Chancery Bar ASSOCIATION

ChBA BVI Conference

Thursday 26th February

BVI International Arbitration Centre

Chancery Bar Association

ChBA BVI Conference

Welcome

Ian Clarke KC
Chair, Chancery Bar Association

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Parting company?

Will the El-Husseiny decision apply in the BVI?

Andrew Twigger K.C.

Fraudulent Conveyances Act 1571

For the avoiding of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, bonds, suits, judgments and executions, as well of lands and in tenements, as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore; which feoffments, gifts, grants etc have been and are devised and contrived of malice, fraud, covin, collusion or guile **to the end, purpose and intent to delay, hinder or defraud creditors** and others of their just and lawful actions, suits, debts, etc;……

Section 423(1) – actus reus

(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—

(a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;

(b) he enters into a transaction with the other in consideration of marriage [or the formation of a civil partnership]; or

(a) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.

Section 436(1)

"transaction" includes a gift, agreement or arrangement, and references to entering into a transaction shall be construed accordingly

Section 423(3) – mens rea

(3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—

(a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or

(a) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.

Section 423(5)

…references here and below to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it…

Gordian Holdings Limited v Sofroniou [2021] EWHC 235 (Comm) at [16]: the concept of a "*victim*" is a deliberately wide one. It extends beyond creditors with present or actual debts. Whether a person is a victim turns on actual or potential prejudice suffered.

Section 425(2) – bona fide purchaser defence

(2) An order under section 423 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the debtor entered into the transaction; but such an order—

(a) shall not prejudice any interest in property which was acquired from a person other than the debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or prejudice any interest deriving from such an interest, and

(b) shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.

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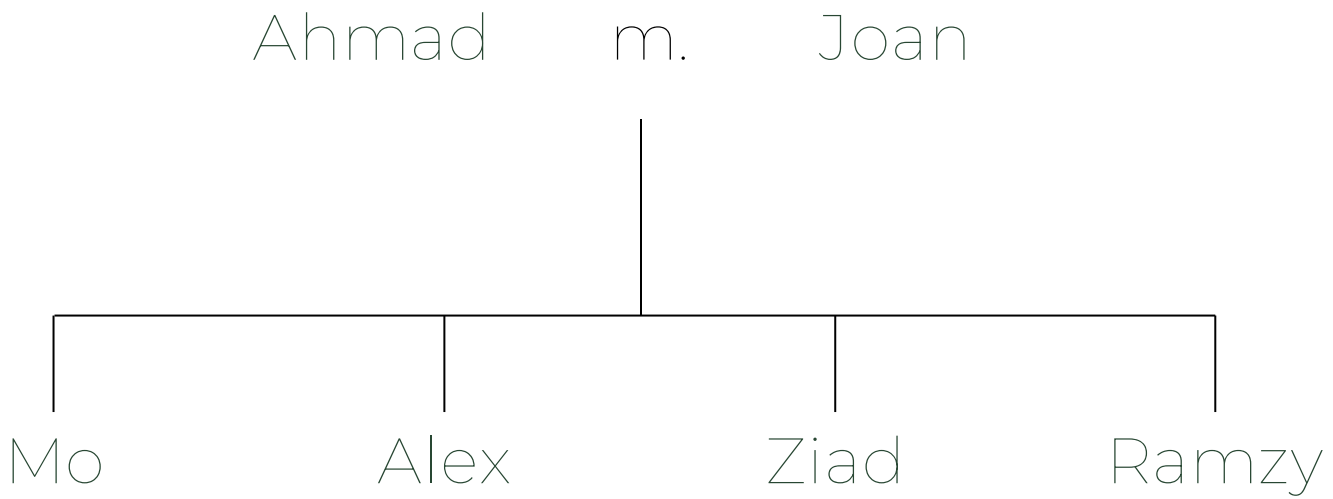
Invest Bank PSC v El-Husseiny [2025] UKSC 4



Ahmad's Assets

Commodore Contracting Company LLC (UAE)
(Construction) – 51% owned by Sheikh Tahnoon

Al-Tadamun Glass & Aluminium Co (UAE)
(Construction) – 51% owned by Sheikh Tahnoon

Marquee Holdings Ltd. (Jersey) – 100% owned by Ahmad
Owned 9 Hyde Park Garden Mews & 18 Hyde Park Square

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Epilogue: Invest Bank v El-Husseini [2024] EWHC 2976 (Comm)

- Gifts planned for many years
- Timed for UK tax reforms for non-doms
- Commodore in good financial position at the time
- Ahmad's difficulties followed later falling out with Sheikh Tahnoon

Conveyancing and Law of Property Act 1961, s. 81

(1) Save as provided in this section, every **conveyance** of property, made whether before or after the commencement of this Act, with **intent to defraud creditors**, shall be **voidable** at the instance of any person thereby prejudiced.

(2) This section does not affect the operation of a disentailing assurance, or the law of bankruptcy for the time being in force.

(3) This section does not extend to any estate or interest in property conveyed for valuable consideration and in good faith or upon good consideration and in good faith to any person not having at the time of conveyance, notice of the intent to defraud creditors.

Conveyancing and Law of Property Act 1961, s. 2

In this Act—

…

"conveyance" includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will; "convey" has a corresponding meaning; and "disposition" includes a conveyance and also a devise, bequest, or an appointment of property contained in a will; and "dispose of" has a corresponding meaning;

Eichholz decd., Re [1959] Ch 708
Yates (A Bankrupt), Re [2004] EWHC 3448 (Ch)

- "Property" includes personal property passing by delivery
- Consolidating act not intended to change the law
- Definition of "Conveyance" is preceded by the words "unless the context otherwise requires" and it uses the word "includes"
- The 1571 Act related to "Fraudulent Conveyances" including personal property

Test for the debtor's "purpose" in s.423(3)

Whether the debtor had positively intended to put funds beyond the reach of his creditors.

No need for this to be the only, or the dominant, or the predominant purpose (but not enough for it merely to be a consequence).

IRC v Hashmi [2002] EWCA Civ 981, [2002] 2 BCLC 489
JSC BTA Bank v Ablyazov [2018] EWCA Civ 1176, [2019] BCC 96
BTI 2014 LLC v Sequana SA [2019] EWCA Civ 113, [2019] BCC 631
Access Bank Plc v Orjiako 1 October 2025 Mithani J

Test for intent to defraud creditors under s.172

- "Defraud" was intended to reproduce the expression "delay, hinder or defraud" in the Elizabethan Statute.
- There is no need to show any additional element of dishonesty.
- No need to show the debtor intended to defraud the particular claimant.
- Query: if a conveyance was for no consideration, no need for proof of actual intention to defeat or delay creditors, if the effect of the conveyance was to leave the debtor insolvent.

Lloyds Bank v Marcan [1973] 1 WLR 339 (Pennycuick V-C); [1973] 1 WLR 1387 (CA)
Marcolongo v Chen [2011] HCA 3
NatWest Bank plc v Jones [2001] 1 BCLC 98
Cadogan v Cadogan [1977] 1 WLR 1041
Freeman v Pope (1869-70) L.R. 5 Ch. App. 538
Re Eichholz decd [1959] Ch 708
Emirates NBD Bank v Almakhawi [2023] EWHC 1113 (Comm)

Footnotes

Barclays Bank v Eustace [1995] 1 WLR 1238:

A *prima facie* case under section 423 is sufficient to engage the iniquity exception to legal professional privilege

Hill v Spread Trustee Ltd [2007] 1 WLR 2404

Action on a specialty – 12 years from date on which the 'victim' became a person adversely affected by the transaction

STOP PRESS: THG Plc v Zedra Trust Co (Jersey) Ltd decided YESTERDAY (25/02/26) by SC – re unfair prejudice

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Developments in mental capacity in the probate context

(with a bit of undue influence thrown in for good measure)

Alex Troup KC, St. John's Chambers

The Banks v. Goodfellow test

"It is essential…that a testator [1] shall understand the nature of the act and its effects; [2] shall understand the extent of the property of which he is disposing; [3] shall be able to comprehend and appreciate the claims to which he ought to give effect; [4] and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."

The difficulties facing a Claimant in arguing that a testator failed the Banks test

1. Policy (identified in Banks itself) - test is not pitched so high as to prevent elderly and unwell from making a will
2. Fairness is not the test
3. Memory is not the test
4. Evidence of solicitor who drafted the will is likely to be of great weight
5. The Golden Rule

Claimant tactic 1 - complexity

The question with which the court is concerned when considering the Banks test is transaction and issue specific. The testator must have the mental capacity (with the assistance of such explanation as he may have been given) to understand "the particular transaction and its nature and complexity" (see Hoff v. Atherton at [33] and Hughes v. Pritchard [2022] Ch 339 at [65]). This would appear to encompass not only the complexities in the will itself (limb 1), but also the complexity of the testator's property (limb 2) and of the moral claims on his estate (limb 3).

Leonard v. Leonard [2024] EWHC 321 (Ch) at §152(k), as approved in Scott v. Scott [2025] EWHC at §291; but c.f. Theobald on Wills (20th ed.) at 4-013

Claimant tactic 2 – limb 4

Not just about insane delusions

In this case, the question for the court … is: was [the testator] suffering from a disorder of the mind which poisoned his affections, perverted his sense of right or prevented the exercise of his natural faculties thereby causing him to bring about a disposal of his property which, if his mind had been sound, would not have been made

Leonard, above, at §157

Proposals for reform

- Statutory test in Mental Capacity Act 2005
- Did it replace the Banks test? General consensus is no
- Law Commission: Modernising Wills Law (2025)
- Draft bill, ss.2 and 23(3) incorporates statutory test in Mental Capacity Act 2005.

