Chancery Bar ASSOCIATION

ChBA Cayman Conference 2025

Welcome
Thursday 7th November

Iain Quirk KC
Chair of the International Subcommittee

Chancery Bar ASSOCIATION

Capacity Issues for the Offshore Lawyer

- Alexander Learmonth KC
- Amy Berry
- Marcus Croskell
- Alexander Farara

New Square Chambers, Lincoln's Inn

Capacity Issues for the Offshore Lawyer

- Different tests for capacity in different jurisdictions
- Commonly encountered diagnoses
- Clinical tests – interpreting medical records
- Capacity issues arising in trusts
- Capacity issues in company law
- Mental health crisis moratoriums
- Managing and safeguarding assets of the elderly.

Test for capacity - testamentary

- Capacity is always decision-specific, time-specific
- *Banks v Goodfellow* (1870) – Cockburn CJ: Ability to understand : -
  - (1) what a will is
  - (2) extent of the property being disposed of
  - (3) 'claims' of potential beneficiaries

  and (4) no insane delusion or disorder of the mind 'poison the affections' or 'pervert the sense of right'
- So the more complex the estate or the family, the more demanding the test – eg *Vegetarian Society v Scott* [2013]

- Policy consideration: allowing the elderly and ill to make wills

Test for capacity – lifetime transactions

- *Re Beaney* (1978) – "the degree or understanding required in respect of any instrument is relative to the particular transaction which it is to effect"
- Testamentary capacity or less.

- Cayman: *Re O Trust* (2018), *Re Poulton* (2022)
- Ditto BVI, Bahamas, Jersey, Guernsey, Canada, New Zealand

Test for capacity – statute

- *Mental Capacity Act 2005*
  - presumption of capacity (s.1)
  - if at the time unable to make a decision for self because of impairment or disturbance in functioning of mind or brain
  - need to understand, retain, use & weigh relevant information
  - including foreseeable consequences

- Capacity and Self-Determination Law (Jersey) Law 2016
- Capacity (Guernsey) Law 2020
- Mental Health Act 2022 (Bahamas)

(compare Cayman Mental Health Act 2013, BVI Mental Health Act 2014 – still modelled on MHA1983)

Which test applies?

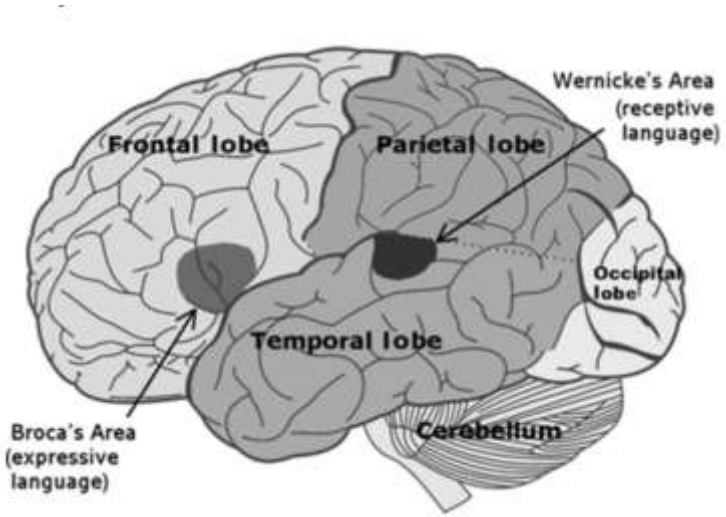
- "This common law test has been applied on countless occasions, and although it is now superseded by the Mental Capacity Act 2005 it applies in the present case since the relevant events took place before that Act came into force"
  - Lewison J in *Perrins v Holland* [2009] EWHC 1945 (Ch)

- MCA2005 s.2: "For the purposes of this Act, a person lacks capacity in relation to a matter if …"
- *Walker v Badmin* [2014] EWHC 71 (Ch), *James v James* [2018] EWHC 43 (Ch), *Clitheroe v Bond* [2021] EWHC 1102 (Ch) – *B v G* continues to apply

- BUT – *Baker v Hewston* [2023] EWHC 1145 (Ch) – no real difference: common law should mould to MCA test.

Potential Causes of Incapacity

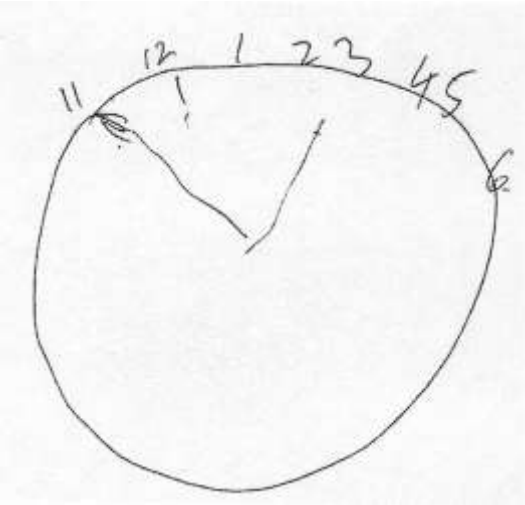
- Forms of Dementia:
  - i) Alzheimer's disease
  - ii) Cerebrovascular disease
  - iii) with Lewy bodies
  - iv) MND
  - v) Chronic alcohol abuse
- Learning Disability
- Affective/ Personality Disorders
- Medical Conditions e.g. UT infections

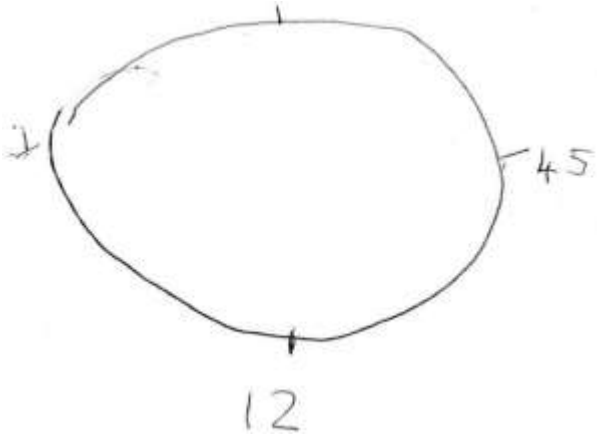


Standardized Cognitive Screening Tests

Mini Mental State Examination (MMSE) v. Montreal Cognitive Assessment (MoCA)

- MMSE: most common but increasingly under scrutiny.
- MoCA: increasingly favoured because it tests a wider range of abilities including "executive function".





Capacity issues: Company Directors

"Just because this is Accounting doesn't mean we're accountable!"

- Automatic termination of Directors under company articles (Table A):
  - *Companies (Tables A to F) Regulations 1985*: reg. 81
  - *Cayman Companies Act 2023 (as revised)*: s.22 & schedule 1
- Company Accounts and Auditor / Director concerns

Statutory Intervention on Mental Health

- England & Wales: Protections for debtors in a mental health crisis: *Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020*
- Similar provisions are not currently being considered by the Cayman Islands Government or other offshore jurisdictions
- Cayman Islands and BVI taking other steps to develop powers akin to the Court of Protection under
  i) Cayman - *Mental Health Act 2013* – amended by *Mental Health Act (2023 Revision)*
  ii) BVI – Similar amendments to its *Mental Health Act 2014*

Managing and safeguarding assets of the elderly

- Golden yet tactless rule (*Kenward v Adams* [1975] CLY 359)
- Revocation of wills (*Sangha v Sangha* [2023] EWCA Civ 660)
- Travel when you lack capacity (Re PO [2013] EWHC 3932 (COP), *J (by his Litigation Friend, the Official Solicitor) v Luton Borough Council* [2024] EWCA Civ 3)
- Recognition and enforcement of power of attorneys (*Re Various applications concerning foreign representative powers* [2019] EWCOP 52)
- Statutory wills for the non-dom or those with immovable property outside of UK
- How can we improve the services we provide?

Thank you

You have been listening to:

- Alexander Learmonth KC
- Amy Berry
- Marcus Croskell
- Alexander Farara

New Square Chambers, Lincoln’s Inn

Chancery Bar ASSOCIATION

The equitable remedy of an account for breach of fiduciary duty: time for a change or time to affirm?

Stephen Cogley KC
4 Pump Court

The Lord Chancellor's foot…

'Equity is a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a Chancellor's foot; what an uncertain measure would this be? One Chancellor has a long foot, another a short foot, a third an indifferent foot: 'tis the same thing in a Chancellor's conscience.'

-17th cent. J Selden, Table Talk, quoted in M B Evans and RI Jack (eds), Sources of English Legal and Constitutional History, Butterworths, Sydney, 1984,223-224

Subjectivity versus precedent

The varying length of the Chancellor's foot symbolized the subjectivity of equitable justice and how it varied from judge to judge.

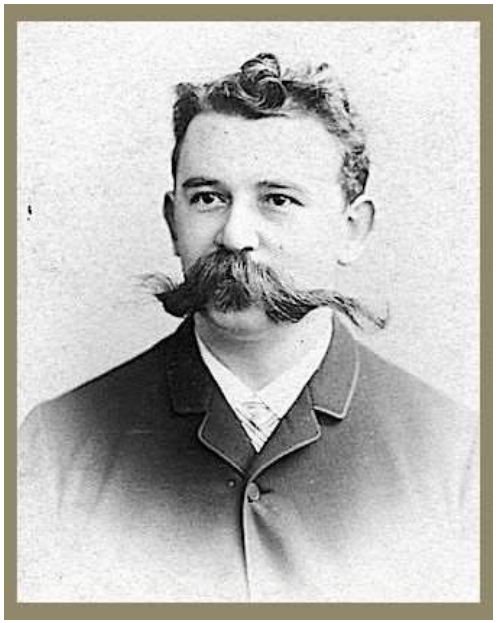
It was argued that the common law, permitting of no such flexibility, was safe, predictable and ostensibly suffered no such vagaries, in contrast to the Courts of Chancery.
That was the debate in the 17th and 18th Centuries

Coryton's moustache: 19th Century

- The differences between the common law and chancery courts approaches to cases were marked
- Not just jurisprudentially and procedurally. One Chancery barrister- Coryton, who was about to make a first appearance in the common law court of Common Pleas wrote to the CJ, Sir William Erle to ask if it was permissible for him to be *"wearing a moustache which he is desirous of wearing during the winter months"*
- He had no such qualms in the Chancery Division

- [Letter from Cortyon to Sir William Erle (13 November 1860) Bodlean Library, MS Don,c.71,91 as per Lobban *"What did the makers of the Judicature Act understand by "fusion""*]

Research has not revealed the Chief Justice's response…



All such divisions and debates were meant to be swept away by the *Judicature Act 1873*

The equitable remedy of an account: 20th century to the present.

