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Talk papers

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Speakers

John McGhee KC
John maintains a wide and varied practice in the fields of modern commercial chancery work. He is well known for his acute intellectual analysis of problems and mastery of the detailed facts of a case as for his robust, practical and commercially realistic advice. Through his editorship of Snell's Equity (which is the leading textbook on equitable principles in common law jurisdictions) and his experience in multi-jurisdictional disputes John is frequently involved in cases overseas. Recent cases have included acting in the *Shlosberg* litigation for a Liechtenstein foundation in connection with a £200m claim against a wealthy Russian businessman. John is listed in The Lawyer Hot 100 2023 and Chambers & Partners 2023 says John is *"encyclopaedic in his approach"* and describes him as "*a leading light*".

Tom Roscoe
Tom has a broad commercial chancery practice, spanning business, trusts and property disputes in the UK and abroad. His practice is evenly split between led and non-led work. Tom regularly appears in a range of domestic and international courts and tribunals. He also undertakes a broad range of advisory and drafting work. Tom's practice has an increasingly international focus and he has recent experience on substantial disputes (litigation and arbitration) in the Cayman Islands, British Virgin Islands, Jersey, Guernsey, the Dubai International Financial Centre, Hong Kong and Bermuda. That experience builds upon secondments in the first three of those jurisdictions between 2013 and 2015 with Campbells (Cayman and BVI) and Mourant (Guernsey). He maintains a practicing certificate in the BVI and is a Registered Part II Legal Practitioner in the DIFC Courts. Chambers & Partners 2023 describes Tom as *"a superb junior and an excellent advocate with a very bright future"*. He was also praised for being *"very clever, extremely confident and very well prepared"*, as well as *"a pleasure to work with"*.

Harriet Holmes
Harriet's practice covers property disputes before the domestic courts and tribunals and other jurisdictions. Harriet has been recommended by the leading directories as a leading practitioner since she was three years into practice. She has been repeatedly noted for being a formidable advocate who brings with her both technical ability and commercial astuteness. In 2021, Harriet was one of three finalists for Real Estate Junior of the Year at the Chambers & Partners Bar Awards. She sits on the Bar Council as part of the Regulatory Review Working Group. The Legal 500 2023 describes Harriet as *"extremely bright and a tenacious advocate", "a silk in the making"*. Chambers & Partners 2023 praises her for being *"extremely thorough"*, as well as *"commercial, down to earth and client-friendly"*.

Daniel Petrides
Daniel already has a thriving commercial chancery practice spanning all of Chambers' core practice areas. He frequently appears as sole counsel in both the High Court and the County Court, as well as retaining a focus on drafting and advisory work. Many of his cases have an international dimension and he has experience of ADR procedures, including arbitration. He is equally comfortable acting alone or as part of a larger team. In the commercial context, he has a particular interest in cases involving allegations of fraud or dishonesty, and in the trusts context, he has assisted on a number of cases involving complex questions of international succession law. The Legal 500 2023 praises Daniel for being *"able to pick up esoteric areas of law very quickly"* and says he *"is happy to get stuck in and assist wherever a job needs to be done."*

Hurdles to property development (and how to clear them)

John McGhee KC, Tom Roscoe, Harriet Holmes and Daniel Petrides

Introduction

1. Property developers face various hurdles. The land must be acquired, planning permission must be obtained, and finance secured. When all these hurdles have been overcome, a neighbouring owner may still object to the development on the basis that it has title to part of the development land or that it has proprietary rights over the land which would be breached if the land were developed as proposed.

2. We spend much of our working lives helping developers overcome these hurdles (or, with another hat on, representing adjoining owners who object to the proposed development).

3. Our talk, with more detail given in this accompanying paper, addresses aspects of two broad topics which arise in that context:

    3.1. how others' rights adversely affecting development property might arise; and
    3.2. the remedies that may be asserted in respect of those rights, and how they may be overcome.

4. The first of those topics, in particular, is of very wide potential scope. We therefore focus on easements (and similar public rights) which give others rights to make use of the subject land. Given the location of our talk, and therefore the likely location of high-value and high-profile developments, we try to focus on issues relating to sea-front property.

5. Easements are, in our experience, less written and spoken about – and sometimes less well understood – than restrictive covenants (or 'restrictive agreements'), which give others rights to control what goes on on the subject land, but not to use it themselves. Any development will, of course, also need to consider any planning restrictions: but planning matters are also outside the scope of this talk and paper. Rights to light, whilst a species of easement, have their own particular complexities – and so they are also not addressed in any detail in this paper.

6. The second of these topics, similarly, focusses on remedies for potential breaches of easements – though many of the principles being considered are of broader application.

Easements & leisure rights after *Regency Villas*

7. The essence of an easement is that it is a species of property right, which attaches to land, and which confers rights over neighbouring land. Purely personal rights to use others' land may of course arise, but for an easement to arise – which is *capable* of running with the land – certain conditions need to be met:

    7.1. There must be a servient tenement (i.e. land which is subject to the right) and a dominant tenement (i.e. land which enjoys the benefit of the right), with different owners.
    7.2. The right must *accommodate* the dominant tenement.
    7.3. The right needs to be capable of forming the subject matter of a grant.

8. The first of those conditions speaks for itself. There may, of course, be difficulties in application of the rule, but we focus on the second and third conditions. That is because, in the development of properties intended to give recreational or leisure purposes to others, or which might interfere with recreational or leisure purposes that others have previously been enjoying, it is these factors which are of greatest interest.

9. The second condition that the right must *accommodate* the dominant tenement, has been understood to mean (following *re Ellenborough Park* [1956] Ch 131) that, to be an easement, the right granted had to lead to the better enjoyment of the dominant tenement (as such). On this principle, rights conferred for the pure (or mere) enjoyment of their exercise were thought not to be capable of being easements. To give some concrete examples:

    9.1. A right of way leads to better enjoyment of the dominant tenement in the form of more convenient access to it. Service easements enable the dominant tenement to receive utilities. Easements of support stop the dominant tenement falling down!
    9.2. A right attaching to a house, however, to visit the local football stadium on match days, may be valuable or desirable to the home owner – but it is has nothing to do with the better or more convenient use of the dominant tenement *qua* house, and so cannot be an easement.

10. This principle led to controversy in the case law as to whether rights granted for purely recreational or leisure purposes could ever be an easement. The concern was that a recreational right is only of capable of being used and enjoyed by people: it does not accommodate or serve or benefit the dominant land *itself*. There were many examples in the authorities of decisions going either way on the point. (Although it is worth noting that Australian jurisprudence has long recognised the existence of recreational easements: see *Riley v Penttila* [1974] V.R. 547, *Blankstein v Walsh* [1989] 1 WWR 277 and *City Developments Pty Ltd v Registrar General of the*

Northern Territory (2000) 135 N.T.R. 1, which concerned sporting rights over land and foreshore adjoining a natural lake).

11. In *Regency Villas Ltd v Diamond Resorts* [2019] AC 553**,** the English Supreme Court resolved this debate. To outline, briefly, the facts of that case:

    11.1. The Court had to consider whether a right for owners of timeshare villas next to a country club to use the "*swimming pool, golf course, squash courts, tennis courts, the ground and basement floor of the Broome Park Mansion House* [i.e. the Country Club]*, gardens and any other sporting or recreational facilities*" could amount to an easement.
    11.2. The right was granted in a 1981 transfer of the villas from the then owner of the country club to the new villa owners. The swimming pool was subsequently moved from the grounds of the country club to the indoor basement of it.
    11.3. As a matter of construction, the Court held that the right was not to use the facilities in place at the time of the grant – but to use all recreational and sporting facilities as existed in the club from time-to-time.
    11.4. (It is instructive to note in passing that it was common ground in that case that an obligation on the original owner of the country club to *maintain* the recreational facilities did *not* bind successive owners as it was a positive covenant: see [9].)

12. It was held, first, in that case that a right does not fail to be an easement just because it is recreational or sporting in nature (see [48]). The question in each case is whether the right accommodates the dominant tenement.

13. To answer that question, the following guidance was offered:

    13.1. In the same way that where a house is sold with a garden, the garden enhances the use of a house – a right to use a neighbouring or communal garden where it adjoins or is in close proximity to the house does likewise, and such right accommodates the dominant tenement. This is to be contrasted with a right to access free of charge a botanical gardens some distance away (for example).
    13.2. The rights need not be subordinate or ancillary to the enjoyment of the dominant tenement – in the sense of being, at most, a useful benefit alongside ownership of the dominant tenement. The enjoyment of the rights might be the dominant reason to acquire the dominant tenement (e.g. in *Regency Villas*, the acquisition of time-share properties next to the country club primarily in order to be able to enjoy use of the country club's facilities).
    13.3. By way of departure from the language of some of the older (and especially Victorian) authorities:

        > *"[T]he advantages to be gained from recreational and sporting activities are now so universally regarded as being of real utility and benefit to human beings that the pejorative expression "mere right of recreation and*

amusement, possessing no quality of utility or benefit" has become a contradiction in terms, viewed separately from the issues as to accommodation of the dominant tenement. Recreation, including sport, and the amusement which comes with it, does confer utility and benefit on those who undertake it." (at [59]).

14. The third condition for an easement (that it is capable of forming the subject matter of a grant) is a little more cryptic. In the case of acquisition of easements other than via express grant (e.g. prescription, to which we will come, or necessity), the application of the condition is more intuitive: easements can only be acquired impliedly or by prescription that *could* have been granted expressly.

15. What this third condition is really aimed at, however, is a shorthand for a miscellaneous set of limits as to the nature of rights that can constitute easements. Those limits include: (i) that the right must be defined sufficiently clearly; (ii) for it not to be purely precarious, so as to be liable to be taken away at the whim of the servient owner; (iii) that the right is not so extensive or invasive or to oust the servient owner from the enjoyment or control of the servient tenement (this is also referred to as the "ouster principle"), and; (iv) that the right should not impose upon the servient owner obligations to expend money or do anything beyond mere passivity.

16. The "ouster" principle, in particular, has been the subject of considerable debate and controversy – most commonly in the context of parking rights. In short, if the servient tenement's car is parked on a part of the servient tenement, then the servient owner has (on one argument) been ousted from that area of the servient tenement. That argument was put to bed, and the existence of rights to park as easements confirmed (provided they did not give the servient owner exclusive rights to possession) in *Moncrieff v Jamieson* [2007] 1 WLR 2620. The test which arises from that case is *"whether the servient owner retains possession and, subject to the reasonable exercise of the right in question, control of the servient land"*.

17. The application of the "ouster" principle to recreation rights is more subtle: plainly, mere use by neighbouring owners of a swimming pool or golf course (for example) is not so extensive or invasive as to oust the servient owner. The argument in *Regency Villas* as to the application of the ouster principle relied, however, on step-in rights:

    17.1. In circumstances where the servient owner cannot be required to expend money, the dominant owner may 'step-in' and carry out works on the servient land itself in order to be able to continue to enjoy the right.
    17.2. For example, the dominant owner may carry out works to maintain a right of way over the servient land. The extent of the permitted works is only those necessary to enable the enjoyment of the right, which must be carried out in a reasonable manner: *Carter v Cole* [2006] EWCA Civ 398.

