CHANCERY BAR

Isle of Man Conference 2022

Registration & Coffee

followed by

An introduction by **Lesley Anderson QC**, Conference Chair

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Commercial Fraud in England & the Isle of Man

James Pickering QC & Samuel Hodge
Enterprise Chambers

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Commercial Fraud in England and the Isle of Man

James Pickering QC & Samuel Hodge
of Enterprise Chambers

- The Hyde Park hotels litigation – a tale of (at least) two frauds
- Equitable compensation against a dishonest assister – how equitable is it? A discussion of ***HPII v Ruhan & Stevens*** [2022] EWHC 383 (Comm)
- Backwards tracing – a backwards step? A discussion of ***SFO v HPII*** [2021] 1273 EWHC (Comm)

The Hyde Park hotels litigation – a tale of (at least) two frauds…

…and (at least) two fraudsters

- In a nutshell:

- Fraudster A commits a fraud
- Fraudster B defrauds Fraudster A
- Fraudster A defrauds Fraudster B

Huge impact on various 3rd parties

Fraudster A – Dr Gerald Smith

The Hyde Park Hotels

Lancaster Gate

Kensington Park

Kensington Palace

Dr Smith's acquisition of the Hyde Park Hotels

Purchase Date: April 2002

Acquiring Entity: Hotel Portfolio II UK Ltd ("**HPII**")

Purchase Price: £599 million

Loan from Morgan Stanley: £500 million +

Deferred Consideration from Thistle: £45 million

The Izodia Theft

- November 2002 - Dr Smith steals £34.8 million from Izodia
- December 2002 – SFO began investigations
- Pressure from Morgan Stanley/Thistle for Dr Smith to sell

Fraudster B – Andy Ruhan

Mr Ruhan's acquisition of the Hyde Park Hotels

Purchase Date: May 2002

Acquiring Method: Acquisition of shares in HPII – appointed director

Purchase Price: £47 million

Plus (maybe): The secret oral agreement – for 40% of gains made from development of the Hyde Park Hotels

The HPII restructuring

- Various applications for planning permission

  BUT

- Pressure from Morgan Stanley and Thistle

- Restructuring of HPII:
  - Morgan Stanley and Thistle each take 33.3% of HPII
  - Mr Ruhan left with only 33.3%

The sale of the Hyde Park Hotels to Cambulo

Purchase Date: March 2005

Purchase Price: £127 million

Purchasing Entity: Cambulo Madeira

Legal owner of Cambulo Madeira: Anthony Stevens

Position of HPII: Sufficient to repay most of debt – but no profit

Dr Smith goes to prison

April 2006: Dr Smith convicted of 10 counts of theft and false accounting

September 2006: Sentenced to 8 years' imprisonment

November 2006: Confiscation order for £41 million

The development and on-sale of the Hyde Park Hotels

- **Lancaster Gate**
  - Cambulo develops
  - August 2006 - Cambulo sells to 3rd party for £67.5 million
  - Cambulo profit: £7.76 million
- **Kensington Park & Kensington Palace**
  - Cambulo enters into JV with the Candy brothers
  - JV develops
  - March 2008 - JV sells to third party for £320 million
  - Cambulo profit: of £115.2 million

Remember HPII?

- April 2008 – HPII goes into CVL
- Deficiency to creditors: £50 million +

So:

- Poor old HPII/Mr Ruhan
- Well done, Cambulo Madeira/Mr Stevens

Dr Smith comes out of prison

- June 2010: Dr Smith comes out of prison
- June 2012: Letter before action – alleges:
  - Stevens merely a nominee – Ruhan true beneficial owner of Cambulo
  - Secret oral agreement - Dr Smith entitled to share of hotel profits
  - Hotel profits invested in Isle of Man trust

July 2012 – *The Sunday Times* article

THE SUNDAY TIMES

Tycoon dragged into the spotlight

Andy Ruhan is the most successful property tycoon you have never heard o
Now a court case could expose his business interests

Oliver Shah

conference call at his office in the old Marks & Spencer headquarters in Baker Street. He sent a

Remember HPII (again)?

- If correct, prima facie Ruhan in breach of various fiduciary and statutory duties owed to HPII
- HPII restored – liquidator reappointed
- Investigations into Ruhan
- April 2018 – HPII brings proceedings against Ruhan and Stevens

HPII v Ruhan & Stevens – The Trial

- Late 2021-early 2022 – 3 week trial
- Ruhan & Stevens denied nominee arrangement – maintained that Stevens was true owner of Cambulo - and that Ruhan not connected
- Numerous legal defences (including a limitation defence)

HPII v Ruhan & Stevens – the judgment [2022] EWHC 383 (Comm)

- February 2022 – judgment
- Ruhan and Stevens found to have lied
- Ruhan found to be true owner of Cambulo and in fraudulent breach of fiduciary duty
- Stevens found to be liable for dishonest assistance

Dishonest Assistance - Liability

- There must be a fiduciary obligation owed by a trustee/fiduciary
- There must be a breach of that fiduciary obligation
- The defendant must have assisted in that breach (the same being more than minimal)
- The defendant's assistance must have been dishonest

- Foxton J: "I am satisfied that the assistance was provided dishonestly, in that Mr Stevens knew that the purpose of the nominee arrangement was to enable Mr Ruhan to conceal the true position from and present a false picture to HPII and its stakeholders, and it involved Mr Stevens himself providing HPII and its stakeholders with a false account of his role. The arrangement which Mr Stevens entered into with Mr Ruhan was clearly dishonest, being undertaken to deceive HPII and thereby facilitate Mr Ruhan's attempt to profit from the Hyde Park Hotels without facing any obstacles from HPII or having to share any profit."

Dishonest Assistance - Remedies

Remedies available against a dishonest assistant are (at the beneficiary's election):

(1) an **account of the profits** made from the dishonest assistance, or

(2) **equitable compensation** for the loss caused by the breach of fiduciary duty which was dishonestly assisted.

Option (1) – Account of profits

Foxton J noted 3 possible approaches:

(1) The dishonest assistant is liable for all profits (whether made by the fiduciary or the dishonest assistant)

(2) The dishonest assistant is not liable for any profits (and is only liable in equitable compensation)

(3) The dishonest assistant is liable for only those profits made by the dishonest assistant him or herself (and not for those made by the fiduciary)

Present case:

- Profit made by Mr Ruhan: £100+ million
- Profit (known to be) made by Mr Stevens: £1.5 million (bribes)
- After review of authorities, Foxton J concluded that (3) was appropriate test – and therefore an account of profits against Mr Stevens would come to (at least) £1.5 million

Option (2) – Equitable Compensation

- So what loss had HPII suffered?
- Application of “but for” test
- There was no suggestion that “but for” Ruhan’s breaches, HPII would have been able to develop and on-sell the hotels themselves
  - If Ruhan had not acted as he had, the hotels either would not have been developed, or would have been developed by a genuinely independent developer
  - And, in either event, HPII would have gained no profit

Equitable Compensation (continued)

- So HPII's case was that Ruhan's conduct could be properly analysed as **TWO** distinct breaches (both of which had been assisted by Stevens):

  (1) Ruhan's acquisition of the hotels (through Cambulo) in breach of the no self-dealing rule

  (2) Ruhan's failure to account to HPII for the profits made from the on-sale of the hotels

- As for (1) - HPII did not suggest that it had suffered loss as a result of this (as it could not be suggested that HPII would have been able to develop the hotels itself) - BUT
- As for (2) – HPII argued that the profits which Ruhan had made from the development of the hotels could properly be analysed as trust property (ie property which Ruhan held as constructive trustee for HPII) which Ruhan ought to have paid over to HPII – and because Ruhan did not pay over those profits, HPII had suffered loss

Equitable Compensation (continued)

- On reviewing the authorities, Foxton J held that:

- Mr Ruhan's conduct could be analysed as 2 distinct breaches

- It was not necessary to consider the full counter-factual as a whole - instead, it was possible to look at one breach in isolation

- There was a sufficient causal link:

> "As the individual in whose name and under whose nominal control the profit was held, and who applied that profit for Mr Ruhan's purposes on Mr Ruhan's instructions, I am satisfied that Mr Stevens played a sufficient role in relation to the acquisition, retention and disposal of those profits to meet the causal requirements of the equitable wrong of dishonest assistance at that stage…"

Potential for appeal?