- Election: damages or an account;
- **Disgorgement**- handing over ill gotten gains;
- Principal's position irrelevant;
- **Causation** not relevant;
- Remoteness and foreseeability not relevant to an account;
- No **entitlement** to an equitable allowance- burden on fiduciary;
- But no **unjust enrichment** of the principal

The fiduciary has to account for all gains where there is a *"reasonable relationship"* between the breach and the profit

- ***Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499, [96]** : " *a fiduciary's duty to account for a secret profit does not depend on any notion of **causation**. It is sufficient that the profit falls within the scope of his duty of loyalty to the beneficiary* "
- ***Recovery Partners v Rukhadze*** [2022] EWHC 690 Comm. *" However again lest the point be said to be live I will make clear that I reject any submission that there is a relevant concept of **equitable causation** in this area. The test is one of reasonable relationship. That may equate to what Professor Conaglen calls "attribution" (Conaglen, " Identifying the profits for which a fiduciary must account " (2020) CLJ, 79(1), pp.38-63); however it is probably safer to stay within the parameters of the way that the concept has been expressed in the authorities. That is clear as a matter of authority, because the question of the role of causation has been previously raised, argued and rejected"*
- See also Arden LJ in ***Murad v Al-Saraj*** [2005], Lewinson LJ in ***Gray v Global Energy*** [2021]

But what does this mean?

- How do you predict what might be caught by this concept- "parasitic" profits- duration?- "degree of connection"…;
- How to advise on whether to claim or defend;
- How to make an offer or advise on settlement;
- Ambit of disclosure;
- How to plan/run business between breach and judgment;
- "Wait and see". Seemingly permissible- subject to laches (see *Recovery Partners*)
- Case management/proportionality

Deterrence and "its all a question of fact"

- These are the standard responses to why causation plays no role: the deterrent purpose behind the remedy would be undermined. **Every case** that has rejected any attempt to ascribe causation a role has asserted this as the rationale. The root is ***Regal Hastings v Gulliver***
- The balance of academic opinion supports this as the **reason** for rejecting causation (e.g. *Conaglen; McInnes; Samet*).
- There should be no scope for the fiduciary performing some cost benefit analysis/calculated risk approach

Tempering the strictness of "no causation"

- "Fashioning the remedy". 4 methods used:
- Temporal limit;
- Particular assets or customers;
- Capital payment instead of account of profits;
- Allowance for skill, labour and assumption of business risk. BUT Each of these are equally uncertain and unpredictable;
- *Warman (Aus);* 2 years
- *Ancient Order of Foresters (Aus).* "But for causation"- but note harsh result- D couldn't show that profits were too remote;
- *Novoship. "*But for causation" re dishonest assistors, but not fiduciary;- but common law causation can apply by analogy!

- *Frank Music v Metro Goldwyn Mayer* (1989): profits too remote;
- *Recovery Partners: no causation allowed , but 25% for skill and labour and significant sums ruled out as "no sufficient nexus"*
- *Parr v Keystone Healthcare* (2019)- "some reasonable connection" sufficed. Per Lewinson LJ
- *Gamatronic v Hamilton* (2016) "no reasonable relationship"
- **But the language used, and the analysis of the earlier cases is not consistent.**

A Rose by any other name is still a Rose…

Time for causation to be recognized:

- It is increasingly applied in all but name;
- Deterrence argument ignores fact that "but for causation" can act far more punitively than "nexus" or "reasonable connection"- ignored by academics;
- No need to conjure with "equitable allowances" "skill and labour" "business risk" "temporal limit" or "unjust enrichment"
- Reflects modern world.
- Predictable and promotes resolution
- Court can respond harshly in deciding where the "remoteness" perimeter is imposed.
- Harmonizes law across sister jurisdictions.

What will the Supreme Court do….

When delivering judgment in *Recovery Partners v Rukhadze*- due shortly.
Predictions:

- *Regal Hastings* remains intact;
- Identification of different sorts of causation..
- Position remains as in CA- which in turn is the same as at first instance.

But who knows- after all its all very unpredictable.

STEPHEN COGLEY KC
scogley@4pumpcourt.com

Chancery Bar ASSOCIATION

Forfeiture as a remedy for breach of fiduciary duty: uses and abuses

Alex Potts KC
4 Pump Court

The principle

If a fiduciary acts dishonestly he will forfeit his right to fees paid or payable by the principal (as distinct from sums paid by a third party, such as a briber). He will also forfeit his right to such fees if he takes a secret profit from a third party which is directly related to performance of the duties in respect of which the fees were payable by the principal, even if the principal has benefited from the fiduciary's performance of those duties. However, a fiduciary's fees may not be forfeit if the betrayal of trust has not been in respect of the entire subject matter of the fiduciary relationship and where forfeiture would be disproportionate and inequitable.

A fiduciary will also lose his or her right to fees payable by the principal if the fiduciary's breach of duty is so grave that there has effectively been no performance at all, on the basis of total failure of consideration.

The key cases

- *Hosking v Marathon Asset Management LLP* [2016] EWHC 2418 (Ch)
- *Item Software UK Ltd v Fassihi* [2004] EWCA Civ 1244
- *Premium Real Estate Ltd v Stevens* [2009] NZSC 15
- *Imageview Management Ltd v Jack* [2009] EWCA Civ 63
- *Governor of the Bank of Ireland v Jaffery* [2012] EWHC 1377 (Ch)
- *Avrahami v Biran* [2013] EWHC 1176 (Ch)
- *Kelly v Cooper* [1993] AC 205, JCPC
- *Keppel v Wheeler* [1927] 1 KB 577

Easy enough in the case of some agents?

Less easy in the case of other fiduciaries?

- Partners (GPs, LPs, LLPs, etc)
- Quasi-Partnerships and Joint Ventures
- Directors & Officers
- Senior & Long-serving Employees

HPOR Services de Consultoria Ltda v Dryships Inc [2018] EWHC 3451 (Comm)

Cockerill J:

102.... It is plain on the authorities that the remedy of forfeiture is one which is applicable to an agent's remuneration and is applicable whether or not that fee has already been paid. It is available in all classes of breach, and is not limited to cases of secret commissions or bribes. The issue is only as to where the line falls, and falls in this case.

103.On my reading of the cases the line which the Court is seeking to draw in them is between serious breaches and relatively harmless ones – of which those described under the label of "harmless collaterality" are probably the archetype. The result will be fact dependent.

104.The outcome turns on the nature and seriousness of the breach, not upon harm; the principal need not demonstrate he has suffered any loss. As was said in *Imageview* at [50]:

> ***"The policy reason runs as follows. We are here concerned not with merely damages such as those for a tort or breach of contract but with what the remedy should be when the agent has betrayed the trust reposed in him-notions of equity and conscience are brought into play. Necessarily such a betrayal may not come to light. If all the agent has to pay if and when he is found out are damages the temptation to betray the trust reposed in him is all the greater. So, the strict rule is there as a real deterrent to betrayal. As Scrutton LJ said in Rhodes's case 29 Com Cas 19, 28, "The more that principle is enforced, the better for the honesty of commercial transactions"."***

Uses and abuses?

- No need to plead, or prove, actual loss
- No need to allege actual fraud or dishonesty
- Forfeiture can be relied upon by way of claim, defence, set-off, and counterclaim
- Useful potential defence to claims brought by fiduciaries (even if brought in different capacities)
- The application of the ‘principle’ is heavily sensitive to the facts

A topic that is ripe for appellate review…

- Peter Watts, *Forfeiture of Agents' Remuneration* (book chapter, Hart Publishing 2019)

"*It is strongly arguable that the reasoning in these cases is inconsistent with both common law and equitable principle, since, where there has been no failure of performance, and any collateral profit has (rightly) already been stripped, forfeiture of remuneration is justified neither by the law of contract nor the principles of equity. In particular, the existence of an independent equitable jurisdiction to forfeit remuneration is plainly based on a misunderstanding of the 19th century case law, and rubs against the principle that equity does not act penally. There has been a simple failure to let basic contract principles do the necessary work (including amongst those the concept of "failure of consideration"). Some other cases have found a way to distinguish Imageview, but the result is only undue complexity.* ***A principled reconsideration of the law is needed***".

