compel payments to be made *to the company*, it would arguably not fall foul of the reflective loss principle, since it carries no risk of double-recovery and prejudice to creditors. That reasoning was deployed successfully in the large array of interim and final injunctive relief obtained in *Say Chong Lim v Francis Ong* [2023] EWHC 321 (Ch).

19. Subsequently in *Broadcasting Investment Group Ltd v Smith* [2022] 1 W.L.R. 1 Asplin LJ stated that although a superficial reading of the authorities (including *Peak Hotels* and *Latin American Investments*) might lead to the conclusion that claims for specific performance (whether with or without seeking additional or alternative relief in the form of equitable damages) do fall within the reflective loss rule, the matter is complex and "*best left to a case in which it is essential to determine the issue*". A further example is *Xie Zhikun v Xio GP Ltd* (unreported) 14 November 2018 in the Cayman Islands Court of Appeal. Sir Bernard Rix JA observed that he did not

see "how, other than perhaps in terms of pure formalism … the present claim differs from … a derivative action".

20. That said, Lord Reed expressed reservations in *Marex* about these cases and as to the availability of a claim for specific performance (see [53]-[54]).

(iii) Direct claims allowed by statute

21. There are limited circumstances in which claims in insolvencies are permitted by statute to be brought on the part of the shareholder for losses suffered by the company.

22. Section 212 of the (English) Insolvency Act 1986 specifically caters for direct claims by contributories against former officers and liquidators (emphasis added):

> *"212.— Summary remedy against delinquent directors, liquidators, etc.*
> *(1) This section applies if in the course of the winding up of a company it appears that a person who—*
> *(a) is or has been an officer of the company,*
> *(b) has acted as liquidator or administrative receiver of the company, or*
> *(c) not being a person falling within paragraph (a) or (b), is or has been concerned, or has taken part, in the promotion, formation or management of the company,*
> *has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company.*
>
> *(2) The reference in subsection (1) to any misfeasance or breach of any fiduciary or other duty in relation to the company includes, in the case of a person who has acted as liquidator of the company, any misfeasance or breach of any fiduciary or other duty in connection with the carrying out of his functions as liquidator of the company.*
>
> *(3) The court may, on the application of the official receiver or the liquidator, or of any creditor or* ***contributory,*** *examine into the conduct of the person falling within subsection (1) and compel him—*
> *(a) to repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just, or*
> *(b) to contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just.*

(4) The power to make an application under subsection (3) in relation to a person who has acted as liquidator of the company is not exercisable, except with the leave of the court, after he has had his release.

(5) The power of a contributory to make an application under subsection (3) is not exercisable except with the leave of the court, but is exercisable notwithstanding that he will not benefit from any order the court may make on the application."

23. This provisions is rarely used by shareholders. Any recovery made by the shareholder claimant (subject to payment of their costs) will go back into the company, as with any derivative claim. Given that in these circumstances the company is insolvent and the shareholder will rank below unsecured creditors in any ultimate distribution, this form of self-help is far from attractive. Following the amendment of subsection (5) there is no longer any requirement that the shareholder demonstrate a surplus for distribution at the application for permission stage if the claim is successful.

(iv) What, if anything, remains of Giles v Rhind?

24. *Marex* was generally reported as the death of *Giles v Rhind*, but those reports may have been greatly exaggerated.

25. The plurality's rejection of *Giles v Rhind* was unnecessary for the appeal to be allowed and Lord Hodge (who delivered a concurring judgment) did not comment on the exception. While the minority suggested that the exception could lead to injustice, this suggestion was likewise made in dicta that had already held that the reflective loss principle either did not exist or did not apply in the case.

26. The Singapore Court of Appeal left this question open in *Miao Weiguo* [2021] SGCA 116 at [155], albeit with an acknowledgment that Lord Reed's rejection of the exception had considerable force.

(v) Drafting of agreements or articles of association so as to exclude the rule

27. It may be possible to "contract out of" the rule against reflective loss. Such drafting could be contained in shareholder agreements or articles of association (governing the relations between shareholders and the company) or alternatively in the terms of retainers of professional advisers (if they could be persuaded to waive any right to rely upon a reflective loss defence).