17.3. In the case of golf-courses, however, the nature of the step-in rights that would be required to keep the course in playable condition was much more intensive than maintaining a right of way: regular mowing, watering and other maintenance would be required. The country club argued that such step in rights would effectively amount to day-to-day management and supervision, amounting to ouster.

17.4. This argument failed on its facts: the nature of the maintenance of the country club facilities was not so extensive as to amount to ouster even if step-in rights were required (see [64]). But, more than that, the plain expectation at the time of the grant of the rights was that the management and control and maintenance of the county club would remain with and be exercised by the county club owner. It was only if it gave up or abandoned those rights that step-in rights would become relevant. In the meantime, questions of step-in rights did not arise.

17.5. In short, therefore, the "ouster" question was to be determined by the facts as they were reasonably expected to be at the date of the grant – not by reference to future hypothetical events when step in rights *may* arise.

18. The "mere passivity" issue was also considered in some detail:

18.1. The "mere passivity" principle does not mean that easements cannot be granted which permit the dominant owner to use structures or facilities on the servient land (e.g. a lavatory (!): *Miller v Emcer Products Ltd* [1956] Ch 304). That is so even though one would ordinarily expect the servient owner to keep those structures or facilities in repair so that the use and enjoyment can continue.

18.2. What the principle *does* mean is that the dominant owner cannot compel the servient owner to do the works of management or maintenance. The servient owner *may* wish to do the works (e.g. so they can enjoy the same facilities) but *need not* do. The grant of the right *may* be conditional on a requirement that the dominant owner contributes towards a reasonable proportion of the cost of upkeep (common in the case of rights of way, for example) – but such conditionality will not usually be implied. It will need to be provided for in express words.

18.3. The relevant test which emerges from *Regency Villas* seems to be this: if meaningful use of the recreational facilities could be made (even if not indefinitely) without the continued provision of management, maintenance, repair and renewal by the servient owner, then an easement can arise.

18.4. It was held, on the facts of that case, that the golf-course could have been mown and the pool kept full of water without the servient owner's management. It may not have been as high end, but it would have been of some meaningful use. That decision, we suggest, may reflect an unrealistic approach to what might in practice have been done or achieved by the neighbouring villa owners in the event that the management of the country club ceased. Lord Carnwath's dissenting judgment on the point is persuasive.

18.5. That is to be contrasted with other forms of recreation where, absent the subservient owner's ongoing management, there is nothing to enjoy. Examples given of recreation activities that were probably the wrong side of the line were: *"Free rides on a miniature steam railway, a covered ski slope with articial snow, or adventure rides in a theme park."*

18.6. The majority of the Supreme Court therefore concluded that the rights granted in the *Regency Villas* case were valid easements.

19. Elsewhere in the common law, rights to recreation taking effect as easements have been well established. We return to say something more about rights over the beach or foreshore below, but the Supreme Court in Canada recognised as easements the grant in favour of residential lots on a development plan of rights to use "foreshore reserves" separating the lots from a bay, treating the analysis in *re Ellenborough Park* as applying all the more emphatically in the case of a beach adjacent to a resort development.

20. For an interesting recent illustration of some of these principles, see the Cayman Court of Appeal's decision in *Cayman Shores Development Ltd v Registrar of Lands* CICA 017 of 2021 (7 March 2023) (in respect of which permission to appeal to the Privy Council has recently been granted):

20.1. The case concerned a large development known as the Britannia Resort, which contained facilities including a hotel, golf course, tennis courts and a beach club – as well as four phases of residential developments.

20.2. The former owner of the resort entered into agreements which purported to grant rights to use the beach club, golf course and tennis courts to neighbouring landowners. They were described and registered as "restrictive agreements", but were in substance not.

20.3. The hotel ceased to operate, and the tennis courts and golf course quickly fell into disrepair, following Hurricane Irma. A new owner acquired the site and planned its redevelopment. The question was whether the owners of the neighbouring properties had rights to use the redeveloped facilities.

20.4. The Court of Appeal held, first, that the agreements were not restrictive agreements or covenants, and did not therefore serve to prevent the new owners from relocating or removing the existing facilities.

20.5. The Court of Appeal, next, recognised (consistently with *Regency Villas*) that the language of the agreements was *capable* of granting easements.

20.6. However, and importantly, they failed to take effect as such because they had not been perfected by registration on the land register (and were not otherwise overriding interests). The registration error stemmed from the incorrect characterisation of the agreement as a restrictive agreement, rather than an easement.

Prescription

21. The rights we have just been considering are express rights. In a development context, the express rights that exist are usually fairly easy to establish (even if there are disputes as to what they mean, who benefits from them or whether the benefit and burden have passed). The greater risk for development is often presented from rights that might be asserted, but are not shown on the documents. The possibility that neighbours may have acquired easements by prescription (i.e., by long user in the absence of an express grant) is therefore an area of significant risk.

22. As Lord Hoffmann noted in *R v Oxfordshire CC (ex p Sunningwell PC)* [2001] 1 AC 335, *"any legal system must have rules of prescription which prevent the disturbance of long-established de facto enjoyment"*. The basis of prescription is therefore the law's reluctance to presume that any longstanding activity is unlawful in nature.

23. All of the points we have discussed above concerning the conditions required for a valid easement to be granted expressly also pertain to the existence of a valid grant which arises by way of prescription: if the right is not capable of having been granted as an express easement, it cannot arise by way of prescription.

24. In order to prescribe, the relevant use needs to be *"as of right"* – which means as <u>if</u> of right. In other words, it needs to be use of the sort that a person with a right would make. The use must therefore be *"nec vi, nec clam, nec precario"* (without violence, without secrecy or stealth, and without permission).

25. There are three different ways in which easements may be acquired by prescription: (i) at common law; (ii) via the fiction of the lost modern grant; and (iii) by statute (in Nevis, the Prescription Act 1882). The interrelation between the different methods is complex. In broadest outline:

    25.1. At common law, the law has a memory – back to 1189 (the year of the accession of Richard I, which was fixed as 'time immemorial' by the First Statute of Westminster in 1275, and which Parliament has never got round to updating). If it could be shown that a right had been enjoyed since then, it was assumed to have been granted lawfully at some point before legal memory began. Over time the courts sought to avoid the obvious difficulty of proving such a long history by the rebuttable presumption that, if the right had been enjoyed for as long as anyone could remember, it would be presumed to have been ongoing since 1189. However, if the date on which usage actually commenced could be shown, that would defeat the action. (So, for example, if a right to light was claimed in respect of a building, but it could be shown that the building was only constructed after 1189, the claim in prescription would fail.) Unsurprisingly therefore, this route is rarely used today, given the existence of the other two set out below.

    25.2. The presumption of lost modern grant was a judge-made rule designed to ameliorate the impracticality of the common law rule. In essence, where 20

years' enjoyment of a 'right' can be shown – the Court will presume that there was once a lawful grant of the right, which has been lost. This is a presumption, or a legal fiction. The presumption should, strictly, not be applied blindly – only where there is no other explanation for the use being *legal* (e.g. permission) should the grant of a right be assumed. However, it should be noted that even positive evidence that there was no grant will not prevent the presumption from operating: see *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528.

25.3. Finally, given the unease felt by judges and juries about finding the existence of rights on the basis of fictitious instruments, the legislature intervened. The Prescription Act provides, at s.3, that:

> *"No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of the Crown, or being the property of any ecclesiastical or lay person or body corporate, when such way, or other matter as herein last before mentioned, shall have been actually enjoyed by any person claiming right thereto, without interruption, for the full period of twenty years, shall be defeated or destroyed by showing only that such way, or other matter, was first enjoyed at any time prior to such period of twenty years; but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated; and, where such way, or other matter as herein last before mentioned, shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."*

What this means, in short, is that an easement will be established if user "as of right" can be shown for 20 or 40 years. A claim for either period can be defeated by showing unity of ownership of the dominant and servient land during the period, or that the right was enjoyed with consent in writing. A claim under the shorter period (but not the longer) can also be defeated in any way that a claim to an easement could be defeated at common law (save for showing commencement of enjoyment within the time of legal memory).

26. It was confirmed by the House of Lords in *Angus v Dalton* (1881-72) LR 6 App Cas 740 that the effect of the legislative intervention has not been to abolish either of the common law doctrines. Indeed, it is common to see claims brought under both the Act and common law/lost modern grant.

27. At first blush, it is perhaps difficult to see what the material differences are between lost modern grant and the Prescription Act. The most significant difference is that the periods of time in the Prescription Act are periods running back from the date on which the court action is commenced; not *any* period of 20 (or 40) years (see s.5

of the Act). For lost modern grant, any 20 years (even if ending some time prior to the commencement of proceedings) will do.

28. The 40-year period under s.3 avoids some of the complications which arise under lost modern grant and the shorter 20-year period under the Act, which are discussed below.
29. In practice, the greatest disputes concerning allegations that rights have been acquired by prescription relate to the nature and intensity of the adverse use:

    29.1. Ultimately, the question in each case is fact dependent.
    29.2. The adverse use must be of such intensity to carry to the mind of a person in possession of the servient tenement that the fact of continuous right to enjoyment is being asserted, and ought to be resisted if such right is not recognised and if resistance to it is intended (*Hollins v Verney* (1884) 13 QBD 304 at 315). Occasional user will not therefore suffice.
    29.3. "Interruption" will prevent the 20 year period from running (see s.5 of the act) if it is acquiesced in by the adverse user for one year. The concept of "acquiescence" means that the interruption needs to by way of some obstruction imposed by the dominant owner: and the servient owner will need some notice that an obstruction is intended. A mere physical interruption will not suffice (e.g. *Seddon v Bank of Bolton* (1882) 19 Ch. D 462).
    29.4. Under the Act, if there has been user for more than 19 years which is then interrupted, a claim brought after 20 years will succeed notwithstanding interruption – as the period of interruption of less than one year will not defeat the claim.

30. Additional complexities arise where the land in question has been demised.

31. As Lord Millett explained in *China Field Ltd v Appeal Tribunal* (*Buildings)* [2009] HKCFA 95, there are two rules which operate to restrict the ambit of prescription in cases involving leasehold interests: (i) the rule that an easement can only be acquired by or on behalf of the owner of a freehold estate in the dominant tenement against the owner of a freehold estate in the servient tenement ("**the Fee Simple Rule**"); and (ii) the rule that dominant and servient tenements cannot have the same freehold owner ("**the Common Freeholder Rule**").

32. The Common Freeholder Rule is said to flows from the absurdity that would arise if a party could effectively prescribe against itself, and applies to all modes of prescription.

33. The Fee Simple Rule is said to have two justifications.

    33.1. First, in cases of common law prescription, to give effect to the fiction that the user has been continuing since time immemorial. As Blackstone explained

"*for, as prescription is usage beyond time of memory, it is absurd that they should pretend to prescribe, whose estates commenced within the remembrance of man*".

33.2. Secondly, in cases where the servient tenement is demised, it operates to protect freeholders who (not being in immediate possession of the land) may not have any opportunity to discover and object to the user. As Lord Ellenborough explained in *Daniel v North* (1809) 103 ER 1047, "*the foundation of presuming a grant against any party is, that the exercise of the adverse right on which such presumption is founded was against the party capable of making the grant; and that cannot be presumed against him unless there was some probably means of his knowing what was done against him*".

34. However, two exception should be noted:

34.1. First, it may be no obstacle to prescription that the servient tenement *became* demised *during* the period of the relevant user, or if the freeholder of the servient tenement actually acquiesced in the user.