Chancery Bar Association

Privilege, *Al Sadeq* and the Judicial Committee of the Privy Council: a panel discussion

Lesley Anderson KC, Kings & Gatehouse Chambers (Chair)

Nicholas Trompeter KC, Selborne Chambers

Julia Beer, Selborne Chambers

Simon McLoughlin, Selborne Chambers

Charlotte Pope-Williams, 3 Hare Court

ChBA Cayman Conference 2025

Afternoon Tea

Chancery Bar ASSOCIATION

Crypto Disputes: Strategic Considerations

Interim remedies, types of claim and insolvency procedures

Karl Anderson
4 Stone Buildings

Some context…

- Cryptocurrency market cap: $2.4 trillion
- Civil, insolvency and criminal proceedings: FTX, Binance-SEC etc.
- The regulatory context: Cayman Virtual Asset (Service Providers) Act, 2020 ("**VASP**")

A common(ish) scenario

- Your client holds bitcoin at an exchange domiciled in the Cayman Islands. Your client has made a request for a withdrawal of their bitcoin and a transfer to a different wallet, but keeps receiving an error message. They have heard on the grapevine that there has been widescale embezzlement; the exchange is on the verge of collapse; and there will shortly be a run on the exchange. Your client believes that his bitcoin may have been transferred through various intermediate wallets to an exchange in England. Your client wants urgent advice on the best way to secure or recover his bitcoin.

A preliminary question – are cryptoassets 'property'?

- In the BVI, yes: Smith v Torque Group Holdings Limited (in liquidation) BVIHC (COM) 0031 of 2021
- In the UK, yes: D'Aloia v Persons Unknown [2024] EWHC 2342 (Ch)
- In the Cayman Islands? Compare:

  • S.436 IA 1986:

  "*"property" includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property*"

  • S. 3(1) Interpretation Law:

  "*"**property**" includes money, goods, things in action, land and every description of property, whether real or personal; also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined*""

(1) Substantive claims – personal or proprietary?

- Exchanges may hold digital assets on constructive trust: Jones v Persons Unknown [2022] EWHC 2543 (Comm)
- But check the type of wallet in which the digital assets are stored: 'trading' v 'personal' wallets (Torque Group Holdings)
- Otherwise, what do the exchange's terms of use say about delivery up?

(2) Interim remedies?

- Freezing and proprietary injunctions: AA v Persons Unknown [2019] EWHC 3556 (Comm); c.f. Piroozzadeh v Persons Unknown [2023] EWHC 1024 (Ch)
- Interim order for delivery up, conversion to fiat currency and payment into court: Law v Persons Unknown [2023] 1 WLUK 577
- Norwich Pharmacal / Bankers Trust relief: Scenna v Persons Unknown [2023] EWHC 799 (Ch)
- Should you apply *ex parte* / in chambers? O.32, r.19

(3) Insolvency procedures – a silver bullet?

- S. 104(2) Companies Act (2023 Revision):

"An application for the appointment of a provisional liquidator may be made under subsection (1) by a creditor or contributory of the company... on the grounds that —

(a) there is a prima facie case for making a winding up order; and

(b) the appointment of a provisional liquidator is necessary in order to:

(i) prevent the dissipation or misuse of the company's assets;

(ii) prevent the oppression of minority shareholders; or

(iii) prevent mismanagement or misconduct on the part of the company's directors."

- Global reach; immediate suspension of directors' powers; broader arsenal of claims (see e.g. Re Three Arrows Capital Ltd (BVI))

Chancery Bar ASSOCIATION

Implementation and impact of OECD Pillar 2 in offshore jurisdictions

Sarah Black
11 New Square

Chancery Bar ASSOCIATION

Intellectual Property in Cayman and beyond

by Martin Howe KC
7 November 2024

- Copyright and confidential information
- Patents, trade marks and designs
- Relationship with UK statutes and applicability of UK and EU case law

Copyright

Cayman adhered to the Berne Convention on 4 June 1966 as a UK dependent territory

Copyright law in Cayman is Part I of the Copyright Designs and Patents Act 1988 (UK) ("CDPA"), extended to Cayman in modified form by the Copyright (Cayman Islands) Order 2015 (SI 2015 No 795) and amended by the Copyright (Cayman Islands) (Amendment) Order 2016 (SI 2016 No 370).

Other Parts of the CDPA, including Part II on protection of performers and Part III on design right, have not been extended to Cayman, although Part III is mirrored in Cayman's own legislation

Copyright (cont) – features applying to Cayman

By 2015 when it was extended to Cayman, the CDPA included many post-1988 amendments, e.g.

- Copyright in the information society amendments mandated by the EC in 2001, including transient and incidental copies defence in s.28A, and the 'making available' right in s.20 (covers VOD and posting on websites)
- Explicit protection of computer programs as literary works
- Modernisation of concept of broadcasting to cover both wireless and wired dissemination

Copyright (cont) – interpretation and case law

- CDPA as extended to Cayman is a UK statute, so seems obvious that UK case law will be authoritative as regards its interpretation in Cayman
- Where parts of the CDPA extended to Cayman were amended before 2015 to comply with EC/EU directives, it seems obvious that the relevant directives and EU case law should be at least persuasive under the principle of The Jade [1976] 1 WLR 430.
- Where UK judges have altered the interpretation of unamended parts of the CDPA in consequence of ECJ case law, it is less obvious that Cayman judges should follow them. The *Marleasing* doctrine requires courts of member states to interpret pre-existing national legislation if possible to comply with EU directives but this doctrine cannot as such apply to Cayman

Protection of confidential information

Cayman follows English law on the protection of confidential information, which is judge-made law but stemming from equity rather than common law

Absence in Cayman of equivalent of the UK's Trade Secrets (Enforcement, etc.) Regulations 2018 is not likely to have any discernible effect

Breach of confidence cases are often contractually based, but the equitable doctrine means that non-parties to a contract are bound by obligations of confidence if they have actual or constructive notice that the information is confidential

Patents

Patents Law (2018 Revision) consolidates changes to the original Patents and Trade Marks Law of 2011.

Patents having effect in the UK can be extended to Cayman by registration with the CIIPO. This means that both UK national patents granted by the UKIPO and European Patents granted by the EPO which designate the UK can be extended to Cayman

Note that the EPO is *not* an EU institution and the UK's relationship with it is not affected by Brexit

Patents (cont)

Section 9 states that registration will "afford in the Islands to the owner of the right so recorded all the equivalent rights and remedies available to the owner in respect of such patent in the United Kingdom"

This imports UK law of patent infringement and remedies

However not clear whether Cayman courts would be able to deal with a challenge to validity. Possibly, validity would need to be challenged in UK courts and an action for infringement in Cayman would be stayed to await the outcome

Patents (cont)

The ‘unjustified threats’ provisions in s.70A of the Patents Act 1977 (UK) do not appear to be imported into Cayman.

However s.15A of the Law provides remedies for ‘bad faith’ assertion of patents extended to Cayman

Trade marks

Having ditched the previous system of extending UK trade marks to the Islands, Cayman now has its own trade marks registry under the Trade Marks Law 2016 (Law 31 of 2016)

The Law is closely modelled on the Trade Marks Act 1994 (UK) which was largely based on the EC's Trade Marks Directive, so likely that both UK and EU case law will apply

Section 32(1) has not followed the UK and allows for global exhaustion of trade mark rights (the UK bizarrely still restricts exhaustion for non EEA countries)

Like the UK Act, the Law preserves the common law right to sue for passing off

Designs

Designs Rights Law, 2019 (Law 3 of 2019)

Most of this Law closely replicates Part III of the CDPA on unregistered design right; however, ss. 6-13 of the law provide for registration of designs

The inter-relationship of the two parts of this Law raises some puzzling questions, both at the level of drafting and at the policy level, since registered design laws in the UK and internationally are very different from Cayman's Design Rights Law

International context

As already noted, Cayman adheres to the Berne Copyright Convention. However it is not party to the Paris Convention which means that Cayman registered rights do not participate in the international priority system

For patents this does not matter since the base patents in the UK are within the Paris Convention system

For trade marks and designs it means that Cayman registrations cannot be used as a basis for international priority claims

Cayman is not party to the Rome Convention or to the more recent WIPO Copyright Treaty or the WPPT (WIPO Performances and Phonograms Treaty)

Chancery Bar ASSOCIATION

Implied representations in complex transactions: where are we now?

Peter de Verneuil Smith KC
3 Verulam Buildings

Outline

1. The implication test.
2. The awareness requirement.
3. Practical implications.

1.1 The Implication Test

- The guiding test is what would a reasonable person in the position of the claimant with known characteristics have inferred was implicitly represented by the words/conduct of defendant.
- Context includes the documents passing between the parties.
- "*An implied representation needs to be clear and capable of being spelled out from the surrounding circumstances*." [328]

Loreley Financing (Jersey) No 30 Ltd v Credit Suisse Securities Europe Ltd [2023] EWHC 2759 [293-296]

1.2 The Geest v Fyffes test

- This test is whether a reasonable representee would assume the true facts did not exist and assume that if they did exist he/she would necessarily be informed of it (Geest v Fyffes [1999] 1 All ER (Comm) 672).
- Applied in Property Alliance Group v RBS [2018] 1 WLR 3529 [132].
- This is one relevant consideration, not the whole test (Loreley [306]).

1.3 Recent examples

- Farol Holdings Ltd v Clydesdale Bank Plc [2024] EWHC 593 (Ch) Zacaroli J– [385]- a statement that a fixed rate loan was made up of a 'margin' and 'fixed rate' did not give rise to an implied rep. that there was no income element to the 'fixed rate'.
- Tactus Holdings Ltd v Jordan & Ors [2024] EWHC 399 (Comm) Simon Colton KC – a provision for stock did not give rise to an implied rep. that there was a reasonable basis for that provision [48(a)].
- Njord Partners Sma-Seal LP v Astir Maritime Ltd [2024] EWHC 1682 (Comm) Richard Salter KC – statement as to assets did give rise to implied rep. that it was honestly held [158].

2.1 The Awareness Requirement

- "*the overarching question is whether the representation operated on the mind of the claimant or materially influenced the claimant*" Loreley [375]
- Conscious thought- PAG (first instance), Marme Inversiones 2007 v Natwest Markets [2019] EWHC 366, Leeds City Council v Barclays Bank [2021] QB 1027 & Loreley [388] and Various Claimants v Barclays Bank Plc [2024] EWHC 2710 (Ch) [118].
- No conscious thought- Spice Girls v Aprilia [2022] EMLR 27, Man v Freightliner [2005] EWHC 2347 (Comm), & Crossley v Volkswagen [2021] EWHC 2444.
- De Verneuil Smith & Day "*Reliance: A comparison between the common law and s.90A FSMA*" (2021) 6 JIBFL 389.