"295. In ***Howard v Le Duc de Norfolk*** (1682) 3 Cases in Chancery 40, 52 (22 ER 955, 962), Lord Nottingham (LC) observed of his own judgment: "I have made several Decrees since I have had the Honour to sit in this Place which have been reversed in another Place, and yet I was not ashamed to make them, nor sorry when they were reversed by others. And I assure you, I shall not be sorry if this Decree, which I do make in this case, be reversed too, yet I am obliged to pronounce it by my Oath and by my Conscience".

296. I cannot claim that the answer to which my application of the relevant legal principles has led me in this case has provoked quite that reaction. Mr Stevens' acts of dishonest assistance in relation to the retention and disposal of the profits were significant, and distinct from those which had enabled Mr Ruhan to acquire the Hyde Park Hotels. Nonetheless, I have not found the answer entirely satisfactory or wholly intuitive…"

So watch this space…

James Pickering QC & Samuel Hodge
of Enterprise Chambers

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Backwards tracing: a backward step?

James Pickering QC & Samuel Hodge
of Enterprise Chambers

- The SFO Proceedings: a whistle-stop tour
  - HPII's claim and why backwards tracing was relevant
- The law of backwards tracing
- ***The SFO & Ors v Hotel Portfolio II UK Ltd*** [2021] EWHC 1273 (Comm)
  - Foxton J's Judgment

The SFO Proceedings

- Initiated by the SFO in the English High Court in 2017, under Criminal Justice Act 1988
- Sought declarations that certain pools of identified, valuable property ("Relevant Property" and "Identified Underlying Assets" (or "IUAs")) represented the realisable property of Dr Smith, which could be used to satisfy confiscation order.
- Popplewell J case managed; directed any persons with interests in the assets to file statements of case.

HPII's claim in SFO Proceedings

- Hyde Park Hotels (owned by HPII; trust property; transferred to "AES Cos" (Ruhan) in BOFD)

↓

- Kensington Hotel Profits (25 March 2008; £94.5m into hands of Euro Estates (AES topco))

↓ Partial backwards tracing analysis…

- Ruhan's Qatar Project (c. $147m + £9m pumped into Qatari property investments; £10.9m used elsewhere)

↓

- Arena Settlement (approx $190m returned from Qatar to Ruhan's interests administered in IOM; 2009-2011)

↓ 2012: Smith instigates Orb Claim v Ruhan; Ruhan denies beneficial ownership of Arena

- Isle of Man Settlement (Smith "persuades" Ruhan's trusted solicitors to transfer to Smith's associates all Arena assets, which includes some Relevant Property (shares/cash))

↓

Fraudulent breach of trust against Ruhan

Ruhan changes defence and counterclaims for return of assets

- Smith/his associates purchase properties in Jersey, some Non-Arena Shares (remaining "Relevant Property"), and IUAs.

- **Geneva Settlement**

  In April 2016, Ruhan and Smith settle & "carve up", including by promise to pay Stevens Cos £73.75m + alleged "equitable assignment" of claims to surplus in Arena Co liquidations. Smith immediately reneges).

- THE SFO PROCEEDINGS (proprietary)

The backwards tracing issue

- Kensington Hotels (in hands of Stevens Co; HPII's trust property)

- Kensington Hotels Profits (**25 March 2008**; traceable by HPII into hands of Euro Estates (AES topco; nominee for Ruhan); "EE's" share = approx **£94.5m**)

- Investec Facility (**21 December 2007**; Ruhan entities ("BTH" Cos) borrow approx **$147m** to fund investment in Qatar; all invested **pre 25 March 2008**)

Investec Facility repaid in full by EE.

On paper, EE becomes "replacement lender" to Ruhan's BTH Cos entities

Could HPII backwards trace through this repayment and into Qatar?

c.**$147m** (approx 75%)

Qatar Project Interests

Additional £9m into Qatar; "lent" by EE to Ruhan

£10.9m"lent" by EE to Ruhan; used to buy other assets

Ultimately into some other IUAs

Into Arena etc…

The Pearl, Qatar

Law of backwards tracing

- Can a beneficiary trace into replacement property where defaulting trustee acquires replacement property with loan from a third party, and later repays the loan using misapplied trust funds?

- If so, in what circumstances?

Bishopsgate Investment Management Ltd v Homan [1995] Ch 211

- Traditionally seen as authority for "no backwards tracing".
- Headnote: "*Equitable tracing cannot be pursued through an overdrawn and therefore non-existent fund, nor can misappropriated money be traced into an asset bought before the money was received by the purchaser*".

- Leggatt LJ: **No backwards tracing.**
  - Cited Buckley LJ in ***Borden (UK) Ltd*** [1981] Ch 25 at 46: "*It is a fundamental feature of the doctrine of tracing that the property to be traced can be identified at every stage of its journey through life*".
  - Leggatt LJ: "*For the same reason there can be no equitable remedy against an asset acquired before misappropriation of money takes place, since ex hypothesi it cannot be followed into something which existed and so had been acquired before the money was received and therefore without its aid. … [T]here can ordinarily be no tracing into an asset which is already in the hands of the defaulting trustee when the misappropriation occurs*."
- Dillon LJ: **Arguably could be backwards tracing.**
  - *"In my judgment, if the connection [postulated] between the particular misappropriation of BIM's money and the acquisition by MCC of a particular asset is sufficiently clearly proved, it is at least arguable, depending on the facts, that there ought to be an equitable charge in favour of BIM on the asset in question of MCC."*
- Henry LJ
  - *"I agree with both judgments."*

Foskett v McKeown

- Court of Appeal: [1998] Ch 265
  - Sir Richard Scott VC: "*The availability of equitable remedies ought, in my view, to depend upon the **substance of the transaction** in question and not upon the strict order in which associated events happen. … I would wish, for my part, to make it clear that I regard the point as still open and…that I do not regard the fact that an asset is paid for out of borrowed money with the borrowing subsequently repaid out of trust money as being necessarily fatal to an equitable tracing claim by the trust beneficiaries*."
  - Majority of Court of Appeal disagreed, approving Leggatt LJ's view in ***Bishopsgate***.
- House of Lords: [2001] 1 AC 102
  - Backwards tracing points not considered on appeal to HOL.
  - Lord Millett:
    - "*The claimant claims the new asset because it was acquired in whole or in part with the original asset. What he traces, therefore, is not the physical asset itself but the value inherent in it.*"
    - "*Tracing is thus neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can be properly regarded as representing his property.*"

Federal Republic of Brazil v Durant International Corpn [2016] AC 297

- Privy Council – Lord Toulson

  - Agreed with Sir Richard Scott VC in ***Foskett*** CA that availability of equitable remedies ought to depend on the **substance of the transaction** and not the strict order in which events occur.
  - Rejected argument there can never be backwards tracing or that the Court can never trace the value of an asset whose proceeds are paid into an overdrawn account.