34.2. Secondly, a lessee of the dominant tenement may prescribe *on behalf of* its landlord, as any lawful enjoyment of tenant is in law to be treated as that of the landlord: *Gayford v Moffatt* [1868] 4 Ch App 133. Furthermore, there is some authority which suggests that the Fee Simple Rule does not prevent a lessee of the dominant tenement from enforcing an easement on behalf of its landlord: *Metropolitan Housing Trust Ltd v RMC FH Co Lt* [2018] Ch 195.

35. Furthermore, while it is clear that the Fee Simple Rule applies to prescription at common law, by way of lost modern grant, and by way of 20 years' user under s.3 of the Prescription Act, the effect of the decision in *Wright v Williams* (1836) Tyr. & G. 375 would appear to be that 40 years' user by a tenant creates an indefeasible title under s.3.

36. The rules are controversial, and in *China Field* Lord Millett suggested that they should be reconsidered the by Supreme Court or Privy Council in a suitable case. However, until such a time they present important and potentially far-reaching limitations on the availability of prescriptive easements in cases of demised land.

Public rights: the foreshore and beach access

37. Our discussion of easements above has been concerned with private rights: i.e. the rights acquired by neighbouring private landowners. Developments of beachfront properties will also often need to contend with, essentially, public rights of a different category relating to the beach and foreshore.

38. There are two elements to this: (i) establishing the shoreline boundaries of the private development land itself; and then (ii) considering what rights the public may have to access the beachfront, and to cross the private development land in order to do so.

39. The first of those questions concerns, first, explaining the concept of the "foreshore":

    39.1. The English common-law does not focus on the concept of a "beach". Caribbean legislation, however, does include that concept: as to which see further below.
    39.2. The common law focusses on the "foreshore" because the landward end of the "foreshore" would mark the boundary of private land (as we'll come on to see in a little more detail).
    39.3. In systems based on English common law the boundary between private land and the foreshore is the median high water mark between the ordinary spring and neap tides.
    39.4. (The boundary of the seashore or foreshore with the high seas is probably the median low tide between the ordinary spring and neap tides).

40. That definition of the "foreshore" means that the boundary between the private land and the foreshore is not necessarily fixed:

    40.1. Most boundaries are fixed. The task of a boundary surveyor (at least in systems that do not use cadastral parcels) is to identify the `root conveyance', being the conveyance by which the land on both sides of the boundary was last conveyed out of common ownership, and correctly plot on the ground the boundary as it is described in that conveyance, taking account of the wording of the conveyance, the content of the plan, and the physical features which existed on the ground at that time.
    40.2. That is not necessarily an easy task: the root conveyance may be lost; the wording may be obscure and self-contradictory; the plan may be out of date or drawn on too large a scale to convey any useful information about the precise location of the boundary; and the features that existed on the ground at the time of the conveyance may be unidentifiable today. But at least the boundaries are (subject to adverse possession) a fixed immutable line, and everybody knows that the task is to try and identify that fixed line.
    40.3. Boundaries next to tidal waters are different. That boundary, again, is defined by the median high water mark. But that will change over time.
    40.4. If some disaster happens, which changes the high water mark over night, the boundary is fixed where it was before, albeit that the land might now be under water.
    40.5. But if the mean high water mark changes gradually and imperceptibly over time, by the natural process of the seas, as it is bound to, then the boundary of the foreshore moves with it.
    40.6. This is called `accretion' or `alluvion' where the boundary moves towards the water, and `diluvion' where the boundary moves towards the land.

41. Why the mean high tide mark?

41.1. English land law is built on the premise that William I acquired title by conquest to the whole of England, thereby creating a *tabula rasa* on which subsequent land law developed. As such, the story goes, if a private estate exists today, it owes its validity to a grant made by him or one of his successors, taking the land out of the residual royal demesne (which is why land escheats to the Crown). Now that, as you might expect, is a legal fiction, not historical fact: William claimed to be Edward the Confessor's legitimate successor, and did not entirely uproot the pre-existing system of land ownership.

41.2. One aspect of this fiction is that, because of their importance for defence and trade, it is presumed that the Crown would not have granted any private individual ownership of the sea or tidal waters up to the point of the mean high water mark. An individual who claims land below the high water mark has to rebut that presumption.

41.3. The same doctrine was imported to the Commonwealth Caribbean when the common law was imposed: see *Cooper v Stuart* (1889) 14 App. Cas. 286. (Albeit that the theoretical basis for doing so is controversial and unclear in circumstances where the creation of feudal tenures was either of no continuing practical importance as at the date of settlement, as in the case of St Kitts and Nevis, or had at the date of settlement been to all intents or purposes formally dismantled by the Tenures Abolition Act 1660). Nevertheless, even if grounded in legal fiction, it was a doctrine that survived.

42. Acquiring the foreshore:

42.1. A private individual can acquire a freehold title by adverse possession to the foreshore, in the same way as for other land, although in England it requires 60 years of adverse possession.

42.2. In practice, however, it is not just the extended time period that makes it difficult to acquire the foreshore by adverse possession.

42.3. An adverse possessor has to make his possession manifest by keeping the paper title owner out, but on a practical level it is hard to do that in an inhabited area without also committing an actionable public nuisance by interfering with public rights over the foreshore. There are, nonetheless, remote areas in Scotland (where the limitation period is shorter) where that has happened.

43. In Nevis, however, there is a statutory concept of "the beach". It is defined in s.2 of the National Conservation and Environmental Protection Act 1987 as meaning:

"[T]he sloping area of unconsolidated material typically sand, that extends landward from the mean high water mark to the area where there is a marked change in material or natural physiographic form or when there is no such marked change in the material or natural physiographic form, the beach shall be deemed to extend to a distance of twenty metres landward from the mean high water mark

or such lesser area as may be determined by the Minister in consultation with the Conservation Commission and in all cases shall include the primary sand dune".

44. (There is a similar definition in St Kitts, at s.2. of the Development Control and Planning Act: *""beach" means that area of the coastal zone from the seaward limit of the foreshore running inland to the vegetation line or other natural barrier whichever is closer to the landward limit of the foreshore, and a beach may consist of sand, stones, gravel, shingle, coral fragments or boulders."*)

45. The second aspect to consider is in two parts: first, to consider what rights the public have to use the foreshore (or beach, recognising that the two concepts are distinct). We consider below what rights the public might have to access the beach:

    45.1. The public have a common law right to use the foreshore for navigation, launching and landing boats.
    45.2. Without interfering with the exercise of those rights, the public also have a common law right to use the foreshore for fishing, which includes digging for bait and taking shellfish when the tide is out. In England there is an exception to the public right of fishing on the foreshore, where an exclusive fishery in that land was granted to a private individual before Magna Carta.
    45.3. There is no (English) common law public right to use the foreshore for anything else, including bathing, swimming or other recreation, nor for vending.
    45.4. There is a discussion by Lord Carnwarth in the Newhaven Beach case (*R (Newhaven Port and Properties Ltd) v East Sussex County Council & Anor [2015] UKSC 7*) as to why that is the case. The reason is that the extent of public rights depends upon historical custom and usage. Recreational sea swimming does not have a strong history in England; and the Victorian authorities which considered the right depended on bathing machines to preserve modesty – which may well have interfered with fishing etc.

46. However, in Nevis, s.24(1) of the National Conservation and Environment Protection Act 1987 provides that *"the public shall have the right of access and the right to use or enjoy the beach for recreational activities and purposes"*. The rights of access are returned to below.

47. It is to be noted that private landowners can also acquire additional private prescriptive rights over the foreshore, for the benefit of their land, in the same way as they can acquire prescriptive rights over other land. As we have discussed above, easements of recreation are now recognised.

48. To get to the foreshore (other than via boat), the public will often have to pass over private land to get between access roads and the beach itself. At common law, long user by the public of a right of way (whether to the beach or anywhere else) would give rise to a public right of way (analogous to the way in which private prescriptive rights apply).

49. There is however (as in much of the Commonwealth Caribbean) a statutory overlay in St Kitts & Nevis:

49.1. S.24(2) of Nevis National Conservation and Environment Protection Act 1987 provides that:

"There shall be at least one public access to every beach in Saint Christopher and Nevis and, where the only existing access is a private road, the owner of that road shall give an unimpeded beach right of way to the public at all times without charge."

49.2. S.12 of the Saint Chritopher and Nevis (Special Resort Development Act) also provides that:

"A development agreement entered into in accordance with the provisions of this Act shall preserve public access to the beaches located in a Resort District as specified in the development agreement".

49.3. In St Kitts, s. 67 of the Development Control and Planning Act provides:

"(1) There shall be at least one public landward access to every beach in Saint Christopher.

(2) Where there is no alternative public access, traditional public use of a private landward access through an existing private development shall be sufficient grounds for establishing a public way over that access for the purposes of access to the beach by the public.

(3) Where the only landward access to a beach is through an existing private development where traditional public use pursuant to subsection (2) has not been established, the Crown may acquire the right to public use of that beach access by gift, agreement, compulsory acquisition, or in exchange for other property, interest, financial, exemption, or by such other means as the Minister may recommend.

(4) Where a proposed development is likely to adversely affect the public's ability to access a beach from the landward side, any development permission shall require as a condition, a landward public access to the beach through the development at all times free of charge.

(5) In this section "traditional public use" means peaceable, open and uninterrupted enjoyment for a period of twenty years or more or such shorter period as the Minister by Notice published in the Gazette may prescribe."

Extinction of easements

50. Once created, an easement (whether created by express grant, prescription, or statute) does not necessarily exist in perpetuity. Instead, there are various modes via which an easement can be extinguished. To list just a few:

50.1. An easement will cease to exist if the dominant and servient tenement have, at any time since its creation, come into common ownership; the rights of the

dominant tenement over the servient tenement are deemed to have been merged in the right of the unified owner to do as they please with their property.

50.2. An easement may cease to exist by operation of law if it was granted for a term of years which expires, or if the purpose for which it was granted ceases.

50.3. An easement may also bd extinguished by operation of law if there is no practical possibility of it benefiting the dominant tenement in the manner contemplated by the grant: *Huckvale v Aegean Hotels* (1989) 58 P. & C.R. 163 at 173.

50.4. An easement may be extinguished by way of implied release if the conduct of the person entitled to it has demonstrated a fixed intention not to assert the right or transmit it to any other party. This is ultimately a question of fact however, in the case of non-continuous easements, such as a right of way, mere non-user, however longstanding, is unlikely to be sufficient to imply that the right has been abandoned: see e.g. *Benn v Hardinge* (1993) 66 P. & C.R. 246 in which a failure to use a right of way for 175 years was held not to have amounted to an abandonment.

Remedies

51. We think of property rights as different from contractual rights or rights arising from tortious or equitable duties. If I enter into a contract to purchase a new car and the dealer fails to deliver I will be entitled to damages representing the difference between the price under the contract and the higher price if any that I would need to pay to buy a similar car from another dealer. But if I agree to buy some land from an owner and the owner defaults I will be entitled to an order requiring the owner to convey the land to me. Property rights are thus treated differently from contractual rights.