2.1 An assumption?

- Where a simple implied rep. is at heart of transaction an assumption seems sufficient –Farol [222]. This echoes Loreley which explains Spice Girls as where "*the representation is simple and cannot be missed by the representee*" [423].
- The same reasoning should apply to the presumption of inducement which generally cannot operate without awareness – Loreley [390] & Allianz v Barclays [118].

3. Practical implications

- There must be close proximity between the implied rep. and the transaction or a core term (such as payment).
- Simple, transaction specific implied reps. which ‘go without saying’ can work without evidence of awareness.
- Where the implied rep. could be missed by the representee then need a witness to say they were aware of the implied rep.

Chancery Bar ASSOCIATION

ChBA Cayman Conference 2025

Cocktail & Canapé Reception

Chancery Bar ASSOCIATION

ChBA Cayman Conference 2025

Welcome
Friday 8th November

Iain Quirk KC
Chair of the International Subcommittee

Chancery Bar ASSOCIATION

Navigating the Arbitration of Internal Trust Disputes: Lessons from FamilyMart and Grosskopf

- Landmark decisions provide practical framework for trust arbitration
- Essential guidance on scope of arbitrable matters
- Practical solutions for key challenges
- Roadmap for practitioners

LANDMARK DECISIONS ON TRUST ARBITRATION

- FamilyMart [2023] UKPC 33 :
  - Two-stage test for identifying arbitrable "matters"
  - Clear distinction between arbitrable underlying issues and court-reserved remedies
  - Emphasis on substance over form in analyzing disputes
- Grosskopf [2024] EWHC 291 (Ch)
  - Applied FamilyMart principles to trust context
  - Confirmed arbitrability of factual matters underlying trustee removal
  - Practical approach to remedy implementation

para [61] (definition of "matter"):"a substantial issue that is legally relevant to a claim or a defence, or foreseeable defence, in the legal proceedings, and is susceptible to be determined by an arbitrator as a discrete dispute."

TWO-STAGE TEST FOR ARBITRABILITY

- **Stage 1:** Identify "Matters" - Review pleadings and underlying controversies - Focus on substantial issues with legal relevance - Consider foreseeable defences
- **Stage 2:** Scope Analysis - Does matter fall within arbitration agreement? - Apply contractual interpretation principles - Consider practical effectiveness
- **What Constitutes a "Matter"?** - Substantial issue legally relevant to claim/defence - Capable of determination as discrete dispute - More than peripheral or tangential issue

BALANCING BENEFITS AND CHALLENGES

- **Key Benefits** - Confidentiality of sensitive trust information - Expert arbitrators with trust law expertise - Flexible procedures for complex disputes

- **Primary Challenges** - Binding protected beneficiaries - Enforcement concerns - Representation issues

- **Practical Solutions** - Careful drafting of arbitration provisions - Clear representation mechanisms - Court coordination where needed

MECHANISMS FOR BINDING BENEFICIARIES

- **"Deemed Acquiescence"** - Beneficiaries bound as condition of claiming under trust - Applies to all benefits, interests, rights - Must be clearly expressed in trust instrument

- **"Conditional Transfer" Approach** - Rights derivative from settlor's wishes - Acceptance of benefits = acceptance of arbitration - Supported by commercial reality

- **Practical Implementation** - Clear conditioning language in trust deed - Express acknowledgment procedures - Documentation of acceptance

PROTECTING INTERESTS OF ALL BENEFICIARIES

- **Categories Requiring Special Attention** - Unborn/unascertained beneficiaries - Minors - Legally incapacitated persons

- **Representation Solutions** - Court-appointed representatives - Special purpose representatives - Independent protection mechanisms

- **Best Practices** - Early appointment of representatives - Clear scope of authority - Court oversight where appropriate

SECURING ENFORCEMENT OF AWARDS

- **New York Convention Requirements** - "Agreement in writing" challenges - Solution: modern flexible interpretation - Focus on deemed acceptance evidence

- **Key Considerations** - Choice of seat implications - Public policy concerns - Representation adequacy

- **Risk Mitigation** - Document acceptance/acquiescence - Clear representation arrangements - Compliance with mandatory provisions

IMPLEMENTING TRUST ARBITRATION

- **Drafting Considerations** - Clear scope of arbitrable matters - Express powers of tribunal - Representation mechanisms - Court coordination provisions

- **Key Provisions to Include** [Sample clause provided on next slide and in Speaking Note]

- **Procedural Framework** - Appointment procedures - Representation arrangements - Court interface mechanisms

Chancery Bar Association

SAMPLE CLAUSE (ICC)

General Provision

"All disputes arising out of or in connection with this Trust, including without limitation:

(a) any dispute regarding the existence, validity or interpretation of the Trust;

(b) any dispute between the Trustees and Beneficiaries;

(c) any dispute concerning the administration of the Trust;

(d) any dispute regarding the rights or obligations of any Beneficiary; and

(e) any dispute about the powers or duties of the Trustees

shall be finally resolved by arbitration under the [Rules] of [Institution], by [one/three] arbitrator(s) appointed in accordance with the said Rules."

Agreement to Arbitrate

"The Settlor hereby agrees to the provisions of this arbitration clause. The Trustees, any Protector, and their successors in office, by accepting to act under the Trust, also agree or shall be deemed to have agreed to the provisions of this arbitration clause."

Binding Effect on Beneficiaries

"Any person claiming or accepting any benefit, interest or right under the Trust shall be bound by, and shall be deemed to have agreed to, the provisions of this arbitration clause as a condition of such claim or acceptance."

Representation Provisions

"The arbitral tribunal shall have the power to appoint one or more qualified persons to represent the interests of any of the following in the arbitration:

EVOLVING LANDSCAPE OF TRUST ARBITRATION

- **Case Law Trends** - Broader acceptance of arbitrability - Practical approach to implementation - Balance with court supervision

- **Legislative Developments** - Increased statutory recognition - Enhanced representation frameworks - International harmonization efforts

- **Practice Evolution** - Specialized arbitration rules - Institutional expertise - Cross-border coordination

ESSENTIAL POINTS FOR PRACTITIONERS

1. **Clear Framework Now Available** - Two-stage arbitrability test - Practical guidance on implementation - Balance with court supervision
2. **Critical Success Factors** - Careful drafting - Clear representation mechanisms - Court coordination
3. **Next Steps** - Review existing arrangements - Update standard documents - Implement new procedures

Thank you for listening!

Mikhail Charles

5 Pump Court Chambers

Chancery Bar ASSOCIATION

Contempt of Court

in

Chancery Commercial litigation

Graeme McPherson KC, 4 New Square

‘The Court’s Ultimate Weapon …’

Proudman J in *Solodchenko*

The Scenario

The Injunction

- You must not …
- You must …

The Penal Notice

- If you do/do not …
- If anyone who knows of this Order does anything to help or permit you to do/not do …

Perceived Non-Compliance

The Opportunity !!

An Application to commit for Contempt of Court:

- Can I ?
- How do I ?
- Should I ?

Can I ? The ingredients of a contempt …

Has there been a (clear) breach of a properly served Underlying Order ?

- Where the Underlying Order requires a positive act
- Where the Underlying Order is a prohibition

By someone who can be liable for contempt ?

- Individuals
- Corporations & Officers (actual and de facto)
- Non-parties/Third parties

With the relevant *mens rea* ?

And can I prove those ingredients to the requisite standard of proof ?

How do I ? The Procedure

Getting off on the wrong foot – threats to apply

Getting things started

- Importance of a precisely worded NOM
- Service of the NOM and the evidence: GCR Order 52

Procedural steps – a tension between

- A short and summary procedure …
- A heightened standard of procedural fairness …

Should I ? What might I achieve ?

Tactical benefits ?

Sanctions

- Purposes of imposing a sanction ?
- Sanctioning options open to the Court ?
- Guiding principles

Discretion not to hear a contemnor in proceedings

And the downside ?

What might the future hold ?

To control abuse of the process ?

- Threshold tests at different stages ?
- Safeguards to prevent weaponisation ?
- Disapproval marked in adverse costs awards ?

To simplify the process ?

Chancery Bar ASSOCIATION

Full of sound and fury, signifying…?

How may trust law accommodate changing perspectives in relation to environmental, social and governance (ESG) matters

Ian Clarke KC, Selborne Chambers
Lydia Pemberton, Selborne Chambers
Greg Williams, Coram Chambers

"**Full of sound and fury, signifying**…" a missed opportunity?

This part of the talk will:

- recap the provisions of section 172, 174 and 260/261 of the CA 2006;
- review the substantive judgment in ***ClientEarth v Shell*** **[2023] EWHC 1897 (Ch)** (the separate costs judgment can be found at [2023] EWHC 2182 (Ch));
- consider why it may be said that the High Court's decision and the Court of Appeal's refusal of permission to appeal may be said to have been a "*missed opportunity*" insofar as understanding the scope of directors' duties in respect of ESG is concerned; and
- as part of the foregoing, consider the Cayman perspective.

Recapping the key provisions in England

The CA 2006 introduced:

(1) section 172(1)(d) – "*A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so* ***have regard*** *(amongst other matters) to*: "***(d) the impact of the company's operations on the community and the environment***" and

(2) sections 260 to 265 – a new statutory provision for derivative actions by shareholders.

What is required of directors?