  BUT

  - ***"The claimant has to establish a coordination between the depletion of the trust fund and the acquisition of the asset which is the subject of the tracing claim, looking at the whole transaction, such as to warrant the court attributing the value of the interest acquired from the misuse of the trust fund. This is likely to depend on inference from proved facts, particularly since in many cases the testimony of the trustee, if available, will be of little value."***

  - PC rejected broader argument that money used to repay a debt can in principle be traced, in all circumstances, into whatever was acquired in return for the debt. Too broad an "expansion of proprietary remedies". Adverse effect on other innocent parties, e.g. unsecured creditors in a bankruptcy or liquidation.

HPII's arguments

- **Broad ground**: Backwards tracing should always be permissible.
  - Professor Lionel Smith, "*Tracing into the Payment of a Debt"* (1995) CLJ 290
  - No good reason why beneficiary should be unable to trace into property acquired using borrowed money or credit, where debt is then settled with use of trust money.
  - Would not be an unjustified expansion of proprietary *remedies*. Innocent recipients can rely on bona fide purchaser.
  - All unknown tracing claims (whether backwards or conventional) can operate to prejudice unsecured creditors; risk.

- **Narrow ground**: Even applying ***Durant's*** (and other cases') limitations, HPII can backwards trace.
  - When Investec Facility taken out, the intention/contemplation was that it would be repaid with Hotels proceeds.
  - Sufficient co-ordination between Ruhan acquiring the Qatari assets using the Investec Facility, and the depletion of the trust fund when repaying the Investec Facility.

Foxton J's judgment in *The SFO & Ors v HPII* [2021] EWHC 1273 (Comm)

- Broad ground failed.
  - [45]: *"I have concluded that the present state of English law is that backwards tracing into assets acquired prior to the misuse of trust assets is not permitted, save in narrow (but, for all that, soft-edged and overlapping) exceptions where a strict insistence on chronological sequence would fail to reflect the substance of the position."* See also [75]-[76].

- Narrow exceptions:
  - [46]: *"On the basis of the authorities to date, these exceptions include:*

    (i) cases where the payment of money through the banking network for the purpose of effecting a payment from A to B involve credits occurring before debits;

    (ii) cases in which the debit of trust property and the credit to be traced were effected as part of a single transaction intended to achieve that outcome through a series of co-ordinated elements, whatever the chronological ordering of those elements […];

    (iii) cases of anticipatory substitution…where an asset is acquired on the basis of an undertaking that the trust property will be exchanged for it (as, in due course, it is); and

    (iv) conventional bilateral exchange transactions where the respective transfers are not simultaneous (e.g. Professor Smith's example of a car sale where the price is payable after the property in the car passes)."

Conclusions on facts

- Judge's view was that the narrow exceptions identified, in particular (ii) and (iii), did **not** apply.

- [77(ii)]: "*I…find it difficult to characterise the borrowing under the Investec Facility, the application of the funds borrowed and the misappropriation of the Hyde Park Hotel profits as a single transaction, in which co-ordinated steps were undertaken to achieve the intended outcome of that single transaction… .*"

  Believed that: *"The relevant act* [which the beneficiary is electing to treat as done for its benefit] *is the use of trust funds to repay the loan, not the taking out of the loan with a view to funding the "Pearl" project and the application of the loan proceeds."*

- [77(iii)]: "*This is not a case in which the loan was granted in exchange for the trust assets (so as to make this a case of anticipatory substitution)".*

- **However:** The above grounds alone did **not** mean case was unarguable (see [78]); would not have struck out for that alone.
- Backward tracing case would be struck out as it did not reflect "the substance" of the transaction: "*because [HPII] relies on the fact that the Investec Facility was paid off by Euro Estates using trust monies, whilst paying no regard to the fact that the substance of the transaction under which this took place was that* ***Euro Estates replaced Investec as BTH1's*** **[the Ruhan entities']** ***lender***" (see [80]).

- Other, more limited, tracing routes to certain IUAs remained open to it, subject to further pleading.

Problems

- **This was a case of anticipatory substitution / sufficient co-ordination**
  - It was held to be "*clearly very strongly arguable that, when the Investec Facility was taken out, the contemplation of both Investec and the Ruhan-side entities was that the Investec Facility would be repaid from the proceeds of the Hyde Park Hotels development project"* as and when this occurred.
  - If contemplation/anticipation was that the Hotel profits would be used to repay the loan, the acquisition of the Qatar interests with the loan merits characterisation as a breach of trust which beneficiary is electing to treat as done for its benefit. Was not a "*subsequent resolution*" to repay loan with trust property (c.f. [43]).

- **EE replacing Investec as "lender" to Ruhan entity is irrelevant**
  - Whether Ruhan got an *unencumbered* asset via using profits to repay the Investec is neither here nor there.
  - Beneficiary should be free to elect asset into which they trace – pre-acquired property (unencumbered or not), or repayment monies – esp. where property acquired when anticipating borrowing would be repaid with trust property.
  - Foxton J considered the rights in Qatar "*had yet to be paid for"*. However, they had been paid for in December 2007.

- **Ignores EE's identity**
  - EE alleged to be Ruhan's nominee, controlled by Ruhan. Use of Hotel profits was at his direction. He papered EE's position as replacement lender. He exploited the trust property to regain financial control.
  - Could lead to trustees interposing companies under their control as replacement lenders to defeat eventual tracing claims?

A backward step?

- Did the English Courts miss a valuable opportunity to review the law of backwards tracing, and to test the justification for narrowly confining it to specific “exceptions”?

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Junior Chancery Bar Panel Session

Zachary Kell, Five Paper Buildings

James Saunders, New Square Chambers

Oscar Schonfeld, One Essex Court

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The future of the economic torts…

…following *Secretary of State for Health v Servier Laboratories Ltd* [2021] UKSC 24

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10th May 2022

Introduction

Five key areas of discussion for this afternoon:

1. What are the economic torts?
2. The tort of causing loss by unlawful means (*OBG v Allen*).
3. What was decided in *Servier*?
4. What does this mean for the economic torts overall?
5. Tips to take into practice.

What are the economic torts?

"Unlawful means conspiracy is one of the so-called economic torts, which include procuring a breach of contract, unlawful interference, causing loss by unlawful means, intimidation, and conspiracy to injure (or lawful means conspiracy). These torts present problems even if they are considered individually (and yet more problems arise if they are treated as a genus). This is as true of unlawful means conspiracy as of any of the other economic torts."

Revenue and Customs Commissioners v Total Network SL [2008] 1 A.C. 1174

At [216] per Lord Neuberger

What are the economic torts?

