Neutral Citation Number: [2025] EWCA Civ 53

Case No: CA 2023 002289
CA 2023 002290

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)
Mr Justice Edwin Johnson
EWHC 1649 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 January 2025

Before:

LADY JUSTICE ASPLIN
LORD JUSTICE COULSON
and
LORD JUSTICE MALES

- -

Between:

In appeal CA 2023 002289

(1) FS CAPITAL LIMITED **(2) PINOTAGE TRUSTEES SARL** **(3) PNG SERVICES LIMITED**	**Appellants**
-and-	
(1) ALAN ADAMS **(2) THE FURTHER CLAIMANTS LISTED IN ANNEX 1 TO THE CLAIM FORM**	**Respondents**

In appeal CA 2023 002290

(1) ALAN ADAMS **(2) THE FURTHER CLAIMANTS LISTED IN ANNEX 1 TO THE CLAIM FORM**	**Appellants**
-and-	
(1) FS CAPITAL LIMITED **(2) PINOTAGE TRUSTEES SARL** **(3) PNG SERVICES LIMITED**	**Respondents**

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James Morgan KC and Josh Lewison (instructed by **Freeths LLP**) for the **Appellants in Appeal 2289**
Hugh Miall and James Fennemore (instructed by **Morgan Rose Solicitors Limited**) for the **Respondents in Appeal 2289 and 2290**

Marcus Flavin (instructed by **Portner Law**) for the **Appellant in Appeal 2290**

Hearing dates: 17 & 18 December 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 28 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Asplin:

1. These appeals arise out of transactions (together referred to as the "Disposal") by which FS Capital Limited, ("FS Capital") (the Appellant in Appeal number 2289 - the "FS Capital Appeal") purchased loan assets from three Jersey trusts (the "2011 Trust", the "2012 Trust" and the "2014 Trust") (together referred to as the "Trusts"). Basic consideration was paid and deferred contingent consideration was capped at a maximum of £1,176,033.93 which was the sum allegedly owed to the Trusts' creditors. The book value of the loan assets was £410 million. That figure was subsequently reduced to £279 million.

2. Mr Justice Edwin Johnson, in a comprehensive and careful judgment, decided, amongst other things, that the Disposal was effected for an improper purpose and, as a result, constituted a breach of the Trusts and was void in equity. He also decided that FS Capital was not a bona fide purchaser for value without notice in relation to the loan assets and that it held them subject to the beneficiaries' equitable interests and was required to reconstitute the Trusts.

3. The appeals raise a number of complex issues in relation to Jersey trust law. The first is whether the judge erred as a matter of Jersey law in concluding that it was only necessary to have actual knowledge of the facts which constituted the impropriety of the Disposal in order to be fixed with actual notice for the purposes of Article 55, Trusts (Jersey) Law 1984 rather than actual knowledge of those facts and knowledge that the impropriety was also a breach of trust, as a matter of Jersey law. The second issue is ancillary to the first. It is whether the judge erred in deciding that FS Capital had failed to discharge the burden of showing that it had no actual notice that the Disposal was made in breach of trust. It is said that the judge should not have resorted to the burden of proof in order to determine the matter. The third issue is whether a transaction arising from the exercise of a fiduciary power for an improper purpose is void or voidable under Jersey law. That includes the ancillary question of whether Jersey law is the same as English law in this respect or merely takes note of the position in English law when determining the question afresh. The last issue in the FS Capital Appeal proceeds on the basis that the judge should have found that the Disposal was voidable. On that basis, it is said that in the exercise of his discretion he should not have set it aside.

4. A further issue arises on the second appeal by Pinotage Trustees Sarl ("Pinotage") numbered 2290 (the "Pinotage Appeal"). It is whether it was open to the judge to decide that Pinotage retired as trustee of the 2011 Trust and the 2012 Trust to facilitate a breach of trust.

Facts in outline

5. The background to this matter is highly complex and detailed. Reference should be made to the judgment for the full details. I shall repeat only the essential facts here.

6. The Trusts were in the same material terms. Each of the Trusts formed part of an Employer-Financed Retirement Benefit Scheme ("EFRBS"). EFRBSs were created by the Income Tax (Earnings and Pensions) Act 2003. They were schemes for the provision of certain benefits to employees or former employees of employers but were not registered pension schemes. In this case, the EFRBSs were used to facilitate loan schemes, pursuant to which participants would receive remuneration from their

employer by way of loans, which would not be subject to income tax. The employer would generally be an umbrella company which provided employment to a number of individuals. The umbrella company would then provide the services of those individuals to the third parties for whom the individuals were working, pursuant to contracts entered into between the umbrella company and the relevant third parties. Those participating in such schemes included employees in the strict sense of the word, and contractors. The object of such schemes was to avoid tax by treating income paid to employees or contractors as loans provided through the mechanism of the relevant loan scheme.

7. In this case, the loan schemes were implemented by the settlors of the Trusts, as employers, loaning sums to the individuals participating in the relevant loan schemes, as employees, by way of remuneration. The beneficial interests in the rights to repayment of the loans were then settled into the Trusts, on trust for the benefit of the participants. In the case of two of the Trusts, the legal interests in the rights to repayment of the loans were also subsequently settled into the Trusts. The judge referred to the rights to repayment as “Loan Assets”.

8. The Loan Assets settled on the Trusts amounted to a substantial loan portfolio involving over 2,000 participants/beneficiaries. The judge referred to those participants from time to time as “the Beneficiaries”. In fact, the classes of beneficiaries under the Trusts were more widely expressed than simply the participants under the scheme.

9. The Loan Assets were unsecured and interest free until they fell due for payment, which was on demand. As a result, the loans did not produce a regular income to meet the costs and expenses of administering the Trusts.

10. The Trusts were: (1) the Anthony Doull Employer-Financed Retirement Benefit Scheme which was established on 25th November 2011 (the 2011 Trust) of which the original settlor and Protector was Anthony Doull (trading as K2 Contractor Solutions) and the original trustee was IFM Corporate Trustees Limited ("IFM"), a Jersey registered company; (2) the K2 Contractor Solutions Employer-Financed Retirement Benefit Scheme 2012 which was established on 14th May 2012 (the 2012 Trust) of which the original settlor and Protector was Lighthouse Trustees Limited (“Lighthouse”), a Jersey registered company and the original trustee was IFM; and (3) the Hyrax Resourcing Employer-Financed Retirement Benefit Scheme which was established on 25th September 2014 (the 2014 Trust) of which the original settlor and Protector was Hyrax Resourcing Limited (“HRL”), an English registered company and the original trustee was HRL Trustees Limited (“HRL Trustees”), a Jersey registered company. IFM and HRL Trustees were companies within the Praxis IFM Group (“Praxis”). HRL Trustees was dissolved on 7th June 2019.

