



# Chancery Bar Association's Jersey Conference

Thursday, 3<sup>rd</sup> November 2016  
The Royal Yacht Hotel, Jersey



# DISCLOSURE OF INFORMATION TO BENEFICIARIES

Penelope Reed QC  
5 Stone Buildings  
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## Introduction

- ❖ Disclosure of Information

  - ❖ *Schmidt v Rosewood*

- ❖ letters of wishes

- ❖ the jurisdiction

- ❖ Privilege

- ❖ incoming trustee.



## *Schmidt v Rosewood*

- ❖ Entitlement to have information not a proprietary right of beneficiary
- ❖ A proprietary interest neither sufficient or necessary
- ❖ Part of the Court's inherent jurisdiction to supervise trusts
- ❖ Matter of discretion for the Court
  - ❖ What is in the best interests of the trust as a whole?



## Letters of Wishes

### ❖ *Re Londonderry's Settlement*

- ❖ Confidentiality of the decision making process

### ❖ *re Rabaiotti's Settlements*

- ❖ Letter of wishes too bound up on decision making process
- ❖ Need to show case for disclosure

### ❖ *Countess Bathurst v Kleinwort Benson (Channel Islands) Trustees Ltd*

- ❖ Not part of decision making process

### ❖ *Breakspear v Ackland*



## Who can apply and against whom

### *Alhamrani v Russa Management Ltd*

Beneficiaries where disclaimer was in doubt

### *Countess Bathurst v Kleinwort Benson (Channel Islands) Trustees Ltd*

Excluded beneficiary

### *Re Application for Information about a Trust*

Clause restricting flow of information to the beneficiaries

### *Re HHH Employee Trust*

*Settlor*



## Privilege

### ❖ *Mackley Blades v Isaac*

- ❖ Distinction between disclosure under *Schmidt v Rosewood* and in litigation
- ❖ No privilege between trustees and beneficiaries as to Opinion obtained in the administration of the trust at the expense of the trust fund

### ❖ *Birdseye v Roythorne & co*

- ❖ Has to be established that someone is a beneficiary before privilege will no longer attach



## The Incoming Trustee

- ❖ Delivery up of documents to the new trustee
- ❖ Discretion in Court to order that documents ought not to be disclosed
  - ❖ *Equity Trust (Bahamas) Ltd v Basel Trust Corp (Channel Islands)*
- ❖ Different Considerations to beneficiaries



## Summary

- ❖ Flexibility
- ❖ Discretion of the Court
- ❖ What is in the best interests of the Trust.



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# Current cross-border insolvency and restructuring issues

David Chivers QC  
Erskine Chambers



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# Corporate Attribution

Martha Maher  
St John's Chambers, Bristol

3<sup>rd</sup> November 2016



# 1. The Issue

Company is an artificial person

- *“No body to be burned and no soul to be damned”*
- Basis of company liability to third parties?
- How is conduct/state of mind of company agents to be attributed to it?
  - When is it deemed a wrongdoer?



## 2. Corporate Attribution

- Contrast Vicarious Liability:

Company is legally responsible for the act of the other person

- without being deemed a wrongdoer and
- without employee's conduct/state of mind being attributed to it.



### 3. Corporate Attribution

Contrast “*piercing the corporate veil*”

How far those who control a company may be held concurrently liable with company



## 4. Criterion for liability: phase 1

- Anthropomorphic approach:
- *“Directing mind and will”* test
  - Lennards Carrying Co Ltd 1915



## 5. Phase 1 ....

- “Exception” to Company liability:

Fraud or breach of duty to principal

- The attribution rule should not bar liability of company directors for misconduct.

(“The Rule in Hampshire Land”)



## 6. Fresh approach

- Identify the “applicable rule” of attribution
- Depends on context

Meridian Global v Securities Commission  
(1995 2 BCLC 116 PC Ld Hoffman)



# Effect of Meridian Global

## 1. Primary rules of Attribution ..

- Decisions of Board of Directors
- Decisions of General Meeting,
- Company Articles

## 2. General Rules of Attribution..

Law of Agency

Estoppel



## 8. Fresh Approach contd

3. Court may fashion a “*special rule of attribution*” for a particular substantive context, if the circumstances require it.



## 9. The Real Question..

Is one of construction  
Of the statute or  
Of the contract ...

It is not a question of metaphysics!



## 10. Fine tuning...

- Moulin Global Eyecare Trading Ltd v Commrs of Inland Revenue  
( 2014 HKCFAR 218)
- Context is key
- It includes not only facts/legislation but also the *nature of the proceedings* in which the Q of attribution arises.
- The fraud exception is limited.