A bit of undue influence

- Rea v. Rea [2024] EWCA Civ 169 is now the leading case in the probate context
- In probate cases, undue influence means coercion
- Burden of proof on person alleging undue influence
- Undue influence can be inferred; but it must be more probable than any other hypothesis, bearing in mind inherent improbability of undue influence

A bit more undue influence

- Etridge test in *inter vivos* cases
- Where does the boundary lie? Naidoo v. Barton [2023] 1 WLR 2162
- The Law Commission's draft bill includes in s.15 a new statutory test for testamentary undue influence:

Where there is evidence which provides reasonable grounds to suspect that the undue influence was exerted … the court may find the undue influence to have been exerted unless the contrary is proved on the balance of probabilities

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Incapacity of Directors

(with some incapacitated trustees thrown in for good measure)

Marcus Croskell, New Square Chambers

Common Scenario

Personal Investment Holding Companies/Family Investment Companies with:

- Single director
- Single shareholder
- Often a corporate vehicle controlled by a parent or grandparent

Single Director/Shareholder Company: What happens in the event of their incapacity or death?

- High risk of uncertainty in company
- Reserve Director, s.113(7) Business Companies Act 2004 (as amended)
- Memorandum and Articles of Association
- Share Transfer, s.52(2) Business Companies Act

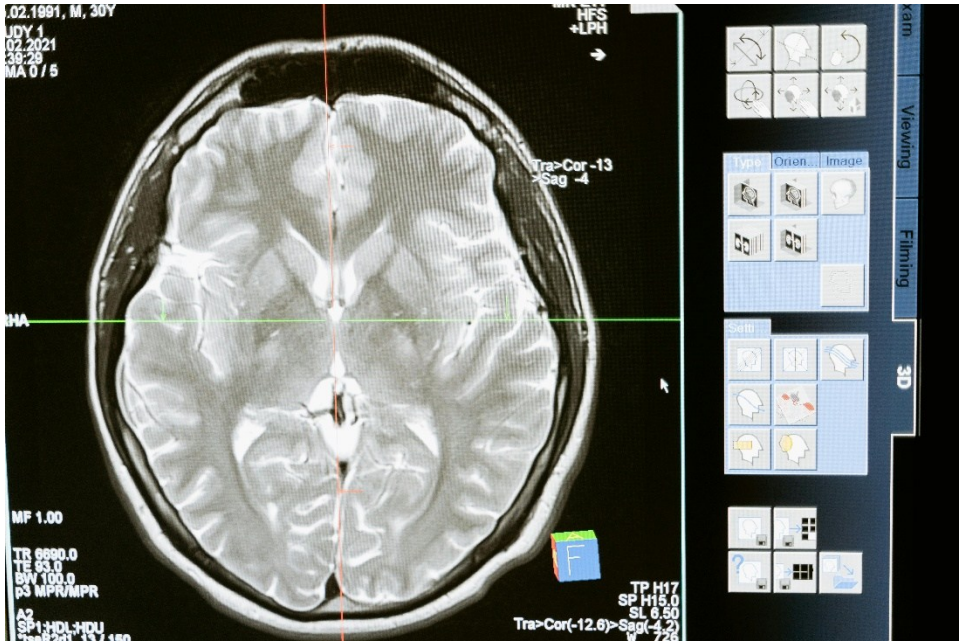
Urgent Application to the High Court

- An urgent application for rectification of the register in the event of the death of a sole director/shareholder.
- Persuasive Chancery Division cases:

i) *Kings Court Trust Limited & Others v Lancashire Cleaning Services Limited* [2017] Bus LR 1255
ii) *Ellott v Cimarron Limited* [2017] EWHC 3872
iii) *Williams & Others v Russell Price Farm Services* [2020] BCC 636

What happens in the event of mental incapacity of a single director?

- Accident
- Sudden illness
- Progressive cognitive decline such as dementia



If a Lasting Power of Attorney in force from outside the BVI

- Not automatically recognised without a court order
- Application under s.38(1) of the Mental Health Act 2014
- Wider powers of court under s.38(1) to transfer the shares to the LPA or a third party as directed by the LPA

Definition of 'Mental Disorder' under s.2 of the Mental Health Act 2014

"a) A health condition that is characterised by

i) Alterations in thinking, mood and behavior, or

ii) A combination of alterations in thinking, mood and behavior,

associated with distress, impaired functioning or distress and impaired functioning

b) A health condition arising from the use of a narcotic drug or substance."

Further relevant sections of the Mental Health Act

- S.32 – general test of when the court will intervene
- S.33(1) – grants the court power to do/ensure the doing of things as appear necessary or expedient including administration of the patient's affairs
- S.34 – List of examples of orders, directions and authorisations the court could make including:

a) management of property

b) carrying on the profession, trade or business of the patient

c) Exercise of any power vested in them beneficially or as guardian, trustee or otherwise.

Recent cases by comparison the application of the Mental Capacity Act 2005

- *Local Authority v JB* [2021] UKSC 52
- *Tonstate Group Limited (In Liquidation) v Wojakovski* [2022] EWHC 1771 (Ch)
- *CT v Lambeth LBC* [2025] 4 WLR 46

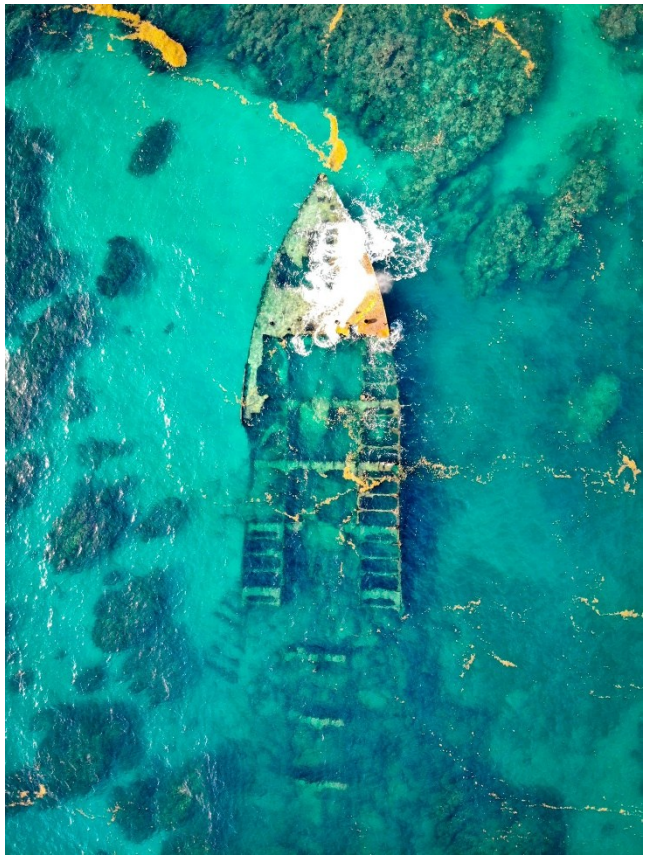
Incapacity of Trustees – Another sinking ship?

- Unless deed provides for automatic termination of post, a trustee remains in post until death, retirement or removal
- Three questions arise:

i) Whether any other party has the power to appoint?

ii) Whether the test under s.32 and/or s.37 is satisfied?

iii) What purpose the new trustee will have?



Power to remove and appoint a new trustee under s.42(1) of the Mental Health Act 2014

"The Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable so to do without the assistance of the Court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.

In particular and without prejudice to the generality of the foregoing provision, the Court may make an order appointing a new trustee in substitution for a trustee who is convicted of felony, or is a person of unsound mind, or is a bankrupt, or is a corporation which is in liquidation or has been dissolved."
[Emphasis applied]

General approach of court to trustee removal

- *Re: Trustees of First Armagh Presbyterian Church* [2022] NICH 4
- *Letterstedt v Broers (1884) 9 App Cas. 371 (PC)*
- *London Capital and Finance Plc (In Administration) v Global Security Trustees Ltd* [2019] EWHC 3339 (Ch)
- *The Earl of Yarmouth v Ragley Trust Limited* [2025] EWHC 1099 (Ch)

Thank you

Alex Troup KC, St. John's Chambers

Marcus Croskell, New Square Chambers

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"I've got the power"

The use of insolvency office-holders' powers as weapons in litigation

Matthew Morrison KC and Zahler Bryan

S.274A IA 2003 (BVI) & S.234 IA 1986 (UK) Getting in the company's property

- Where any person has in his (1) possession or control any assets (BVI) / property (UK); or (2) documents (BVI) / books, papers or records (UK) to which the company appears to be entitled, the court may require that person forthwith (or within such period as the court may direct) to pay, deliver, convey, surrender or transfer the same to the office-holder (s.234(2), IA 1986).

- Only relates to documents to which the company appears to be entitled cf. any document which might throw light on the company's affairs (*Chesterton v Emson* [2017] EWHC 3226 (Ch))

S.235 IA 1986 (UK)
Duty to co-operate with office-holder

(2) Each of the persons mentioned in the next subsection shall

(a) give to the office-holder such information concerning the company and its promotion, formation, business, dealings, affairs or property as the office-holder may at any time…reasonably require, and

(b) Attend on the office-holder at such times as the latter may reasonably require

(3) Includes:

- Anyone who has been an officer at any time or an employee within the year of the liquidation, administration etc.
- Officers or employees of a corporate director of the company within the year of the liquidation or administration
- Includes employment under a contract for services

S.282 IA 2003 (BVI)
Power to obtain information

(1) An office-holder may, by notice in writing, require a person specified in subsection (2)-

(a) to provide him or her with such information concerning the company, including the promotion, formation, business, dealings, accounts, assets, liabilities or affairs as he or she reasonably requires;

(b) to attend on him or her at such reasonable time and at such place as may be specified in the notice; or

(c) to be examined on oath or affirmation by him or her, or by his or her legal practitioner, on any matter referred to in paragraph (a).

S.282 IA 2003 (BVI)
Power to obtain information

(2) A notice under subsection (1) may be sent to –

- An officer or former officer of the company
- A person who is, or at any time has been, a receiver, accountant, or auditor of the company
- A person who is or who at any time has been an officer of or in the employment of a company which is an officer of the company
- Extends to those employed under a contract for services

s.282 IA 2003 (BVI) & S.235 IA 1986 (UK) Applied

- Can only compel disclosure/ provision of information that is reasonably required – not *"everything forever"* (*Webb v Eversholt Rail Ltd* [2024] EWHC 2217 (Ch) and [2026] EWHC 101 (Ch)
- BVI specifically extends to accountants and auditors
- Under UK legislation auditors are officers, and accountants would be regarded as employed under contract for services
- BVI also has contract for services language: may extend to bank or financial institution providing services beyond merely being a lender
- No need for a Court order in BVI or UK

S.236 IA 1986 (UK)
Inquiries into Company's dealings, etc.