52. So too if my builder agrees to carry out some work on my house for me by the end of September but takes a more profitable job in the meantime and does not carry out the work until October my claim in breach of contract is only for the loss, if any, which I have suffered because of his delay. I have no claim for the extra profit which he made by taking on the more profitable job. However if Harriet takes my car for the weekend without my permission and returns it full of petrol and without a scratch on it I have suffered no loss but I have a claim for the money which she has saved in not having to hire a car. The reason I am entitled to that profit based claim is that she has interfered with my property rights by taking my car without permission.

53. Instinctively therefore we think of an interference with a property right as giving rise to an entitlement to injunctive relief or profit based damages. If a property developer builds so as to trespass on to its neighbour's property or builds in a way which interferes with its neighbour's right of way it seems that as a matter of course the court will order the developer to alter the development so as not to trespass on to the neighbour's land nor to interfere with its rights. If the neighbour seeks damages instead one would expect the court to make an award of damages that

required the developer to pay the neighbour at least a share of the extra profit which it made by interfering with its neighbour's rights in this way.

54. But both the readiness of the court to award injunctive relief and to award profit based damages are put in doubt by two important decisions of the Supreme Court in the United Kingdom.

55. *Lawrence v Fen Tigers* [2014] UKSC 13 concerned a complaint for noise nuisance caused by a racing track. The neighbouring owners succeeded in their claim that this activity caused a nuisance and the question arose whether they should be awarded injunctive relief or should be confined to an award of damages. The case did not directly concern property development but Lord Neuberger gave detailed consideration of the circumstances in which an injunction should be awarded against a developer who interfered with the rights of a neighbour. His judgment seems clearly aimed, as between neighbour and developer, in moving the dial in favour of the developer. However, in England at least, the effect of the judgment has been largely to exchange certainty for uncertainty. Neighbouring owners and developers are now uncertain as to when an injunction will be granted and when it will be refused.

56. Prior to *Lawrence v Fen Tigers* the question of when an injunction would be granted, at least in the case of interference with an easement, was said to depend on the rule in *Shelfer's* case (*Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287) in which in influential dicta Al Smith LJ said:

> *"In my opinion, it may be stated as a good working rule that – (1) if the injury to the plaintiff's legal rights is small, (2) And is one which is capable of being estimated in money, (3) And is one which can be adequately compensated by a small money payment, (4) And the case is one in which it would be oppressive to the defendant to grant an injunction:- then damages in substitution for an injunction may be given."*

57. The meaning and application of the rule in *Shelfer's* case are not free from difficulty. But it was taken to mean that an injunction would be awarded as of course unless the interference with the neighbour's rights were exceptionally small or if it would be unjust to grant an injunction for example because the neighbour had delayed a long time before complaining and in the meantime the developer had completed and let or sold the development.

58. Lord Neuberger attempted a major reset of the circumstances in which an injunction should be awarded. Whilst the position would remain that in the absence of any argument to the contrary an injunction would be awarded the court should, he said, consider all the evidence and argument on both sides without any inclination either way to grant or refuse an injunction. Relevant matters included on the one side the existence of planning permission, any public benefit from the development and the

waste of money and resources if it was required to be pulled down, and on the other side whether the developer was attempting to steal a march on the neighbour by rushing on with a development which it knew interfered with the neighbour's rights.

59. A key aspect of whether an injunction should be awarded is thus the conduct of the developer. A developer is in a better position if it genuinely thinks it is not interfering with its neighbour's rights or, at least, if it has been advised by its lawyers, that there is a good argument that it is not doing so. And it is important that the developer is seen to be acting in an open way and engaging with its neighbour as a reasonable and responsible developer would do.

60. Where that leaves the neighbour and the developer is not easy to predict. But it seems to be having an effect on the way in which developers and neighbours settle their disputes. In the last two years there have been two significant cases in which developers undertaking major developments in central London infringed (or at least arguably infringed) the rights of light of their neighbours. The neighbours brought proceedings. Top London solicitors firms and top KCs were instructed on both sides. It is interesting to note that in both cases they settled at the door of the court presumably for a money payment and that the developments are proceeding. It is doubtful that they would have settled on these terms but for *Lawrence v Fen Tigers*.

61. Apart from trying to remove or limit the uncertainty left by Lord Neuberger's dicta, the other unfinished business of the courts is to consider whether or not the same flexibility over remedy applies to an order for possession as it does for an order for injunctive relief. If a developer builds so as to interfere with its neighbour's right of way the court may award injunctive relief to require it to demolish the development. But if the developer trespasses on to its neighbour's land the court may simply make an order in favour of the neighbour for possession of the land in question. This is a distinction of form not substance and it makes obvious sense for the same principles to be applied to whether or not the court will grant such an order. But whilst the courts are well used to treating the remedy of an injunction as discretionary so that they may refuse to grant it where appropriate the remedy of an order of possession is not traditionally regarded a discretionary in the same way. It remains to be seen therefore how long it will be before the court acknowledges that the underlying principles are the same and that a neighbour cannot sidestep the power of the court to refuse specific relief by seeking an order for possession rather than an injunction.

62. If an injunction (or order for possession) is refused it is well established that the neighbour is entitled to damages in lieu thereof. There are many decisions establishing that in a property case those damages reflect the value of the property rights which the developer has in effect compulsorily expropriated by interfering with those rights in circumstances where the court refuses specific relief. Such damages are usually measured not by reference to the loss to the neighbour (which may be low or even nominal) but rather on the basis of the extra profit (or a rather a share of the extra profit) which the developer is expected to make through

interfering with those rights. To take an example: if a developer is able to build over 80% instead of 60% of the site if it obstructs the neighbour's right of way, damages are assessed on the basis of the sum which a reasonable neighbour would agree to accept from a reasonable developer in a negotiation for the release of the right of way. Typically that might amount to one third of difference between the profit that the developer would expect to make from a development which covered 60% of the site and one which covered 80% of the site.

63. It used to be assumed that the neighbour was entitled as of right or almost as of right to damages awarded on this basis, so-called "negotiating damages". But another Supreme Court case, *One Step (Support) v Morris-Garner* casts doubt on that. As with *Lawrence v Fen Tigers* the dispute was not one between a neighbour and a property developer but the principles which it established were intended to set out the circumstances generally in which negotiating damages were to be awarded and those in which they were to be refused.

64. Lord Reed gave the leading judgment. He said that there were three different categories of case. First cases "*of the invasion of rights to tangible moveable or immoveable property*" where negotiating damages are readily awarded. Secondly cases where damages are awarded in substitution for an injunction where one possible method of quantifying damages is as negotiating damages but, he added, that this is not the only approach and it is "*for the court to judge what method of quantification, in the circumstances of the case before it, will give a fair equivalent for what is lost by the refusal of an injunction*". Thirdly there are cases of breach of contract where negotiating damages are not normally awarded.

65. Cases of trespass to land fall within the first category of case and accordingly if a developer builds over his neighbour's boundary it can expect to pay damages assessed on this basis. But interferences with easements such as rights of way fall within the second category in which the court has a broad discretion. Little guidance is given on how that discretion is to be exercised. But it appears from other parts of Lord Reed's judgment that the question to be asked is whether or not the right in question is a be treated as "*an asset*" so that interference with the right is in effect the loss of that asset such that negotiating damages are appropriate. If that is the test then there may be a distinction between a right of way whose purpose is simply to enable the neighbour to better enjoy its property and, for example, a right to extract minerals, which is a right of potential monetary value which may be traded. Again, we will need to see how the courts clarify the exercise of this discretion in future cases. In England this is being played out in claims against developers for interference with rights of light. Are rights of light to be regarded as valuable assets capable of being traded away so that interference with them gives rise to a right to negotiating damages or do they exist simply in order to protect the amenity of the property in question so that damages ought to be limited to compensation for loss of amenity and diminution in value consequent on the reduction in light?

Powers and improper purposes

John McGhee KC, Tom Roscoe, Harriet Holmes and Daniel Petrides

Introduction

1. Over the centuries, the courts have developed an extensive arsenal for controlling the exercise of powers (both fiduciary and non-fiduciary) by their donees. This paper seeks:

    1.1. To recap the key principles of the law of powers and explain how different powers can be categorised (and why that categorisation matters).

    1.2. To look at detail at one of the most far-reaching – and most controversial – weapons in the Court's arsenal: the improper purpose rule.

    1.3. To try to explain the relevance (or potential relevance and application) of: (i) the improper purpose rule; and (ii) the rationality requirement in trustee decision making outside of the usual trusts sphere, in a commercial or insolvency context.

The Taxonomy of Powers

2. A power is a legal authority conferred on a person to dispose of property which is not their own.[1] There are various ways in which powers can be classified, and some attempt to categorise powers into different groups is needed in order to understand the limits placed on their exercise.

3. One method of classifying powers is to focus on the function of the power. Viewing powers through this lens, they can be divided into dispositive powers and administrative powers. In outline:

    3.1. Dispositive powers "*enable the donee [...] to change the beneficial entitlements under the trusts and powers*", e.g. powers of appointment or maintenance.

    3.2. Administrative (or managerial) powers "*enable the donee to safeguard and enhance the trust property*", e.g. powers to enter into contracts or invest.[2]

[1] *Freme v Clement* (1881) 18 Ch.D. 499, at 504

[2] Lewin on Trusts (20th Ed.), at [28-009]

4. Another method of classifying powers is to focus on the relevant duties and restrictions on their exercise.[3] The following three-fold classification applies:[4]

   4.1. Beneficial powers: these are powers which may be exercised in any way for the benefit or purposes of the holder of the power without any restrictions. An example of such is a general power of appointment with the person holding the power being included as an object of the power.

   4.2. Limited powers (sometimes, when not fiduciary, referred to as limited *personal* powers): these are powers that are subject to the restrictions that they must be exercised in good faith for the purposes for which they are given. As such, they are subject to the doctrine of fraud on a power, i.e. the power cannot be exercised for a purpose foreign to that of the original purpose(s) for the creation of the power.

   4.3. Fiduciary powers: these are a sub-class within limited powers such that they must still be exercised in good faith and for the purposes they are given. A donee of a fiduciary power, however, further owes a duty to the objects of the power to consider from time to time whether and how to exercise it.

5. Although the distinction between these three types of power is well established, the terminology to describe them is not. *'Beneficial'* is not in particularly widespread use,[5] '*limited'* is used, but often within the context of powers of appointment only, where it is also used interchangeably with '*special'* (as opposed to '*general*' powers).[6] '*Fiduciary in the full sense'* is sometimes used instead of *'fiduciary powers'*, as '*fiduciary'* is sometimes used to indicate simply that the power is subject to the doctrine of fraud on a power.

6. A further division exists within the class of fiduciary powers: (i) mere powers; and (ii) trust powers. In the former, the donee is under no obligation to exercise the power whereas in the latter, the donee is under a duty to exercise the power in due time.

How to classify powers in practice?