11. A measure known as the “Loan Charge” was introduced in the Finance (No. 2) Act 2017. It created a new, retrospective charge to income tax of 45% on all relevant loan payments made since 1999, to be payable in one tax year (2018-2019). It applied where loans were outstanding as at 5 April 2019. As initially enacted, the Loan Charge applied to loans made on or after 6th April 1999. Those facing the Loan Charge were given a choice of settling with HMRC, paying off the loan balance, or paying the charge. These provisions were amended subsequently. Once the Loan Charge was enacted, loan schemes, including those subject to the Trusts, were no longer viable.

12. Pinotage was appointed as trustee of each of the Trusts on 22 January 2018. At the same time, PNG Services Limited, the Third Appellant in the Pinotage Appeal, was appointed as Protector of the 2011 and 2012 Trusts. HRL remained as Protector of the 2014 Trust. Each of the Trusts was cash-flow insolvent at the time Pinotage was appointed as trustee.

13. At that stage there were 2,145 Beneficiaries of the Trusts. In its circulars to Beneficiaries, Pinotage explained the effect of the Loan Charge which would take effect in April 2019, sought "know your client" information and set out the options available to Beneficiaries. They were stated as: (i) settlement with HMRC; (ii) repaying the loans on or before 5 April 2019; (iii) payment of the Loan Charge; or (iv) personal insolvency. By the end of 2018 a large number of Beneficiaries had still failed to engage with Pinotage or provide "know your client" information. Mr Reid, a solicitor whose role is explained below, considered that Pinotage had little option other than to call in the Beneficiaries' loans or sell the Loan Assets to a third party and he identified the latter as a commercial opportunity.

14. The full details of the subsequent dealings in relation to the Trusts are set out at [15] – [18] of the judgment and reference should be made to those paragraphs. In outline, they were as follows:

(1) In relation to the 2011 Trust:

a. on 25 June 2019 the Loan Assets were assigned by IFM to Pinotage;

b. on 30 June 2019 a company called Pinotage (PTC) Limited, a British Virgin Islands registered company, incorporated on 21 June 2019 ("Pinotage PTC"), was appointed as trustee in place of Pinotage;

c. on the same day the Loan Assets were assigned by Pinotage to Pinotage PTC; and

d. on 30 October 2019, pursuant to two sale purchase agreements entered into between Pinotage PTC and FS Capital, the Loan Assets were assigned by Pinotage PTC to FS Capital.

(2) In relation to the 2012 Trust:

a. on 25 June 2019, the Loan Assets were assigned by IFM to Pinotage;

b. on 30 June 2019 Pinotage PTC was appointed as trustee in place of Pinotage;

c. on the same day the Loan Assets were assigned to Pinotage PTC; and

d. on 30 October 2019, pursuant to two sale purchase agreements entered into between Pinotage PTC and FS Capital, the Loan Assets were assigned by Pinotage PTC to FS Capital.

(3) In relation to the 2014 Trust:

a. on 30 June 2019 Pinotage PTC was purportedly appointed as trustee of the 2014 Trust, in place of Pinotage. It is common ground that the appointment of Pinotage PTC was not effective;

b. on 30 October 2019, by two sale purchase agreements entered into between Pinotage PTC and FS Capital the Loan Assets were sold to FS Capital;

c. by a resolution made on 6th December 2019, Pinotage purported to ratify all acts previously done by Pinotage PTC as trustee de son tort, including the sale of the Loan Assets to FS Capital.

15. Notwithstanding the replacement of Pinotage with Pinotage PTC as trustee of the 2011 and 2012 Trusts, Pinotage's role in the Disposal did not change significantly after 30 June 2019. Mr O'Shea, whose role is explained below, remained the effective decision maker for both Pinotage and Pinotage PTC.

16. In relation to all three Trusts the disposals/purported disposals (both sale purchase agreements and deeds of assignment) which took place on 30 October 2019 were followed by subsequent assignments of the residual assets in each of the Trusts. In each case the relevant assignment was made to a Delaware registered company called Hatstone LLC. The purpose of these assignments was described as "mopping up" any remaining assets in the Trusts. The judge used the term "Disposal" to refer collectively to the various disposals which were made or were purportedly made on 30 October 2019. The Disposal involved 1,392 Beneficiaries, the remainder having settled with HMRC or participated in a different scheme.

17. In May 2020, FS Capital began to serve statutory demands upon the Beneficiaries in respect of the outstanding loans. That precipitated the issue of these proceedings. The Respondent Beneficiaries in the FS Capital Appeal number around 700 individuals.

18. Although, for the sake of completeness, I have referred to the 2014 Trust to which the Disposal also related, neither of the Appeals concern it directly.

Parties and individuals

19. Before turning to the core of the judge's reasoning it is necessary to understand the roles of the parties and individuals concerned in a little more detail. FS Capital is a company registered in England and Wales. It was incorporated as a special purpose vehicle on 16 May 2019 for the purchase of the Loan Assets. It is a wholly owned subsidiary of a company called Slap 8 Limited ("Slap 8"). Slap 8 is itself the corporate holding company within a group of entities of which the parent entity is Redbox Associates LLP ("RA"). RA was the successor to Redbox Tax Associates LLP ("RTA"). RTA and RA's business was and is tax planning projects. RTA was set up by Simon Emblin and Mark Reid. Mr Emblin is an accountant and Mr Reid is a solicitor. They ran tax planning businesses together. RTA and, in succession, RA were both owned and controlled by Mr Emblin and Mr Reid, and this remains the position in relation to RA. Mr Emblin was and remains a director of FS Capital. Mr Reid was and remains a director of Slap 8.

20. Pinotage is a Swiss based trust company which provides professional trustee services to families and private clients from multiple jurisdictions. PNG Services Limited is a

British Virgin Islands registered company. It was incorporated to act as a protector to trusts.

21. As I have already mentioned, Pinotage PTC, was a British Virgin Islands registered company incorporated on 21 June 2019, which was appointed as a trustee in place of Pinotage and to which the Loan Assets were transferred. It then transferred the Loan Assets to FS Capital. It went into voluntary liquidation on 29 December 2019, and was dissolved on 18 March 2020.