Applies to Administrations and Liquidations

Subsection (2) provides that

The court may, on the application of the office-holder, summon to appear before it –

(a) Any officer of the company,

(b) Any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or

(c) Any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company

S.236 IA 1986 (UK)
Inquiries into Company's dealings, etc.

Applies to Administrations and Liquidations

Subsection (3) provides that:

The court may require any such person as is mentioned in subsection (2)(a) to (c) to submit to the court an account of his dealings with the company or to produce any books, papers or other records in his possession or under his control relating to the company or the matters mentioned in paragraph (c) of the subsection

S.284 IA 2003 (BVI)
Application for examination before Court

(1) Where a company is in liquidation, an application may be made to the Court, *ex parte*, by the liquidator or by the Official Receiver, for an order that a person specified in subsection (2) appear before the Court for examination concerning the company, or a connected company, including the promotion, formation, business, dealings, accounts, assets, liabilities or affairs of the company or connected company

S.284 IA 2003 (BVI)
Application for examination before Court

s.284(2) - An application under subsection (1) may be made in respect of –

- A person specified in section 282(2); or
- Any other person whom the applicant considers is capable of giving information concerning the company or a connected company; or
- Any other person who the applicant knows or suspects has in his or her possession or control any asset of the company or is indebted to the company

S.284 (BVI) & s.236 (UK) Applied

- Very broad category of persons who can be the subject of an application
- Court has unfettered discretion BUT exercised along well-established lines:
  - Necessary in interests of winding up and not oppressive or unfair (*Re British & Commonwealth Holdings plc (No.2)* [1993] AC 426)
  - Burden on office-holder to demonstrate this, but views accorded a good deal of weight (*Re Sasea Finance Ltd* [1998] BCC 216 at 220)
  - Cannot be used to obtain special advantages in ordinary litigation and generally not available if have made firm decision to sue (*Re Atlantic Computers plc* [1998] BCC 200; *Re Castle New Homes Ltd* [1979] 1 WLR 1075

S.284 (BVI) & s.236 (UK) Applied

- No privilege against self-incrimination, but cannot rely on record of an examination as evidence in any criminal proceedings (s.287 (BVI); *Re Bishopsgate Investment Management Ltd* [1993] Ch 1; *Saunders v UK* [1997] BCC 872;)
- Persons within the jurisdiction can be the subject of an arrest warrant and kept in custody until brought before the court (s.288 (BVI); s.236(5)-(6) (UK))
- Extra-territorial effect: UK (probably) says "no"; BVI (probably) says "yes"!

(UK: *Re Tucker* [1990] Ch 148; *Re MF Global UK Ltd* [2015] EWHC 2319; *Re Akkurate Ltd* [2020] EWHC 1433 (cf. *Re Mid-East Trading Ltd* [1998] BCC 726; *Re Omni Trustees Ltd* [2015] EWHC 2697 (Ch); *Re Carna Meats (UK) Ltd* [2019] EWHC 2503 (Ch). BVI: *Re Three Arrows Capital Ltd* BVIHC(COM) 2022/0119 (reasons released 23/12/23) (cf. *Re Ocean Sino Ltd 2015/0065* (reasons released 13/3/23))

Clawback Provisions: S.81 of the Conveyancing and Law of Property Ordinance 1961 (BVI) & s.423 IA 1986 (UK)

- Available outside of insolvency context
- Require "intent to defraud" (BVI) / entering into the transaction for the purpose of putting assets beyond the reach of creditors or otherwise prejudicing their interests in relation to claims (UK)
- For UK also necessary that it is a transaction at an undervalue

Clawback Provisions: IA 2003, ss.245-246 & 401-402 (BVI) and IA 1986, ss.238-241 & 339-342 (UK)

- BVI and UK both render transactions voidable if they are:
  - Preferences (IA 2003, s.401 (individual) & s.245 (company) IA 2003 (BVI) / IA 1986, s.239 (company) & 340 (individual) (UK); or
  - Transactions at an undervalue (IA 2003, s.402 (individual) & s.246 (company) IA 2003 (BVI) / IA 1986, s.238 (company) and s.339 (individual) (UK)
- BVI requires them to be "insolvency transactions": i.e. entered into at a time when the company / individual is insolvent (in the sense of being unable to pay debts as they fall due) or causing the company / individual to become insolvent (IA 2003, ss.244(2) (company) and 400(2))

Clawback Provisions: IA 2003, ss.245-246 & 401-402 (BVI) and IA 1986, ss.238-241 & 339-342 (UK)

- Similar provisions in UK requirements for transaction to be entered into at a "relevant time": (IA 1986, s.240(2))

- BVI and UK have certain presumptions and extended periods to challenge transactions if entered into with connected persons

Meaning of a transaction at an undervalue (IA 2003, ss.246 & 402 (BVI) and IA 1986, ss.238, 339 and 423 (UK)

- Companies and Individuals:
  - Gift or transaction for which receive no consideration
  - Transaction for consideration, the value of which in money or money's worth is significantly less than the value in money or money's worth of the consideration provided
- For individuals under IA 1986, s.339 (UK) also includes a transaction in consideration of marriage

Meaning of a transaction at an undervalue
Recent Case Law

- The focus must be on the transaction which the individual or company in question has entered into
- A mere connection of some sort between transactions will not be sufficient to enable them to be treated as a single transaction
  TAQA Bratani Ltd v Fujairah Oil & Gas UK LLC [2025] EWCA Civ 1669
- A transaction at an undervalue may still be established if it is from a legal owner to a beneficial owner if there are grounds for impugning the trust arrangement
  National Iranian Oil Co v Crescent Gas Corp Ltd [2025] EWCA Civ 1211

Transaction at an undervalue: Defences
Recent Case Law

It is a defence to a transaction at an undervalue claim in the BVI (for individual and companies) and in the UK (for companies only) if:

- The company/individual enters into the transaction in good faith and for the purpose of its/their business; and

- At the time there were reasonable grounds for believing that the transaction would benefit the company / them
  (IA 2003, ss.246(2) (company & s.402(2) (individual) (BVI); IA 1986, s. 238(5) (company) (UK)

In the context of a corporate defendant, the question of benefit must be answered from the perspective of the company alone, which (where there are creditors) is distinct from the interests of other members of a corporate group
TAQA Bratani Ltd v Fujairah Oil & Gas UK LLC [2025] EWCA Civ 1669

Obtaining recoveries against directors
Recent Case Law

- Former directors whose powers have ceased upon the commencement of an insolvency process may nevertheless owe and breach fiduciary duties if they subsequently interfere

  Mitchell v Al Jaber [2025] UKSC 43

- The court will look to appraise equitable compensation by reference to what is "just and equitable"; loss will not always be appraised as at the trial date; and the burden is on the defaulting director / fiduciary to show a break in the chain of causation between the breach and trial

  Mitchell v Al Jaber [2025] UKSC 43

- Balance sheet neutrality is not always a defence if a payment to a creditor when the creditor duty obtains depletes the amount available for equal distribution among the creditors as a whole

  Byers v Chen [2021] UKPC 4 & BVIHCMAP2024/0009 cf. *Stanford International Bank Ltd (in liquidation) v HSBC Bank plc* [2023] AC 761

Any Questions?

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Morning Coffee Break

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Stepping down and sorting out: Trustees issues explained

Presented by:

- Amy Berry, Barrister, New Square Chambers
- James Anson-Holland, Barrister, Radcliffe Chambers

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Removal of executors, top tips, ademption, double portions and incapacity of fiduciaries

Presented by:

- Amy Berry, Barrister, New Square Chambers

Removal of executors:

Aslam v Seeley [2025] EWHC 24 (Ch)
Hanson v Coleman [2025] EWHC 116 (Ch)
Osborne v Osborne [2025] EWHC 455
Pocza v Chopra [2025] EWHC 1668 (Ch)
Fernandez v Fernandes [2025] EWHC 2373 (Ch)
Smith v Campbell [2025] EWHC 3011 (Ch)
Shufflebotham v Shuff-Wentze; [2025] EWHC 3321 (Ch)
Earl of Yarmouth v Ragley Trust [2025] EWHC 1099 & 3400 (Ch)
House v Helme [2026] EWHC 75 (Ch)

Top tips:

- Fiduciaries – trustees, protectors, executors, administrators
- Pick your best points
- Plead breach of trust properly
- Which hat are the parties wearing
- Should you cling to office
- Be practical and pragmatic
- Costs follow the event in hostile litigation
- Never ever loss control

Ademption and double portions:

- Overlooked but promotes fairness between siblings during life and after death
- Presumption of lifetime gifting is part of gifted legacy in will
- Presumption of legacy to child is a portion
- Kirk v Eddowes (1841)
- Re Cameron [1999] Ch 386
- Re Frost [2013] EWHC 435 (Ch)
- Sheron v Sheron [2021] EWHC 2526 (Ch)

Incapacity of fiduciaries:

- Overlooked in high functioning professionals
- Reduce risks (i) Golden yet tactless rule and (ii) Normalise capacity assessments
- Review and amend governance documents
- Beyond the statutory remit of BVI Mental Health Act 2014 - vulnerable adults (i.e. addicted, abused), fluctuating capacity. Look to UK vulnerable adult common law in High Court and MCA 2005 for guidance to be applied by analogy.