- Historical background:
  - *Keeble v Hickeringill* 1701 11 East, 574, n.: *"He that hinders another in his trade or livelihood is liable to an action for so doing."* (per Lord Holt CJ)
  - *Allen v Flood* [1898] A.C. 1: an act that is legal in itself will not be made illegal because the motive of the act may be bad (per Lord Halsbury LC)
  - *Quinn v Leathem* [1901] A.C. 495: *"… numbers may annoy and coerce where one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce."* (per Lord Lindley)

Causing loss by unlawful means

- Existence of the tort first recognised in *Allen v Flood* [1898] A.C. 1 but by the 1980's it was still *"relatively undeveloped"* (*Barretts & Baird (Wholesale) Ltd v IPCS* [1987] I.R.L.R. 3 at 10, per Henry J).
- Used as an alterative to procuring breach of contract in *JT Stratford & Son Ltd v Lindley* [1965] A.C. 269: *"the defendants have inflicted injury on the plaintiffs in the context of their business and have resorted to unlawful means to bring this about."* (per Viscount Radcliffe).

OBG Ltd v Allan [2007] UKHL 21; [2008] 1 A.C. 1

- Three appeals heard over a ten-day period with almost 350 authorities before the House of Lords (Lord Nicholls called it *"a daunting task"*).
- A tort of primary liability (cf. inducing breach of contract).
- Lord Hoffmann: *"The essence of the tort therefore appears to be (a) a wrongful interference with the actions of a third party in which the claimant has an economic interest and (b) an intention thereby to cause loss to the claimant."*

OBG Ltd v Allan [2007] UKHL 21; [2008] 1 A.C. 1

…The common law has traditionally been reluctant to become involved in devising rules of fair competition…It has largely left such rules to be laid down by Parliament. In my opinion the courts should be similarly cautious in extending a tort which was designed only to enforce basic standards of civilised behaviour in economic competition, between traders or between employers and labour. Otherwise there is a danger that it will provide a cause of action based on acts which are wrongful only in the irrelevant sense that a third party has a right to complain if he chooses to do so.

Lord Hoffmann at [56]-[57]

Islamic Investment v Cains Advocates [2012]

- Application for strike out/summary judgment per the Rules of the High Court of Justice 2009.
- In relation to causing loss by unlawful means, the Respondent suggested the court should follow pre-*OBG* case law, in particular Lord Denning's judgment in *Acrow (Automation) Ltd v Rex Chainbelt Inc and another* [1971] 1 WLR 1676.
- At 1682: *"[…] if one person, without just cause or excuse, deliberately interferes with the trade or business of another, and does so by unlawful means, that is, by an act which he is not at liberty to commit, then he is acting unlawfully"*.

Islamic Investment v Cains Advocates [2012]

- Application granted.
- First Deemster Doyle refused to depart from *OBG* stating at [146]: *"[…] I prefer Lord Hoffmann's analytical and well reasoned opinion […] which was endorsed by Lady Hale and Lord Brown. Lord Hoffmann's conclusion on the ambit of "unlawful means" was that it consists of acts intended to cause loss to the claimant by interfering with the freedom of a third party and is intended to cause loss to the claimant; but it excluded acts which may be unlawful against a third party which did not affect the third party's freedom to deal with the claimant […]"*

Secretary of State for Health v Servier Laboratories Ltd [2021] UKSC 24

- **2001**: Servier applies to the European Patent Office ("**EPO**").
- **2004**: EPO grants the patent.
- **2005**: English High Court holds UK designation of patent invalid.
- **2006**: Opposition Division of the EPO upholds the patent.
- **2008**: Court of Appeal upholds High Court's decision.
- **2009**: EPO Technical Board of Appeal revoked the patent.

Secretary of State for Health v Servier Laboratories Ltd [2021] UKSC 24

- Was it a necessary element of the unlawful means tort that the unlawful means should have affected the third party's freedom to deal with the claimant: **yes**.

- Should *OBG* be departed from (in accordance with *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234): **no**.

What does this mean for the economic torts overall?

A return to keeping the economic torts *"within reasonable bounds"*:

"…the restrictive policy approach towards economic torts adopted by the majority of the House of Lords in *OBG* is reflected not only in its decision as to the elements of the unlawful means tort, but also in its decision on inducing breach of contract and on conversion. Thus, inducing a breach of contract was held to require knowledge that a breach was being induced and an actual breach rather than interference with contractual relations. A new economic tort of strict liability for economic loss caused by conversion of a chose in action was also rejected." (Lord Hamblen JSC at [62])

What does this mean for the economic torts overall?

Lord Sales JSC's *obiter* comments at [102] *"I venture to think that this is an issue which will have to be resolved at some stage…"*:

- A wide class of "unlawful means"? *(Revenue and Customs Comrs v Total Network SL* [2008] UKHL 19; [2008] A.C. 1174).
- Affects the tort of intimidation (*Rookes v Barnard* [1964] A.C. 1129).
- Exploring the relationship between these torts and general concepts of accessory liability in civil law (*Fish & Fish Ltd v Sea Shepherd UK* [2015] UKSC 10; [2015] A.C. 1229).

Tips for practice

- The economic torts can be useful for claimants seeking to prevent unlawful interference with legitimate business interests.
- However, practitioners should approach any proposed claim by first asking: what is inherently unlawful about the acts of the defendant?
- When advising or even pleading the claim, careful consideration of the elements and boundary lines of the various torts need to be borne in mind.

Conclusion

- *Servier* signifies a return to narrowing the elements of the economic torts (see the recent application of *Servier* by Calver J in *E D & F Man Capital Markets v Come Harvest Holdings Ltd* [2022] EWHC 229 (Comm) at [496]-[500]).
- This is unlikely to be the last time the Court of Appeal or the Supreme Court have to consider the economic torts, as indicated by Lord Sales' comments.
- Practitioners will need to be focused on the specific parameters of the torts on which they are advising/pleading.

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RE KLIMT INVEST [2022] EWHC 596 (Ch)

Winding up for loss of substratum

James Saunders
New Square Chambers

CHANCERY BAR

JP SPC 4 and JP SPC 1 v Royal Bank of Scotland International

Can banks owe duties of care directly to the beneficial owners of funds in their customers' accounts?

Oscar Schonfeld
One Essex Court

Facts

Isle of Man based scheme to fund low-value, high-volume litigation in England and Wales

Scheme bank accounts held with RBSI by “Loan Manager”

Funding from Cayman investment vehicles (the Claimants)

Funds misappropriated from the accounts by individuals in control of the Loan Manager

Claim against the Bank

Recovery from Loan Manager or fraudsters unlikely

Claim against the Bank for executing obviously suspicious payment instructions

Bank applied to strike out – no duty of care could be owed to non-customer as a matter of law

Question for the Court

Well-established "Quincecare duty" owed to banks' customers:

> *"a banker must refrain from executing an order if and for as long as the banker is 'put on inquiry' in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company"*
>
> – Barclays Bank Plc v Quincecare [1992] 4 All ER 363, 376

Same duty also owed to beneficial owners of funds in customers' accounts?

Arguments in (very) brief

For:

Established authority - Baden v Soc Gen [1993] 1 WLR 509

Alternatively, incremental development by analogy with White v Jones line of case

Freestanding negligence claim, not a question of accessory liability

Against:

Baden no longer good law

No White v Jones type lacuna of liability as customer can ordinarily claim

Duty to non-customer would cut across dishonesty requirement for accessory liability

Decisions, decisions, decisions…

IoM High Court (Deemster Wild):

"there is a realistic argument that a duty of care in tort can be owed to non-customers [as a matter of existing authority]"

"if an incremental extension of the law in this area is required to impose a duty on RBSI, such an extension is arguable and has at the very least a more than fanciful chance of succeeding"

Decisions, decisions, decisions…

IoM Court of Appeal (Judge of Appeal Storey QC and Deemster Collas):

"…no legal authority has been cited to us which has established that a duty of care in negligence was owed to the beneficiaries of the monies by the bank in the absence of dishonesty."