## 11. Moulin decision

JR proceedings by liquidator claiming  
objection to tax assessments

Repayment of tax paid to IR consequent to Co's  
management having fraudulently inflated profits

Q : was the knowledge of management attributable  
to company? A: **Yes**



## 12. Nature of proceedings..

- Distinguish:
- Liability cases:
  - Co sued by another for dishonest conduct of director/employee: Attribution ? **Yes**, even if the company is in some sense also a victim....
- Redress Cases:
  - Co sues directors and accomplices for wrongs to it: Attribution? **No.**



## 13. Bilta UK Ltd v Jetivia SA

(2015 2WLR 1168)

- Defence of illegality not available to block claim by Co in liquidation against directors and their assistors.
- Meridian approach upheld.
- This also applies to “one man companies”



## 14. Bilta..

*“..It is certainly unjust and absurd to suggest that the answer to a claim for breach of a director’s (or any employee’s) duty could lie in attributing to the company the very misconduct by which the director or employee has damaged it”*

[Lord Mance para [38]]



## 15. Bilta and Illegality

When can illegality defence be run against Co whose directors have fraudulently caused loss to 3rd party, and Co seeking to recover against 3rd party?

Not where innocent shareholders/directors

Not where co vicariously liable

General predisposition to limiting Stone and Rolls  
:"*marked not to be looked at again*"! (Ld  
Neuberger)



## 16. Impact of Bilta

Heralded Patel v Mirza 2016 UKSC 42 changing the approach to illegality, holding that the “reliance” approach (Tinsely v Milligan 1994) not to be followed.

Tensions in approach between Lds Toulson (flexibility) and Sumption (mechanistic) to illegality defence in Bilta not resolved.



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# Changes to the taxation of foreign domiciliaries in the UK

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## **Domicile: relevance to tax**

### **Inheritance tax**

Non-doms pay no IHT on foreign situate assets.  
Excluded property trusts (settled by non-doms).

### **Income tax & capital gains tax**

Non-doms have access to remittance basis.  
(For an annual fee paid to HMRC, they pay no UK IT/CGT tax in respect of offshore income or gains arising in the relevant year and only on income or gains “remitted”.)



## Domicile: relevance to tax

### The remittance basis

Introduced by William Pitt the Younger in 1799 & intended to assist those who left their country of origin to live and work in another part of the British Empire.





## Domicile: relevance to tax

### The remittance basis

Amended in 2008 (not, of course, for the first time) to introduce the annual charge.

£30,000 for more than 7 years residence out of the last 9 years  
£60,000 for 12 years residence out of the last 14 and  
£90,000 for 17 years residence out of the last 20.





## Domicile: relevance to tax

Professionals are under a duty of care (as a matter of English law) to:

- (1) Raise domicile if their client was originally not from the UK
- (2) Be aware that fiscal benefits may be available to non-doms
- (3) Advise that further advice be sought from an expert.

See *Mehjoo v Harben Barker* [2013] EWHC 1669 (QB)



## Domicile: the current law

General law (“real”) domicile

**Domicile of origin:** father’s domicile at time of birth (or if parents unmarried, mother’s domicile at time of birth).  
(Probably not H.R. law compliant.)

**Domicile of choice:** residence & intention to remain indefinitely.  
The residence should be the main residence of the individual:  
*Plummer* 60 TC 452.



## Domicile: the current law

### Inheritance tax deemed domicile:

Section 267(1) IHTA 1984 currently provides:

*A person not domiciled in the UK at any time (in this section referred to as “the relevant time”) shall be treated for the purposes of this Act as domiciled in the UK (and not elsewhere) at the relevant time if—*

- (a) he was **domiciled in the UK within the three years** immediately preceding the relevant time, or*
- (b) he was **resident in the UK in not less than seventeen of the twenty** years of assessment ending with the year of assessment in which the relevant time falls.*



## Domicile: the current law

### Inheritance tax deemed domicile:

Section 267ZA IHTA 1984 provides for a non-domiciled spousal election. This is to deal with the restriction on the general spousal exemption from IHT (under section 18 IHTA 1984) which limits the amount of the spousal exemption in circumstances where one spouse is UK domiciled and the other is not.

This is specified not to apply for section 48 purposes, i.e. not for settling excluded property trusts. See section 267ZA(5) IHTA 1984.