Marex Tort

(i) The decision in Marex itself

28. *Marex* is undoubtedly best known for what it has to contribute to the doctrine of reflective loss. However there is another important aspect of the case that comes out of the first instance decision of Robin Knowles J sitting in the Commercial Court. *Marex* was of course appealed twice, but nothing adverse was said along its appellate journey about the judge's conclusions on a cause of action now known as "Marex tort".

29. Those seeking to bring claims in fraud typically share a common concern – how are they to recover the money due to them if they win their claim. Defendants have long sought to evade the effects of judgments, actual or prospective, but surely it cannot be right that a successful claimant is left without a remedy if a person seeks to cause a judgment debtor to move assets beyond the reach of the now judgment creditor. A particular subset of the factual matrix that gives rise to this general concern is the company director who causes his company to move company assets away for such a purpose.

30. The solution to the above problem may well be the Marex tort, which can be summarised as being the tort of knowingly inducing or procuring a person to act in wrongful violation of rights under a judgment.

31. In *Marex* itself, the claimant obtained judgments against two BVI companies, and thereafter a post-judgment freezing order. The defendant, being the ultimate beneficial owner, controller, agent and de factor or shadow director of the companies, in breach of fiduciary duty, it was said, transferred or caused the companies to transfer away assets in the sum of some US$9.5million into his personal control. He did this for the most part in the narrow window between having sight of the embargoed draft judgment and handing down.

32. The claimant asserted that such conduct was a wrong against *him* (it was plainly a wrong against the companies). It asserted that the defendant had induced or procured a violation of its rights under the judgment (and had also intentionally caused loss by unlawful means). The claimant served proceedings out of the jurisdiction, relying upon CPR r.6.36 and a "claim in tort" as its jurisdictional gateway.

33. The defendant brought an application challenging the jurisdiction of the English court, contending that there was no tort of violating rights under a judgment, and that the unlawful means alleged did not count for the purposes of the tort of interference by unlawful means. It was also asserted that the rule against reflective loss meant that there was no complete cause of action, but that point was of course addressed by the Supreme Court.

34. The claimant's case was that the proper construction of a "claim made in tort" for the purposes of service out was simply that it was tortious in nature. The defendant said that the claim must address to the requisite standard whether a tort had been committed. There was something of a dispute as to what that standard should be in the context of a challenge to service out. The options available to the court were (i) to decide the legal issue; (ii) to determine whether the claimant had a good arguable case, or "the better of the argument"; or (iii) a lower standard still of whether there was "a serious question to be tried". In ordinary circumstances the court would seek to decide the question of law,[110] but not if there were to be an exceptionally difficult and doubtful point of law.[111]

35. The argument against there being a Marex tort was that the judgment begins a new regime, that the rights in contract (being the underlying cause of action) merge into the judgment, and that whereas the non-payment of a contractual debt is an actionable wrong by the debtor, the non-payment of the judgment debt is not – the new regime, it was said, has its own means of enforcement.

36. The argument for the Marex tort was that the cause of action sits within the principle first recognised in *Lumley v Gye*,[112] i.e. the tort of inducing breach of contract. As the claim founding the judgment was a claim in contract, recognition of the existence of the tort would be unsurprising, it was said, given that the tort *is* recognised where the violation is of rights in contract. Non-payment of a judgment debt itself is an actionable wrong. Indeed this is the theoretical basis for enforcing foreign judgments at common law. However it is a principle of general application, not merely a fiction applied to that area of common law.

37. Admittedly there is dicta in *Law Debenture Trust Corpn v Ural Caspian Oil Corpn Ltd* which leans against the existence of the tort, which was discovered and quite rightly brought to the attention of the court by the claimant, based upon the notion that there is no wrong committed if a defendant makes himself judgment-proof before being enjoined from doing so (i.e. by way of an injunction).[113] However Robin Knowles J considered that in that case the Court of Appeal was addressing the situation where there was no right of the claimant before the freezing order

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[110] Per *VTB Capital plc v Nutriek International Corpn* [2012] 2 Lloyd's Rep. 313 at [99].