"Bank accounts in which funds are held not for the account holder (the bank's customer) but for other persons…are not at all uncommon. To extend the Alleged Duty of Care to the First Claimant would be more than an incremental development of existing case law; it would be a massive extension with significant consequences for banking law."

Decisions, decisions, decisions…

Privy Council (Lords Briggs, Kitchin, Hamblen, Burrows and Lady Rose):

Hearing on 10 February 2022

Judgment awaited

Oscar Schonfeld
One Essex Court

CHANCERY BAR

Reflective loss in the Isle of Man: a controversial rule

Iain Quirk QC
Essex Court Chambers

CHANCERY BAR

Cross-border Insolvency in England & Wales and the Isle of Man

Matthew Morrison and Zahler Bryan
Serle Court Chambers

Gateways for Assistance

- Common Law
- Insolvency Act 1986, s.426
- Cross-Border Insolvency Regulations 2006 / UNCITRAL Model Law
- EU Insolvency Regulation / Recast Insolvency Regulation no longer available unless proceedings commenced pre-31/12/2020

Common Law and Modified Universalism

***Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508**

Three propositions held to form part of Manx and English common law by Lord Hoffmann:

1. Modified Universalism: personal and corporate insolvency proceedings should be accorded universal recognition and court should recognise and assist foreign office-holders
2. Court can do everything it could do in a domestic insolvency subject to its own law and public policy
3. This power is the source of jurisdiction regardless of *in personam* or *in rem* jurisdiction

Common Law and Modified Universalism

Rubin v Eurofinance SA [2013] 1 AC 236 / *Singularis Holdings Ltd v PwC* [2015] AC 1675

- Recognition of foreign insolvency proceedings is not *sui generis*: normal common law rules for recognition and enforcement of *in rem* and *in personam* judgments apply (*Rubin* at [132] *per* Lord Collins)
- Just because a court has a power within a domestic insolvency, this does not mean it can be exercised when rendering assistance to a foreign office-holder (*Singularis* at [18] (Lord Sumption) and [38] (Lord Collins))
- Court does have power to recognise and assist foreign office-holders

BUT

- It is subject to local law and local public policy; and
- It is to be determined on a case-by-case basis: *"how far it is appropriate to develop the common law so as to recognise an equivalent power" (Singularis* at [19] *per* Lord Sumption).

Common Law Assistance: Accepted Situations

- Recognition of office-holder, at least insofar as appointment made or recognised in place of jurisdiction, subject to fraud / public policy and natural justice exceptions

  Re HIH Casualty and General Insurance [2008] 1 WLR 852 (HL) at [31]; *Rubin,* [13]; *Kireeva v Bedzahmov* [2022] EWCA Civ 35 at [41] *per* Newey LJ; cf. *Re China Agrotech Holdings Ltd* (FSD 157 of 2017) (Cayman Grand Court, Segal J)

- Stay of proceedings against the company and its property / relief against winding up

  Re African Farms [1906] TS 373 at 377; *Stichting Shell Pensioenfonds v Krys* [2014] UKPC 41 at [14]-[26]; *Interdevelco Limited v Waste2Energy Group Holdings plc* CHPR 2012/56 (10/10/12, Deemster Doyle) at [98]-[103]

Common Law Assistance: Accepted Situations

- Provision of information so long as the same power is available in the foreign jurisdiction, and such information is required for the purpose of the insolvency proceedings (cf. for use in actual or anticipated litigation)

  Singularis at [25]-[29] cf. *Brittain v Impex Services* CP 2003/96 (26/1/2004, Deemster Doyle) at [106]-[107]

- Vesting / remittance of movable assets

  Singularis at [17] (Lord Sumption) and [433] (Lord Mance); *Gladstone v Brunning* CP 2004/146 (7/3/2006, Deemster Doyle) at [171]-[176], but n.b. *Re OJSC International Bank of Azerbaijan* [2018] EWHC 59 (Ch) at [142](4) as to the need for caution if the foreign scheme of distribution differs

Common Law Assistance: Jurisdictional Limits

Kireeva v Bedzhamov & Ors [2022] EWCA Civ 35

- Receiver appointed under Russian bankruptcy order recognised by Snowden J, but refused relief in respect of immovable property
  Re Bedzhamov [2021] EWHC 2281 (Ch)
- Majority (Newey and Stuart-Smith LJJ) reversed and remitted decision on recognition but upheld refusal of relief in respect of immoveable property:
  - No power to vest title to immovables at common law
  - Jurisdiction to appoint a receiver under s.37 Senior Courts Act 1981 not unfettered and should not be used to circumvent immovables rule (at [94]-[104] and [131-137])

Common Law Assistance: Jurisdictional Limits

***Kireeva v Bedzhamov & Ors* [2022] EWCA Civ 35**

- Arnold LJ (dissenting on the immovables appeal only):
  - Agreed no power to vest title in immovables at common law (at [110-112])

  BUT

  - Appropriate to exercise power to appoint a receiver in circumstances where bankrupt was subject to the *in personam* jurisdiction of the English court
  - This is based upon the principle of modified universalism (at [116, 119 and 124-129])

Insolvency Act 1986, s.426

- Statutory obligation on UK insolvency courts to assist courts in any other part of the UK *"or any relevant country or territory"* (s.426(4))
- Isle of Man and Channel Islands specifically designated by s.426(11)
- Extended by SI 1986/2123 to Anguilla, Australia, Bahamas, Bermuda, Botswana, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Republic of Ireland, Montserrat, NZ, St Helena, Turks & Caicos, Tuvalu and the Virgin Islands.
- Extended to Malaysia and South Africa by SI1996/253 and Brunei by SI 1998/2766.

Insolvency Act 1986, s.426

- Court retains discretion whether to assist but unlikely to decline save in exceptional cases

  Hughes v Hannover-Rucksversicherungs AG [1997] BCC 921 cf. *Duke Group v Carver* [2001] BPIR 459

- Assistance may be granted before formal foreign insolvency proceedings commenced

  HSBC Bank plc v Tambrook Jersey Ltd [2013] EWCA Civ 576

- May not be used directly to enforce foreign judgments

  Rubin, [145]-155]

- Court may exercise powers under inherent jurisdiction, domestic insolvency law, substantive insolvency law of foreign jurisdiction or a combination of each

Insolvency Act 1986, s.426
Examples

- *Re Southern Equities Corp* [2001] Ch 419: Assistance with Australian interview procedure unavailable as a matter of English law
- *Re Dallhold Estates (UK) Pty Ltd* [1992] BCC 394: Administration order made in respect of Australian company to preserve English leasehold interest which could not have been granted by ordinary application under IA1986
- *Re BCCI No 9* [1993] BCC 787: Declarations of fraudulent and wrongful trading, and transactions at an undervalue, under ss.213, 214 and 238 IA 1986 in respect of Cayman Islands company despite absence of corresponding Caymanian legislative provisions

Insolvency Act 1986, s.426
Isle of Man Examples

- *Re Television Trade Rentals Ltd* [2002] EWHC 211 (Ch):
  - English High Court directed that provisions of Part I, IA1986 relating to company voluntary arrangements should apply to two Isle of Man companies
  - Companies carried on majority of business and had majority of creditors in England and Wales
- *Capita v Gulldale* (2014) CHP 2013/145*:*
  - Successful letter of request from Manx Court placing an Isle of Man company into administration under laws of England and Wales
  - No direct equivalent available in Isle of Man and provided the most efficient and effective way to deal with company's real estate interests in the City of London