## Domicile: the current law

### Key cases

Generally concerning proper law domicile of choice – what is the intention indefinitely to reside?

*Bullock* 51 TC 522 says: “until the end of his days unless something happens to make him change his mind.”

In that case: UK residence for 40 years but would return to Nova Scotia should his wife die (or abandon her hatred of Nova Scotia).



## Domicile: the current law

### Key cases

*Furse* [1980] STC 596: “If a man intends to return to the land of his birth upon a clearly foreseen & reasonably anticipated contingency...the intention required by law is lacking; but, if he has in mind only a vague possibility, such as making a fortune...such a state of mind is consistent with the intention required by law.”



## Domicile: the current law

### Tax avoidance/domicile cases:

*Spence* [1995] STC 335: “the mere fact that a person moves to another country in order to avoid liability for tax in the country of origin does not necessarily mean that he cannot or is unlikely to acquire thereby a domicile of choice in that other country.”



## **Domicile: the current law**

### **Losing a domicile of choice**

Ceasing to reside/ceasing to intend to reside indefinitely.

Then: (1) domicile of origin resumes or (2) new domicile of choice is acquired.



## Domicile: an example of simple IHT planning

Enveloped dwellings.



Offshore trust (settled by non-dom) owns shares in offshore company, which in turn owns a UK residential property.

The trust is an excluded property trust. The trust assets are non-UK situs.

The house is outside the UK IHT net.



## Domicile changes: the politics

George Osborne, July 2015 budget speech:

*“British people should pay British taxes in Britain – and now they will...”*

(Define “British”.)

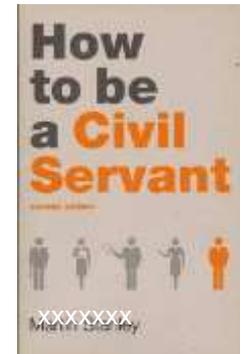
*“It is not fair that people live in this country for very long periods of their lives, benefit from our public services, and yet operate under different tax rules from everyone else.”*





## Domicile changes: the process

New rules will take effect from 6 April 2017.



A trickle of information and a lamentable lack of certainty:

- “Technical Briefing on Non-Dom changes” (July 2015)
- Consultation paper “Reforms to the taxation of non-domiciles” (September 2015)
- Policy paper “IHT: reforms to the taxation of non-domiciles” & draft IHT clauses (September 2015)
- Policy paper “Domicile: Income Tax and CGT” & draft IT/CGT clauses (2 Feb, updated 5 Feb 2016)
- Budget 2016
- “Reforms to the taxation of non-domiciles: further consultation” (August 2016)



## The proposed changes in summary

New deemed domicile rules:

- Returning domiciliaries



- Long term residents



New residential transparency rules for inheritance tax



## The proposed changes in summary

New deemed domicile rules:

To be 4 types of IHT deemed domicile; and  
2 categories of IT/CGT deemed domicile.

2 of the IHT deemed domicile types exist already: the current 3 year rule & the current spousal election rule. The rest are all proposed new rules.



## The proposed changes in summary

IHT deemed domicile

<b>IHT deemed domicile</b>	<b>Comment</b>	<b>IHTA section</b>
3-year rule	Unchanged	267(1)(a)
Returning domiciliary	New	267(1)(aa)
15-year rule	Was 17-year rule	267(1)(b)
Spouse-election	Unchanged	267ZA



## The proposed changes in summary

CGT/IT deemed domicile

**CGT/IT deemed domicile**

**Comment**

Returning domiciliary

New

Condition A

15-year rule

New

Condition B

(The 15 year rule differs slightly from the IHT 15 year rule)



## New deemed domicile: returning domiciliaries

### Inheritance tax

Section 267(1) IHTA 1984 will have new subsection:

“(aa) he is a formerly domiciled resident for the tax year in which the relevant time falls ...”

“Formerly domiciled resident” defined in section 272 IHTA 1984:

“formerly domiciled resident”, in relation to a tax year, means a person—

- (a) who was born in the UK,
- (b) whose domicile of origin was in the UK,
- (c) who was resident in the UK for that tax year, and
- (d) who was resident in the UK for at least one of the two tax years immediately preceding that tax year.

(N.b. The domicile start date for formerly domiciled residents will therefore be 6 April in the 2nd year of residence.)