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Trustee removal without replacement

Presented by:

James Anson-Holland, Barrister, Radcliffe Chambers

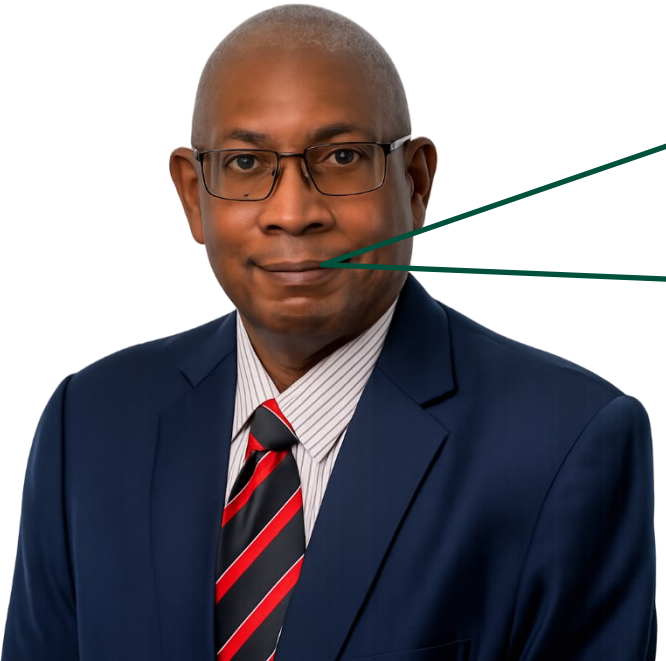
Re O Trust [2025] CIGC FSD 56

The basic facts:

- Discretionary family trust settled in 1993 under Cayman Islands law.
- Settlor named relatives as sole life interest beneficiary and residuary beneficiaries.
- Sole corporate trustee appointed in 2008.
- The life interest beneficiary and the corporate trustee had a "breakdown in relations".

Re O Trust [2025] CIGC FSD 56

The order (per Kawaley J):



*"**Until the Plaintiff is discharged of its trusteeship**, the Plaintiff is permitted to pay its usual fees and expenses in administering the O Trust out of the funds of the O Trust **and shall be held before the Court** and shall file its accounts for the period since the Account with the Court and serve its accounts on the Defendant every twelve (12) months from the date of this Order…"*

A trustee being "held before the court": What does it mean?

The cases relied on:

- Ontario Superior Court of Justice decision *Evans v Gonder* (Ontario SCJ, 12 June 2009).
- Court of Appeal for Ontario decision *Gonder v Gonder* [2010] ONCA 172.

A trustee being "held before the Court": What does it mean?

Akin to an administration order or something else?

- *Lewin on Trusts* (20th ed, 2020) at [39-075]:

  "*The effect of an administration order (formerly a general administration order) is so far to paralyse the powers of the trustees that after it has been made the trustees may not exercise any power without the sanction of the court.*"

- *Williams, Mortimer & Sannucks – Executors, Administrators and Probate* (22nd ed, 2022) at [53-002]:

  An administration order puts "*the whole administration in the hands of the court*".

A trustee being "held before the Court": What does it mean?

Akin to an administration order or something else?

- Interpretation 1:

  The trustee is relieved of all powers and duties of administration save for the preparation and filing of accounts.

- Interpretation 2:

  The trustee is paralysed from acting (save for the preparation and filing of annual accounts) without court sanction.

Alternatives to being "held before the Court"

Some options:

- The appointment of receivers.
- The payment of monies into court.
- The appointment of a 'judicial trustee'.

Questions?

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Chancery Bar ASSOCIATION

End of the Non-Dom Regime & Taxing "Indirect Transferors"

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Main Topics Covered

- What are the principal Income Tax, CGT & IHT implications for offshore structures of HNWs?
- What do offshore directors and trustees need to know and do?
- Who is an "indirect transferor" for TOAA and why the new rules are important.
- The new right of recourse for TOAA

Income and CGT Changes: FA 2025 ss37-42

- End of Remittance Basis for Foreign Income & Gains arising after 5.4.2025.
- Very limited transitional relief for pre-existing structures
- Reduced tax rate for pre-6.4.2025 Foreign Income & Gains designated in tax years 2025/26-2027-2028.
- Relief from tax on foreign income and gains during first 4 years of residence for new residents.

End of Remittance Basis: FA 2025 ss40&43, Sch 9 & 12

- Remittance basis still applies to pre-6.4.2025 foreign income & gains.
- Widens test for remittance where property "*used outside the UK (directly or indirectly) for the benefit in the UK of a relevant person*" -ITA s809L.
- Re-basing of foreign assets owned by non-dom remittance individual on 5.4.2017 and disposal after 5.4.2025. Can elect not to apply.
- Re-based to OMV on 5.4.2017

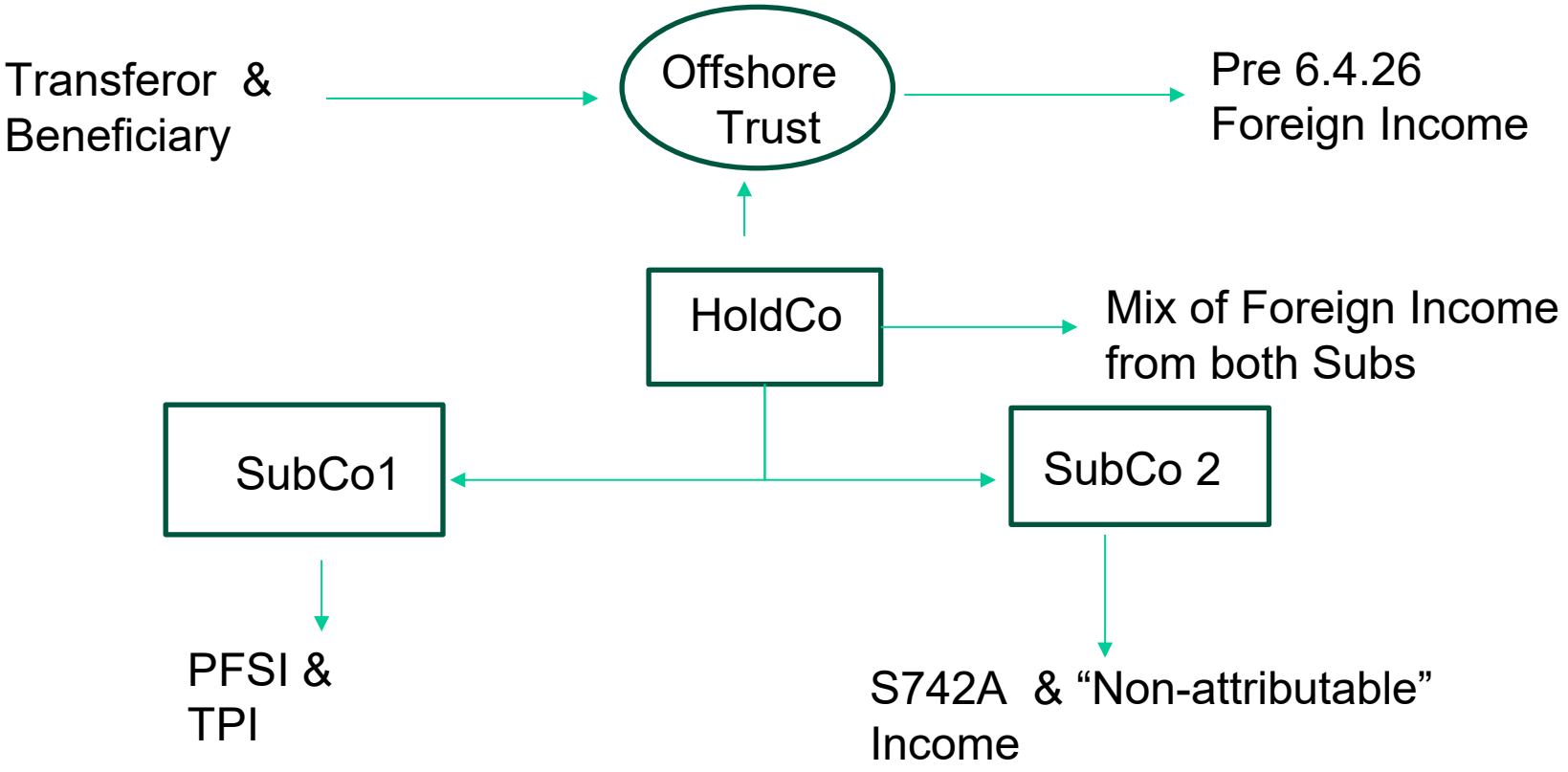
Impact on Existing Foreign Trusts & Structures:

- Settlement Provisions: ITTOIA 2005 Pt V Ch 5:
  - where settlor retained interest, post 5.4.2025 foreign income taxed on an arising basis.
  - Special treatment of historic protected foreign source income ("PFSI") & transitional trust income matched to benefits: ss643ZA-B & 643A-B
- Transfer of Assets Abroad: ITA 2007 Pt 13 Ch 2.
  - Post-5.4.2025 income arising to a "person abroad" deemed to be transferor's & taxed on arising basis.
  - Historic PFSI and transitionally protected income ("TPI") still taxed on benefits basis.
- TCGA 1992 S86: no exception for non-dom or non-LTR settlors.

Temporary Repatriation Facility: S41 & Sch 10

- Flat rate of 12% for 2025/26 and 2026/27 & 15% for 2027/28 and no other charge to UK IT or CGT if correctly designated.
- Applies to amounts of "qualifying overseas capital". Amounts must be subject of "designation election" in Return for relevant year.
- Election may be made only if individual was subject to remittance basis for at least one year prior to 2025/26 & UK resident for tax year of designation.
- Income need not be remitted in tax year of designation;
- Can apply to FIG attributed to individuals as a result of benefits within TOAA or capital payments within TCGA 1992 s87

Extracting Value from Offshore Structures



4-Year FIG Regime for New Residents: ss37-39 FA 2025

- Inserts new ITTOIA ss 845A-J, ITEPA 41M-41Z1 & Sch D1 TCGA 1992.
- Available in respect of wide range of FIG arising in first 4 years of UK residence following a period of at least 10 years consecutive non-UK residence.
- Being non-resident by virtue of tie-breaker provisions in DTA does not count.
- Can apply to individuals already UK resident prior to 6.4.2025 if within first 4 years.
- Amounts of FIG for which relief available needs to be quantified and claimed in individual's return.
- Can apply to attributed foreign income & gains as result of benefits/capital payments: s845H & Sch D1 para 6.