[111] Per the Privy Council decision in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2012] W.L.R. 1804 at [86].

[112] *Lumley v Gye* (1853) 2 E&B 216.

[113] See *Law Debenture Trust Corpn v Ural Caspian Oil Corpn Ltd* [1995] Ch. 152 *per* Sir Thomas Bingham at 166.

enjoined the defendant from committing the acts complained of. It was similar to a claim in damages *before* judgment. In *Marex* however, the claimant had the right to be paid a contract sum pre-judgment, and a judgment sum post-judgment.

38. There was a suggestion made before Robin Knowles J that the tort would be widely invoked – what appears to be a floodgates argument - but even if that were to be the case, we find it hard to object to such an outcome if the result is that successful claimants have better prospects of making the recovery to which they are plainly entitled.

39. Accordingly Robin Knowles J concluded that the claimant had "the better argument for the existence of the tort", and the Court of Appeal refused permission to appeal that conclusion.

(ii) The crystallisation of the tort: Lakatamia Shipping Co Ltd v Su

40. A substantial judgment was handed down by Bryan J sitting in the Commercial Court in July 2021 in *Lakatamia Shipping Co Ltd v Su.*[114] The matters considered in the judgment were broad ranging, but of particular interest is the reliance placed by the claimant on Marex tort.

41. A claim was brought by Lakatamia Shipping in both unlawful means conspiracy and for the intentional violation of rights in a judgment debt (i.e. Marex tort). Mr Su was the subject of a worldwide freezing order. His mother, referred to in the judgment as Madam Su, and various corporate defendants were said to have conspired to dissipate the son's assets, in particular two Monegasque villas and a private jet.

42. The court found that Madam Su and the companies knew that Mr Su was the subject of the injunction (necessary for unlawful means conspiracy) and knew of the judgment debt (necessary for tortious liability), and knowingly procured Mr Su's failure to discharge that debt.

43. The court considered what Robin Knowles J had said in *Marex*. At paragraph [118] Bryan J observed as follows:

> "[118] In the context of an application for permission to serve a claim form out of the jurisdiction, Robin Knowles J held that there was (at least) a good arguable case that English law recognised a tort of inducing or procuring a violation of rights under a judgment. He essentially did so on the basis that, given that inducing a breach of contractual rights is actionable, it would be

[114] *Lakatamia Shipping Co Ltd v Su* [2021] EWHC 1907 (Comm).

counterintuitive if it were not also tortious to procure a violation of rights in a judgment debt that was founded upon a contract, a fortiori given that non-payment of a judgment debt is itself an actionable wrong…"

44. It is interesting to then note what Bryan J considered that Robin Knowles J had found:

> "[119] … In *Marex*, Robin Knowles J took the view that where a contractual right to payment is merged into a judgment, then a third party procuring a breach of contract must necessarily also be committing a tort. Whilst aspects of the case have something of an appellate history, the Court of Appeal refused permission to appeal against that part of the judgment that related to Marex tort's existence…"

45. Bryan J went on to conclude (at [120]-[121]):

> "[120] Marex tort finds a close, and I consider compelling, analogy with the tort of inducing a breach of contract. There would seem to be no compelling reason why, in circumstances where the law protects against intentional interference by third parties with contractual rights it should not equally protect against intentional interference with rights established by judgments.
>
> [121] I consider that the position is *a fortiori* in relation to judgments vindicating contractual rights (which is the case here given that it is the judgments of Cooke J that are in issue in this litigation). When judgment is given for a claim for breach of contract, the contractual right merges in, and is novated by, the judgment, see *Zavarco plc v. Nasir* [2020] EWHC 629 (Ch); [2020] Ch. 651, at [12], and I can see no reason why the law should protect against third-party interference with contractual rights but not against such interference with contractual rights that have been novated by judgment. Absent such protection, the law would perversely diminish the protection that it affords to a victim of a breach of contract where the victim has had those rights vindicated by the courts."