## New deemed domicile: returning domiciliaries - trusts

The 2015 Technical Paper said:

“27. Irrespective of their actual intentions, such an individual (the returning UK dom) will become UK domiciled for tax purposes once they become UK resident. In addition, while UK resident after their return here, **the returning UK domiciliary will not benefit from any favourable tax treatment in respect of trusts set up while not domiciled here (whether inheritance tax treatment or otherwise)...”**

This means that trusts may yo-yo in and out of excluded property status.

E.g.: if an formerly domiciled resident who has created a trust comes to the UK for 5 years, a 10 year charge depends on the accident of whether the 10 year anniversary falls within any of those 5 years.

Ensure trust terms & powers are as helpful as possible. May need to consider varying. See e.g. *Pemberton v Pemberton* [2016] EWHC 2345 (Ch).



## New deemed domicile: returning domiciliaries

### IT/CGT

Draft s.835B(3) ITA provides:

Condition A is that—

- (a) the individual was born in the UK,
- (b) the individual's domicile of origin was in the UK, and
- (c) the individual is resident in the UK for the tax year referred to in subsection (2).

This is the equivalent of the IHT formerly domiciled resident rule.

There is no equivalent to para (d) of the IHT rules, so the domicile start date is 6 April in the 1st year of residence.



## Returning domiciliaries: tip

A person (“H”) with a UK place of birth and domicile of origin may be married to a person (“W”) who was not born in the UK, or who did not have a UK domicile of origin. If H and W become UK resident, then H will be deemed domiciled as a formerly domiciled resident; and W will not. In that case the tax issues can be resolved by a transfer from H to W (and a transfer from a settlement made by H to W). This should be considered before H and W become UK resident.



## New deemed domicile: long term residents

### 15 year rule – IHT

Section 267(1):

“ (b) he was resident in the UK—

(i) for at least fifteen of the twenty tax years immediately preceding the tax year in which the relevant time falls, and

(ii) for that tax year or, if he was not resident in the UK for that tax year, for at least one of the four tax years immediately preceding that tax year.



## New deemed domicile: long term residents

### 15 year rule – IHT

UK residence from	Deemed domicile start date	
	15-year rule	Old 17-year rule
2002/03	6 April 2017	6 April 2018
2003/04	6 April 2018	6 April 2019
2004/05	6 April 2019	6 April 2020
2005/06	6 April 2020	6 April 2021



## **New deemed domicile: long term residents**

### **15 year rule – IHT**

### **Losing deemed domicile**

Deemed domicile under the 15 year rule ends under (ii) once an individual has been non-resident for more than four consecutive years.



## New deemed domicile: long term residents

### 15 year rule – IT/CGT

Draft s.835B(4) ITA:

“Condition B is that the individual has been UK resident for at least 15 of the 20 tax years immediately preceding the tax year referred to in subsection (2).”

The £90,000 remittance basis charge (introduced 2015/6) will end after 2016/17. This is a logical consequence.



## Rebasing

Budget 2016 announced that those individuals who will become deemed-domiciled in April 2017 because they have been resident for 15 of the past 20 years will be able to rebase directly held foreign assets to their market value on 5 April 2017.

Excludes:

- (1) assets held in companies held by individuals
- (2) assets held in trust, subject to the s.86 charge

The relief will not be available to those who become deemed domiciled after 2017.



## Mixed fund relief

Individuals will be able to rearrange their mixed funds overseas to enable them to separate those funds into their constituent parts. This window will last for one tax year from April 2017 and it will provide certainty on how amounts remitted to the UK will be taxed.

During this time, non-doms with mixed funds will be able to rearrange their mixed funds and separate out the different parts. This will mean, for instance, that they will be able to move their clean capital, foreign income and foreign gains into separate accounts, and will then be able to remit from their accounts as they wish and pay the appropriate amount of tax.



## Mixed fund relief

2 practical tips:

- (1) It would be worth drawing up mixed fund accounts now, so the data is ready when needed on 6th April 2017.
- (2) Consider deferring remittances from mixed funds until next year, in order to take advantage of the relief.



## Long term resident deemed domiciliaries - trusts

Beneficial rules apply to a trust made by a settlor at a time when:

- (1) Not UK domiciled; and
- (2) Not deemed domiciled under the IT/CGT 15-year rule (including all pre 2017 trusts as this rule does not begin to apply until 2017/18).  
E.g. CGT charges under sections 86 & 87 TCGA 1992 may not apply.  
HMRC/treasury still considering.

Ensure trust terms & powers are as helpful as possible. May need to consider varying. See e.g. *Pemberton v Pemberton* [2016] EWHC 2345 (Ch).



## Further details

Transfer of assets abroad:

Some re-writing will be necessary.