IHT Changes: Finance Act 2025 Sections 44-45 (1)

- Charge on Non-UK assets based on "long-term UK residence", not actual or deemed domicile; IHTA s6(1).
- Basic definition: UK resident for at least 10 of previous 20 years; IHTA s6A(2)
- Exceptions for individual not resident in the current tax year where:
  - Non-resident for 10 consecutive years during previous 19 years; or non-resident for "required number of years".

IHT Changes: Long Term UK Resident (2)

- Companies LTRs if UK incorporated or resident.
- Transitional relief where individual:
  - non-UK domiciled as at 30.10.2024;
  - non-UK resident continuously from 2025/26; and either non-resident for 3 tax year prior to tax event or non-resident for less than 15 of previous tax years; FA 2025 Sch 13 para 46.

  Deemed domicile rules do not apply for this purpose.

IHT Changes: Settlements: IHTA 1984 s48ZA

- New rule determines "excluded property" status by reference to:
  - Non-LTR status of settlor at the time if alive;
  - Non-LTR status of settlor if dies after 5.4.2025;
  - Domicile status of settlor when property became comprised in settlement if dies before 6.4.2025.
- Exceptions where:
  - Qualifying IIP held by UK LTR & settlor alive on 5.4.2025 or where IIP acquired for consideration.

IHT Changes: Settlements (2): FA 2025 Sch 13

- No termination charge on life or death for qualifying IIPs where excluded property as at 30.10.2024.
- Settled property can move between “excluded” and non-excluded property status during 10-year period according to settlor’s LTR status.
- Partial relief for excluded property periods;s66(2).
- Trustees are liable for 10 yearly & exit charges & Settlor also liable if trustees non-UK resident; IHTA s201(1)(a).
- Spouse/CP of LTR can elect to be LTRs; IHTA s267ZC.

Novel exit charge on becoming excluded property

- Settlor becomes LTR: no relief in IHTA s 66(7)-(7D)
- Loophole closed in Finance Bill clause 70: if settlor ceased to be LTR while property UK situs, then later switch to excluded property is charged
- Includes historic non-excluded property trusts

Practical issues

- Trustees' obligations depend on settlor's behaviour
- How can trustees ensure they know whether settlor LTR?
- What if HMRC and settlor dispute UK residence?

Finance Bill 2026 Changes: Clauses 62 & 71 & Sch 12

- £2.5 million cap on 100% APR and BPR relief. 50% relief on excess value.
- Not excluded property where value derived from UK agricultural property.
- Where previously excluded property at 30.10.2024, cap on combined exit and periodic charges of £5m every 10 years; new IHTA s75B.

Transfer of Assets – transfers by close companies (1)

- Supreme Court in *Fisher* rejected "quasi-transferor" concept.

- New rules apply in respect of income arising from 6 April 2024: ITA 2007 ss. 720A, 727A

Transfer of Assets – transfers by close companies (2)

- Individual must have a "qualifying interest" – participator or indirect participator
- Not just shareholders – loan creditors and life tenants
- No de minimis exception
- Timing – is this at time of charge, or time of transfer?

Transfer of Assets – transfers by close companies (3)

- "Involved in the company"
    - Deemed to be involved unless HMRC satisfied otherwise
    - Decision-making of the company, not the specific decision to transfer

- Avoidance condition:
    - Did not object to the transfer
    - "*reasonable to draw the conclusion*" that "*aware, or ought reasonably to have been aware*" of the transfer and that a "*direct or indirect consequence*" was the avoidance of tax.

Transfer of Assets – motive defence (ITA ss 737-740)

- This will matter for trusts that previously didn't have to consider it
- Need evidence of reasons for original settlement
- Avoid tainting by associated operations

Transfer of Assets – right of recovery

- For 2025-6 onwards, ITA s 725A and 729B
- "the individual is entitled to recover the amount of the tax from the person abroad"
- Enforceability issues if transferor not a beneficiary?
- How should the payment be funded?

Chancery Bar ASSOCIATION

ChBA BVI Conference

Lunch

Chancery Bar ASSOCIATION

Jurisdiction and forum non conveniens – Magomedov and other updates

James Bogle

10KBW

Chancery Bar ASSOCIATION

Gilbert v Broadoak:

An update on *Chabra* injunctions and jurisdiction

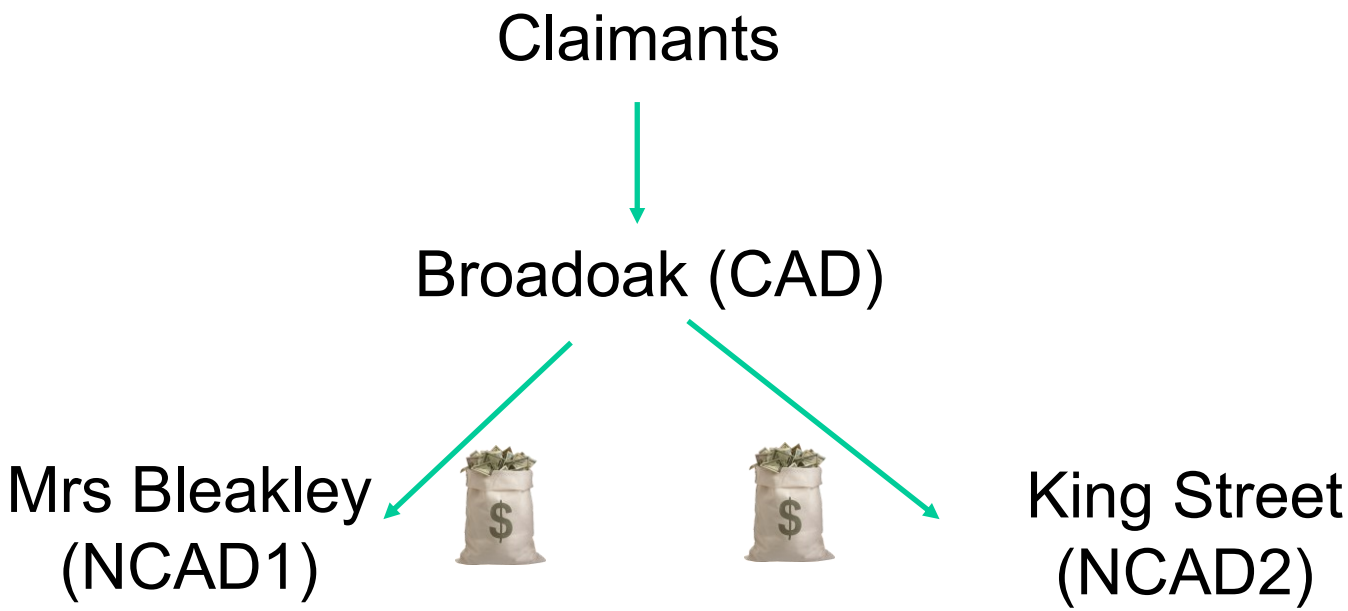
Lara Kuehl
Serle Court

Gilbert v Broadoak Private Finance Ltd [2026] EWHC 153 (KB)

Claimants

Broadoak (CAD)

Gilbert v Broadoak Private Finance Ltd
[2026] EWHC 153 (KB)



The injunction gateway

"*A claim is made for an injunction… ordering the defendant to do or refrain from doing an act within the jurisdiction*"

(English CPR PD 6B para 3.1(2); EC CPR 7.3(2)(b))

Does not apply to freezing injunctions: *The Siskina* [1979] AC 210; *Mercedes-Benz* [1996] AC 284; *Broad Idea* [2023] AC 389

BUT note the change from "action" to "claim" between RSC Order 11 and the modern wording. Does a "claim" include an application for *Chabra* relief?

The "necessary or proper party" gateway

"*A claim is made against a person ("the defendant") on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –*

(a) there is ***between the claimant and the defendant a real issue*** *which it is reasonable for the court to try; and*

(a) The claimant wishes to serve the claim form on another person who is ***a necessary or proper party to that claim****.*

(English CPR PD 6B para 3.1(3); EC CPR 7.3(2)(a))

The "necessary or proper party" gateway (cont.)

- "*There must be a common issue to be investigated as against the anchor defendant and the NCAD*" - *Commercial Bank of Dubai PSC v Al Sari* [2024] EWHC 3304 at [280(i)]

- No live common issue where final judgment has been entered against the CAD.

- But note *NKT v NMH et al* (BVIHCMAP2024/0031) Eastern Caribbean Court of Appeal, 30 Jan 2026)

The "enforcement" gateway

- "*A claim is made to enforce any judgment or arbitral award*" English CPR PD 6B para 3.1(1)
- "*a claim is made to enforce any judgment or arbitral award which was made by a foreign court or tribunal and is amenable to be enforced at common law*" EC CPR 7.3(4)
- Not available for *Chabra* relied because it is not a claim to enforce any judgment against the CAD but only ancillary relief to assist in enforcement: *Linsen International v Humpuss* [2011] EWHC 2339 (Comm)

The "property within the jurisdiction" gateway

- "*The subject matter of the claim relates wholly or principally to property within the jurisdiction…*" English CPR PD 6B para 3.1(11); EC CPR 7.3(5)

- Judgment debt is property within the jurisdiction, but application for *Chabra* relief not a claim which relates "wholly or principally" to the judgment debt and is primarily concerned with the assets held by the NCADs

The "property within the jurisdiction" gateway (cont.)

When must the property have been within the jurisdiction?

- *Fetch.ai Ltd v Persons Unknown* [2021] EWHC 2254 (Comm) [23]
- *D'Aloia v Persons Unkown* [2022] EWHC 1723 (Ch) at [22]
- *Osbourne v Persons Unknown* [2023] EWHC 39 (KB) at [34]-[36]

The "enactment" gateway

- *"A claim is made… under an enactment which allows proceedings to be brought and those proceedings are not covered by any of the other grounds referred to in this paragraph"* English CPR PD 6B para 3.1(20)

- *"A claim is made under an enactment which confers jurisdiction on the court and the proceedings are not covered by any of the other grounds referred to in this Rule"* EC CPR 7.3(10)

The "enactment" gateway (cont.)

Section 37 of the Senior Courts Act 1981 provides that:

"*the High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do* so"

The "enactment" gateway (cont.)

