

Challenging Fiduciary Decisions

Jonathan Adkin KC (Serle Court)

Matthew Morrison (Serle Court)

Elizabeth Doherty (Macfarlanes LLP)

Scott Pearman (Conyers Dill & Pearman Limited)



serle court



The differences fiduciary duties can make

- ❑ Easier to establish breach of obligations which involve abnegation of self-interest
- ❑ Exercise of fiduciary powers involves significant limitations on freedom of action
- ❑ Advantageous equitable remedies
- ❑ Duty to self report

Item Software (UK) Ltd v Fassihi [2005] 2 BCLC 91 at [41]; *Hanco ATM Systems Ltd v Cashbox ATM Systems Ltd* [2007] EWHC 1599 (Ch) at [65] *Bank of Ireland v Jaffery* [2012] EWHC 1377 (Ch) at [301]



Labels do not always disclose all the ingredients...

- ❑ Established categories exist

BUT

- ❑ Not all within those categories will owe the same duties

- ❑ Bare trustees

- Lewin*, 1-038 to 1-039

- ❑ Non-fiduciary agents

- Pengelly v Business Mortgage Finance 4 Plc* [2020] EWHC 2002 (Ch) at [34]

- ❑ Nominee *de jure* directors of companies

- Hawkes v Cuddy* [2009] 2 BCLC 427 at [33]

The label unpeeled...

☐ When are fiduciary duties owed by shadow directors?

Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch) at [1289]-[1290];
Vivendi SA v Richards [2013] EWHC 3006 (Ch) at [142-143]; *IAP v Rosser* [2018] EWHC 756 (Ch) at [259]; *Standish v The Royal Bank of Scotland Plc* [2019] EWHC 3116 (Ch) [55]-[65]

☐ [Spoiler alert] The debate about protectors...



Unlabelled fiduciaries: What is the general test?

“...someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence ”

Bristol & West Building Society v Mothew [1998] Ch 1 at 18

“...fiduciary duties typically arise where one person undertakes and is entrusted with authority to manage the property or affairs of another and to make discretionary decisions on behalf of that person. ”

Al Nehayan v Kent [2018] EWHC 333 (Comm) at [159]



Unlabelled fiduciaries: What is the general test?

“...a person will be in a fiduciary relationship with another when and in so far as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other’s interest to the exclusion of his or her own or a third party’s interest”

(Finn J in *Grimaldi v Chameleon Mining NL (No.2)* [2012] FCAFC 6 at [177]; endorsed by CA and Lady Arden in *Lehtimäki v Cooper* [2020] UKSC 33 at [48])



Uncertainties...

- ❑ “*Reasonable expectation*” of self-abnegation not applicable in every case (but no clear guidance as to when it will and will not apply)
- ❑ Whose views and expectations matter, and are they weighted?
- ❑ What other matters may be taken into account?
- ❑ Do the subjective views of the principal matter?
Lehtimäki per Lady Arden at [91]; *Kelly v Baker* [2022] EWHC 1879 (Comm) at [27]
- ❑ Always context specific, even in relation to “no profit” / “no conflict duties”
Joint ventures: *Ross River Ltd v Waverly Commercial Ltd* [2013] EWCA Civ 910 at [41] and [93]
Sales and estate agents: *Kelly v Cooper* [1993] AC 205



Protectors

- Purpose and origins of the office of protector

- Option one: the wider view

In the Matter of the Piedmont Trust & Riviera Trust [2021] JRC 248

- Option two: the narrower view

In the Matter of the X Trusts [2021] SC (Bda) 72 Civ - “X Trusts (No. 2)”

- Analysing the options: narrower v wider

- A “postscript”

PTNZ v AS & Ors [2020] EWHC 3114 (Ch)

- Protectors’ powers: now and in the future



The Exercise of Fiduciary Powers

Whose interests do trustees have to take into account?

- ❑ Exercise of fiduciary powers brings in requirements to act within scope, following adequate deliberation and for proper purposes (*Pitt v Holt*)
- ❑ Lord Walker's well known three categories. But whose interests do the trustees have to take into account when exercising the powers?
- ❑ Before we get into the discussion...



Wong: Act 1, Scene 1
Wong and Anr v Grand View Private Trust Company Limited et al [2019] SC (Bda) 37 Comm (5 June 2019)

- ☐ Remember: it's Summary Judgment
- ☐ A “substratum” emerges
- ☐ Attempt at restraint of the exercise of the power
- ☐ Power to add and remove beneficiaries



Wong: Act 1, Scene 2
Grand View Private Trust Company v Wong and 3 Ors
Court of Appeal for Bermuda, Civil Appeal No. 5A of 2019

- ☐ Sir Christopher Clarke's "Landmark Judgment"
- ☐ Proper construction of the Trust Deed



Wong Act 1, Scene 3

Appeal to the Judicial Committee of the Privy Council - JCPC 2020/65

☐ It's all about an Irreducible Core of duties...



Whose interests do you have to take into account?

- ☐ Wait for the Privy Council to tell us, or...
- ☐ Speculate (extremely diplomatically)