22. Mr O'Shea was, at all material times, a director of Pinotage. He also held the shares in Pinotage on a trust of which he was the sole trustee, for certain individuals. He was also the sole director of PNG Services Limited, and the owner of its shares, as nominee for Pinotage. Mr O'Shea is a Jersey Advocate, an English qualified solicitor, and a British Virgin Islands qualified solicitor. He is a Group Partner in Hatstone, a multi-jurisdictional group which provides legal investment fund administration and corporate services, with offices in a number of jurisdictions, including the British Virgin Islands, Jersey and South Africa. Hatstone LLC is the Delaware registered company which was the assignee of the assignments, or purported assignments, of the residual assets of the Trusts made on 11 December 2019.

The judgment

23. Given the detailed and complex background to these appeals and the nature and complexity of the issues which arise it is both helpful and necessary to set out the judge's reasoning at some length.

General approach

24. Having noted that Jersey law applies in relation to the substantive issues in this case, the judge also noted at [134] of the judgment that it was common ground that the approach to statutory interpretation under Jersey law is the same as in England and Wales. In relation to trust law, he noted that the principal source of Jersey trust law is the Trusts (Jersey) Law 1984 (the "1984 Law") and that there is a close relationship between Jersey and English trust law. In this regard, he quoted from the judgment of Lord Hodge in *Investec Trust (Guernsey) Limited v Glenalla* [2018] UKPC 7, [2019] AC 271 at [57] – [58] and *In Re The Esteem Settlement and the No. 52 Trust* 2002 JLR 53 per Deputy Bailiff Birt (as he then was) at [84]. The passage in the *Investec* case is as follows:

> "57. Before addressing article 32, some preliminary observations need to be made. The TDT is a discretionary trust established under the law of Jersey. In their modern form, trusts are a creation of equity judges in England. There are of course concepts in other legal systems, notably in Roman law and in the civil law of France, which have some features in common with an English law trust. But they do not have the elaboration and detailed prescription which the existence of a large and coherent body of case law has given to the English trust law. The law of trusts in Jersey is a comparatively recent import from England. Its widespread use in the custody and management of wealth dates from the rise of a significant financial services industry in

> the 1960s. The international appeal of Jersey trusts is to a significant extent dependent on the certainty which it derives from the English case law. Naturally, English trust law must be modified where it conflicts with established principles of Jersey customary law, and it has also been modified by Jersey statutes. These general remarks apply equally to the trust law of Guernsey.
>
> 58. The TJL is the principal indigenous source of Jersey trust law. It is not a complete code of the law of trusts. But it gives statutory effect to some principles already well established in England and significantly modifies other principles. English trust law therefore serves as the background against which the provisions of the TJL fall to be construed."

The passage from the *In Re The Esteem Settlement* case is as follows:

> "However the 1984 Law is not a codification. Trusts were recognised and enforced by the Jersey courts well before the passing of the 1984 Law and, in doing so, they looked to English law for guidance on trust matters and, by and large, adopted English principles save where it was appropriate to differ. A Jersey trust is essentially the same animal as is found in English law, subject to certain local modifications."

25. Where reference was made to English case law and to decisions of the Privy Council (in non-Jersey cases), the judge noted at [137] that he made such references on the basis that it was common ground between the parties that he was entitled to take the relevant authority into account, for the purposes of applying Jersey law to the substantive issues in the case.

Exercise of power for an improper purpose

26. The judge then turned to the law in relation to improper purpose and the recent explanation of that subject by Lord Richards in the Privy Council decision in *Grand View Private Trust Co Ltd v Wong* [2022] UKPC 47 who in turn referred to a passage in the judgment of Lord Sumption in *Eclairs Group v JKX Oil & Gas plc* [2015] UKSC 71, [2016] 3 All ER 641 at [15]. The judge concluded at [172] that when applying the proper purpose rule, there are two questions to be answered: the first question concerns the proper purpose or purposes of the relevant power which is an objective question; and the second question concerns the purpose or purposes for which the relevant power has in fact been exercised. Was it outside the purpose or range of purposes for which the relevant power was conferred? He stated that "[T]his is a factual and subjective question, to be answered by determining the subjective purposes of the relevant decision maker in the exercise of the relevant power."

27. The judge went on to state that equity will usually only intervene if the primary or dominant purpose was improper [173] and to note that as a general rule, fiduciary powers must be exercised to further the purposes of the beneficiaries [174]. It was in this light that he went on to consider the financial position of the Trusts at [176] – [208].

He summarised his findings as to Jersey law, in the context of the duties of a trustee where the trust is insolvent (using the convenient shorthand) at [185] as follows:

> "...
>
> (1) The position is not as absolute as stated in *Z Trusts* at [32]. There is no absolute rule that, once there is an insolvency or probable insolvency of a trust, the trustee and all those holding fiduciary powers in relation to the trust can only exercise those powers in the interests of the creditors. A Jersey court would take account of the decision of the Supreme Court in *Sequana*, and would adopt a more nuanced approach to this question.
>
> (2) In a situation of insolvency or probable insolvency a trustee should primarily exercise their fiduciary powers and duties in the interests of the creditors.
>
> (3) Whether and, if so, to what extent the residuary interests of the beneficiaries should be taken into account in the exercise by the trustee of their fiduciary powers and duties in a situation of insolvency is a fact sensitive question which depends upon the circumstances of the particular case.
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> (4) In answering the question at (3) above, the court should adopt the approach set out by Lord Briggs in *Sequana*, at [176]; that is to say a balancing exercise. The extent to which the interests of the beneficiaries can and should be subordinated to the interests of the creditors will depend upon all the circumstances of the case and, in particular, on the question of whether the situation is one where there is light at the end of the tunnel or one where the insolvency situation is irreversible."

28. He went on to find that each Trust was cash-flow insolvent at the time of the Disposal but he was unable to make any finding about balance sheet insolvency because there was no evidence which enabled him to arrive at any reliable valuation of the assets in the Trusts and, in particular, the Loan Assets, at any particular time:[196] and [208]. He found, however, that none of Messrs Emblin, Reid and O'Shea knew the true value of the Loan Assets but all three appreciated that they could have a substantial value:[201] – [205]. In particular, in relation to Mr O'Shea, the judge found as follows:

> "205. In cross examination Mr O'Shea claimed that he had carried out his own mental valuation process of the Loan Assets and valued the Loan Assets "at probably next to zero". Mr O'Shea said that he did not conceive that the Loan Assets had any value. I cannot accept this evidence. I do not consider that Mr O'Shea was being dishonest in this part of his evidence. Rather it seems to me that Mr O'Shea had persuaded himself that this was his thinking at the relevant time. In my judgment Mr O'Shea was seeking to defend, on a retrospective basis, his orchestration of the consideration payable on the Disposal to a figure equalling the sums calculated as due to the Second