7. Whilst there are trust instruments which specify expressly whether the powers they contain are to be regarded as beneficial, limited or fiduciary, they are far from

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[3] Lewin on Trusts (20th Ed.), at [28-015]ff

[4] Adopted in *Re HHH Employee Trust* [2012] JRC 127B, at [21]

[5] But is used in Lewin and is adopted here for convenience

[6] As in Thomas on Powers (2nd Ed.), at [1.16]ff

common.[7] Instead, classifying the power will be a matter of construction of the particular instrument creating it. But there are certain general rules that have been adopted by the courts which assist when it comes to classifying a power, for example:

8. The general rule is that every power conferred on trustees in virtue of their office as trustee is a fiduciary power.[8] There may be cases where, upon the true construction of the trust instrument, the power is given to the trustees as designated individuals (and not in virtue of their office), however, this is unusual, and it must be expressed in clear and apt language.[9]

9. A power to appoint a new or additional trustee is generally acknowledged to be a fiduciary power, but one which need not be conferred on trustees or the holders of any office.[10]

10. Similarly, a power to appoint a protector is itself a fiduciary power.[11] A 'protector' is not a term of art, but is typically the holder of a group of powers or requirements of consent, and so, if the protector holds an office under the trust, it will usually be impossible to construe the power(s) as beneficial, as the protector will be there for the protection of the beneficiaries and so his/her powers will be fiduciary.[12]

11. Where a power of veto is conferred on a beneficiary, it is more likely to be intended to be a beneficial power than where it is conferred on a trustee. For example, where the consent of the adult beneficiaries was required for both major and minor decisions of the trustees, it has been held that they were given the veto for their own protection and were therefore not in a fiduciary position. [13]

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[7] E.g. *Centre Trustees Ltd v Pabst* [2009] JRC 109; 12 ITELR 720

[8] *Whishaw v Stephens (the Gulbenkian case*) [1970] AC 508 at [518]; *McPhail v Doulton* [1971] AC 424 at [449], [456]–[457]; *Re Hay's Settlement Trusts* [1982] 1WLR 202

[9] *Re Smith* [1904] 1 Ch 139 at [144]

[10] *Re Skeats' Settlement* (1889) 42 Ch D 522 at [527]; *Bridge Trustees Ltd* [2008] EWHC 2054 (Ch)

[11] E.g. *Re Bird Charitable Trust* [2008] WTLR 1505

[12] *Lord Vestey's Executors v IRC* [1949] 1 All ER 1108 (where the protectors were termed '*authorised persons*')

[13] *Rawson Trust Co. Ltd v Perlman* (1996) 1 BOCM 31, Bah SC; *Blenkinsop v Herbert* [2017] WASCA 87; 51 WAR 264.

Why do the distinctions matter?

12. Administrative vs dispositive powers: while a trustee's exercise of dispositive power can be reviewed on the basis that s/he has failed to take into account relevant factors that s/he ought to have, there is some uncertainty as to whether or not the same limit applies to the exercise of an administrative power:

    12.1. In *Donaldson v Smith*,[14] DHCJ Donaldson QC made the obiter remark that the Hasting-Bass (i.e. adequate deliberation) principles do not apply to the exercise of the power of a trustee to conclude a contract with a third party:

    > "*[T]he Hasting-Bass principles are concerned with the exercise of a discretionary power under a trust instrument, typically a power of appointment or advancement, and with the conditions impliedly imposed by the instrument as to the matters to which the trustee must or may have regard in exercising the discretion. A contract is different: the power of the trustee to conclude a contract with a third party derives from the general law*".

    12.2. This obiter remark, however, runs contrary to the view taken by both the Jersey and Cayman Courts. In *Re Howe Family Trust*,[15] which concerned the trustees' exercise of power of investment and to advance a loan under the trust instrument, the Royal Court of Jersey had no difficulty applying the principles in *Hastings-Bass* in reviewing the exercise of the power of investment. Similarly, the Grand Court of the Cayman Islands applied the 'relevant factors' test to a power of investment in *Barclays Private Bank & Trust (Cayman) Ltd v Chamberlain*.[16]

    12.3. Given the broad enunciation of the *Hastings-Bass* rule in *Pitt v Holt*,[17] and the fact that the rule has now been applied to the exercise of unilateral contractual powers in *Braganza* (discussed below), it is difficult to see why the distinction drawn in *Donaldson* should be maintained.

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[14] [2006] EWHC B9 (Ch); [2007] WTLR 421, at [54]

[15] [2007] JRC 248

[16] (2005) 9 ITELR 302

[17] [2013] UKSC 26

13. As to fiduciary powers, mere powers and trust powers, their differences were considered in *in re Hay's ST*[18]:

    13.1. Unlike a donee of a trust power, a donee of a mere power is not bound to exercise it, and the court will not compel him to do so. On the other hand, if a donee of a trust power fails to exercise the power in due time (the timeframe of the exercise of the power is a matter of construction of the trust instrument), he will either be permitted to do so late or the court will supervise the exercise of that power.[19]

    13.2. However, a donee of a mere power is a trustee who is still subject to fiduciary duties or in other words, a mere power is still a fiduciary power. Thus, he cannot "*simply fold his hands and ignore it, for normally he must from time to time consider whether or not to exercise the power, and the court may direct him to do this*". It is incumbent on the trustee to "*make a survey of the range of objects or possible beneficiaries […]*"[20] so as to consider if a particular advancement was appropriate.

    13.3. As to limited powers which are not fiduciary powers, the donee is under no obligation to consider exercising it. However, if the donee does decide to exercise it, he must do so for a proper purpose.[21]

14. Finally, as to the distinction between beneficial and limited powers, one of the key distinctions (aside from the fact that the donee can be the object of a beneficial power) relates to the applicability of the doctrine of fraud on a power (or, in modern parlance, the improper purpose rule):

    14.1. In *Kain v Hutton*,[22] the Supreme Court of New Zealand considered a general power of appointment which entitled the donee to appoint in favour of anyone, including himself under the trust instrument. The highest court of New Zealand concluded that "*[t]here cannot, therefore, be excessive execution of, or a fraud on, such a power because it is logically impossible for the donee/appointor to exceed the donor's mandate*".

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[18] [1982] 1 WLR 202, 209ff

[19] Lewin on Trusts (20th Ed.), at [28-023]

[20] *In re Baden (No. 1)* [1971] AC 424 per Lord Wilberforce

[21] Lewin on Trusts (20th Ed.), at [30-066]

[22] [2008] NZSC 61, at [47]

14.2. In *Clayton v Clayton*,[23] the New Zealand Court of Appeal adopted the same approach and arguably took the exercise of beneficial power even further away from the reach of the court's supervisory function. The court reasoned that since both the 'good faith' test and 'proper purpose' test fall under the same doctrine of 'fraud on power' umbrella, neither test would apply to a beneficial power. Again, the New Zealand Court of Appeal ruled that it would be *"logically impossible for Mr Clayton to exceed his own mandate"*.[24]

14.3. It is apparent from the reasoning in the two New Zealand authorities that the courts of that jurisdiction were (at least in these cases) not distinguishing the doctrine of fraud on a power as distinct from the question of the scope of the power and trustee's mandate under the trust instrument.

14.4. That approach is, at best, questionable. As Lord Sumption has stated in *Eclairs Group Ltd v JKX Oil & Gas plc*,[25] the *"proper purpose rule is a principle by which equity controls the exercise of a fiduciary's powers in respects which are not, or not necessarily, determined by the instrument"*. The doctrine of fraud on a power (or improper purpose) is thus separate from the question of the scope of power.

14.5. That said, in the case of beneficial powers, the question of control of the exercise of a *fiduciary's* powers does not arise (because the donee of the power is not a fiduciary).

15. While it will undoubtedly be more difficult to set aside the exercise of a beneficial power, it may still be arguable that restraints as to rationality and capriciousness should still apply to beneficial powers. This is so especially since the court has not recoiled from policing the exercise of contractual powers on the basis of rationality and capriciousness, even if the contractual power/discretion is phrased in seemingly absolute terms.[26]

Challenges to the exercise of a power

16. A trustee's exercise of a power can generally be reviewed on broadly the following two grounds:[27] (i) a failure to act honestly or in good faith – this ground commonly

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[23] [2015] NZCA 30, at [89]-[92]

[24] *Ibid*, at [91]; the decision was reversed in part on appeal [2016] NZSC 29 but not on this point.

[25] [2015] UKSC 71, at [15] and [30]

[26] *Paragon Finance plc v Nash* [2001] EWCA Civ 1466, at [31]

[27] *Re Londonderry's Settlements* [1965] 1 Ch 918, CA

also encompasses the rationality test;[28] or (ii) acting for an improper purpose (also known as the doctrine of fraud on a power).[29]

17. Limited non-fiduciary powers may also be challenged on improper purpose grounds.

18. We deal, first, with improper purpose – and return to questions of rationality and good faith next.

The improper purpose test

19. The rule will be familiar to all trusts practitioners, and can be stated with deceptive simplicity: a power "*may be exercised only for a purpose for which the power has been conferred*".[30] The *locus classicus* is perhaps those cases in which an *intra vires* exercise of the power is made with the intention of benefiting a non-object of the power pursuant to some collateral agreement between the object and the non-object. However, as it has extended into different legal contexts and encountered the full spectrum of human behaviour in both family and commercial life, the precise rationale for, and application of, the doctrine has become an increasingly vexed question for lawyers and judges alike.

20. The decision of the Privy Council in *Grand View Private Trust Co Ltd v Wong* [2022] UKPC 47 is the most recent consideration of the doctrine at commonwealth appellate level. It provides a useful – and, for the time being, definitive – guide to some aspects of the rules application. (Although only strictly binding authority in Bermuda, the speech of Lord Richards purports to be of general application, and is expected to be treated as extremely persuasive authority in all other jurisdictions). However, it leaves some questions unanswered, and has not escaped criticism.

21. It is perhaps easiest to begin by setting out what the improper purpose rule is not.

22. First, despite the historical nomenclature of 'fraud on the power', it is not a necessary perquisite to the doctrine's operation that the donee's motivation in exercising the power was dishonest or otherwise morally nefarious (although it may well have been). Indeed, there are many cases where it appears that the donee genuinely believed the impugned course of action to be in the best interests of the

[28] Lewin on Trusts (20th Ed.), at [29-034]ff

[29] *Eclairs*, at [15]

[30] *Grand View Private Trust Co Ltd v Wong* [2022] UKPC 47 at [1]; cf. numerous other statements to similar effect in *Vatcher v Paull* [1915] AC 372 at 378; *In re Courage Group's Pension Scheme* [1987] 1 WLR 495 at 505; *Pitt v Holt* [2013] UKSC 26.

objects of the trust or the company towards whom they stood as a fiduciary.[31] In *Wong* itself, the Privy Council noted that there is "*much to be said*" for discarding the old language of 'fraud on the power' so as to avoid confusion as to the ingredients of the rule.[32]

23. Secondly, equity's intervention is not explicable on the basis of inadequate deliberation. While an improper purpose will almost invariably be an irrelevant factor for a donee to take into account, this flaw in the deliberations is not the reason for law's response. Instead, it is the mere fact that the purpose of the power has been exceeded which renders its exercise invalid; the decision-making process via which that outcome was achieved forms no substantive part of the court's enquiry. Indeed, the difference between the two doctrines becomes clear at the remedial level: whereas the practical consequence of inadequate deliberation is that the exercise of the power is merely voidable, if a power has been exercised for an improper purpose it will be void *ab initio.*[33]

24. Finally, despite some contrary *dicta*,[34] an exercise of a power for an improper purpose is not a species of excessive execution. This was the view of the Supreme Court in *Pitt v Holt* [2013] UKSC 26, where Lord Walker suggested that the rule "*may need a separate pigeon-hole somewhere between the categories of excessive execution and inadequate deliberation*"[35], and in *Eclairs Group Ltd v JKX Oil & Gas Plc* [2015] UKSC 71 where Lord Sumption emphasised the distinction between the rule and the construction of the instrument in the following terms:

> "15. ...*[T]he proper purpose rule is not concerned with excess of power by doing an act which is beyond the scope of the instrument creating it as a matter of construction or implication. It is concerned with abuse of power, by doing acts which are within its scope but done for an improper reason.*
>
> ...
>
> 30. *The rule is not a term of the contract and does not necessarily depend on any limitation on the scope of the power as a matter of construction. The proper purpose*

[31] See for example *Eclairs Group Ltd v JKX Oil & Gas Plc* [2015] UKSC 71 where a power in a company's articles of association to exclude shareholders from a meeting was exercised to prevent a hostile takeover of a company.