Is section 37 an enactment that allows proceedings to be brought?

YES:

- Foxton J, "*The Big Freeze: The Rise and Rise of the Mareva Injunction*"
- *Commercial Bank of Dubai PSC v Al Sari* [2024] EWHC 3304.
- And note *Gorbachev v Guriev* [2022] EWHC 1907 (Comm) at [82]

The "enactment" gateway (cont.)

Is section 37 an enactment that allows proceedings to be brought?

NO:

- Henshaw J, ""*Frozen 2": An Update on Commercial Injunctions and Associated Jurisdictional Issues*"
- *AES Ust v Ust-Kamenogorsk* [2011] EWCA Civ 647 (*obiter* at [126]; [207]; [192])

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Directors' duties – recent cases

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Mitchell v Sheikh Mohamed Bin Issa Al Jaber

[2025] UKSC 43

- Sheikh Al Jaber was the director of MBI International & Partners Inc, a BVI company.
- A winding up order was made against the company in 2011.
- Under BVI law, the sheikh's powers and duties as a director ended on commencement of the liquidation.
- In 2016, and after the winding up order was issued, the sheikh transferred 891,761 shares in JJW Hotels & Resorts Holding Inc that the company had owned to JJW Guernsey for no consideration and without the knowledge of the liquidator. JJW Inc and JJW Guernsey were both in the sheikh's group of companies.
- In 2017, JJW Inc's assets and liabilities were transferred to JJW UK (another company associated with the sheikh). This rendered the previously transferred shares (now owned by JJW Guernsey) worthless.
- The liquidators sued the sheikh for breach of fiduciary duty and sought equitable compensation.
- How could the sheikh breach his fiduciary duties as a director if he didn't have any powers or duties?
- How could the sheikh be liable to compensate given the shares ended up being worthless? The company could have suffered no loss from his earlier breach.

Key Takeaways from Supreme Court

- fiduciary duties can arise *ad hoc;* equity will impose fiduciary duties on anyone who assumes such powers, whether or not they technically hold office at the relevant time.
- Here, the sheikh signed share transfers "*for and on behalf of [the Company] as its 'Director.*"

Key Takeaways from Supreme Court

- Equitable compensation is assessed by asking what position the company would have been in had the director complied with their director's duties.
- This assessment normally begins at the time of the breach
- the valuation date ultimately depends on what is most just and equitable in the circumstances.
- Later developments will not reduce the loss unless the director can clearly prove that those developments would have happened irrespective of the breach.
- = especially where claims involving transfers at an undervalue, diversion of opportunities, or undisclosed use of company funds.

Fang Ankong v Green Elite
[2025] UKPC 47

- Directors have no right to be paid for their services or make presents to themselves unless authorised to do so by the shareholders
- Can be authorised or ratified by a shareholders' meeting or informally by unanimous assent
- Duomatic principle does not need the features of a binding contract nor to have "legal effect"
- All that is needed is that the shareholders intended to bind themselves as if they had passed a resolution.

Byers v ChenNingNing

EC CA

- Solvent - interest of shareholders generally
- Zone of insolvency – interest of creditors become paramount
- Paying one creditor = balance sheet neutral
- = No defence = duty to creditors collectively
- Absence of personal benefit not relevant to liability

Cohen v Morrison
[2026] EWHC 184

- a quasi partnership does not of itself give rise to fiduciary duties to directors / shareholders
- Directors owe duty to the company not shareholders
- exception if
- "sufficiently proximate relationship" (usually trust and confidence)
- + assumption of responsibility to a particular shareholder
- + reliance
- Abuse of responsibility

Kaye v SJ Pay
[2025] EWHC 3034

- Whilst a director can delegate their functions and trust their competence and integrity to a reasonable extent, does not absolve his duty to supervise the delegated functions
- Need to acquire and maintain sufficient knowledge to discharge that duty
- Inadequate record keeping is no excuse

No excuse by

- Delegation to third parties
- Absences from day to day running of the company
- Ill health
- Ignorance of the law
- A third party lost the books and records
- “that only needs be said to make it apparent the extent of Shahid’s and Shams’ failing as a directors of the company”

Chancery Bar ASSOCIATION

ChBA BVI Conference

Afternoon Tea

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Ivanishvili v Credit Suisse Life Bermuda

Charlotte Pope-Williams

3 Hare Court

Ivanishvili v Credit Suisse Life et Ors [2025] UKPC 53

Factual Background

- In around 2011 to 2012 Bidzina Ivanishvili, former Georgian Prime Minister and leader of the Georgian Dream Party, entrusts Credit Suisse Life (Bermuda) Ltd ("Credit Suisse Life") over US$750M of his personal fortune to invest.
- Credit Suisse Life is a Bermudan insurance company that is 100% by Credit Suisse Bank
- Credit Suisse Life advise Mr Ivanishvili, through relationship manager Patrice Lescaudron, to take out two life insurance policies with his immediate family as beneficiaries.
- It comes to light that Mr Lescaudron had been perpetrating a fraud against Mr Ivanishivili in that he had been "*misappropriating assets, transferring assets from the policy accounts to those of unrelated clients, transferring assets into the policy accounts at an overvalue to hide losses of those unrelated clients, and enriching himself by making investments of policy assets on which he received secret commissions.*"
- Mr Ivanishvili complained to the Swiss police about Mr Lescaudron and he was therefore arrested. In around 2018 Mr Lescaudron was prosecuted in Switzerland and convicted of *"offences of fraud, mismanagement, aggravated mismanagement and forgery"*. He was sentenced to 5 years in prison. He later committed suicide.

Procedural History & findings of the Courts below the Judicial Committee of the Privy Council ("JCPC")

- In August 2017 Mr Ivanishvili commenced proceedings in Bermuda. There was a 5-week trial before Chief Justice Hargun who gave a 281-page judgment in favour of Mr Ivanishvili and his family in the amount of USD 607.35 million [2022] SC (Bda) 19 Civ (29 March 2022).

- A central issue considered by the first instance Court was "Elements of implied misrepresentations; whether the representee must "understand" that the representation is being made in the sense in which he complains in the action"

- Mr Ivanishvili misrepresentation claim centered on the tort of deceit i.e., the principle that a person who causes another person to suffer loss by deceiving that other person is liable to compensate the other person for such loss.

- Mr Ivanishvili's team invited the First Instance Court to find that *"Mr Lescaudron (on behalf of CS Life) impliedly misrepresented when selling the LPI Policies to Mr Ivanishvili that he (and the Bank) was not fraudulently managing the Plaintiffs' existing accounts and/or did not intend to manage the Policy Assets fraudulently and intended the Plaintiffs to act on those misrepresentations"*

Procedural history etc. cont.

At paragraph 444-445 of the First Instance Judgment said as follows:

"The Court accepts and finds that by selling the LPI Policies to Mr Ivanishvili in the circumstances set out in Mr Ivanishvili's evidence, Mr Lescaudron (acting on behalf of CS Life) impliedly represented that he (and the Bank) was not fraudulently managing the Plaintiffs' existing accounts and/or did not intend to manage the Policy Assets fraudulently.

"The Court also finds that Mr Lescaudron knew the misrepresentations were false and, in the circumstances, infers that he intended to continue fraudulently mismanaging the Plaintiffs' Assets and intended the Plaintiffs to act in reliance on his deceit."

Procedural history etc. cont.

- Credit Suisse Life appealed. The Court of Appeal dismissed the appeal in respect of breach of contract and breach of fiduciary duty but allowed the appeal in respect of Mr Ivanishvili's representation claim [2023] CA (Bda) 13 Civ (The President, Sir Christopher Clarke, Justice of Appeal Geoffrey Bell and Justice of Appeal Sir Anthony Smellie)

- The Court of Appeal considered whether it was necessary for Mr Ivanishvili to have any conscious awareness or understanding of the representation (namely "contemporary conscious thought" or that the representation must be "actively present in his mind"), albeit implied, being made to him at the relevant time.

- CS Life drew the Court of Appeal's attention to the UK LIBOR/EURIBOR cases which it said established that an awareness of the representation being made is a necessary ingredient for a successful misrepresentation claim (see para 257 of the Court of Appeal Judgment).

Procedural history etc. cont.

"*CS Life contended that the Plaintiffs had not pleaded or led evidence to seek to prove that they (whether through Mr Ivanishvili or any other person) had any awareness or gave any consideration to the misrepresentations sued on in this action. That is correct. The RASoC does not plead any awareness or understanding of the representation relied on, either by Mr Ivanishvili or anyone else, or that such an awareness could be inferred, or the circumstances from which it could be; nor did Mr Ivanishvili give evidence of any such awareness or understanding. He did give evidence that he understood that all the investments proposed to him, including the Life Policies, were designed to achieve his objectives - to preserve and protect the wealth that he had built up for his family and to ensure that they were looked after in the future should anything happen to him; that, at the time the Policies were proposed, he understood his relationship with Credit Suisse to be a successful one; and as long as the investments were performing well and were in line with the investment objectives that he had outlined to Credit Suisse, he was happy. He also gave evidence that had he known at the time the fraudulent transactions had taken place on the existing accounts at Credit Suisse and that the accounts had been mismanaged he would never have agreed to set up the Life Policies." [para 258 CoA Judgment]*

Procedural history etc. cont.

The Court of Appeal considered that:

"The Chief Justice held that, in appropriate circumstances, an implied representation, intended by the representor to be relied upon by the representee, which is accompanied by evidence that the representee would not have entered into the agreement if he had known the true position can be sufficient to found liability for misrepresentation. In my view this formulation elevates what is, in essence, an assumption of the representee (that the Bank had been and would continue to be honest) into an understanding that a representation had been made; elides the difference between representation and non-disclosure; and entitles the Plaintiffs to a claim in misrepresentation based upon assumption alone, which is insufficient. It also enunciates a special rule for representations implied from conduct, which the authorities do not, in my view, support. It is no doubt true that the more obvious the implication of a representation the more likely it is that the representee would have understood it to be made; but that is not to say that the evidence of the understanding is unnecessary.

Procedural history etc. cont.