> Defendant and Hatstone Jersey, as creditors of the Trusts. The fact that Mr O'Shea appreciated that this might be problematic is demonstrated by his email of 21st July 2019, which I regard as a more reliable guide to what was in Mr O'Shea's mind at the relevant time. The same point is also demonstrated by the inclusion of the Cap in the SPAs (the limitation on the amount of the Deferred Consideration payable out of the profits realised by the First Defendant from the Loan Assets). As was pointed out to Mr O'Shea in cross examination, the Cap only made sense if there was a possibility of the Loan Assets turning out to have a value in excess of the Cap. Mr O'Shea described the Cap as something which might have been "extra unnecessary terminology" . I cannot accept this suggestion. It seems clear to me, and I so find, that the Cap was intended to limit the Deferred Consideration to what had been calculated as due to the Second Defendant and Hatstone Jersey, and was intended to guard against the possibility of the Loan Assets turning out to have a higher value. I am satisfied that Mr O'Shea understood all this when the Cap was devised and put into the SPAs."

29. Having considered the test in *Grand View* and all the evidence, the judge concluded and found at [229] that the purpose or purposes for which the power of sale was exercised, was or were: (i) to terminate the Trusts; (ii) to benefit FS Capital by assignment of the Loan Assets to it, free of the obligations of the Trusts, for a consideration limited by the Cap; (iii) to benefit Pinotage and Hatstone Jersey by paying off the sums calculated as being due to them; and (iv) to ensure that the consideration payable on the Disposal would leave no surplus for the benefit of the Beneficiaries.

30. He went on, also at [229] to find: ". . . that the situation was not one where Mr O'Shea considered that it was legitimate to exclude the interests of the Beneficiaries. I find that Mr O'Shea made the decision to confine the consideration payable on the Disposal to what he calculated as being due to the Second Defendant [Pinotage] and Hatstone Jersey, regardless of what the Loan Assets were worth, and with the intention that there should be no surplus for the Beneficiaries, whatever the Loan Assets were worth. I find that the intention thus to exclude the Beneficiaries was a primary or dominant purpose and a primary or dominant cause of the Disposal. The intention to exclude the Beneficiaries was not a subordinate purpose or subordinate cause of the Disposal."

31. The judge then considered whether the purpose which he had identified was within the proper purposes of the power of sale contained in the Trusts. He concluded at [230] that the answer to that question came down to "the question of whether Pinotage PTC was entitled to effect the Disposal on terms which concentrated on the interests of the creditors of the Trusts, and effectively excluded the interests of the Beneficiaries." He went on to conclude that this turned upon "whether the situation of the Trusts, as cash-flow insolvent trusts in all the circumstances as they existed at the time of the Disposal, justified such exclusion of the Beneficiaries or, putting the matter another way, justified departure from the general rule (see Lord Richards in *Grand View* at [120]), that fiduciary powers conferred on a trustee of a trust with identified beneficiaries must be exercised to further the interests of the beneficiaries."

32. The judge concluded that the situation in this case was one in which the Trusts were cash-flow insolvent but that they held assets in the form of the Loan Assets which were illiquid but might have substantial value [234]. He went on at [235] to state that he could not see how it could be said that a proper purpose of the power of sale contained in the Trusts was a purpose which effectively involved the exclusion of the Beneficiaries. He went on also at [235]:

> ". . . [A]pplying the relevant law, the situation was not one where the interests of the Beneficiaries could simply be disregarded in favour of the creditors. This however was what occurred. The value of the Loan Assets was unknown. The principal actors in relation to the Disposal, namely Mr Emblin, Mr Reid and Mr O'Shea did not know the value of the Loan Assets, but did know that the value of the Loan Assets might be substantial. They also knew that the purpose of the Disposal was to pay the creditors without leaving any surplus for the Beneficiaries, so that the Trusts could be terminated. All this follows from the findings which I have already made. The interests of the Beneficiaries were disregarded in the Disposal or, putting the matter another way, the interests of the Beneficiaries were effectively excluded from the Disposal. This would have been justifiable, if there had been no light at the end of the tunnel, and it was clear that the value of the Loan Assets was not going to be adequate to do more than meet the sums owed to creditors. This was not however the position. No one knew what the Loan Assets were worth. What was known by the principal actors (Mr Emblin, Mr Reid and Mr O'Shea) was that the value of the Loan Assets might be substantial."

33. He concluded at [236] that the purpose for which the power of sale was exercised included the effective exclusion of the Beneficiaries as a primary or dominant purpose and the purpose of the Disposal fell outside the purposes for which the power of sale was conferred. He summarised his conclusions as follows:

> "237. In summary therefore, and in answer to the first question identified in *Grand View*, and in answer to the second part of the second question identified in *Grand View* I conclude (i) that a disposal for a purpose which involved the exclusion of the interests of the Beneficiaries was not, in the circumstances as they existed at the time of the Disposal, a proper purpose of the power of sale contained in the Trusts, and (ii) that the Disposal, which was a disposal for a purpose which involved the exclusion of the interests of the Beneficiaries, was effected for a purpose which fell outside the permitted purposes of the power of sale contained in the Trusts.
>
> 238. In summary, and for the reasons which I have set out in the relevant previous sections of this judgment, I reach the following conclusions, in relation to the question of whether the Disposal was effected for an improper purpose:

> (1) In the circumstances which existed at the time of the Disposal the proper purposes of the power of sale did not include a disposal of the Loan Assets for a consideration which ensured that there would [be] no surplus left for the benefit of the Beneficiaries. The circumstances were not such that the interests of the Beneficiaries could be disregarded, or excluded in this way.
>
> (2) In effecting the Disposal the purposes of the principal actors, Mr Emblin, Mr Reid and Mr O'Shea (and in particular Mr O'Shea) were, in each case, to ensure that the consideration payable on the Disposal would leave no surplus for the Beneficiaries.
>
> (3) This purpose was not a subsidiary purpose, but was central to the purpose of the Disposal, whether judged on the basis of purpose or on the basis of causation. The whole point of the Disposal was to confine the consideration to what was calculated as due to the creditors. If the consideration was not so confined, the purpose of the Disposal would been defeated. Confining the consideration in this way ensured, to the detriment of the Beneficiaries, (i) that the Trusts could be terminated, (ii) that the First Defendant [FS Capital] would obtain the benefit of the Loan Assets, free of the obligations of the Trusts, at a price which might well turn out to be a substantial undervalue, (iii) that Hatstone Jersey and the Second Defendant would be paid what was calculated as due to them, and (iv) that the Beneficiaries would get nothing."