Transitional:

There are transitional rules. Most notable:

For those who leave the UK before 6 April 2017 but would nevertheless be deemed domiciled under the 15 year rule on 6 April 2017 the present rules will apply.



## IHT transparency for residential property

2015 con doc:

“The government intends to amend the rules on excluded property so that trusts or individuals owning UK residential property through an offshore company, partnership or other opaque vehicle, will pay IHT on the value of such UK property in the same way as UK domiciled individuals. The measure will apply to all UK residential property whether it is occupied or let and of whatever value.”





## IHT transparency for residential property

### Schedule A1 IHTA 1984

- (1) Property is not excluded property by virtue of section 6(1) or 48(3)(a) at any time if or to the extent that its value is attributable to a
- chargeable interest that is exclusively in or over land which—
  - (a) consists of a dwelling at that time, or
  - (b) consisted of a dwelling at any time in the period of two years ending with that time.



## IHT transparency for residential property

This comes with its own targeted anti-avoidance rule:

“In determining whether (or the extent to which) property situated outside the United Kingdom is excluded property, no regard is to be had to any arrangements the purpose or one of the main purposes of which is to secure a tax advantage by avoiding the effect of paragraph 1(1).”



## IHT transparency for residential property

2015 Con doc:

“9. The government does not intend to change the IHT position for non doms or exclude property trusts in relation to UK assets other than residential property, or for non-UK assets...”





## IHT transparency for residential property

### Mixed use property:

Provided the property has wholly or partly met the definition of a dwelling at any time in the previous two years, it will be chargeable to IHT. However, the tax liability which arises will be determined by the extent to which the property has a residential use.





## IHT transparency for residential property

### Debts

In line with the current IHT rules, the new charge on residential property will apply only on the value of the UK residential property at the point of the chargeable event and will take account of any relevant debts. For these purposes, relevant debts are those which relate exclusively to the property, such as amounts outstanding on a mortgage which was taken out to purchase the property.

Connected party loans to be disregarded?



## Residential property: the future

Ownership by individuals. (IHT RNRB may help & remember spousal exemption.)

De-enveloping. (Look out for CGT & SDLT as well as IHT!)

Held on discretionary trust. (Ideally between 10 year anniversaries.)  
Beware gift with reservation if settlor has interest in trust. Consider any helpful variations – *Pemberton v Pemberton* [2016] EWHC 2345 (Ch).

Held by non-resident company. (IHT transparency; but potentially still CGT advantages. Beware ATED.)

You've survived

25 minutes of tax.





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## Voyaging through uncertain waters

*Direct investor claims, the duties and supervision of unit trust investment managers and trustees*

Catherine Newman Q.C., Maitland Chambers

Alex Hall Taylor, 4 New Square

Benjamin Wood, 4 New Square



## Jersey and Guernsey strike out cases

*Barclays Wealth Trustees (Jersey) Ltd v. Equity Trust (Jersey) Ltd*  
[2014] JRC 102D, Mark Herbert Q.C., Commissioner

*Tranquility Holdings Ltd v. Invista Real Estate Investment  
Management (CI) Ltd.* (2015) (38/2015), Sir Richard Collas, Bailiff

The dangers of: “At least arguable...”



## Standing to bring claims – direct and derivative claims

- Trustee against manager
- Manager against trustee
- Successor trustees or managers against predecessors
- Investors/Unit holders against trustees or managers
- Limitation or exoneration clauses



**Why does it matter?**

**No one to blame...?**

**Where should any liability for losses rest...?**





## Standing and liability

### Linear relationship



### Triangular relationship





## Derivative claims and reflective loss

- *Johnson v. Gore Wood (a Firm)* [2002] 2 AC 1
- Applicable to beneficiaries seeking loss to value of shares held by trustee?
- *Ellis v. Property Leeds (UK) Ltd* [2012] EWCA Civ 32
- An alternative approach in Guernsey....  
*Jefcoate v. Spread Trustee Company Limited* (42/2014)



## Statutory obligations - trustees

Trusts (Jersey) Law 1984: Articles 21 and 24

- Act with due diligence, as a prudent person, to best of ability and skill, observe terms of trust and utmost good faith
- Preserve and enhance value of trust property, and not profit
- Exercise powers only in interests of beneficiaries and in accordance with terms of trust