[32] At [56].

[33] *Re Marsden's Trust* (1859) 4 Drew 594.

[34] E.g. *Duke of Portland v Topham* (1869-70) LR 5 Ch App 40 at 55; *Wong v Burt* [2004] NZCA 174 at [27]; cf. also Lord Sales writing extra-judicially in 'Fraud on a power: the interface between contract and equity' (2019). However, interestingly Lord Sales was part of the Board in *Wong* which appeared to favour the view that the doctrine is distinct from the exercise of construction.

[35] [62].

rule is a principle by which equity controls the exercise of a fiduciary's powers in respects which are not, or not necessarily, determined by the instrument".

25. Instead, the improper purpose rule should be understood as occupying a place at the limits of construction. If the rule is therefore best understood as giving voice to a factual matrix not immediately apparent on the face of the instrument, how widely can the net be cast to find the 'purpose' of a particular power? This was one of the central issues before the Privy Council in *Grand View v Wong*.

Grand View v Wong

26. *Grand View v Wong* concerned a Bermudan irrevocable discretionary trust, called the Global Resource Trust No. 1 ("the GRT"), which had been established in 2001 by two Taiwanese businessmen, known as the Wang brothers, to benefit their children and remoter issue. The trustee of the GRT was a specially-incorporated company called the Global Resource Private Trust Co Ltd ("GRPT").

27. On precisely the same day that the GRT was established, the brothers had established a further non-charitable purpose trust, the Wang Family Trust ("the WFT"), whose trustee was the Grand View Private Trust Company ("Grand View").

28. The trust instrument of the GRT gave the trustee widely drawn powers of appointment in favour of the objects of the trust. In 2005, GRPT purported to exercise this power to change the objects of the GRT by excluding the named beneficiaries and transferring the assets of the GRT to Grand View, to hold on trust for the WFT. The GRT was then wound up.

29. The excluded beneficiaries brought a challenge against the decision. This succeeded at first instance on the basis of the *substratum* rule. The Bermuda Court of Appeal reversed that decision – in a detailed judgment Sir Christopher Clarke P held that Clause 8 was so widely drawn as to have (effectively) no limiting purpose.

30. The beneficiaries then brought a further appeal to the Privy Council.

31. Lord Richards, giving the sole speech on behalf of the whole Board, began by providing a helpful checklist for the application of the improper proper rule:

    31.1. The proper purpose rule only arises for consideration once the scope of the power has been determined, applying the ordinary principles of construction, and once it has been determined that the impugned exercise of the power was within that scope.[36]

[36] [54] – [55]; [57].

31.2. The proper purpose of the power falls to be determined as at the date of the instrument conferring the power, and is to be determined objectively.[37]

31.3. The matters to be taken into account in determined the purpose of the power at the relevant date include not only the text of the instrument conferring the power, but also extraneous documents which "*objectively inform the context of the instrument in question*", including "substantially contemporaneous documents which are intended to be read with the trust deed, such as a letter of wishes…".[38]

32. Applying those principles to the facts of the case, the Privy Council allowed the appeal.

32.1. First, it was held that the transfer to Grand View had been *intra vires*.[39] Accordingly, the question of whether the transfer had nonetheless been for an improper purpose arose.

32.2. It was accepted by the parties (which arose on a summary judgment application) that, for the purposes of the appeal, the court should proceed on the basis that the purpose of GRT trustees in making the transfer to Grand View had been to exclude the children and remoter issue of the settlors and substitute a purpose trust.[40]

32.3. Taking into account all of the relevant materials, the objectively ascertainable purpose of the settlors establishing the GRT had been to create a family trust for the benefit of their direct descendants. Although Clause 8 itself was very broadly drafted, the other terms of the trust, the terms of the WFT (which had been incorporated on the same date as part of a suite of settlements), and contemporaneous statements of the founders' wishes said to have been made to a witness (Mrs Wang) who provided a statement to the court, all supported this understanding of the GRT's purpose.[41] That being so, it would be contrary to this purpose for Clause 8 to be used to deprive all the children and future descendants of the settlors of any benefit under the trust, and to substitute a trust which was incapable of benefiting them.

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[37] [61].

[38] [62] - [63].

[39] [66] – [71].

[40] [72] – [73].

[41] [76] – [87].

External evidence of the purpose

33. *Wong* was not the first case in which extraneous evidence was held to be admissible for the purpose of ascertaining the purpose of the trust. However, the use of hearsay evidence of the Founders' wishes does appear to be a somewhat novel extension which suggests that the net may be cast wider than previously thought.

34. Letters of wishes were considered by Briggs J (as he then was) in *Breakspear v Ackland* [2008] EWHC 220 (Ch), where he defined them as follows as [5]:

> "*The essential characteristic of a wish letter…is that it is a mechanism for the communication by a settlor to trustees of the settlement of non-binding requests by him to take stated matters into account when exercising their discretionary powers. Typically, wish letters are concerned with the exercise of dispositive discretions, but they may include wishes in relation to the exercise of powers of investment, or of other purely administrative powers. For present purposes I am concerned with a wish letter which is substantially contemporaneous with the settlement itself. The question whether later wish letters have the same status is beyond the scope of this judgment*."

35. It is now well-established that, despite their quintessentially non-binding nature, letters of wishes *ought* to be taken into account as part of trustees' deliberations when exercising fiduciary powers.[42] And given the contextual nature of the exercise which a court is being asked to undertake when applying the improper purpose rule, the implication in *Wong* that a contemporaneous letter of wishes could be taken into account when ascertaining the purpose of a power seems unobjectionable.

36. The position of later letters of wishes is more controversial.

37. As is clear from the passage of Briggs J's judgment quoted above, the relevance of letters of wishes post-dating the settlement of the trust was not one which arose in *Breakspear*. Nevertheless, the principle that a trustee may take account of wishes of the settlor express over time is now well-established by the caselaw.[43] Indeed, it has recently been suggested in New Zealand that later letters of wishes should be given preference over earlier ones to the extent that there is any inconsistency.[44]

38. Because the evidential material before the Board in *Wong* only consisted of contemporaneous documents/statements, which it was common ground could legitimately be considered in ascertaining the purpose of the trust/power, the

[42] See *Pitt v Holt* at [66].

[43] *Re Esteem Settlement* [2003] JLR 092 at [166];

[44] *Kain v Public Trust* [2021] NZCA 685.

question of whether subsequent materials could be used did not strictly arise for consideration.

39. In the Bermuda Court of Appeal, Sir Christopher Clarke P had suggested at [195] that the wishes of a settlor expressed *after* the creation of a trust could be of relevance:

> "*the natural assumption as to what the economic settlors contemplated as the purpose of the conferment of the power was that the GRT Trustee would, if it thought it right, exercise the power having regard to the economic settlors' known intentions and wishes when setting up the trust and from time to time thereafter…*"

40. But the Board, (albeit in *obiter*, and on the basis of a concession by the parties), cast doubt on this at [63]:

> "*It was common ground that, while trustees could legitimately have regard to wishes later expressed by the settlor, or in this case the Founders, as to how the trustees should exercise their dispositive powers, such wishes were not admissible in determining the purpose of those powers".*

41. At first blush, there is much to commend this view. After all, a settlor who has settled assets on trust should not be able to retrospectively re-write the terms of the trust through the back door, and the courts should be slow to permit a trust's purpose to become ambulatory in nature.

42. However, in *In re Courage Group's Pension Scheme* [1987] 1 WLR 495 Millet J (as he then was) appeared to suggest, in the context of a challenge to a power of amendment, that the purpose of certain types of instrument could change over time:

> "*…in the case of an institution of long duration and gradually changing membership like a club or a pension scheme, each alteration to the rules must be tested by reference to the situation at the time of the proposed alteration, and not by reference to the original rules at its inception. By changes made gradually over a long period, alterations may be made which would not be acceptable if introduced all at once. Even the main purpose may be changed by degrees*".[45]

43. There is, of course, a distinction between the alteration of purposes via a power of amendment conferred precisely for the purpose of allowing the trustees to respond to unforeseen changes over the lifetime of the trust, and mere expressions of wishes by a settlor at a later date. But if as a matter of principle (i) contemporaneous letters of wishes can be relevant to understanding the purpose of a trust, and (ii) both the content of letters of wishes and the purpose of the trust can be updated over time, it seems to be well arguable that subsequent letters of wishes should in principle

[45] At 536.

be capable of altering the purpose of a power/trust. This may be a question which needs to be revisited in an appropriate future case.

Ascertaining the improper purpose

44. One issue which did not arise for consideration in *Wong* (because there was no dispute as to the purpose for which the power had been exercised) was whether the purpose in question was in fact improper. However, in many cases this will be a central battleground.

45. It is now well-established that it is the subjective intention of the donee which matters. An innocent exercise of a power which has an unforeseen collateral consequence which would have amounted to an improper purpose if intended will not be captured by the rule.

46. In cases involving single decision makers this is a straightforward question of fact. In cases involving multiple decision makers, the exercise is less straightforward. There are two broad possibilities:

    46.1. Where the terms of the instrument require a unanimous joint decision to be reached, then it seems that impropriety in the purpose of any one of the joint holders will vitiate its exercise.[46]

    46.2. However, where a majority decision is permitted, and the improper purpose is held only by the minority, or by only some of those in the majority, the exercise of the power will only be bad if it can be shown that the decision would not have been reached without the concurrence with those whose purposes were impure.[47]

47. A further question which remains unresolved is the correct approach in cases involving multiple purposes. While it has never been the law that the improper purpose must be the sole purpose (because it is very rare for a person's acts to be straightforwardly motivated by a single purpose), the law's traditional approach has been to vitiate an exercise of a power where the 'predominant' purpose was improper. So, in *Howard Smith Ltd* Lord Wilberforce referred to the need for the improper purpose to be "*the substantial or primary purpose*".[48]

48. However, in *Eclairs* Lord Sumption (with whom Lord Hodge agreed) posited an alternative 'but for' approach to causation. Such an approach is already firmly

[46] *Lawrie v Bankes* (1857) 4 K & J 142.

[47] *Roadchef (Employee Benefit Trustees) Ltd v Hill* [2014] EWHC 109 (Ch) at [129].