- Credit Suisse appealed to the Privy Council as of right in respect of the breach of contract and breach of fiduciary duty claims. Mr Ivanishvili cross-appealed in respect of the misrepresentation claim.

- Chief Justice Hargun made 31 findings of fact which were affirmed by the Court of Appeal. Credit Suisse Life accepted that it was bound by the concurrent findings of fact made by the Courts below the JCPC applying the principle set out in *Devi v Roy* [1946] AC 508 and amplified in *Sancus Financial Holdings Ltd v Holm* (Practice Note) UKPC 41

JCPC Judgment

- The JCPC noted that what it means to deceive someone can be 'unpacked' as follows: *"(1) making a representation of fact (or law) which (2) is false, (3) the maker does not believe to be true, (4) is intended to be believed by the representee, and (5) causes the representee to believe that the representation is true."* [para 128]

- The Court said that what counts as a misrepresentation is very broad: "*The concept is not limited to statements which expressly assert the truth of a proposition. Indeed, it is not limited to statements: it includes actions as well as words. For the purpose of the law of deceit, the term "representation" encompasses any words or act calculated to cause another person to believe a proposition."* [para 129]

- The JCPC tried to lay the groundwork for asserting that it was not creating new by saying at paragraph 132 of the judgment that: "*There is nothing recent or novel in the notion that deceit can be perpetrated by entirely non-verbal conduct, including conduct of which the claimant is unaware. An old example is Schneider v Heath (1813) 3 Camp 506, where the seller of a ship, to hide the fact that the hull was worm-eaten and the keel broken rendering the ship unseaworthy, had the ship removed from the ways where she lay dry and floated in a dock so that the defects would not be seen when the buyer came to bid for her. Sir James Mansfield CJ had no hesitation in holding that on these facts the buyer was entitled to succeed in a claim to recover back his deposit on the ground that he was induced to pay it by deceit."*

JCPC Judgment cont.

The JCPC said that: *"Statements of the essential elements of a claim in deceit do not traditionally include a requirement that the claimant was aware of the representation relied on and understood it to have been made For example, in a summary that has often been cited, Viscount Maugham in Bradford Third Equitable Benefit Building Society v Borders [1941] 2 All ER 205, 211, said that an action for deceit requires four things to be established:*

"First, there must be a representation of fact made by words, or, it may be, by conduct. … Secondly, the representation must be made with a knowledge that it is false. It must be wilfully false, or at least made in the absence of any genuine belief that it is true … Thirdly, it must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which will include the plaintiff, in the manner which resulted in damage to him … Fourthly, it must be proved that the plaintiff has acted upon the false statement and has sustained damage by so doing …" (Citations omitted.) "

JCPC Judgment Cont.

The JCPC considered [at 136-137] that "*cases of ordering a meal, raising an auction paddle or covering up dry rot… are cases in which it may be obvious that the representation contended for was made but not at all obvious that the representee would have understood it to be made. Indeed, it may be plain that the representee would have had no conscious awareness of the making of the representation. There is no escaping from the choice that must be made. Either the Board must conclude that all cases of the kind described at paras 130-136 above were wrongly decided; or it must reject the theory which has gained some currency following the dicta in Raiffeisen that contemporaneous awareness and understanding of the representation is in law an essential element of a deceit claim. The Board has no hesitation in adopting the latter course.*

- The JCPC noted that previous Courts had fallen into error by considering that awareness of a representation was a necessary ingredient to establish reliance on that representation. The JCPC held [at 161] that "*There are two aspects to the requirement. The first is that the representation must have deceived the claimant (C) by causing C to hold a false belief ("reliance in belief"). The second is that C must because of holding that false belief have acted so as to suffer loss ("reliance in action"). Both aspects of reliance require the representation to operate on the mind of C. But neither logically requires C to be consciously aware of the representation at the time when C acts on it. Nor is there any good reason to insist on such an additional requirement."*

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Stevens v HPII [2025] UKSC 28

Hotels, Dishonesty and Greed - Assessing the liability of a dishonest assistant

James Pickering KC – Enterprise Chambers

All things start with 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

Enter… Andy Ruhan

Mr Ruhan's acquisition of the Hyde Park Hotels

Purchase Date: May 2003

Acquiring Method: Acquisition of shares in HPII – appointed director

Purchase Price: £47 million

Plus (maybe): Secret back-end deal with Dr Smith

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 (probably a fair market value)
- **Purchasing Entity:** Cambulo Madeira
- **Legal owner of Cambulo Madeira:** Anthony Stevens
- **Position of HPII:** Sufficient to repay most of secured 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

- Hotels now owned by Cambulo (Anthony Stevens)

- **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

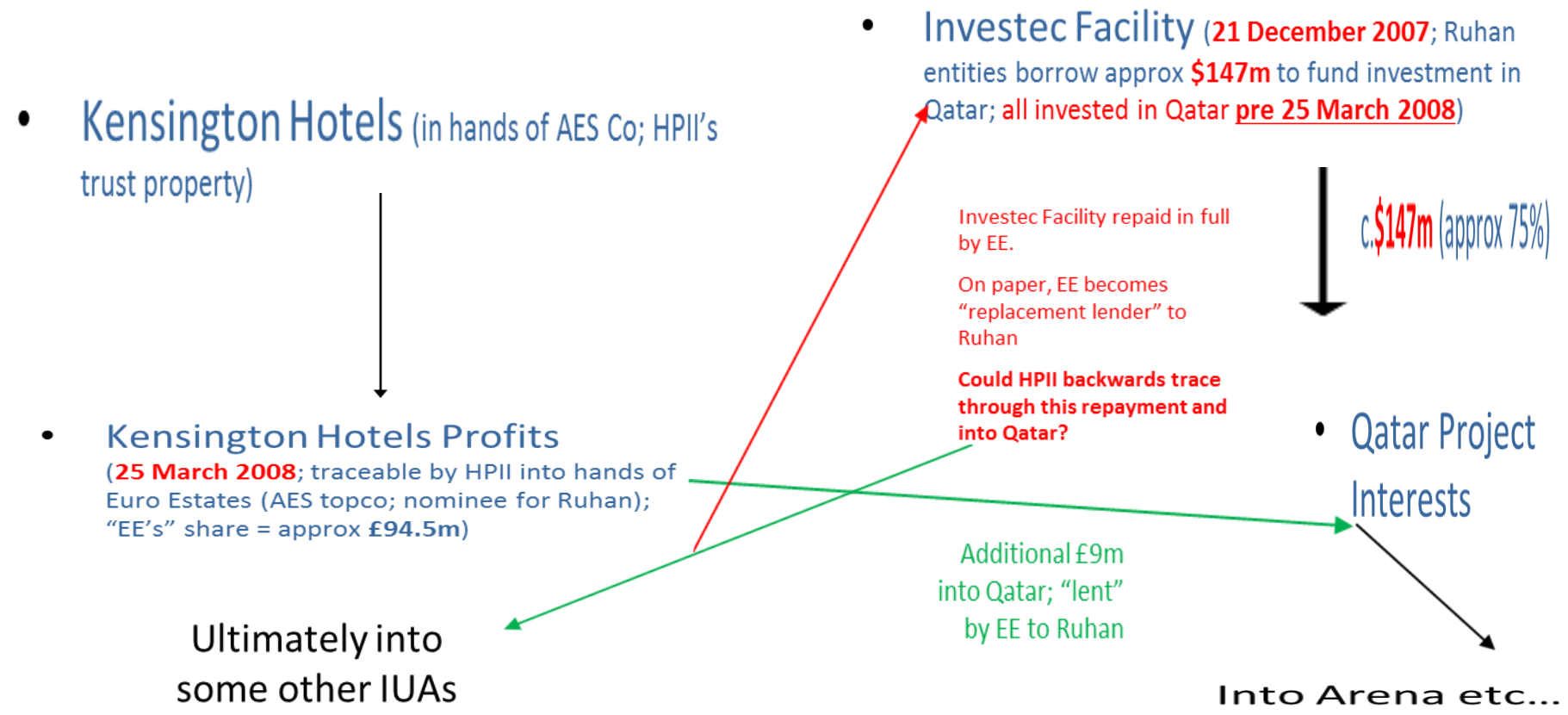
  March 2008 - JV sells to third party (Abu Dhabi royal family) for profit of £320 million

  Cambulo profit: of £115.2 million

And what did Cambulo (Mr Stevens) do with all the money?

(You can ignore the next slide…)

What Cambulo (Mr Stevens) did with all the money



The Pearl, Qatar

Remember HPII?

- Back in 2005 HPII had sold to Cambulo at a price sufficient to repay most of secured debt – but no profit – April 2008 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 (not happy with Mr Ruhan)
- Dr Smith brings High Court claim
  - alleges Stevens merely a nominee – and that Ruhan true beneficial owner of Cambulo (and had made all the profits)
  - alleges secret oral agreement with Ruhan - and an entitlement to a share of hotel profits
- Long and bitter court proceedings – eventually settled

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 Published 22 July 2012

Andy Ruhan, inset, has an appetite for risk, as a racer, and for the party life at Nikki Beach

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

Remember HPII (again)?