## Statutory obligations – registered persons

- Person registered by the Commission to carry on fund services business as defined by FS(J)L 1998, Art. 2(10)
- Due regard for the interests of the fund
- Act with due skill, care and diligence
- Exercise discretion in a proper manner
- Avoid any conflict of interest
- Always act in the best interests of the Fund
- Not make statements that are misleading, false or deceptive
- Claim for breach of statutory duty (e.g., CIF(J)L 1988, Art. 35)



## Contractual duties

- Relationship between unitholder, trustee and manager
- *Barclays Wealth* instruments
- Duties of the manager
  - Manager to exercise all powers except those conferred on trustee, and trustee to facilitate manager's actions (Cl.36)
  - Manager to be authorised, devote time and attention and comply with trust instrument and prospectus (Cl.38)
  - Manager to have regard to purpose of investment policy and restrictions and *'any other matter to which a prudent investment manager to an investment portfolio should reasonably pay regard in the proper discharge of his duties'*



## Trustee role and duties

- Primary role – legal owner
- Delegation to reasonably competent and qualified investment managers permitted by Art. 25 T(J)L
- *Barclays Wealth* duties of trustee (Cl.45):
  - Custody and control of investments
  - Dealing in accordance with ‘proper instructions’ of manager
  - Payments in accordance with manager’s directions
- *Barclays Wealth* trustee entitled and required to rely exclusively on manager in selection and realisation of investments (Cl.26).
- No duty to enquire and responsibility expressly excluded if complying with ‘proper instructions’ (Cl.53)



## Defining the contractual interrelationship: *Tranquility*

- Unitholder agreed its interest was ‘*as a beneficiary*’ and covenanted to be bound by instrument (Application Form and Cl.2.6)
- Trustee held the whole of the Trust Property upon Trusts (Cl.2.2)
- Reciprocal obligations between Trustee and Manager (Cl.2.8)
- Trustee supervisory responsibility (Cl.15.1)
- Manager to do all things it deems desirable in interests of Trust in its absolute discretion (Cl.17.1)
- No express covenants between Manager and Unitholders
- Unitholders no rights except as expressly provided (Cl.19.1)



## Limitation and exoneration

- Contractual limitation and indemnity clauses
- Article 30(10) of the Trusts (Jersey) Law permits except where fraud, wilful misconduct or gross negligence
- Article 30(4) T(J)L not liable for breaches prior to appointment
- Article 34 of T(J)L: release on retirement
  - *Barclays Wealth*: applies only to trustee sued as trustee
- Article 45 of the T(J)L: release by Court acting honestly and reasonably, ought fairly to be excused



## Framing the fiduciary duty: the issue

- Duties of loyalty vs other duties owed by fiduciaries
- Barclays Wealth: *“...this distinction between different kinds of fiduciary and other duties is...another red herring. It is true that the phrase fiduciary duty should, in some contexts, be reserved to describe the duties of loyalty which are specific to trustees and others in a similar position. But the phrase is also widely used to describe other duties owed by persons who have the stewardship of property for the benefit of others. This is not a misuse of language...”*



## In favour of “wider” fiduciary duties

- Usual context particularly relationship of trust and confidence
- Consistent with “fiduciary duties of care”
  - *Henderson v. Merrett* [1995] 2 AC 145
- Range of remedies



## In favour of narrow duties of loyalty

- Millett LJ in *Bristol & West BS v. Mothew* [1998] Ch 1 at 18A-B: the “distinguishing obligation” of loyalty
- *MacFirbhishigh and Ching v. CI Trustees and Executors and others* [2015] JRC 233 (at [191]) common ground that Jersey law was the same as English law
- *Re E, L, O and R Trusts* [2008] JRC 150, summarising the *Mothew* definition of fiduciary duties, cited with approval



## Framing fiduciary duties: reason for distinction?

- Down Under - Less dramatic due to possibility of reduction for CN, e.g. *Duke Group v. Pilmer* (2001) 207 CLR 165
- E&W - CN not available as defence to breach of fiduciary duty: *Nationwide BS v. Balmer Radmore* [1999] PNLR 60
- Wrong to circumvent contractual limitations through artificially wide definitions of fiduciary duties
- Wrong to impose duties when interests are adequately protected by obligations owed to trustee



## Concluding remarks

- Current market volatility: liquidity pressure, reduced returns
- *Barclays Wealth* leaves the door open to claims (and was followed in Guernsey)
- Allocation of risk (and reward)
- Will Jersey adopt the *Jefcoate* approach to reflective loss?
- Start (and end) with the scheme documents and legislation?



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Champagne & canapes reception  
– Sirocco Restaurant

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Thank you for coming