46. The judge observed that whereas the defendants had described the Marex tort as "novel", it was only novel in the sense of being newly recognised as a form of tortious wrongdoing, and that the English courts continue to recognise and

acknowledge further types of tortious wrongdoing, giving as a recent example the recognition of the tort of malicious prosecution of civil proceedings.[115]

47. Thus it seems, therefore, that a good arguable case for the existence of the tort, or "the better of the argument", has crystallised into a determination that it does unequivocally exist. It is interesting to note, however, that this "upgrade" occurred in the absence of any argument to the contrary, or at least not by the time of closing submissions.[116] The judge observed:

> "[124] In any event, the existence of the Marex tort is not disputed on behalf of Madam Su, and it is expressly confirmed at paragraph 374 of Madam Su's Written Closing Submissions that Madam Su is content to adopt the analysis of Robin Knowles J, on the basis that where a contractual right has been merged into a judgment right, then a tort of procuring a breach of a right under a judgment may be established."

48. Helpfully, he then went on to identify the elements of the tort. He noted that it was common ground that given that the Marex tort was a development of the tort of inducing a breach of contract, its elements stood to be identified by analogy with that tort, referring to the summary of the elements of that tort set out by Morgan J in *Aerostar Maintenance International Ltd v Wilson.*[117]

49. Applying those elements *mutatis mutandis* to the Marex tort, the elements were identified as follows:

    (1) the entry of a judgment in the claimant's favour;
    (2) breach of the rights existing under that judgment;
    (3) the procurement or inducement of that breach by the defendant;
    (4) knowledge of the judgment on the part of the defendant; and
    (5) realisation on the part of the defendant that the conduct being induced or procures would breach the rights owed under the judgment.

50. The judge also set out five supplementary principles. First, it suffices that the defendant intended to violate the claimant's rights under the judgment. The defendant does not need also to intend thereby to damage the claimant. Second,

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[115] See *Willers v Joyce* [2016] UKSC 43; [2018] A.C. 779.

[116] It is suggested that the reference by Madam Su to the tort being novel was perhaps an attempt to encourage the judge not to continue the journey begun by Robin Knowles J, without fully opposing it for strategic reasons.

[117] *Aerostar Maintenance International Ltd v Wilson* [2010] EWHC 2032 (Ch) at [163].

just as it is unnecessary for a defendant in a claim for inducing a breach of contract to know the details of the contract provided that they had "the means of knowledge", it is not essential that the defendant to a claim for the Marex tort has actual knowledge of the *contents* of the judgment. Third, in this regard blind-eye knowledge is sufficient. Thus, as was said by Lord Denning in the *Emerald Construction* case, *"it is unlawful for a third person to procure a breach of contract knowing, or recklessly, indifferent whether it is a breach or not"*.[118] The same principle applies to Marex tort. Fourth, any active step taken by the defendant having knowledge of the covenant by which he facilitates a breach of that covenant falls within the ambit of the tort.[119] Fifth, there is no need to establish " *spite, desire to injure or ill will"* on the part of the defendant.

51. The judge further observed (perhaps as a sixth principle) that, as both sides recognised, an important element is that there be procurement or inducement by the defendant of the breach of the rights existing under the judgment by persuading, encouraging or assisting the other to do so, and in this regard it is essential that *"the defendant's acts of encouragement, threats, persuasion and so forth have a sufficient causal connection with the breach ..."*.[120]

52. Given the extent to which the tort of inducing breach of contract has been used not only to provide support for Marex tort's existence, but also then used to determine its elements, what is the difference between the two? The most significant one is that inducing breach of contract requires a contract. Marex tort does not – it requires a judgment. As will be seen below, that judgment does not need to arise from breach of contract claim. Further there may be a difference in the defences available.

53. In the case of procuring breach of contract, whilst intentionally procuring a breach of contract is actionable *independently* of the motive or reason for so doing (since the action depends upon breach of the claimant's right and is not based on the spite, desire to injure or ill will of the defendant), some exception has been made on the ground of justification, albeit it has been recognised that *"it would be extremely difficult, even if it were possible, to give a complete and satisfactory definition of what is 'sufficient justification'"*.[121] The defence of justification in

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[118] *Emerald Construction Co Ltd v Lowthian* [1966] 1 W.L.R. 691 at 700.

[119] See *British Motor Trade Association v Salvadori* [1949] Ch. 556 at 565.