[48] At 823. Although, cf. Lord Sumption's valiant effort to explain this as really an application of a 'but for' test in *Eclairs* at [24].

entrenched in the Australian jurisprudence.[49] Lord Sumption expressed what he saw as the logic of this approach as follows:

> "*[The directors'] duty is broken if they allow themselves to be influenced by any improper purpose. If equity nevertheless allows the decision to stand in some cases, it is not because it condones a minor improper purpose where it would condemn a major one. It is because the law distinguishes between some breaches of duty and others. The only rational basis for such a distinction is that some improprieties may not have resulted in any injustice to the interests which equity seeks to protect. Here, we are necessarily in the realms of causation.*
>
> ....
>
> *If the answer is that without the improper purpose(s) the decision impugned would never have been made, then it would be irrational to allow it to stand simply because the directors had other, proper considerations in mind as well, to which perhaps they attached greater importance…Correspondingly, if there were proper reasons for exercising the power and it would still have been exercised for those reasons even in the absence of improper ones, it is difficult to see why justice should require the decision to be set aside*".

49. However, Lord Mance (with whom Lord Neuberger agreed), whilst noting that he had originally agreed with Lord Sumption's judgment when it was circulated in draft to the parties, declined to express a firm conclusion on the matter because it had not been the subject of full argument and was not necessary to the decision in the case. Lord Clarke (with whom Lord Neuberger also agreed) stated that while he was "*inclined to agree*" with Lord Sumption, he saw the "*force*" in the reservations expressed by Lord Mance.

50. There is indeed some force to reasons given by Lord Sumption for adopting a 'but for' test. It would also align the general law to the approach adopted in cases involving majority decision-making (explained above).

51. But there are also practical uncertainties around the use of a 'but for' test in this context. In particular, it will require detailed enquiries to be carried out into the balancing of different factors in the subjective decision of the donee. But much the same could be said for a 'dominant purpose' test, which also requires the court to attribute weight to each the various purposes. Only a bright-line rule that the presence of *any* improper purpose invalidates the exercise of the power would circumvent the need for such an exercise, which seems like an undesirable extension of the rule (although is an approach adopted in other contexts, such as challenges to transactions intended to defraud creditors)

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[49] See e.g. *Whitehouse v Carlton Hotel Property Ltd* (1987) 162 CLR 285 at 294.

52. It is also unclear whether the rules on 'but for' causation in this context would be borrowed from the law of torts (with their dizzying hypotheticals and rules around remoteness), the restrictive approach adopted in public law, or mirror the more flexible approach which seems to prevail in cases of inadequate deliberation.[50] This is not, however, an insuperable problem.

Acting honestly and in good faith

53. As we have seen above, the requirement for a trustee to act honestly, in good faith and rationally is a separate consideration to improper purpose. It is instructive, first, to consider the similar principles which apply to the exercise of contractual powers – which will then be compared with the constraints on the exercise of a trustee's powers.

Rationality test in a contractual context

54. In *Paragon Finance Plc v Nash*,[51] the Court of Appeal considered a mortgagee's contractual power to fix the level of interest rates. Dyson LJ held that the mortgagee's power was subject to the implied limitation that it must not be done for a capricious reason, for instance where the lender decided to raise the rate of interest because its manager did not like the colour of the borrower's hair.

55. *Paragron Finance* put limits on capricious behaviour – being at one end of a spectrum of culpably irrational behaviour. In *Braganza*, however, the court went further in laying the groundwork for the introduction of the public law *Wednesbury* rationality framework to private law powers and decision-making processes. The decision concerned Mr Braganza's employment contract which included a specific lump-sum death in service benefit payable by his employer BP. The contractual term provided that the lump sum

> *"[S]hall not be payable if, in the opinion of the Company or its insurers, the death…resulted from amongst other things, the Officer's wilful act, default or misconduct whether at sea or ashore…."*

56. Mr Braganza disappeared at sea between 1am and 7am on 11 May 2009 while working for BP. BP formed the opinion, on the basis of one single report, that Mr Braganza had indeed committed suicide and refused to make a lump sum under the clause. Mr Braganza's widow challenged the conclusion and brought a claim under the contract for the payment of the death lump sum.

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[50] See *Pitt v Holt* at [92].

[51] [2001] EWCA Civ 1466, [31]

57. The Supreme Court unanimously decided that the court can imply a term into the contract that the decision-making process must be rational. There are two limbs to the test:

    57.1. Fist limb: *"whether the right matters have been taken into account in reaching the decision"*; this limb focuses on the decision-making process.

    57.2. Second limb: '*whether even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it*'; this limb focuses on the outcome of the decision-making process.[52]

58. Importantly, the Supreme Court also endorsed the helpful enunciation in *Hayes v Willoughby*[53] by Lord Sumption of the difference between a reasonableness and rationality review:

> *"Rationality is not the same as reasonableness. Reasonableness is an external objective standard applied to the outcome of a person's thoughts or intentions. A test of rationality, by comparison, applies a minimum objective standard to the relevant person's mental process. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and [...] an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse."*[54]

59. By a majority (three to two), the Supreme Court concluded that BP had acted irrationally in reaching its decision; it had further failed to consider all relevant factors in arriving at the decision in that BP had failed to take into account the real possibility that Mr Braganza had suffered an accident.

60. More recently, in *Pa Sam Nang v HSBC Ltd*,[55] the Hong Kong Court of First Instance noted that the decision in *Braganza* represented a willingness for a court, as a matter of necessary implication, imply a term that a decision-maker's discretion is limited by concepts of *"honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality"*.

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[52] *Braganza v BP Shipping Ltd* [2015] UKSC 17, at [23]-[30] (Lady Hale); at [103] (Lord Neuberger).

[53] [2013] UKSC 17, at [14]

[54] Accepted in *Braganza*, at [23] (Lady Hale); [102] (Lord Neuberger)

[55] [2016] HKCFI 409, at [45]

61. The decision in *Braganza* has also recently been applied by the English High Court in *CMC Spreadbet plc v Tchenguiz*,[56] to a company's decision to close-out a trading account of a professional customer under spread betting contract under the FCA's Conduct of Business Sourcebook Rules ("COBS"). The court and the parties accepted that the *Braganza* duty applied in the context[57] but ruled on the facts that there was no breach of the duty.

Comparison of *Braganza* with irrationality test in a trust context

62. The first limb of *Braganza* (concerning the decision-making process) is very similar to the test formulated by Lightman J and approved by Lord Walker in *Pitt v Holt* on the requirement of adequate deliberation by a trustee when exercising powers:

> *"What has to be established is that the trustee in making his decision has [...] failed to consider what he was under a duty to consider. If the trustee has in accordance with his duty identified the relevant considerations and used all proper care and diligence in obtaining the relevant information and advice relating to those considerations, the trustee can be in no breach of duty [...]*".

63. The only wrinkle in applying *Braganza* alongside *Pitt v Holt* is the requirement that the failure to take into account relevant considerations *"must be sufficiently serious as to amount to a breach of fiduciary duty"* in order for a beneficiary to challenge a trustee's decision.[58] "*Fiduciary duty*" in this case likely refers to a duty owed by a fiduciary, as opposed to the narrow sense of the duty peculiar to fiduciaries as envisaged by Lord Millett, i.e. the duty of loyalty.[59]

64. The second limb of the *Braganza* test (focussing on the outcome) echoes the test of rationality as established by a long line of trust authorities which stems from the classic formulation a 'good faith' test.[60]

    64.1. In *IBM*, the Court of Appeal applied the second limb in *Braganza* to an exercise of power of an employer under an occupational pension scheme:

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[56] [2022] EWHC 1640 (Comm).

[57] *Ibid*, at [138]-[139],

[58] *Pitt v Holt*, at [73]; similarly in *Gany Holdings (PTC) SA v Khan* [2018] UKPC 21, at [54]

[59] Lewin on Trusts (20th Ed.), at [30-045]; *Bristol and West Building Society v Mothew* [1998] Ch 1 at 16

[60] *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896; *TJH and Sons Consultancy Ltd v CPP Grou plc* [2017] EWCA Civ 46, at [16]

"[W]as the decision [...] so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it, or is it completely lacking in any logical connection between the relevant circumstances and the ostensible reasons for the decision?"[61]

64.2. Another issue that may arise under this limb is whether the fact that the power is couched in the contract as an absolute power would prevent the court from exercising the rationality review. Analogous difficulties arise in seeking to determine whether trust powers drafted in ostensibly wide terms are in fact beneficial, limited personal or fiduciary powers.

64.3. The answer in both scenarios is ultimately a question of construction, to be carried out applying usual principles of construction. We suggest that Courts will generally be reluctant to find that a discretion or power can be exercised capriciously or in bad faith unless there is clear language to support such a conclusion.

64.4. This principle is well established in the context of a contractual discretion.[62]

64.5. In *Dundee General Hospital*, the exercise of a trust power couched in seemingly absolute terms was held reviewable on the basis of irrationality.[63]

65. The two-stage *Braganza*-approach has also been applied by the New Zealand High Court to a commercial trustee's exercise of power in *Wellington City Council v Local Government Mutual Funds Trustee Ltd*.[64]

65.1. The case concerned a commercial trust to which local authorities contributed, called 'Riskpool'. Under the trust, the trustee had the discretion to use the funds to meet claims made by individuals on the local authority for damages for 'water ingress' in buildings. Wellington Council made a claim and the claim was rejected by the trustees. Wellington Council applied to challenge the decision. Wellington Council brought both a claim for breach of contract and fiduciary duties.

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[61] *IBM United Kingdom holdings Ltd v Dalgleish* [2017] EWCA Civ 1212

[62] See: *British Telecommunications plc vv Telefonica O2 UK Ltd* [2014] UKSC 42, at [37] (per Lord Sumption).

[63] See fn 28.

[64] [2017] NZHC 2901 (Collins J)

65.2. Collins J reasoned that the "*principles enunciated in [...] Braganza are consistent with the discharge of any fiduciary duties owed by the Board to the Council*"; in his view, the analysis under both the contractual and breach of fiduciary duties claim led to the same result and that no material differences could be identified between the two claims. Either way, the discretion must not be exercised "*arbitrarily, capriciously or irrationally*".[65]

65.3. Collins J further applied the first limb of the *Braganza*-test in considering whether or not the trustees have taken into account irrelevant considerations. While Collins J accepted that irrelevant considerations were taken into account – namely that the Council had left Riskpool and that the Council had received more benefits than it had contributed to Riskpool – he ultimately came to the conclusion that these considerations were minor considerations and did not influence the Board's decision in any meaningful way.[66]

65.4. Even though Collins J did not explicitly refer to the breach of fiduciary duty requirement in *Pitt v Holt*, the seriousness and severity of the trustee's consideration of irrelevant matters must be relevant. In *Wellington*, even though the trustees may have considered irrelevant matters, it was not sufficiently serious so as to amount to a breach of fiduciary duty; it follows that their decision cannot be challenged.

Outside of a trust context

66. As will be apparent from some of the cases already discussed, the improper purpose rule is not confined to the traditional trusts context. Indeed, public law has long had a functionally equivalent doctrine of the same name which controls the exercise of powers by public bodies: see for example *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 and *R v Somerset County Council, ex parte Fewings* [1995] 1 All ER 513 at 524. In this final section, a number of other private law applications are considered.

67. As seen in the discussion of *Braganza*, tests equivalent to the requirement that a trustee act rationally are commonplace in other private law contexts. We set out below some examples of both principles (or something quite close to them) in play.

[65] *Ibid*, at [168]-[170].

[66] *Ibid*, at [172] and [178].

Company law

68. Company law has been a fruitful home for the improper purpose rule. In addition to applying to all fiduciary powers as a matter of common law, it has also been put on a statutory footing in many jurisdictions.