CHANCERY BAR

Trustees, investments and ethics

A changing climate for trustees and investments

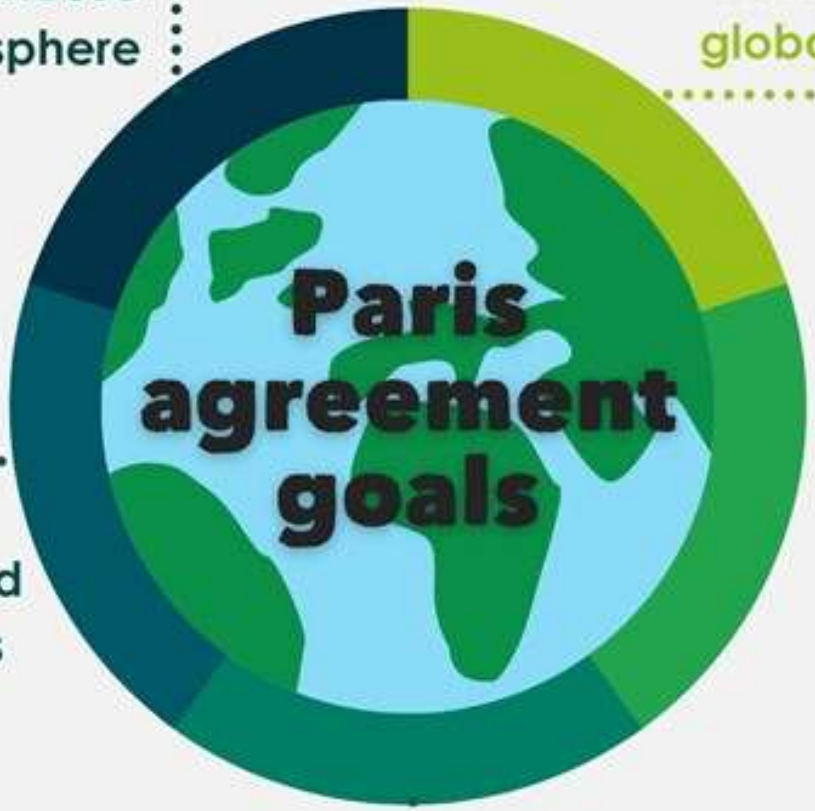
Edward Cumming QC
Maxim Cardew


Nations Unies
Conférence sur les Changements Climatiques 2015
COP21/CMP11
Paris, France

CHANCERY BAR

Save & increase forest area to capture greenhouse gases from the atmosphere

Hold average increase in global temperature to 2°C



Make finance consistent and aligned with Agreement goals

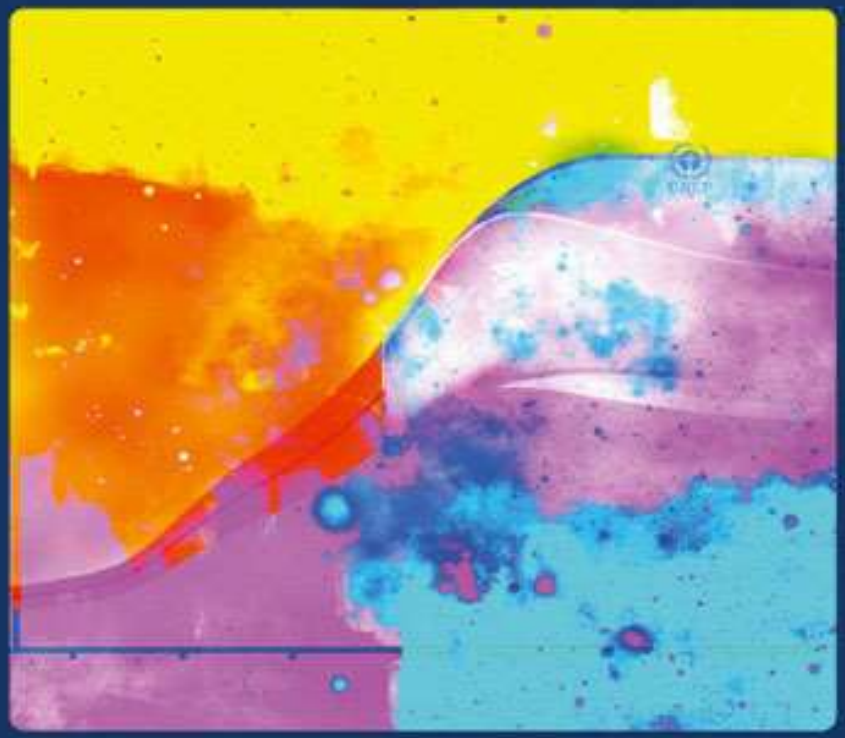
Limit temperature increase to 1.5°C

Increase ability to adapt to climate change

TREEAID

www.treeaid.org

Then, in October 2018…



ipcc
INTERGOVERNMENTAL PANEL ON climate change

WMO UNEP

Global Warming of 1.5 °C

An IPCC special report on the impacts of global warming of 1.5 °C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty.

Westminster acts…

Isle of Man

- November 2021: Isle of Man and other Crown dependencies request to be included in the Paris Agreement is approved
- December 2021: Climate Change Act 2021 gains Royal Assent
- Cabinet Office: "*We - every Island resident, Government department, business, **third sector organisation** across the whole of the Isle of Man - all have to work together to achieve net-zero*."

CHANCERY BAR

How does this concern trustees?

Trustees' powers of investment

- Trustees have a duty to make trust fund productive for beneficiaries
- IoM Trustee Act 2001 s. 3 / EW Trustee Act 2000 – very wide general power of investment
- Any exclusion or restriction in trust instrument?

Express powers of investment

- Express powers are strictly interpreted (*Re Maryon-Wilson's Estate* [1912] 1 Ch 55) but not to be restricted unduly *(Re Harari's Settlement Trusts* [1949] WN 79)

- Such investments as the trustees think fit:
  - Used to be interpreted restrictively
  - Now will normally cover anything which can properly be called an investment, even if it does not add that the trustees are to have the powers of a beneficial owner (which puts it beyond doubt).

Meaning of "invest"

- One traditional meaning of "*invest*": "*to apply money in the purchase of some property from which interest or profit is expected and which property is purchased in order to be held for the sake of the income which it will yield*" (*Re Wragg* [1919] 2 Ch 58 at 65).

- Three issues:
  1. Property acquired for occupation or use (*Re Power's Will Trusts* [1947] Ch 572).
  2. Property acquired for trading (*Orr v Wendt* [2005] WASCA 199).
  3. Non-income producing property.

The investment power is fiduciary

- A power to choose investments is a fiduciary power
- Must (obviously) confer no benefit on its holder
- Must be exercised with a single eye to the benefit of the beneficiaries (*Lord Vestey's Executors v IRC* [1949] 1 All ER 1108 at 1115, HL; *Re David Feldman Charitable Foundation* (1987) 58 OR (2d) 626).

Duties of care in relation to exercising investment powers

Generally same degree of diligence/care in office of a person of ordinary prudence in managing his/her own affairs (subject to particular characteristics of the officeholder that merit a higher standard).