Section 172

Duty to promote the success of the company

(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so ***have regard (amongst other matters)*** to—

(a) the likely consequences of any decision in the long term,

(b) the interests of the company's employees,

(c) the need to foster the company's business relationships with suppliers, customers and others,

(d) the impact of the company's operations on the community and the environment,

(e) the desirability of the company maintaining a reputation for high standards of business conduct,

(f) the need to act fairly as between members of the company.

(2). Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.

Section 174 - Duty to exercise reasonable care, skill and diligence

A company director has a duty to:

"(1)…exercise reasonable care, skill and diligence", defined as "(2) …the care, skill and diligence that would be exercised by a reasonably diligent person with:

(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the Company; and

(b) the general knowledge, skill and experience that the director has."

Further:

- The procedural focus on reporting and documentation of environmental factors in corporate decision-making is also reflected in other provisions. For example, section 414CZA(1) provides (subject to 414CZA(2)) that "*A strategic report for a financial year of a company must include a statement (a "section 172(1) statement") which describes* ***how*** *the directors have had regard to the matters set out in section 172(1)(a) to (f) when performing their duty under section 172*" (non-prescriptive).

- Lord Sales, Justice of the Supreme Court, speaking extra-judicially in 2019, said:

  "*As things stand, there is much force in the view that directors may and increasingly must take into account and accord significant weight to climate change in their decision making […] Under certain circumstances, however, their companies' interests may be so implicated by climate change effects that their general fiduciary and due care obligations actually require them to cause their companies to take action to reduce their contribution to climate changing activity*"

  ("Directors' duties and climate change: Keeping pace with environmental Challenges"
  Anglo Australasian Law Society, Sydney, 2019)

- Accordingly, if a director fails to consider ESG factors when making a decision which affects the success of the company, they could be in breach of their director duties. If it can be shown that a failure to consider ESG factors has led to a decision which is detrimental to the company, there is the potential for litigation.

Directors' duties and ESG - the Cayman perspective:

- The duties of directors of exempted companies in Cayman are primarily governed by the Companies Act (2023 Revision) (as amended, the Companies Act) and common law, which includes the duty to act bona fide in the best interests of the company, to exercise his or her powers for proper purposes (and not to exercise them for purposes for which they were not conferred), not to make secret profits; and to act with reasonable care, skill and diligence in the performance of his or her duties.

- There is no equivalent section 172(1)(d) and ESG trends may be considered as driven or responsive to appetite rather than a mandatory regulatory regime.

- There are currently no ESG-specific disclosure regulations in the Cayman Islands. The Cayman Islands government and CIMA are considering legislative and regulatory initiatives that in the longer-term could provide a framework and supervisory regime for industry participants **who wish** to be subject to ESG criteria but at present these matters are voluntarily and a question of self-assessment of its ESG strategies etc.

- **(As I understand!!!)** there have been no material decisions by the Cayman Islands courts in relation to ESG issues but there are potential risks in the right situation. For example, the risk of shareholder activism presents against companies or directors where, say, there has been materially false of misleading ESG disclosures or representations in prospectuses (see: sections 90 and 90A Financial Services and Markets Act 2000). Novel as it may be, perhaps a derivative claim could sound, or an investor petition to wind up a solvent company on just and equitable grounds.

Derivative claims

- Claims based on breaches of fiduciary duties and negligence are almost invariably claims properly belonging to the company, and not the individual shareholder investor, and may only be pursued by the individual shareholder investor as a derivative claim on behalf of the company when permitted.
- The circumstances in which such a claim may be brought were set out by Jenkins, L.J., in ***Edwards v Halliwell*** [1950] 2 All E.R. 1064:

  "It has been further pointed out that where what has been done amounts to what is generally called in these cases a fraud on the minority and the wrongdoers are themselves in control of the company, the rule [in Foss v Harbottle] is relaxed in favour of the aggrieved minority who are allowed to bring what is known as a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue."

Section 261 Application for permission to continue derivative claim

(1) A member of a company who brings a derivative claim under this Chapter must apply to the court for permission (in Northern Ireland, leave) to continue it.

(2) If it appears to the court that the application and the evidence filed by the applicant in support of it do not disclose a *prima facie* case for giving permission (or leave), the court—

- (a) must dismiss the application, and
- (b) may make any consequential order it considers appropriate.

(3) If the application is not dismissed under subsection (2), the court—

- (a) may give directions as to the evidence to be provided by the company, and
- (b) may adjourn the proceedings to enable the evidence to be obtained.

(4) On hearing the application, the court may—

- (a) give permission (or leave) to continue the claim on such terms as it thinks fit,
- (b) refuse permission (or leave) and dismiss the claim, or
- (c) adjourn the proceedings on the application and give such directions as it thinks fit.

Prima facie case?

"At this first stage…I interpret the phrase "prima facie" case to require me to consider whether the evidence is such as would entitle Mr Haider to the relief he claims if it were uncontradicted and if it were considered from his point of view, that is to say, taking it at its reasonable highest. I do not interpret it to mean that I should go further, and myself decide, at this first stage, whether or not it should be taken at its highest: that is a matter for the second stage. This applies to both parts of the application, i.e. (a) are the requirements for bringing a derivative claim satisfied, and (b) does such a claim raise a sufficient case against the defendant"

(per Peter Knox KC sitting as a Deputy High Court Judge in ***Zulfiqur Al-Tanveer Haider v Delma Engineering Projects Company*** (2023) EWHC 218 (Ch)); para. 48).

Section 263

Whether permission should be given

- Permission *must* be refused if (263(2)(a)) "*…a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to continue the claim*"

- In addition, the court is required (by s 263) to take into account certain matters, including (s 263(2)(a)) "*whether the member is acting in good faith in seeking to continue the claim*".

- Under CPR19.15, the initial decision is made on the papers, but the claimant can request a hearing. The company must be notified of the claim, but is not made a respondent at that stage. The decision at this stage will "normally" be made without the involvement of the company, and that if "*without invitation from the court*" the company takes an active part, it will not "*normally*" be allowed any costs of doing so.

Derivative claims - the Cayman Perspective

- Exception to the rule in ***Foss v Harbottle*** [1843] 2 Hare 461 i.e., the proper plaintiff in an action to recover loss arising from a breach of duty owed to a company is the company itself.
- The requirement is for an application for *'leave to continue*' substantive proceedings already commenced in the Cayman Islands.
- Order 15 rule 12A of the Grand Court Rules provides that in every derivative action, after the defendants have served notice of intention to defend, the plaintiff must file an application for leave to continue the action.
- There is no requirement that the shareholder/investor actually request the board to institute a claim or to convene a meeting. Evidence of voting control by the alleged wrongdoers is sufficient.
- A shareholder of a Cayman Islands company does not require leave from the Cayman courts to pursue a derivative action in a foreign jurisdiction (***Top Jet Enterprises Limited v Sino Jet Holding Ltd and Jet Midwest Incorporated*** [2018] CILR 18).

Cont.

- "**Renova Resources Private Equity Ltd v Gilbertson [2009] CILR 268 per Foster J:**

  "*The appropriate test to be adopted in considering an application for leave to continue a derivative action was that the court would have to be satisfied that the plaintiff had a prima facie case both in relation to the merits of the claim on behalf of the company, and that the alleged wrongdoing had been perpetrated by the majority of the shareholders, who were in a position to prevent the company from pursuing the claim against them. The requirement to obtain leave was to protect the defendant against and prevent the wasted expense and time of vexatious litigation. In deciding whether the plaintiff had shown a prima facie claim, the court would have to take a view of its merits, based on its first impressions of all the evidence presented, including that submitted by the defendant. The court would have to be satisfied that it was not unfounded or speculative, that it had been seriously brought on bona fide grounds in the interests of the company and that it was sufficiently strong to justify granting leave to continue the action rather than dismissing it at a preliminary stage*".

ClientEarth v Shell [2023] EWHC 1897 (Ch)

- ClientEarth (holding 27 shares) lodged a derivative action against Shell's directors for not complying with their duties under the Companies Act 2006,in relation to their failure to adopt policies capable of achieving the company's target of becoming a net zero business by 2050.

- It sought (1) a declaration from the Court that the Board has breached its duties and (2) a mandatory order requiring the Board to adopt and implement a strategy to manage climate risk in compliance with sections 172 and 174, and to immediately comply with a Dutch court order (in May 2021 the Hague District Court ordered Shell to reduce its net carbon dioxide emissions by 45% by 2030, in line with the global emissions pathway for meeting the 1.5°C temperature limit set out in the Paris Agreement).

- Trower J refused to grant permission to continue the claim and dismissed it on two occasions: first on the papers on 12 May 2023, and then again on 24 July 2023 following an oral reconsideration hearing (attended by Shell) which took place on 12 July 2023. The Court of Appeal refused permission to appeal that decision.

The pleaded case

- To manage climate risk, in April 2021 the Shell Board set an "*Energy Transition Strategy*" to (a) become a "net zero" energy business by 2050, by reducing absolute emissions to net zero; and (b) be committed to be "*aligned with the more ambitious goal of the Paris Agreement, to limit the increase in the average global temperature to 1.5 degrees Celsius above pre-industrial levels*";

- ClientEarth alleged three overarching breaches:
  (i) a failure to set appropriate targets;
  (ii) the means adopted to meet the objectives of the said strategy; and
  (iii) Non-compliance with a Dutch court order

- It argued that that the targets and means adopted by the Shell Board were "***irrational and fall outside the range of reasonable decisions open to the directors, because they do not put Shell on any pathway likely to meet the outcomes which the board recognises are necessary to promote the success of the company***".

- In formulating our case, it pleaded that there were various "***necessary incidents***" of/to sections 172 and 174 CA 2006, when considering climate risk for a company. These were duties to:

  (a) make judgments regarding climate risk that are based upon a reasonable consensus of scientific opinion;

  (b) accord appropriate weight to climate risk;

  (c) implement reasonable measures to mitigate the risks to the long-term financial profitability and resilience of the company in the transition to a global energy system and economy aligned with the GTO;

  (d) adopt strategies which are reasonably likely to meet the company's targets to mitigate climate risk;

  (e) ensure that the strategies adopted to manage climate risk are reasonably in the control of both existing and future directors; and

  (f) ensure that the company takes reasonable steps to comply with applicable legal obligations.