69. This is to some extent inherent in the latitude necessarily given to directors of a company to manage its affairs. As Lord Sumption noted in *Eclairs* at [31], while "*the purpose of a power conferred by a company's articles is rarely expressed in the instrument itself*" but "*it is usually obvious from its context and effect why a power has been conferred*". As such, the rule provides an important mechanism for ensuring that the balance of roles struck by the company's constitution is protected.

70. Prior to *Eclairs* the majority of the cases had involved decisions to issue shares, often for the purpose of defeating hostile takeover bids. So, in one of the earliest cases, *Fraser v Whalley* (1864) 2 H & M 10, the directors of a statutory railway company, who expected to be removed from office at the next shareholders' meeting, were prevented by the doctrine from issuing shares to dilute the shareholdings of the existing shareholders so as to defeat the resolution for their removal. Similarly in *Howard Smith* the Privy Council held that it was improper to have issued new shares so as to favour a takeover by one prospective purchaser rather than another.

71. An interesting counterpoint to these decisions is provided by *CAS (Nominees) Ltd v Nottingham Forest Plc* [2002] BCC 145. The claimant held the entire issued share capital in Nottingham Forest FC. By 1999 the club was in dire need of investment, but under the statutory framework in force at the time it was not possible for the claimant to issue new shares without also issuing a rateable proportion to its existing shareholders. As such, the directors procured the issue of new shares by Nottingham Forest Plc itself to a new investor, who became the majority owner of the club. Upon a challenge to this decision by the pre-existing shareholders in the Claimant, it was held that although the *effect* had been to bring about the takeover against the wishes of the existing shareholders, the *purpose* of the directors had been the entirely proper one of raising capital (and to the extent that the dilution of the shares had been a necessary gateway to this it was not, therefore, improper). This emphasises both the subjectivity of the test and how fact-sensitive the assessment of impropriety can be.

72. Moving away from improper purposes; the test in *Pitt v Holt* was applied by the High Court in *Power Adhesives Ltd v Sweeney* on a director's exercise of power to issue shares.[67]

    72.1. Mr Sweeny, a director of the relevant company, was terminally ill. He had previously extended a loan to the company of £490,000 and the company was concerned that the loan would become immediately payable upon his death. On advice, it decided to issue 490,000 £1 shares in settlement of the loan. Following the death of Mr Sweeney, it transpired that the share issuance had the effect of causing an unintended transfer of value which triggered various adverse IHT and CGT consequences.

    72.2. The High Court applied the *Hastings-Bass* rule and held that since the directors had failed to take into account the adverse tax consequences, they had breached their duties.[68] Most notably, in applying *Hastings-Bass*, Chief Master Marsh made the observation that the principle is very similar to the *Wednesbury* principles although he did not refer to *Braganza* explicitly.[69]

73. A similar version of the test under the second-limb of the *Braganza* test can also be readily found in cases regarding what is known to be the *Allen* jurisdiction[70] which polices the shareholders' exercise of voting rights to amend a company's articles of association.

74. In *Arbuthnott v Bonnyman*,[71] Etherton C stated that while it is generally for the shareholders to decide whether an alteration of the articles is for the benefit of the company, the court may intervene if "*no reasonable person would consider it to be such*". A similar limitation will equally apply to members and creditors voting in a class meeting in a scheme of arrangement,[72] loan instrument,[73] and in the variation of class rights.[74]

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[67] [2017] EWHC 676 (Ch), at [11]-[17]

[68] *Ibid*, at [28]

[69] *Ibid*, at [11]

[70] Named after the decision in *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656

[71] [2015] EWCA Civ 536, [90]-[96]

[72] *Re Dee Valley Group plc* [2017[EWHC 184 (Ch)

[73] *Assenagon Asset Management SA v Irish Bank Resolution Corp Ltd* [2012] EWHC 2090 (Ch)

[74] S. 630 of CA 2006; Gower on Principles of Company Law (10th Ed.), at [19-12]

Insolvency law

75. Another context in which it has long been recognised that there are external constraints on those given quasi-fiduciary powers is insolvency law. While office-holders in insolvency/bankruptcy are creatures of statute, the common law has always subjected the wide-ranging powers conferred upon them to additional controls. The most famous of these is the rule in *Ex Parte James* [1874] LR 9 Ch App 609, described by David Richards LJ in *Lehman Brothers Australia Limited v MacNamara* [2020] EWCA Civ 321 at [35] as the principle that "*the standards which right-thinking people…would think should govern the Court or its officers*". As such, whilst *intra vires*, an act or decision of an office-holder which offends those standards may be liable to challenge.

76. There are myriad illustrations of application of such standards to the exercise of powers by/decision-making process of insolvency practitioners. For example:

    76.1. In *Re Edennote Ltd*,[75] Nourse J rejected the application of the 'relevant factors' test to the exercise of discretion by a liquidator but endorsed the application of the 'rationality' test: *"it is certainly possible for a liquidator to do something so utterly unreasonable and absurd that no reasonable man would have done it"*.

    76.2. More recently, the test in *Re Edennote Ltd* was applied by the Court of Appeal in *Re Edengate Homes*.[76] The decision involved a challenge of a decision to assign a claim against Mrs Lock, which was the only valuable asset of the company, to a litigation funder. The Court of Appeal rejected counsel's submission that the liquidator's failure to offer an opportunity to Mrs Lock to purchase the cause of action rendered the decision perverse. The test as laid down in *Re Edennote* was said to be a formidable one, which was not met on the facts of the case.[77]

    76.3. The High Court also recently considered the obligations of an administrator under para 3 of Sch B1 of the English Insolvency Act 1986 in *Davey v Money*;[78] under the schedule, the administrator could choose from amongst three options as to the objective of the administration, e.g. rescuing the company as a going concern. In the same vein, the court applied a rationality-based test:

[75] [1996] 2 BCLC 389, 394

[76] [2022] EWCA Civ 626, at [43]

[77] *Ibid*, at [46]-[49]

[78] [2018] EWHC 766 (Ch)

"Parliament intended a degree of latitude to be given to an administrator in deciding upon the objective to be pursued [...] the appropriate standard of review by the court should be one of good faith and rationality".[79]

76.4. In another recent case, *Re Baglan Operations Ltd* [2022] EWHC 647 (Ch) a decision of the Official Receiver to disclaim a defunct power station was reversed due to a failure to take into account the risk of flooding the local area (where the flood defences were still powered via a connection through the power station).

77. These tests are not by virtue of a fiduciary duty, or implied term in a contract – but reflect a free-standing principle of insolvency law which appears to partake of elements of both the rule in *Re Hastings-Bass* and the type of *Braganza* features referred to above. However, it also speaks to separate freestanding and wide controls existing over the exercise of far-reaching powers which are functionally similar to the improper purpose rule as described in this paper.

78. An interesting illustration, in which an improper purpose challenge ultimately failed, is provided by the decision of the House of Lords in *Re Pantmaenog Timber Co Ltd* [2004] 1 AC 158. In that case, the House of Lords had to consider the question of whether the Official Receiver could use its powers under s.236 of the Insolvency Act 1986 to obtain information in circumstances where the sole purpose of doing so would be to pursue separate disqualification proceedings against a former director. Lord Millett, in allowing Official Receiver's appeal against the Court of Appeal's decision that it could not do so, was critical of *"the unspoken assumption [in the CA judgment] that a liquidator's 'functions in the winding up' are limited to the collection and distribution of the company's assets..."*. Instead, he held that "*the liquidator's functions in relation to the company which is being wound up are not and never have been limited to the recovery and distribution of the company's assets.*".[80] He continued:

"64. ... I reject the unspoken assumption that the functions of a liquidator are limited to the administration of the insolvent estate. This is only one aspect of an insolvency proceeding; the investigation of the causes of the company's failure and the conduct of those concerned in its management are another. Furthermore such an investigation is not undertaken as an end in itself, but in the wider public interest with a view to enabling the authorities to take appropriate action against those who are found to be guilty of misconduct in relation to the company.

[79] *Ibid*, at [252]-[256]

[80] [63].

Similarly, Lord Walker in his speech noted at [78] that "*what I might call the public element in winding up has changed a good deal in the course of a century and a half*" and, having reviewed the old cases on the OR's role in direct disqualification proceedings, observed at [86] that "*although the court has always been concerned to see that its extraordinary powers should not be exercised oppressively, the 19th century and early 20th century cases do not show any inclination to limit investigation to matters of direct concern to creditors and shareholders.*" Landlord and tenant

79. In *No 1 West India Quay Ltd v East Tower Apartments Ltd,*[81] the Court of Appeal considered the exercise of a contractual discretion (held by the landlord) to decide whether to consent to assign two underleases, such consent not to be unreasonably withheld.

80. When the tenant sought the landlord's consent, the landlord had sought to impose a number of conditions (the tenant was to pay landlord's administration fees, the properties to be inspected by a surveyor and bank references for the prospective assignees was to be provided). The tenant refused to meet the conditions, and the landlord accordingly refused to grant its consent.

81. The High Court found that, although the administrative fees sought by the landlord had been excessive and that, although the landlord's other two reasons for refusing to grant consent had been good, they were vitiated by the single 'bad' reason.

82. That approach did not find favour with the Court of Appeal, which held that where there are multiple reasons for a decision refusing consent to assign, the fact that one of those reasons was bad would not normally render the refusal unreasonable.

83. The Court reached the conclusion by noting that since *Braganza*, the courts have recognised that the exercise of a contractual discretion is to be judged by the same principles as the exercise of public law decisions. There have since been cases in where a decision-maker gives good and bad reasons for a decision, but the good reason is enough to support the decision. When explaining that view, Lewison LJ referred to *Eclairs* (and other cases concerning the exercise of contractual and directors powers) and said the following: "*The theme running through all these cases is that if the decision would have been the same without reliance on the bad reason, then the decision (looked at overall) is good. In that situation, the bad reason will not have vitiated or infected the good one.*"

[81] [2018] 1 WLR 5682

Limits to the application of these principles

84. There are corners of private law where the rule does not reach. For example, in *Reda v Flag Ltd* [2002] UKPC 38 the Privy Council held that an express contractual right for the employer to terminate an employment contract without cause was not liable to challenge on the basis that it had been exercised for an improper purpose. Lord Millet, giving the judgment of the Board, explained that

> "*The principal ground on which this was disputed by the appellants at trial was that the decision of Flag's directors to bring their contracts to an end was vitiated by their "collateral purpose' in seeking to avoid having to grant the appellants stock options. But in the present context there is no such thing as a "collateral' or improper purpose; a power to dismiss without cause is a power to dismiss for any cause or none.*"

85. And in *Doherty v Birmingham City Council* [2009] 1 AC 367, Lord Scott similarly held that a private landlord's right to terminate a tenancy was wholly unfettered and could be exercised for any reason:

> "*69.... If private owners are entitled to recover possession of their property under the ordinary domestic law, whether common law, statute or a combination, their reasons for deciding to recover possession are irrelevant. Private owners are entitled to take decisions about their own property to suit themselves unless and to the extent that statute has fettered that entitlement.*"

Conclusion

86. There is, therefore, an emerging consistency in the approaches to the improper purposes rule and the rationality of decision making the exercise of powers across the trust, company, insolvency and other commercial contexts (such as landlord and tenant). The similarity of tests in different contexts should not, however, disguise the fact that the tests in different contexts have different legal underpinnings. And there are limits as to how far such principles can reach.

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