Section 1, IoM Trustee Act 2001 / EW Trustee Act 2000: statutory duty of care when exercising either statutory power or any power of investment: "*use such skill and care as is reasonable in the circumstances*".

Duty can be excluded by the trust instrument.

Exercise of powers of investment

- Usually obliged to seek proper advice.

- Trustees then have to take account of standard investment criteria – suitability and diversification: see ss. 4(1) and 4(3), IoM Trustee Act 2001 / EW Trustee Act 2000.

What about ethical considerations?

- *Cowan v Scargill* [1985] Ch 270 per Megarry VC: put aside personal interests and their views about social and political issues

- *Re Wyvern Developments Ltd* [1974] 1 WLR 1097 at 1106 per Templeman J; *Cowan v Scargill* at 288: cannot make moral gestures

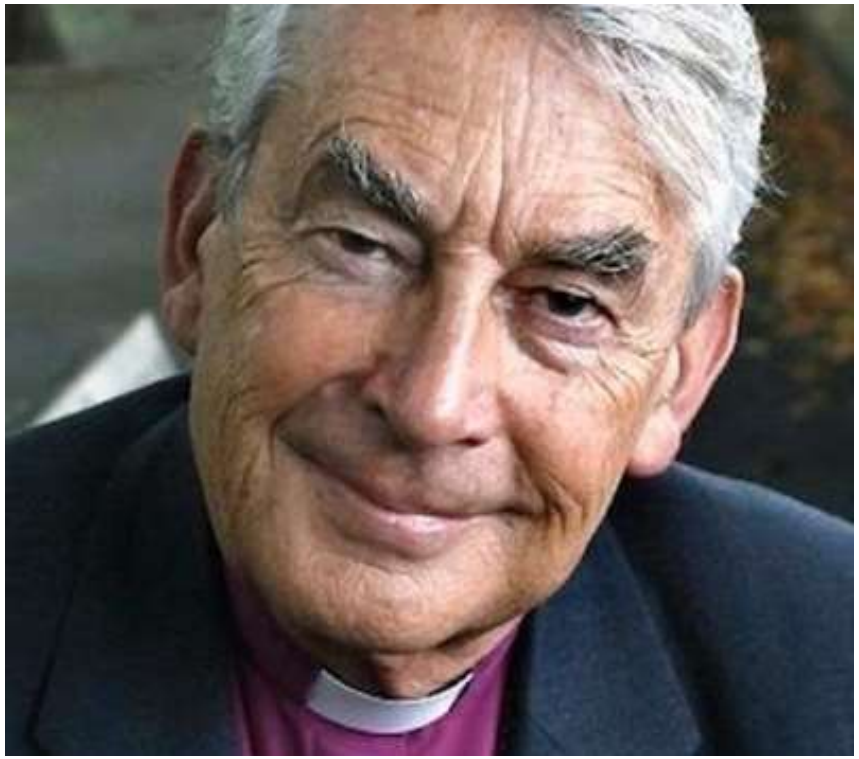
What about charities?

Larger registered charities (income > £0.5m) hold total long-term investments worth **c.£144bn**

Only 23.7% of registered charities in E&W indicate that they have a written investment policy

The *Bishop of Oxford* case

Harries v Church Commissioners for England [1992] 1 WLR 1241



- Property held for *"functional purposes"* or *"property held for the purpose of generating money"* (i.e. investments)?
- *Prima facie* interests of charity best served by seeking maximum return consistent with commercial prudence – the more money the better
- Investments should be selected using well-established investment criteria (i.e. advice, diversification, and balancing income vs growth, and risk vs return)

The *Bishop of Oxford* case

What about ethical considerations?

Charity trustees can take into account ethical considerations when:

- A particular investment conflicts with the aims of the charity.
- Holding certain investments would make beneficiaries unwilling to be helped or alienate financial supporters.
- The trust deed expressly permits them to do so (this may also apply to private trustees).

The *Bishop of Oxford* case

What about ethical considerations?

Only if two investments are equally suitable can trustees choose between them on personal grounds e.g. abhorrence of alcohol, tobacco, armaments (see also *Cowan v Scargill).*

Whilst charity trustees need (must?) not act to bring themselves or their charity into disrepute – (i) this does not allow "*moral statements*", and (ii) trustees should not be "*too tender*".

So, two exceptions to 'the more money, the better':

1. (What we call) '**direct conflicts**' (p. 1246F-G)
   - Avoid even if it would be likely to result in *"significant financial detriment"* (p. 1246G-H)
   - Nicholls VC thought these would be comparatively rare (p. 1246H)

2. (What we call) '**indirect conflicts**' (p. 1247A-B)

   Appears to be discretionary.

Possibly *"other cases"*, but not specified by the VC.

Picture becomes a bit blurry though…

Nicholls VC, at p.1247H:

Trustees are permitted (but not obliged) to "*accommodate the views of those who consider that on moral grounds a particular investment would be in conflict with the objects of the charity, so long as the trustees are satisfied that course would not involve a risk of significant financial detriment*".

- **What is a risk of significant financial detriment?**
- **Some sort of balancing exercise involved?**
- **In E&W: Charity Commission guidance (CC14)**

CHANCERY BAR

Other developments

- EW: Social investment power for charities – new Part 14A of the Charities Act 2011 in 2016.

- EW: Section 172 of the Companies Act 2006 applies to all companies, including charitable companies.

- Section 4(3) of the EW Trustee Act 2000 / IoM Trustee Act 2001 applies to all trusts: suitability and appropriateness of investments to be considered by reference to the particular circumstances of the trust.

- Section 5 of the EW Trustee Act 2000 / IoM Trustee Act 2001: whether investment advice is to be considered proper requires consideration of adviser's experience of "*financial* ***and other matters***" relating to the proposed investment

CHANCERY BAR

Butler-Sloss & ors v Charity Commission & anr

THE ASHDEN TRUST

THE MARK LEONARD TRUST

Butler-Sloss & ors v Charity Commission & anr

- Investment policies which seek, as far as practically possible, to exclude investments that are not aligned with the Paris Agreement

- Those policies risk the charities suffering relative financial detriment => greater risk / lower returns

- Leave granted under section 115(5) of the EW Charities Act 2011 by Michael Green J: *Butler-Sloss & ors v Charity Commission & anr* [2021] EWHC 1104 (Ch).

Butler-Sloss and Others v Charity Commission and HM Attorney General [2022] EWHC 974 (Ch)

- Headline - investment policy was blessed: [88]
- Re-interpretation of *Bishop of Oxford* case: "*should*" means something less than "*must*", and doesn't preclude consideration of other factors : [72].
- However: "*a direct conflict is likely to be the most significant factor and should be avoided if possible*" [72].
- "*Where conflicts arise… these are matters for the discretion of the trustees acting consistently with and so as to further the purposes of the trust*" [74].

Butler-Sloss v Charity Commission (2)

- 10-point checklist for "*taking into account non-financial considerations*" at [78]:
  1. Powers derive from trust deeds / governing instruments and from statute
  2. Primary and overarching duty is to further the purposes of the trust
  3. Normally achieved by maximising return (taking into account standard investment criteria, suitability, diversification, advice, and risk)
  4. Social investments or impact / programme-related investments are made using separate powers not the pure power of investment
  5. If specific investments are prohibited, cannot be made.