[120] See *OBG Ltd v Allan* [2007] UKHL21; [2008] A.C. 1 at [36] per Lord Hoffman.

[121] At [130], citing *Glamorgan Coal Co v South Wales Miners Federation* [1903] 2 K.B. 545 at 573 CA per Romer LJ.

relation to inducing a breach of contract has itself been recognised as being of *"fairly restricted ambit"* and *"narrow scope"*.[122]

54. In contrast, the Marex tort does not have scope for an equivalent defence. Whilst there may be limited circumstances in which it is reasonable to induce a breach of a contractual right (a right which by its very nature is a right created by contract) in the furtherance of, by way of example, a moral obligation, the judge could not see any room for an equivalent defence in relation to rights established by due process and enshrined in a judgment.

(iii) Conclusion

55. Those campaigning for the existence of the Marex tort were consider by Robin Knowles J to have the better of the argument. Then in a case in which the existence of the tort was conceded, that has morphed into an apparently crystallised cause of action. Whilst not suggesting that this is not a positive step in the development of the law – the authors respectfully suggest it plainly is – is there any room left for a sensible argument that the tort does not exist?

56. The answer to that, at least at first instance, is probably not. Indeed the decisions in *Marex* (at first instance) and *Lakatamia Shipping v Su* have already been referred to in other cases.

57. In *Hotel Portfolio II UK Ltd (in liquidation) v Ruhan*,[123] Foxton J was considering the question as to whether one can dishonestly assist in the breach of a constructive trust. He observed that at common law, there appears to be no tort of procuring or inducing breach of a secondary obligation (i.e. one which arises as a result of, and as remedy for, the breach of the primary obligation), which he considered to be the effect of the *Law Debenture Trust* case (a case identified in *Marex* itself, as discussed above). However he then expressly contrasted the position where the primary liability had merged in a judgment, referring to *Lakatamia Shipping*.

58. The tort was also referred to in the recent decision handed down on 9th June 2022 in *Gee v Gee* by HHJ Paul Matthews (sitting as a Judge of the High Court).[124] In that case the claimant had obtained an order at trial that the first defendant should use his reasonable endeavours to procure a landlord's consent to assign a tenancy of a farm from himself to a company (in which the claimant had an interest). In fact

[122] Clerk & Lindsell on Torts, at paras 23.59-60.

[123] *Hotel Portfolio II UK Ltd v Ruhan* [2022] EWHC 383 (Comm).

[124] *Gee v Gee* [2022] EWHC 1369 (Ch).

the second defendant, under a lasting power of attorney, caused the surrender of the lease by the first defendant in breach of the order in exchange for the sum of £63,000. The landlord subsequently re-let the land to another. The claimant contended that leaving aside issues of contempt of court, the surrender of the lease gave rise to a separate cause of action following *Lakatamia Shipping*. The defendant contended that any such claim should be commenced in a separate action. The court concluded, among other procedural and practical matters, that there was no need for separate proceedings to be commenced to deal with a breach of the order in the original proceedings, but observed that "*the procuring by B of a breach of an order addressed to A has been held (in the Lakatamia case) to amount to a tort, so that it may be the subject of an independent claim*". It is important to recognise that the underlying claim giving rise to the judgment had nothing to do with breach of contract – it was a claim in proprietary estoppel.

59. Finally, Marex tort was pleaded (at least to some extent) in *Commercial Bank of Dubai PSC v Al Sari* [2023] EWHC 1797. The hearing before Bright J in the Commercial Court concerned determining the appropriate forum to resolve a dispute whereby various UAE based defendants were said to have colluded to try to avoid the enforcement of certain judgments obtained in various jurisdictions. The learned judge was somewhat critical of the way the claim had been pleaded, and noted that only overseas judgments were overtly relied upon in support of the Marex tort claim. He held that England was the appropriate forum (for other reasons), but seems to have happily accepted the existence of the tort "recognised at first instance by Knowles J in *Marex*... and reviewed by Bryan J in *Lakatamia*..."

60. Accordingly, and irrespective of its incremental genesis, it rather seems that Marex tort is here to stay.

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