Bona fide purchaser for value

34. In relation to the bona fide purchaser for value defence, the judge first noted at [241] that the burden was upon FS Capital to establish that it was a bona fide purchaser for value of the Loan Assets without notice of the breach of trust, being that the Disposal was effected for an improper purpose. He referred to Foxton J in *The Serious Fraud Office v Litigation Capital Limited* [2021] EWHC 1272 (Comm), at [149] - [150] in this regard.

35. He went on to conclude that FS Capital was a purchaser for value (see [242] – [270]) and that the requisite notice required by Article 55 of the 1984 Law was actual notice and that actual notice, as a matter of Jersey law comprises what have become known as *Baden* categories (i), (ii) and (iii). They are: (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; and (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make. See [271] – [295] and [290] and [295], in particular.

36. The judge summarised his findings and added to them as follows:

> "297. I have already made a number of findings in relation to Mr Emblin and Mr Reid, in my discussion of whether the Disposal

was made for an improper purpose. In particular, I have made the following findings:

(1) At the time of and prior to the Disposal, Mr Emblin and Mr Reid did not know the true value of the Loan Assets. They did know that the Loan Assets could have had substantial value.

(2) At the time of and prior to the Disposal Mr Emblin and Mr Reid knew that the purpose of the Disposal, as demonstrated by the existence of the Cap, was to pay the creditors without leaving any surplus for the Beneficiaries, so that the Trusts could be terminated.

(3) In effecting the Disposal the principal purpose of each of the principal actors, whom I have identified as Mr Emblin, Mr Reid and Mr O'Shea, was to ensure that the consideration payable on the Disposal would leave no surplus for the Beneficiaries.

298. Other findings follow from these findings and from what was conceded by Mr Emblin and Mr Reid in cross examination. First, at the time of and prior to the Disposal, Mr Emblin and Mr Reid also knew or must be taken to have known that there was a real possibility that the Beneficiaries still had an economic interest in the assets in the Trusts. Second, at the time of and prior to the Disposal, Mr Emblin and Mr Reid also knew or must be taken to have known that the interests of the Beneficiaries were being disregarded in the Disposal, in the sense that, if the Beneficiaries did have any economic interest in the assets in the Trusts, this would not be reflected in the terms of the Disposal.

299. Mr Morgan sought to argue that Mr Emblin and Mr Reid had no reason to think, at the time of the Disposal, that the Disposal was being made for an improper purpose. His argument was that Mr Emblin and Mr Reid were entitled to take the view, and were in fact advised that it was legitimate to put the interests of the creditors first. On the facts of this case, I cannot accept this argument. It seems quite clear to me (and I so find), both from the evidence of Mr Emblin and Mr Reid and from the evidence of the contemporaneous documents, that neither Mr Emblin nor Mr Reid was or could have been satisfied that it was legitimate to disregard the interests of the Beneficiaries. The reality was that Mr Emblin and Mr Reid, in concert with Mr O'Shea, designed the Disposal in a way which would achieve what they wanted to achieve; namely payment of the creditors and termination of the Trusts. The history of their dealings together demonstrates that they were looking for ways to justify their design of the Disposal, but I do not accept that any of them, at the time of the Disposal, considered that they had achieved a position where it was clear that the interests of the Beneficiaries could be disregarded in the Disposal."

37. At [301], the judge referred to the guidance in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347 [2012] Ch 453, at [102]-[108] in relation to whether and, if so, when it is appropriate to impute the legal consequences of facts to a party who is aware of the relevant facts. He noted, also at [301], that "[I]t is clear that such knowledge is not automatically to be imputed to a party." At [302], he stated that in the particular circumstances of the case, he could not see that FS Capital could claim to have had no knowledge of the breach of trust, within the terms of the first three *Baden* categories. He did so for two related reasons:

> "303. First, it seems to me that Mr Miall is right to draw attention to the fact that the burden is upon the First Defendant [FS Capital] to establish that the First Defendant [FS Capital] did not have actual notice of the breach of trust. The evidence of Mr Emblin and Mr Reid was not presented on the basis that, while they may have known of the facts which constituted the breach of trust, they were unaware that those facts constituted a breach of trust. In those circumstances I find it difficult to see how Mr Miall can be criticised for cross examining Mr Emblin and Mr Reid on the basis of their knowledge of the facts which, as I have decided, constituted the breach of trust. Ultimately, I do not consider that it has been established, on the evidence, that this is a case where Mr Emblin and Mr Reid, despite being aware of the facts which constituted the breach of trust, were ignorant of the fact that these facts constituted a breach of trust.
>
> 304. Second, I am not convinced that the facts of the present case justify the separation which Mr Morgan sought to make between the facts which constituted the breach of trust, and the breach of trust itself. This does not seem to me to be a case of wilful shutting of eyes or of wilful and reckless failure to make such inquiries as an honest and reasonable man would have made. The reason for this is that the eyes of Mr Emblin and Mr Reid were not shut, and there was no need to make the inquiries. I refer back to my findings on the question of whether the Disposal was made for an improper purpose, and to the narrative section of this judgment. It is clear from all the evidence that Mr Emblin and Mr Reid, on the one side, and Mr O'Shea, on the other side, did not deal at arm's length, as would have been the case in a normal sale transaction. Instead, as I find, Mr Emblin, Mr Reid and Mr O'Shea collaborated in the design of the Disposal and, in particular, in the design of the components of the Disposal which resulted, as I have found, in the Disposal being made for an improper purpose. Given this position, I think that Mr Miall was right in his submission that, at least on the facts of the present case, the actual knowledge which the First Defendant, [FS Capital] by Mr Emblin and Mr Reid, was required to possess, in order to be fixed with actual notice, was knowledge of the facts which constituted the impropriety of the Disposal, as opposed to

> knowledge that the impropriety was, as a matter of Jersey law, a breach of trust."

38. The judge tested the matter in the following way:

> "305. . . . I have found that Mr Emblin and Mr Reid, in concert with Mr O'Shea, designed the Disposal in a way which would achieve what they wanted to achieve; namely payment of the creditors and termination of the Trusts. I have found that Mr Emblin and Mr Reid could not have been satisfied and were not satisfied that it was legitimate to disregard the interests of the Beneficiaries in this way. Given this state of knowledge it strikes me that it would have been perverse, if this had been the evidential position, that the First Defendant could have escaped being affected by the breach of trust which resulted from the design of the Disposal, on the basis of evidence from Mr Emblin and Mr Reid that they did not know that their design of the Disposal would constitute a breach of trust under Jersey law."