- In respect of the Dutch Court Order, ClientEarth alleged that, by failing to put Shell in a position to comply, the Board had not only breached its duties under sections 172 and 174 CA 2006 but had also breached its duty to take reasonable steps to ensure that a court order of which it is aware is obeyed. A duty which, it said, arose under the common law of England and Wales, as well as under Dutch law.

- It said that the Board's current approach falls outside the range of reasonable responses to climate risk and this was having or would have a serious adverse effect on Shell's financial performance.

The Decision

In summary, the Court found that:

a. the "*incidental*" duties described above at paragraph 33 were inconsistent with the well-established principle that it is for directors themselves to determine how best to promote the success of a company (paras. 27-28);

b. ClientEarth had established a 'prima facie' case (meaning a case that Shell faces material and foreseeable risks as a result of climate change which have or could have a material effect on it (para. 45);

c. but ClientEarth had not made out a prima facie case that Shell's Board was mismanaging that risk, because:

(i) the evidence submitted by ClientEarth in this regard was not submitted in the appropriate form i.e., expert evidence (paras. 59-63);

(ii) "*[The] management of a business of the size and complexity of that of Shell will require the Directors to take into account a range of competing considerations, the proper balancing of which is classic management decision with which the court is ill-equipped to interfere*" (paras. 66-68);

Cont.

d. the evidence did not support a case that there is a universally accepted methodology as to the means by which Shell might be able to achieve the targeted emissions reductions in its energy transition strategy, so it could not be said that the strategy fell outside the range of reasonable responses (para. 64);

e. a director acting perversely or irrationally can only be evidence that the directors have not discharged their legal duty, not a separate ground of breach (paras. 29-30);

e. there is no separate duty on directors under English law to take reasonable steps to ensure that the order of a foreign court is obeyed or complied with, and that any such duty under Dutch law would have been irrelevant to the claims made (paras. 34 to 36);

f. the request for injunctive relief was "*too imprecise to be suitable for enforcement*" and the request for a declaration would "*have no substantive effect and fulfil no legally relevant purpose*" (paras. 79-83);

g. "*where the primary purpose of bringing the claim is an ulterior motive in the form of advancing ClientEarth's own policy agenda with the consequence that, but for that purpose, the claim would not have been brought at all, it will not have been brought in good faith [in the legal sense of that term] – and that ClientEarth's very small shareholding gave rise to that inference*" (paras. 85-93); and

h. the Board has received majority support from shareholders at AGMs, this was "confirmatory of the fact that a person acting [to promote the success of the company] would not seek to continue the claim". The support which ClientEarth received for its claim was only a very small proportion of the total shareholder constituency (paras. 85, 96-98).

The Appeal

Ground 1: The evidential approach to the prima facie case

The Court erred in setting the evidential bar too high. The Court imposed inappropriate evidential expectations creating unfair and unworkable barriers to the applicable jurisdiction.

Ground 2: Misunderstanding the case and/or incorrect legal conclusions

The Judge reached a number of conclusions in relation to the legal architecture of ClientEarth's case which are unsustainable and involve either a misunderstanding or mischaracterisation of ClientEarth's submission, or errors of law.

Ground 3: Error in approach to the Dutch Order

The Judge was wrong to dismiss the limb of ClientEarth's claim relating to Shell's failure to comply with the Dutch Order

Ground 4: Approach to relief

Ground 5: Good faith

The Judge erred in his assessment of whether ClientEarth was acting in good faith in seeking to continue the claim, applying an incorrect legal test.

The Court of Appeal refused permission on each of six grounds (the sixth being in respect of costs):

Grounds 1 and 2:

> "The appellant needed to show a prima facie case that there is no basis on which the directors could reasonably have come to the conclusion that the actions they have taken have been in the interests of Shell…Overall, as the Judge said, the evidence "falls some way short of establishing a prima facie case that the way in which Shell's business is being managed by the Directors could not properly be regarded by them as in the best interests of Shell's members as a whole". Further, the Judge was entitled to consider that "the current evidence, unsupported by any expert analysis of why all the Directors got the balancing exercise they are required to carry out so wrong as to be actionable, does not support a prima facie case in relation to breach of the s.174 duty of care";

…the Judge did not suggest that expert evidence would be required in every case. Rather, he took the view that expert evidence would have been needed on the facts of this particular case as a "reflection of the very serious nature of the case [the appellant] seeks to advance and the attendant difficulties which its pursuit entails". The Judge was justified in taking that view.

Ground 3: The Judge detailed the weaknesses in the Dutch lawyer's evidence, and the appellant does not provide solid grounds for considering the Judge's approach to have been mistaken.

Ground 4: The Judge's comments that the mandatory orders sought by the appellant fall foul of the principle that a Court will not grant mandatory injunctive relief if constant supervision is required and he further doubted what legitimate purpose the grant of a declaration would fulfil", made "*good sense*".

...The Judge was "amply justified" in concluding that a person acting in accordance with section 172 would not continue to claim.

Ground 5 : "The Judge was also justified in concluding that the appellant had not adduced sufficient evidence to counter the inference of collateral motive. There is every reason to think that the appellant has brought the claim to advance its policy agenda rather than to enhance or protect the value of its very small shareholding. In fact, given the appellant's objects, it is hard to imagine that it holds its 27 shares for investment purposes at all"

Ground 6: "This Court is slow to interfere with discretionary decisions as to costs. There is no likelihood of its doing so in the present case".

A missed opportunity?

- Dismissal of ClientEarth's evidence out of hand?
- Failure to consider whether Shell had credible policies for achieving an effective energy transition strategy?
- Why object to the declaratory relief?
- Why a "lack of good faith" when, in a sense, any shareholder has an ulterior motive?
- How could the Court of Appeal helped?

Chancery Bar ASSOCIATION

Lydia Pemberton
Selborne Chambers

Chancery Bar ASSOCIATION

When Chancery and Family Law Collide

Greg Williams
Coram Chambers, London

Act 1 – Setting the Scene

***"Love looks not with the eyes, but with the mind,
And therefore is winged Cupid painted blind"***

**A Midsummer Night's Dream,
Act I, Scene I**

Act 1 – Setting the Scene

Act 1 – Setting the Scene

Act 2 – The Supreme Court Litigation

"There is no more mercy in him than there is milk in a male tiger"

Coriolanus
Act V, Scene IV

Unger and another v Ul-Hasan, decd and another [2023] UKSC 22; [2024] AC 497; [2023] 3 WLR 189

Act 3 – The Chancery Division Claim

"O'er Lawyers fingers, who straight dream on fees"

Romeo and Juliet,
Act I, Scene IV

Chancery Bar Association

The Estate of Nafisa Hasan (deceased) v Digit Limited (in liquidation) & Anor [2024] EWHC 1127 (Ch)

Chancery Bar ASSOCIATION

The Estate of Nafisa Hasan (deceased) v Digit Limited (in liquidation) & Anor [2024] EWHC 1127 (Ch)

The Estate of Nafisa Hasan (deceased) v Digit Limited (in liquidation) & Anor [2024] EWHC 1127 (Ch)

Hugh Sims KC, sitting as a Deputy High Court Judge, at [20] quoting Lord Sumption in *Prest* v *Petrodel Resources Ltd and others* [2013] UKSC 34; [2013] 2 AC 415 at [45]

"The family finances will commonly have been the responsibility of the husband, so that although technically a claimant, the wife is in reality dependent on the disclosure and evidence of the husband to ascertain the extent of her proper claim. The concept of ***the burden of proof****, which has always been one of the main factors inhibiting the drawing of adverse inferences from the absence of evidence or disclosure,* ***cannot be applied in the same way to proceedings of this kind as it is in ordinary civil litigation.*** *These considerations are not a licence to engage in pure speculation. But* ***judges exercising family jurisdiction are entitled to draw on their experience and to take notice of the inherent probabilities when deciding what an uncommunicative husband is likely to be concealing****."*

The Estate of Nafisa Hasan (deceased) v Digit Limited (in liquidation) & Anor [2024] EWHC 1127 (Ch)

Hugh Sims KC, sitting as a Deputy High Court Judge, at [21]:

"… this is not a licence to speculate and there must be an evidential basis to so conclude. But the observations do have some bearing in this case, where ***Nafisa has consistently asserted a case in support of her claim for a beneficial interest, and the response to that from Digit and/or Colonel Hasan, before the Colonel's death, has either been silence, or a series of inconsistent statements****. Any positive assertions have tended to be bare assertions, not supported by any documents."*

The Estate of Nafisa Hasan (deceased) v Digit Limited (in liquidation) & Anor [2024] EWHC 1127 (Ch)

Hugh Sims KC, sitting as a Deputy High Court Judge, at [53]:

"…If Digit had genuinely bought a residential dwelling as an investment vehicle for its own benefit and profit I would not have expected it to stood idly by for over 7 years, from 2002 to 2009, permitting someone to occupy it without paying any rent. Nafisa acted, and was permitted to act, as if the Property was her own because, ***in my judgment, this reflected the real and shared intention of her, Colonel Hasan, and Digit, as at 1998. The use of Digit was to conceal the true intention****."*

Chancery Bar ASSOCIATION

ChBA Cayman Conference 2025

Morning Coffee

Chancery Bar ASSOCIATION

THE REVOLUTION IS HERE AND NOW!