- Dr Smith's basic allegation was that Stevens was just a nominee – and that Cambulo was in fact owned and controlled by Ruhan
- 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 – Foxton J
- Ruhan & Stevens denied nominee arrangement – maintained that Stevens was true owner of Cambulo - and that Ruhan not connected
- Numerous legal defences (including limitation)

The judgment - *HPII v Ruhan & Stevens* [2022] EWHC 383

- February 2022 – judgment – Foxton J
- Ruhan and Stevens found to have both lied
- Ruhan found to be true owner of Cambulo and in fraudulent breach of fiduciary duty
- Stevens found to be liable for dishonest assistance
- June 2022 – 2 day consequentials hearing - £185 million

Quantum – Mr Ruhan

- Fraudulent breach of fiduciary duty
- Remedy: account of profits (his gain) or equitable compensation (our loss)
- Mr Ruhan had made a profit of £185 million
- So quantum against Mr Ruhan: £185 million

Quantum – Mr Stevens

- Dishonest assistance
- Remedy: account of profits (his gain) or equitable compensation (our loss)
- Account of profits? While R had made a profit of £185 million – S's profits had been just the bribes (about £5 million to £10 million)
- Equitable compensation BUT…

Quantum – Mr Stevens

- Equitable compensation - but what loss had HPII suffered?
- Application of “but for” test
- There was no suggestion that “but for” R’s breaches, HPII would have been able to develop and on-sell the hotels themselves
  - If R 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

Quantum – Mr Stevens

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

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

  - No loss suffered at this stage

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

  - Loss of the entire profit suffered at this stage

Quantum – Foxton J

- 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
- But…

The Court of Appeal - *HPII v Ruhan & Stevens* [2023] EWCA 1120

- Permission to appeal granted
- Court of Appeal – Newey, Males, Birss LJJ
- Held - artificial to consider in 2 stages
- ***HPII v Ruhan & Stevens* [2023] EWCA 1120**
- But…

The Supreme Court

- Permission to appeal granted by UK Supreme Court
- Hearing: February 2025
- Lord Reed, Lord Briggs, Lord Burrows, Lord David Richards, Lord Hamblen
- Judgment reserved…

The Supreme Court: the final score

HPII	**4**	**-**	**1**	**Mr Stevens**
Briggs				Burrows
Read				
Richards				
Hamblen				

The Supreme Court: the analysis

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

- At this stage - no loss suffered at this stage
- But.. a constructive trust came into existence
- ***FHR v Mankarious*** [2014] UKSC 45; ***Aquila Advisory v Faichney*** [2021] UKSC 49
- ***Rukhadze v Recovery Partners*** [2025] UKSC 10

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

- Dissipation of the profit amounted to a dissipation of HPII's property

The Supreme Court: Set off?

- In my judgment, for the reasons which follow, the true principle (a label which I prefer to a rule) is better expressed as follows. The general principle applied by equity where gains and losses are made and incurred for the trust estate by a series of breaches of trust is that one breach may not be set off against the other. **Its effect is that the beneficiary is entitled to the gains, but the trustee must bear the losses**.
- But the court may recognise an **exception** where the application of the no set-off rule would, usually because of a particular type of connection between the breaches concerned, produce a clearly inequitable result.
- **The only connecting factors which may be said to bind together all three transactions can best be described as dishonesty and greed.** All three were dishonestly concealed under the same cloak of secrecy, to keep them from HPII's attention. And Mr Ruhan's desire, in breach of fiduciary duty, to use HPII's property to enrich himself may fairly be categorised as greed. These do not look like connecting factors which ought to enable Mr Ruhan to complain that the application of the no set-off principle causes him an injustice…

HPII – Key Takeaways

- Confirms unauthorised profits are trust property
- Failure to account (or dissipation of) trust profits amounts to a distinct breach
- Assistance (if dishonest) by an assistant of either may result in liability for the dishonest assistant
- Gains from one breach of duty cannot (in general) be set off against losses from another connected breach

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Unlawful means conspiracy

A useful claim in response to fraud?

OR

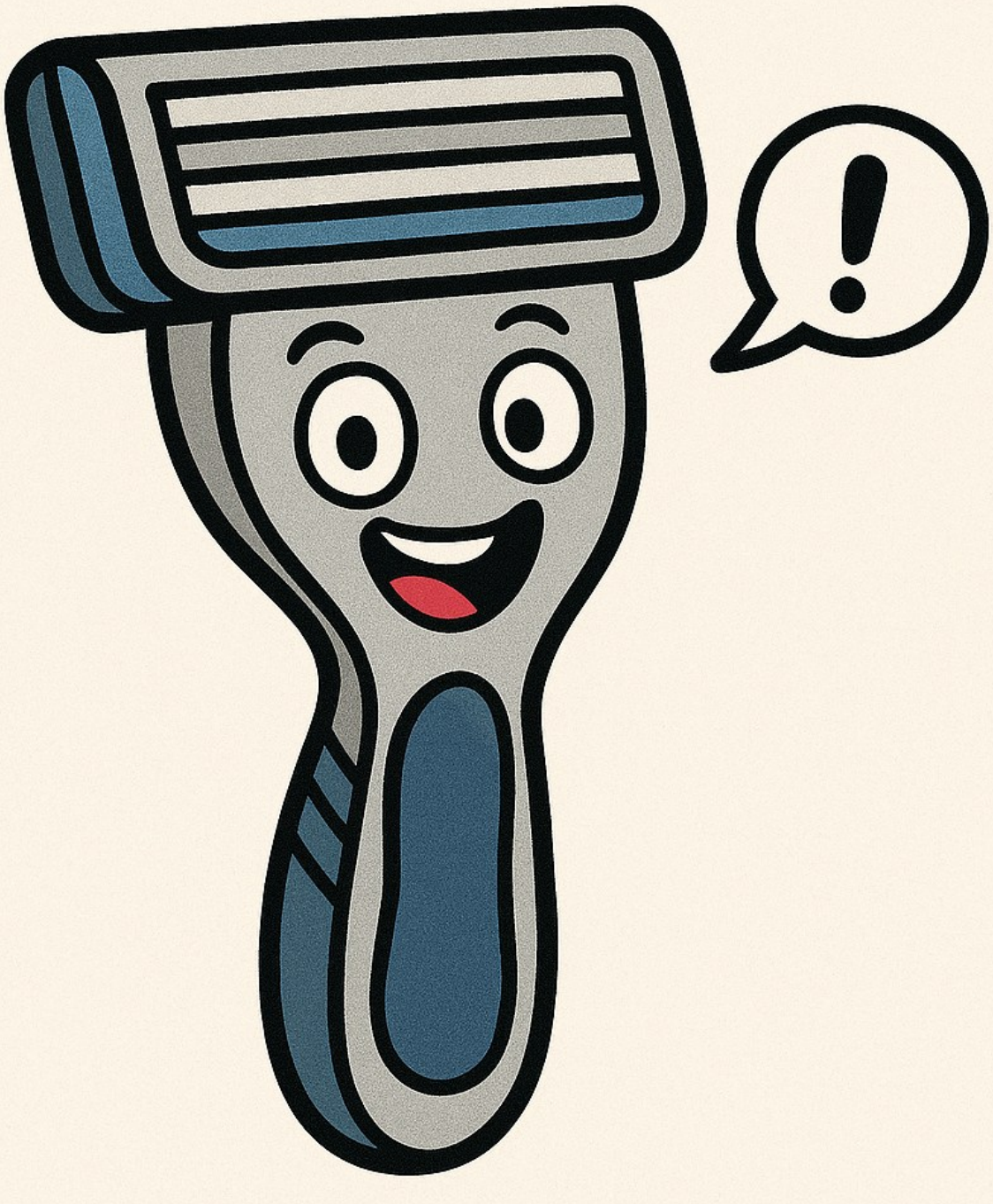
Rarely worth the hassle?

Phillip Patterson – Gatehouse Chambers

Alicia Tew – Hailsham Chambers

Evidential hurdles

1. Enquiry into the contents of a person's mind
2. Hanlon's Razor
3. Repeat enquiry for more than one Defendant



Overcoming the evidential hurdles

1. Agencies

2. Investigators

3. Whistleblowers

4. Pressure on potential co-defendants

Legal hurdles – Combination requirements

- Knowledge of only some facts
  - *The Dolphina* [2012] 1 Lloyd's Rep 304
  - *Huntley v Thornton* [1957] 1 WLR 321
- Directors conspiring with their companies
  - *Belmont Finance Corp v Williams Furniture Ltd (No. 2)* [1980] 1 All ER 393
  - *R v McDonnell* [1966] 1 QB 233
  - *Barclay Pharmaceuticals v Waypharm* [2012] EWHC 306 (Comm)
  - *Twentieth Century Fox v Harris* [2014] EWHC 1568 (Ch)
- Passivity
  - *Kuwait Oil Tanker v Al Bader* [2000] 2 All ER 237
  - *R v Siracusa* (1990) 90 Cr App R 340
  - *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2010] EWHC 774 (Ch)

Legal hurdles – Intention to harm

- Previously "predominant purpose"
- Still the test for a lawful means conspiracy
- Requirement now – an intention is to cause harm (*Lonrho Plc v Al-Fayed* [1992] 1 A.C. 448)
- Intention to profit (ends, means and consequences)
- "Constructive" intention - *JSC BTA Bank v Ablyazov (No. 14)* [2018] UKSC 19

Legal hurdles – knowledge that the means are unlawful

- *British Industrial Plastics Ltd v Ferguson* [1940] 1 All ER 479 (HL) - company did not know that its involvement would cause the former employee to breach his contract with the claimant
- *Belmont Finance Corp v Williams Furniture Ltd (No.2)* [1980] 1 All ER 393 (CA) - Buckley LJ: *"If all the facts which make the transaction unlawful were known to the parties, as I think they were, ignorance of the law will not excuse them."* - Ferguson not cited
- Meretz *Investment NV v ACP Ltd* [2007] EWCA Civ 1303 - in the absence of knowledge that the unlawful means were unlawful the claim must fail (Arden LJ)

Legal hurdles – knowledge that the means are unlawful

Racing Partnership Ltd v Done Brothers [2020] EWCA Civ 1300

- Majority (Arnold LJ and Phillips LJ) – if you know what the means are and the means are, in fact, unlawful – the requisite knowledge is present
- Dissent (Lewison LJ) - where the unlawful means consist of a violation of some private right, knowledge of unlawfulness is an essential ingredient of the tort

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Other defences

Just cause

- Croften Hand Woven Harris Tweed Company v Veitch [1942] AC 435
- JSC BTA v Ablyazov (No 14) [2018] UKSC 19

Legitimate competition


PIZZA

Conclusions

1. Significance?

2. Sympathy for the Claimant/Defendants on the facts.

3. Parallel claims

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Chancery Bar Association

Sanctioning Bad Behaviour: What works?

Michael Gibbon KC
Maitland Chambers

Chancery Bar ASSOCIATION

ChBA BVI Conference

Conclusions & Thank Yous

Ian Clarke KC
Chair, Chancery Bar Association

Cocktails & Canapes at the
Sugar Mill
(buses outside)