39. At [306] the judge concluded that on the evidence, FS Capital had failed to discharge the burden of demonstrating that it had no actual notice that the Disposal was made in breach of trust. At [307] he went on to decide that the defence of bona fide purchaser for value without notice was not available to FS Capital. He stated that he accepted that it was a bona fide purchaser for value of the Loan Assets but did not accept that it was a purchaser without notice of the breach of trust.

Void or voidable?

40. The judge also decided that the Disposal was void, as a matter of Jersey law, so far as it purported to transfer the beneficial interests in the Loan Assets. It was accepted that the Disposal was effective to vest the legal title in the Loan Assets in FS Capital, however. As the judge pointed out at [313], as he was deciding whether the Disposal was void or voidable as a matter of Jersey law, the relevant English Court of Appeal decision of *Cloutte v Storey* [1911] 1 Ch 18 was not binding upon him unless it represented the settled law of Jersey. He considered English and Jersey authorities and noted at [321] that none of the Jersey authorities involved a direct consideration of whether *Cloutte v Storey* was correctly decided. He went on to note that the experts in Jersey law were agreed that the question of whether the exercise of a power is vitiated as a fraud on the power is void or voidable is currently not settled under Jersey law and that the position was currently reflected in the English case law to which a Jersey court might refer when considering the issue. The judge concluded that the question was one for submissions [322].

41. He also rejected the submission that the presumption of similarity in relation to foreign law considered in *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, [2022] AC 995 applied, with the effect that *Cloutte v Storey* would be followed:

> "325. The facts of the present case are very different to *Brownlie*. In the present case there is ample evidence of the state of Jersey law, both from the experts and from the researches of counsel. In addition to this, the experts are agreed that the position is not

> settled in Jersey law, on the question of whether a fraud on a power is void or voidable. In these circumstances I can see no room for the operation of a presumption that *Cloutte v Storey* should have the same status under Jersey law as it has under English law; that is to say a binding decision of the Court of Appeal, unless it can be shown to be distinguishable. It may be that this is the position, as a matter of Jersey law, but I do not think that this position can be achieved by the operation of any presumption."

42. Ultimately, he concluded that:

> "352. Drawing together all of the above discussion on the void/voidable issue, I reach the following conclusions.
>
> (1) I do not think that *Cloutte v Storey* can be distinguished in the present case.
>
> (2) *Cloutte v Storey* is Court of Appeal authority which binds me as a matter of English law.
>
> (3) I would expect a Jersey court to follow *Cloutte v Storey*, as a matter of Jersey law. Accordingly, I consider that *Cloutte v Storey* remains good law, so far as Jersey law is concerned.
>
> (4) I therefore conclude that, in the present case, the Disposal was void rather than voidable, in so far as it constituted a transfer of the Beneficial Interest."

Exercise of discretion

43. Lastly, the judge considered the arguments in relation to whether the Court should exercise its discretion to set aside the Disposal, had he decided that the Disposal was voidable rather than void. He summarised his conclusions thus:

> "370. I am of course considering the question of whether the Disposal should be set aside on a hypothetical basis. I have already decided that the Disposal was void, with the consequence that the Beneficial Interest will have remained in the Trusts. If however I had decided that the Disposal was voidable, I can summarise the decision which I would have made, on the question of whether the Disposal should be set aside, in the following terms:
>
> (1) I would have rejected the first three reasons advanced by the First Defendant for not setting aside the Disposal. For the reasons which I have set out above, I do not consider that any of these reasons have merit.
>
> (2) I would have required to hear further argument on what I should do, given the apparent absence of anyone available to act as trustee of the Trusts. I stress that this further argument would

> have been confined to the merits or otherwise of the fourth reason advanced by the First Defendant for not setting aside the Disposal. This would not have been a licence to re-open the first three reasons.
>
> (3) I would not have made a decision at this stage, to set aside the Disposal. I would have reserved that decision until I had heard the further argument from the parties on what I should do, given the apparent absence, at least as matters stand, of anyone available to act as trustee of the Trusts."

44. The first three reasons which the judge rejected at [357] – [366] were: (i) alleged inequitable conduct on the part of the Beneficiaries in the form of widespread failure to engage with the Trustees; (ii) the allegation that the Beneficiaries had been participants in artificial tax avoidance schemes and as such ran the risk that the scheme would not work and that the court should not lend itself to granting relief which would allow them to escape the consequences of the risk they took; and (iii) that restitution of the consideration paid and payable pursuant to the Disposal was said to be impossible. Pinotage PTC to which the £100,000 had been paid had been wound up and the right to receive the additional consideration had been assigned to Hatstone LLC, which is not a party to the action.

45. The fourth reason was a practical one, namely that if the Disposal were set aside, the assets transferred to FS Capital by the Disposal would come back to the Beneficiaries and would need to be held by a trustee on the terms of the Trusts. No trustee had been identified, however [367].

Retirement to facilitate a breach of trust

46. The Pinotage Appeal is concerned with what has been dubbed, the "retirement to facilitate a breach of trust" point. It arises in relation to the 2011 Trust and the 2012 Trust. The judge addressed the relevant issues at [376] - [401] of his judgment. Having considered the evidence, the judge summarised what he said it demonstrated at [394] as follows:

> "394. This evidence demonstrates, or more accurately confirms what can also be derived from the contemporaneous documents, namely that when the Second Defendant came to resign as trustee, it did so in circumstances where the intentions of the parties, namely the Second Defendant and the First Defendant, as represented by Mr O'Shea, Mr Emblin and Mr Reid, were (i) that the Disposal should proceed, (ii) that the Second Defendant would continue to be involved in an administrative role, and (iii) that Pinotage PTC would be put in place as trustee/vendor of Loan Assets in order to avoid the regulatory difficulties which might result from the Second Defendant continuing as trustee of the Trusts. To use the language of *Head v Gould* , the evidence demonstrates that the Disposal was very clearly contemplated by the Second Defendant, at the point when it resigned, or purported to resign in favour of Pinotage PTC."