GOOD FAITH, FIDUCIARY DUTIES AND BRAGANZA IN PARTNERSHIPS, LLPS AND ELPS

Eleanor Temple KC
Kings Chambers

Jeremy Callman
Ten Old Square

Jonathan Gavaghan
Ten Old Square

Chancery Bar ASSOCIATION

THE REVOLUTION IS HERE AND NOW!

Partnerships, LLPs and ELPs: Good Faith and Fiduciary Duties

JONATHAN GAVAGHAN
Ten Old Square

What is the fiduciary duty of good faith?

No complete "one size fits all" definition: duty may be fact sensitive, but…

- Obligation to subordinate your self-interest to that of your principal is key point.

- Means you can't (at least without informed consent):
  - make a personal profit from your position;
  - divert business opportunities from the firm to yourself;
  - set up a competing business;
  - use confidential information to personal advantage.

Also includes acting honestly, genuinely and for relevant purpose.

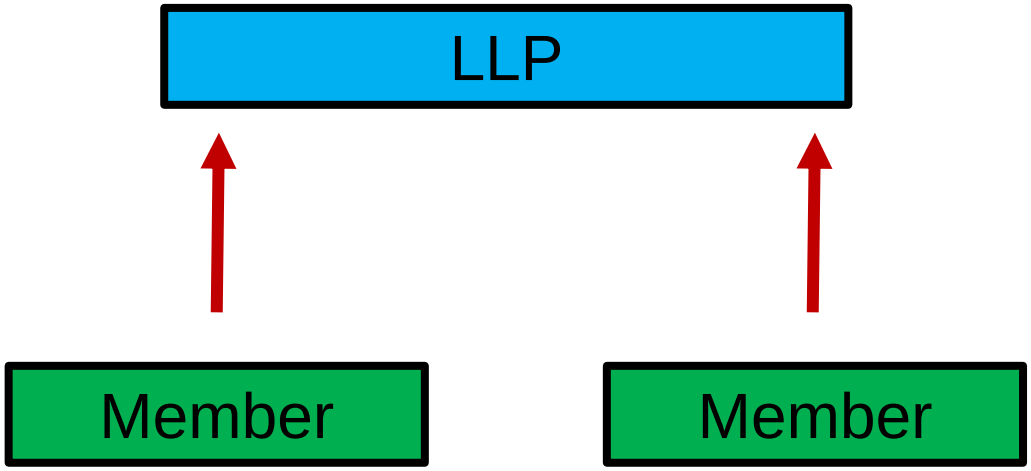
General Partnerships: Fiduciary Duties

Fiduciary Duty: General Partnerships

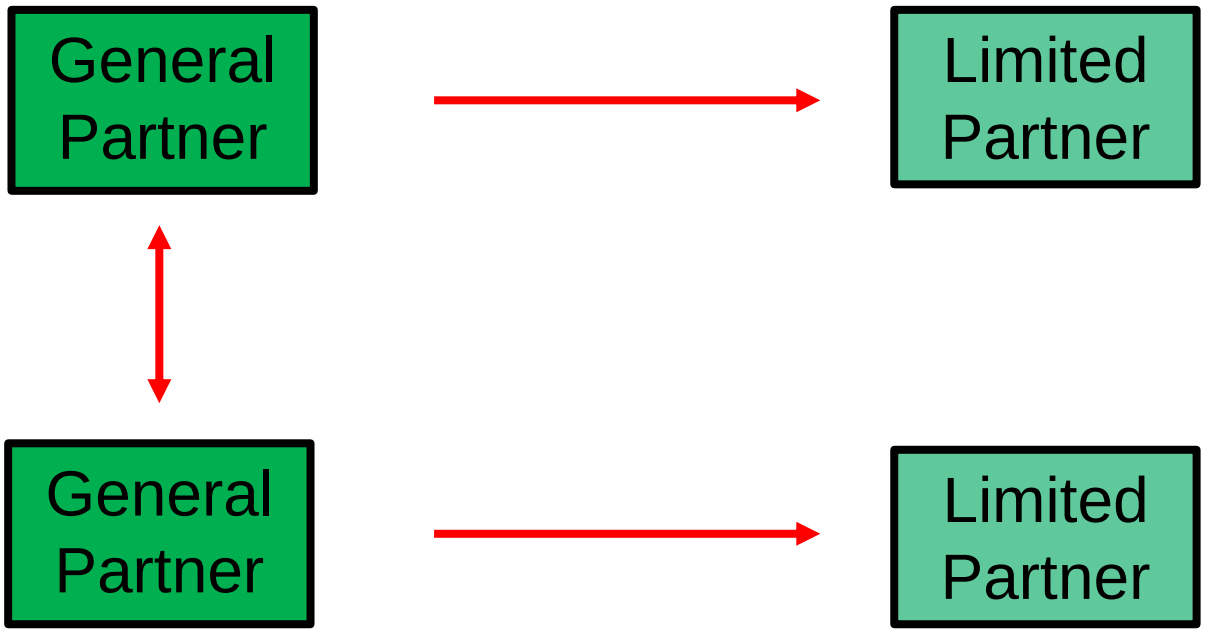
Helmore v Smith (1886) 35 Ch D 436, 444 (Bacon, V.C.):

> "*If fiduciary relation means anything I cannot conceive a stronger case of fiduciary relation that that which exists between partners. Their mutual confidence is the life blood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust each other that the business goes on*".

LLPs: Fiduciary Duties



ELPs: Fiduciary Duties



Good Faith: A revolutionary?

Leggatt J

Che

Good Faith outside Fiduciary Relationship

Traditional position – no general duty of good faith in contract law of England and Wales:

> *"There is in my view a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement."* per Moore-Bick LJ in *MSC Mediterranean Shipping Co v Cottonex* [2015] EWHC 283 (Comm); [2016] EWCA Civ 789 at para 45 (cautioning against comments made by first instance judge: Leggatt J)

Good faith: A revolution?

Revolution started with Leggatt J in *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep 526.

- Lamented the bluntness of the conventional distinction between ordinary contracts and relationships such as partnership, trusts and other fiduciary relationships.
- Controversial decision – followed by some, distinguished by others.

Yam Seng contd.

Picked up by (surprisingly!) Leggatt J in *Sheik Al Nehayan v Kent* [2018] EWHC 333 at [167]:

> "*I drew attention to a category of contract in which the parties are committed to collaborating with each other, typically on a long-term basis, in ways which respect the spirit and objectives of their venture but which they have not tried to specify, and which it may be impossible to specify, exhaustively in a written contract.* ***Such 'relational' contracts involve trust and confidence but of a different kind from that involved in fiduciary relationships. The trust is not in the loyal subordination of one party of its own interests to those of another. It is trust that the other party will act with integrity and in a spirit of co-operation****. The legitimate expectations which the law should protect in relationships of this kind are embodied in the normative standard of good faith*."

Yam Seng contd.

Then picked up by Fraser J in *Bates v Post Office (No. 3)* [2019] EWHC 606 (QB) – emphasizing **relational contracts** as being different – can be implied duty of good faith.

Followed by Pepperall J in *Essex CC v UBB Waste (Essex) Ltd* [2020] EWHC 1581 (TCC).

Fraser J. gave 9-point guidance in *Bates* as to what a relational contract is - which might be said to apply to members agreements of many LLPs…

Bates v Post Office (No. 3): *Test for relational contracts*

Fraser J sets out test (see *Bates* at paras 725-6):

1. No specific express terms that prevent a duty of good faith being implied into the contract.
2. Long term contract, with the mutual intention of the parties is that there will be a long-term relationship.
3. The parties must intend that their respective roles be performed with integrity, and with fidelity to their bargain.
4. Parties will be committed to collaborating with one another in the performance of the contract.
5. Spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract.

Test for relational contracts contd.

6. Parties will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships.
7. The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty.
8. There may be significant investment or financial commitment by one party (or both) in the venture.
9. Exclusivity of the relationship may also be present.

Nine factors are merely helpful indicia

See also Pepperall J in *Essex CC v UBB Waste (Essex) Ltd* [2020] (supra) at 106:

> *"[I]t must be kept firmly in mind that these nine factors do not fall to be construed like the words of a statute, rather they are helpful indicia of a relational contract. Indeed, Fraser J no doubt had this very much in mind in his comments at [726].."*

Coulson LJ in *Candey Ltd v Bosheh [2022] EWCA Civ 1103* refers to him using the list "*merely as a sense check rather than a series of statutory requirements.*"

Not everyone is signed up for the revolutionary army …

Coulson LJ in *Candey Ltd v Bosheh* (supra) at 31-32:

"In reliance on these authorities, there has been something of an avalanche of claimants in recent years trying to show that the contract into which they seek to imply the term is a relational contract, thereby bringing with it the implied obligation of good faith. Only a relatively few have succeeded… [I]t might be said that the elusive concept of good faith should not be used to avoid orthodox and clear principles of English contract law."

What is the content of the implied duty of good faith in relational contracts?

Pepperall J. in *Essex CC v UBB Waste (Essex) Ltd* [2020] (supra) stated at para 115-6:

- Not an obligation to subordinate your interests to the other party (therefore distinct from fiduciary duty of good faith).
- What will be required in any individual case will depend on the contractual and factual context.
- Whether a party has not acted in good faith is an objective test.

Content of implied duty of good faith in relational contracts contd.

Key element according to Pepperall J in *Essex CC* case as follows:

> "*Dishonest conduct will be a breach of the duty of good faith, but dishonesty is not of itself a necessary ingredient of an allegation of breach…*
>
> *Rather the question is* ***whether the conduct would be regarded as "commercially unacceptable" by reasonable and honest people***."

Chancery Bar ASSOCIATION

THE REVOLUTION IS HERE AND NOW!

Braganza: ELPs, LLPs and Partnerships

JEREMY CALLMAN
Ten Old Square

What are we going to cover?

This is all about how to challenge decision-making.