Butler-Sloss v Charity Commission (3)

6. If in "*reasonable view*" that particular investments of classes may conflict, have a discretion, "*reasonably balancing all relevant factors*" including likelihood and seriousness of conflict and likelihood and seriousness of financial effect.
7. Can take into account reputational damage.
8. BUT should not made decisions on "*purely moral grounds*".
9. Act honestly and reasonable (with due care and skill).
10. If balancing exercise properly done, trustees "*have complied with their legal duties… and cannot be criticised, even if the court or other trustees might have come to a difference conclusion".*

Thank you for listening

What questions do you have?

Edward Cumming QC

XXIV Old Buildings

Maxim Cardew

Maitland Chambers

CHANCERY BAR

Protectors: who guards the guards?

Rose Fetherstonhaugh
5 Stone Buildings

Case study

Logan, the family patriarch, settles a number of trusts governed by Manx law (the Roy Trusts) because he is worried about an impending divorce and, also, wants to put some wealth planning measures in place. However, he wants to ensure that he retains a measure of control over the Roy Trusts and is also concerned about his children, Shiv, Roman, Kendall and Connor, trying to extract excessive amounts of capital after he dies.

Case study continued

The trustee is RoyCo, a private trust company populated by handpicked directors which include Shiv's husband Tom. The trust deed creates the office of protector and Logan appoints his trusted friends and advisers, Gerri and Frank, as joint protectors. Logan has, of course, reserved the power to remove and replace the trustee and the protectors because his affections change quickly.

Case study continued

The trust deeds confer significant powers on the protectors. These include powers of consent/ veto over almost every dispositive and administrative power conferred upon the trustee (including, notably, distributions of any size).

They also provide that, although the protectors are bound to exercise their powers in the best interests of the beneficiaries, they do not owe any fiduciary duties and their powers are not vested in them in a fiduciary capacity.

Case study continued

Logan suddenly dies in a freak helicopter accident shortly after Frank retires, leaving Gerri as sole protector.

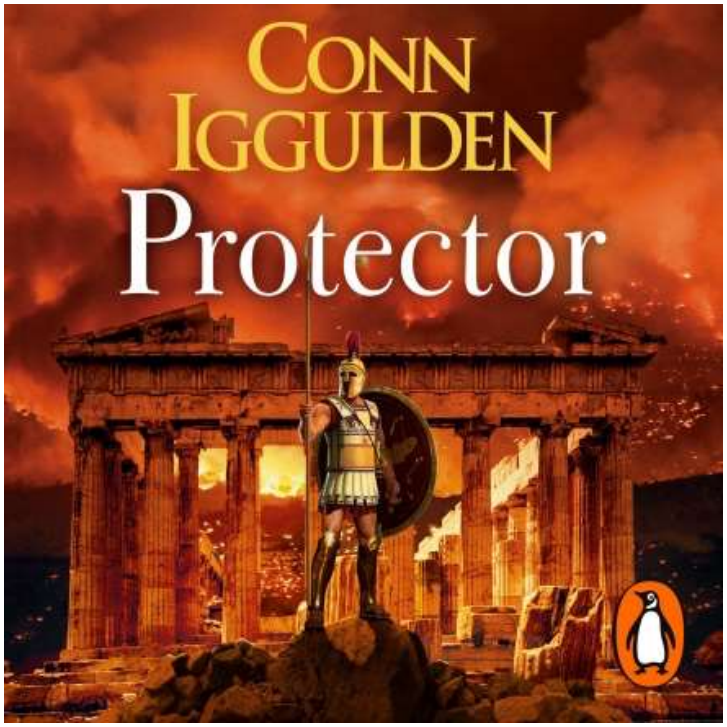
After his death, things start going badly wrong. Shiv and Kendall think that Gerri is favouring Roman because she vetoes every distribution RoyCo proposes to make in their favour and consents to every proposal in Roman's favour (Shiv and Kendall suspect a torrid affair).

Shiv and Kendall therefore bring an application in the Manx court for Gerri's removal.

What is a protector?

- Not a term of art
- Usually there to monitor the trustees – a "watchdog"
- *Not* there simply to enact the settlor's wishes: *Rawcliffe v Steele* 1993-95 MLR 426, *Re A and B Trusts* [2012] (2) JLR 253
- Often has powers to consent/veto
- Often has powers to appoint/remove trustees

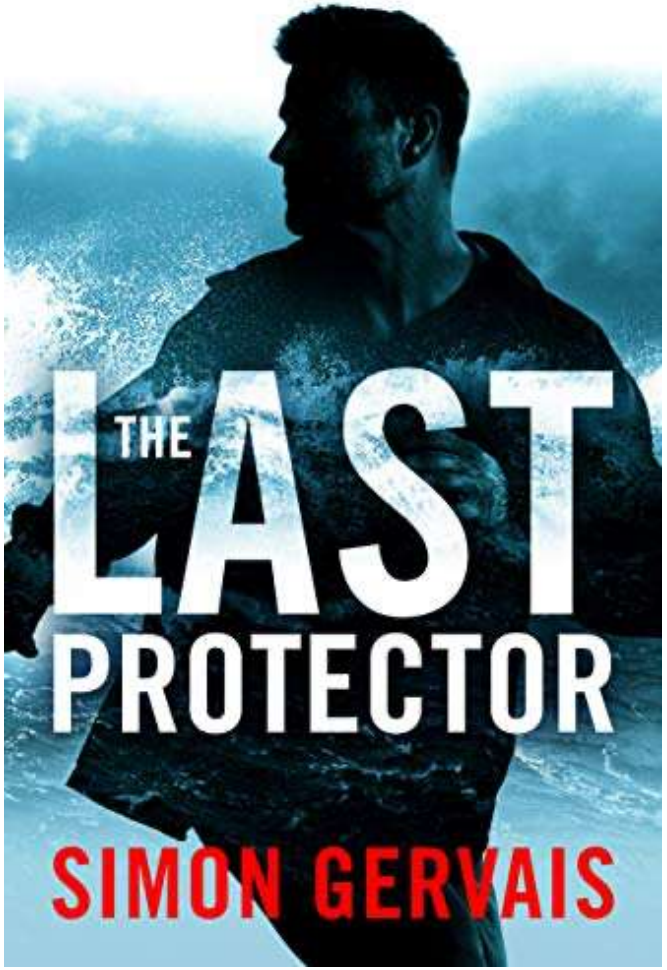
When does a protector owe fiduciary duties?



- Office of protector not in itself fiduciary
- May be the case that, in relation to a particular trust, some powers are fiduciary and others personal
- In the first instance a matter of construction of the trust instrument – see *In the matter of the Bird Trust* [2008] JRC013 at para 82

What difference does it make?

- *Re Osiris Trustees Ltd* 1999-01 MLR 206
- *Van Rooyen Family Trust* [2009] JRC 109



What is the scope of the protector's powers of consent?

- *Re the X Trusts* [2021] SC (Bda) 72 Civ
- *In the matter of the Piedmont and Riviera Trusts* [2021] JRC 248
- Which way will the Manx court go? *Rawcliffe v Steele* 1993-95 MLR 426
- ? When the protector is not a fiduciary?

How easy is it to remove a protector?

- Does the court's jurisdiction depend on the fiduciary (or not) nature of the office?
- Grounds for removal – distinction between protectors and trustees
- Are exceptional circumstances required?
  - *Re Papadimitriou* [2001-3] MLR 287 para 75
  - *In the matter of the K Trust* GRC 31/2015 para 39