47. At [395], he accepted that Pinotage resigned as trustee as a result of its regulatory concerns. He added, however, that that was an incomplete statement of what occurred. He went on:

> "... The breach of trust which, as I have found, was constituted by the Disposal, was not merely the outcome of the retirement of the Second Defendant as trustee. The whole purpose of putting Pinotage PTC in place as new trustee was to allow the sale of the Loan Assets, on terms which excluded the interests of the Beneficiaries, to proceed to completion, with the Second Defendant still dealing with the administration of the sale, but not having to deal with the regulatory issues which would or might arise if it continued as the actual trustee of the Trusts. Put more simply, Pinotage PTC was put in place as trustee in order to ensure that the Disposal would proceed, and would not be frustrated by the Second Defendant's regulatory concerns. These facts seem to me to be about as far from the facts of *Head v Gould* as they could be.
>
> 396. These facts also seem to me to demonstrate, and I so find, that the Second Defendant contemplated the very breach of trust which was in fact committed, namely the Disposal, at the time when the Second Defendant resigned, or purported to resign as trustee of the Trusts in favour of Pinotage PTC. These facts also seem to me to demonstrate, and I so find, that the Second Defendant retired in order to facilitate the breach of trust which was committed, namely the Disposal."

Outcome

48. The judge declared that the assignment of the Loan Assets to FS Capital was void in equity and that FS Capital held them as a constructive trustee. Further, amongst other things, he ordered that:

> "The First Defendant shall, upon receiving notice of the appointment of a new trustee of the Trusts from (i) the Claimants or (ii) a new trustee of the Trusts, take all steps necessary to transfer the Loan Assets to that new trustee, save that if upon receiving such notice the First Defendant within 14 days makes an application for directions pursuant to paragraph 7 of this order, the First Defendant shall not be required to take any steps prejudicing any equitable lien it may hold over the Loan Assets."

Jersey Law

49. Each of the grounds of appeal is concerned with Jersey trust law. It is accepted, as it was before the judge, that that law is a recent import from English law and that the Jersey courts will look to English trust law unless it is contrary to Jersey statute or customary law. I consider this aspect of the appeals in more detail in relation to Ground 3 of the FS Capital Appeal. It is also agreed that although questions of foreign law are questions of fact, they are of an unusual kind and that an appeal court may more readily

review a finding in relation to foreign law: *King v Brandywine Reinsurance* [2005] 1 C.L.C. 283 at [66] – [68].

FS Capital Appeal – Ground 1 – knowledge that the impropriety was, as a matter of Jersey Law, a breach of trust and Ground 2 - discharge of the burden of demonstrating no actual knowledge

50. The first two grounds of appeal are concerned with whether the defence of bona fide purchaser for value without notice is available to FS Capital. Mr Morgan KC, with Mr Lewison on its behalf, submit that the judge was in error in relation to Jersey law when determining at [304] that on the facts of this case, the only actual knowledge which FS Capital was required to possess in order to be fixed with actual notice was knowledge of the facts which constituted the impropriety of the Disposal, as opposed to knowledge that the impropriety was, as a matter of Jersey law, a breach of trust. It is submitted that a defendant is only prevented from relying on the defence if he knows of the probability of the legal consequences of an act.

51. It is accepted, for this purpose, that the judge was correct to equate actual notice with actual knowledge of the breach of trust, or wilful shutting of eyes to this fact, or wilfully and recklessly failing to make such inquiries as an honest and reasonable man would have made. It is also accepted that actual knowledge arises where the defendant appreciates that the transaction in question is probably improper or there has probably been a breach of trust: *Papadimitrio v Credit Agricole Corp* [2015] UKPC 13, [2015] 1 WLR 4265 at [14]. Furthermore, it is agreed that the knowledge of Mr Emblin and Mr Reid is to be attributed to FS Capital and that it is for the party raising the defence of bona fide purchaser for value without notice to plead and prove the constituent elements of the defence, including, in particular, that it did not have notice of the breach of trust.

52. In relation to the need for knowledge of the probable legal consequences of an act, we were referred to the *Sinclair Investments* case per Lord Neuberger MR at [102] – [108]. That was a case in which proprietary rights were asserted in relation to the proceeds of sale of shares. It was common ground that if the proprietary right was established that party would, in principle, be entitled to trace those proceeds into a particular property. However, as Lord Neuberger MR explained at [28], any proprietary right would be no more than an equitable right and could, therefore, be defeated if the proceeds had passed to a bona fide purchaser without notice. That defence was relied upon by certain banks which had received monies which other parties sought to trace into their hands. In relation to notice of the relevant facts, Lord Neuberger MR explained the matter in the following way:

> "100. In the present case, as at the three dates identified in para 95 above, TPL's case is that the banks ought to have appreciated that the transfers of money effected on, or as at, those dates was "probably improper" on the ground that the money was beneficially owned by TPL, or at least that the banks ought to have made inquiries before accepting the money. It is accepted by both TPL and the defendants that the issue is to be determined by asking what the banks actually knew, and what further inquiries, if any, a reasonable person, with the knowledge and experience of the banks, would have made, and, in the light of

> that, whether it was, or should have been, obvious to the banks that the transaction was probably improper."

53. Lord Neuberger MR then addressed the question of whether the banks should be treated as appreciating the legal consequences of the facts which they knew or ought to be treated as knowing, even if they did not in fact appreciate those consequences. Having noted that Mr Miles, on behalf of Sinclair Investments, had contended that the banks should be assumed to have appreciated the legal consequence of the facts which they knew, Lord Neuberger MR addressed the issue as follows:

> "104 In my view, despite what was apparently assumed in the *Belmont Finance Corpn* case, it seems to me that it is not possible to be as categorical as Mr Miles suggests. Just as in some cases but not in others a defendant ought to make further inquiries as to the facts, so in some cases but not in others it may be that a defendant should be taken to know the law. In my opinion, once a person knows certain facts, he should only be treated as appreciating the legal consequences if he actually knew of those consequences, or if in all the circumstances he ought reasonably to have appreciated those consequences.
>
> 105 That conclusion seems to be consistent with the principles referred to in paras 98 and 99 above, although the cases referred to there were concerned with facts and factual inferences rather than legal consequences. . . .
>
> 106 It is true that, like the *Belmont Finance Corpn* case [1980] 1 All ER 393, the *Carl Zeiss* case [1969] 2Ch 276 was not a notice case. It is also true that different standards may be appropriate for assessing what constitutes knowledge or notice in knowing receipt, constructive trust, and notice cases: see per Megarry V-C in *In re Montagu's Settlement Trusts* [1987] Ch 264 and *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437. However, all such cases ultimately involve the question whether a recipient of money to which another person has a proprietary claim can properly retain the money, in the face of a claim by the other person, given what the recipient knew or ought to have appreciated at the time he received the money.
>
> 107 Even if different standards are appropriate to those different equitable claims (as to which I express no view), it would be surprising if a wholly different approach was taken when assessing whether the recipient of the money should be assumed to appreciate the legal consequences of the facts he knows or ought to know. It seems to me that the question whether one attributes to the recipient of the money knowledge of the legal consequences of the facts that he knows should be determined by reference to the same standard as is applicable to the facts. Thus, in the present case, the proper approach to the issue should be as laid down in the passages cited in paras 98—100 above."