The principles apply across ELPs, LLPs and partnerships. Key questions are:

- What are *Braganza* duties?
- What fetters apply to decision-makers?
- When do Braganza duties arise (and how)?
- Can they be excluded by contract?
- What happens if a decision is irrational? What then?

Renford Braganza

Niloufer Braganza

The facts and context of Braganza v BP Shipping & another [2015] 1 WLR 1661

- Chief engineer on a BP vessel (MV British Unity); contract of employment that provided for a death in service benefit save where the death had resulted from an individual's own willful act.
- Mr Braganza disappeared overnight and, after a search, was declared to be lost overboard, presumed drowned.
- BP sets up its own investigation team, which discounted foul play. Having seen e-mail messages between the deceased and his wife which suggested that he had been troubled by financial and other worries, and being of the opinion that there had been no good reason for him to have gone on deck at night, the team reported that the most likely explanation for his disappearance was that he had died by suicide, rather than accidentally falling overboard.
- On the basis of that report, the second defendant's general manager decided no benefit was payable to the widow.
- This led to a claim which establishes (in the Supreme Court) key principles on how to challenge a discretionary decision-making process

MV British Unity

Bring in The Wednesbury unreasonableness test

Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223:

"The court is entitled to investigate the action of the local authority with a view to seeing whether **[1]** they have taken into account matters which they ought not to take into account, or conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. **[2]** Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it" per Lord Greene MR" [*Numbering added*].

What are the fetters on decision-making powers?

When exercising decision-making powers (for example a General Partner running an ELP) what are the fetters on those powers?

- Stage one is to construe the power. Remember to consider:
  - ❖ whether the act was within the scope of the power as properly construed
  - ❖ was it exercised by the right decision-maker;
  - ❖ was it exercised in favour of a permitted object eg if a power can be exercised in favour of A, B of C, then D is a non-object
- Stage two: was the exercise in good faith for a proper purpose?
- Stage three: will *Braganza* duties be implied (implying a term)?

Reminder……

Following the decision of the Supreme Court in *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661, where *Braganza* duties apply, two types of fetters are imposed (carrying over the public law Wednesbury unreasonableness test: *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223):

- A court may overturn the conclusion reached by a decision-maker where either:

(1) The decision-maker:

- ❖ has taken into account matters which ought not to have been taken into account; or
- ❖ has refused to take into account or neglected to take into account matters which ought to have been taken into account; (the 'process limb'); or

(2) The decision is one which no reasonable decision-maker could ever have come to (the 'outcome limb').

When will Braganza duties be implied?

There is a distinction drawn in *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200, at [83] (a case decided before *Braganza*) between:

- "*a simple decision whether or not to exercise an absolute contractual right*" where *Braganza* duties are unlikely to be implied; and
- "*making an assessment or choosing from a range of options, taking into account the interests of both parties*" where *Braganza* duties are likely to be implied

(see also *Shurbanova v Forex Capital Markets Ltd* [2017] EWHC 2133 (QB) at [91] and *Taqa Bratani Ltd v RockRose UKCS8 LLC* [2020] EWHC 58 (Comm))

Some cases where Braganza duties have been implied….

- *Braganza* has been applied in a wide range of cases, among others:
  - *Monk v Largo Foods Ltd* [2016] EWHC 1837 (Comm)
  - *Shurbanova v Forex Capital Markets Ltd* [2017] EWHC 2133 (QB)
  - BHL v Leumi ABL Ltd [2017] EWHC 1871 (QB)
  - *Property Action Group Ltd v RBS plc* [2018] 2 BCLC 322
  - *UBS AG v Rose Capital Ventures Ltd* [2018] EWHC 3137 (Ch)
  - *Kwik Lets Ltd (and others) v Khaira* [2020] EWHC 616 (QB)
  - *Tribe v Elborne Mitchell LLP* [2021] EWHC 1863 (Ch)
  - *HFFX LLP* [2023] UKUT 00073 (TCC)
- Remember also that the court will start from the position that it is a high hurdle for the Claimant to establish irrationality (see eg *Faieta v ICAP Management Services Ltd* [2018] IRLR 227)

BUT…. the revolutionary strikes again!

Lord Leggatt sets the cat among the pigeons (again) in *Tesco Stores Ltd v Union of Shop, Distributive and Allied Workers & others* [2024] UKSC 28:

- A case about fire and re-hire. Could Tesco terminate employment contracts for the specific purpose of depriving them of 'retained pay' (RP)?
- All the Judges allowed the appeal and reinstated the injunction against Tescos, but Lord Leggatt made some (obiter) comments on *Braganza* in the process….
- The main judgments centred around the words in the contract that the right to receive RP would "remain a permanent feature" and implied a term that Tesco's right to dismiss could not be exercised for the purpose of depriving employees of the right to RP

Lord Leggatt says the distinction is "unsound".....

"**Equally unsound**, in my view, is a suggestion made that there is a material distinction between (1) a discretion that involves making an assessment or choosing from a range of options and (2) a provision that gives a party a binary choice (such as whether or not to terminate the contract), such that only the former and not the latter can be subject to a good faith restriction..... There is no reason as a matter of logic or legal principle why this should be so. A binary choice, just as much as one made from a range of options, may involve an exercise of evaluative judgment to be made in good faith and not arbitrarily, capriciously or irrationally or for an improper purpose." (para 117)

But ….Lord Reed fights back!

Lord Reed politely disagrees with Lord Leggatt (at para 149):

> "I do not find it necessary to rely on the reasoning set out at paras 114-120."

Where does that leave things?

Can Braganza duties by excluded by contract?

- A clause giving the decision-maker "absolute discretion" probably does not exclude the implication of *Braganza* duties ie does not allow the decision- maker to act irrationally:
  - *HFFX LLP and Ors v HMRC* [2023] UKUT 00073 (TCC) HFFX relied on the words "**may, in his sole and absolute discretion**" to argue that Braganza duties ought not to apply. Rejected by the Court.
  - In *Faieta v ICAP Management Services Ltd* [2018] IRLR 227 the Court said that despite the garden leave clause allowing the company to act "**in its absolute discretion**" *Braganza* duties still applied
  - In *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 the directors' powers were "expressed in the widest terms" including "**an absolute discretion**" and that their decision was to be "**final and conclusive**". Nevertheless, the HL held that a term must be implied that the decision-makers "would not exercise their discretion in conflict with contractual rights"
  - In *WestLB v Nomura Bank International plc* [2012] EWCA Civ 495 despite the decision-maker having the "**sole and absolute discretion**", nevertheless it was held that the Court had to ask itself "how would [the decision-maker] have decided the matter… had it made a valid determination, honestly and rationally"?

So can Braganza duties be excluded?

Could it be done with some sort of exclusion clauses?:

- Cases suggest it is "extremely difficult though not impossible to exclude [*Braganza* duties] " (see *Tribe v Elborne Mitchell LLP* [2021] EWHC 1863 (Ch) at para 72).

- "Such a term is extremely difficult to exclude, although I would not say it is utterly impossible to do so" (per *Mid Essex* [2013] EWCA Civ 200 at para 83)

- If you were to try to exclude good faith or irrationality you would need "very clear language to the contrary" (see *BT plc v Telefonica O2 UK Ltd* [2014] UKSC 42 at 37). Questionable if it is possible to exclude all elements of good faith.

How do drafters try and draft to exclude?

- How do people go about drafting such clauses?:
  - ❖ Different approaches – define and confine cf outright exclusion
  - ❖ Try and make the clause a mere exercise of a power rather than a discretion?
  - ❖ Expressly identify what can and cannot be taken into account?
- Financial services context, likely to be more aggressive than professional services (an exclusion clause may give the firm an argument?)
- But is it wise to try to exclude entirely? Do you actually want to expressly draft to allow decision-makers to act irrationally?

When will relying on an irrelevant matter (or failing to rely on a relevant matter) vitiate a decision?

- In the public law context, a decision will not be set aside where an irrelevant factor is taken into account but had only an insignificant or insubstantial or immaterial effect on the decision-maker's thinking (see, e.g., *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* (1988) 57 P & CR 306 and *R (FDA) v Secretary of State for Work and Pensions* [2013] 1WLR 444).

- Do similar principles apply as regards failure to take account of a relevant factor? See *Faieta v ICAP Management Services Ltd* [2018] IRLR 227 in the employment context where the court looked for a "motivating factor" behind the decision.

What then?

- If it is set aside, what then?
- Is it 'remitted'? If so to who and on what hypothetical set of assumptions (including as to the timing of the remitted decision and events since the original decision)?
- Does the court re-make the decision for the decision-maker?
- If so, how?
- *Down the rabbit hole.....!*

Chancery Bar ASSOCIATION

Abuse of Power: A consideration of two recent JCPC cases

Michael Todd KC
& Hermione Williams

Introduction

The concept of "abuse of power" and the nature of the claims which it spawns, recently, have come under close scrutiny by the Privy Council, *Grand View Private Trust Co Ltd & another v Wen-Young Wong & others [2022] UKPC 47 and Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [JCPC 2023/0002].

Q: What issues did the Privy Council have to consider in *Grand View* and *Tianrui ?*

Abuse of power

Q: What do we mean by abuse of power in a) trusts and b) company law?

Q: What were the issues concerning abuse of power in *Grand View and Tianrui* and how do they overlap?

Constraints on powers

Q: What constraints and/or restrictions exist on the exercise of powers?

Q: From where are those constraints restrictions derived?

Privy Council in Grand View & Tianrui

Q: What did the JCPC decide concerning abuse of power in *Grand View?*

Q: What should the JCPC decide concerning abuse of power in *Tianrui*?

Locus Standi & takeaways

Q: What issues arise in relation to locus standi (a) in trust law; and (b) in company law?

Conclusions/Takeaways…

Any questions?

ChBA Cayman Conference 2025

In conclusion - **Iain Quirk KC**

Then…