Mr Morgan also referred us to the recent Supreme Court authority of *Lifestyle Equities v Ahmed* [2024] 2 WLR 1297 at [108], [126] and [127] and to *Racing Partnership v Done Bros* [2021] Ch 233.

54. Mr Morgan submits that at the time of the Disposal the authoritative statement of Jersey law was that where a trust was cash-flow insolvent, the trustee could only exercise its fiduciary power in the interests of creditors: *Representation of the Z Trusts* [2015] JRC 196C at [30]. Accordingly, at the time of the Disposal, knowledge of the fact that the Disposal was designed to exclude the interests of the Beneficiaries in favour of the creditors should not be equated with knowledge that the facts constituted a breach of trust. Even if the Disposal left nothing for the Beneficiaries, Messrs Emblin and Reid would have had no reason to know that that was improper as a matter of Jersey law. He says, therefore, that although the judge referred to the *Sinclair* case at [301] he erred at [304] by compressing fact and law and in failing to analyse the *Z Trusts* case. The judge's erroneous approach to Jersey law affected the way in which he dealt with the evidence in this regard. The distinction between knowledge of the facts and of their legal consequences as a matter of Jersey law was eroded and the judge did not grapple with the evidence as required.

55. Mr Morgan submits that the judge's finding at [303] that he did not consider that it had been established on the evidence that this was a case in which, despite being aware of the facts which constituted a breach of trust, Messrs Emblin and Reid were ignorant of the fact that the facts constituted a breach of trust was invalidated by the reasoning at [304] and [305]. He says that the judge did not engage with the issue because of his error of law.

56. In relation to knowledge of the law, Mr Morgan places reliance upon two emails. The first is dated 13 May 2019 and is from Mr O'Shea to Messrs Emblin and Reid. It is quoted in full at [76] of the judgment. For ease of reference I will set it out again here:

> "Apologies for the delay, I have just had a chance to discuss the matter with general legal counsel for Pinotage.
>
> It is suggested that the issues with regard to either Hatstone being seen as holding the funds on escrow for Pinotage or the funds being held as part of the trusts remain. In addition, £100k for a potential £300m to £400m loan book is hard to justify from a trustee perspective.
>
> Having discussed the matter, it is clear there shall be good reasons for the trustee to proceed down the path of selling the loan book, but the sale amount must be appropriate.
>
> We have therefore come up with an alternative approach which it is hoped achieves all parties objectives:
>
> 1. Hatstone issues the invoice for £106k with the original narrative – facilitating the sale of the loan book. This way it is clear there is no escrow arrangement or funds forming part of trust property.

> 2. Hatstone invoices Pinotage for all time incurred to date on this matter – that will total between £750k to £1m.
>
> 3. The trusts will therefore arguably be 'insolvent' being another key reason why Pinotage will wish to sell the loan book – to help it satisfying such professional fees.
>
> 4. Pinotage agrees to sell the loan book to the SPV on the basis the SPV agrees to pay Hatstone from any proceeds it recovers. Hatstone will agree to this. The value to be paid for the loan book can be agreed, but can be up to £1m, which can be a more realistic purchase price. Any balance can be written off by Hatstone. The SPV shall not be taking on the debt – it is just agreeing to pay Hatstone from any proceeds recovered (or there could be a side agreement where Hatstone agrees to replace this for a 50% interest etc).
>
> This way:
>
> A. Hatstone cleanly receives its £106k
>
> B. The SPV does not need to pay anything upfront for the loan book
>
> C. The trustee has a good additional reason to sell the loan book and the value will be potentially more reflective of the market etc
>
> D. The proposed 50/50 split remains the same."

The second email is dated 9 October 2019. It is from Mr O'Shea to Mr Reid and was copied to Mr Emblin and is referred to by the judge at [97]. He quoted Mr O'Shea's explanation in relation to the consideration for the Loan Assets, as follows:

> "The consideration here is calculated based on time engaged by Hatstone and Pinotage for dealing with the contractor structures – it has not been calculated to include time on the EBTs. In terms of the consideration for the EBTs, it is suggested that this can be on a wholly deferred basis or I can try to calculate an increased consideration now (but not sure how that works when the PTC is not the trustee). To try to explain a little more, from the trustee's perspective, the trustee of the trust calculates the "consideration" by asking its creditors (the trustee and Hatstone) for their outstanding charges and approval to proceed with the disposal with the creditors agreeing to accept the deferred consideration in lieu of outstanding fees. This is the main way the trustee can justify the sale and the setting aside of the best interests of the beneficiaries, as the creditor rights arguably usurp those of the beneficiaries."

57. Mr Morgan says that Mr Emblin was cross-examined about the email of 13 May 2019 but not on the basis that the statements contained in it were untrue or that he did not believe them to be true. In re-examination, he confirmed that he had no reason to doubt what he was being told by Mr O'Shea. Mr Reid was cross-examined on the same basis and his re-examination was similar. Mr Reid was cross-examined on the second email of 9 October 2019 in just the same way. It was not suggested that the statements it contained were untrue or that he did not believe them to be true. Extracts from the cross-examination are set out at [212] – [215] of the judgment.

58. Given the opportunity to cross-examine and FS Capital's pleaded case that the Trusts were insolvent so that they were to be administered in the interests of creditors, Mr Morgan submits that this was not an appropriate case to resort to the burden of proof. The judge could reasonably have been expected to make a finding one way or the other: *Verlander v Devon Waste Management* [2007] EWCA Civ 835 at [19]. The judge should have concluded that Messrs Emblin and Reid did not have actual knowledge that the Disposal, as a matter of Jersey law, was a breach of trust and therefore, FS Capital discharged the burden of demonstrating that it did not have actual notice within the meaning of Article 55 of the 1984 Law.

59. Mr Miall, with Mr Fennemore, on behalf of the Respondent Beneficiaries, says that this argument fails for the simple reason that this was not the way in which the case was presented. Reliance upon the *Z Trusts* case and the submission that Messrs Emblin and Reid did not know that the facts amounted to a breach of trust in Jersey law, was only raised in closing. Neither Mr Emblin nor Mr Reid stated in their witness statements that they were unaware that the Disposal amounted to a breach of trust as a matter of Jersey law or that they believed that the transactions were lawful as a matter of Jersey law. Nor did they address their knowledge and state of mind in their witness statements. In addition, Mr Miall says that there was no mention of the insolvency point or the two emails which are now relied upon. There was no evidence to the effect that Messrs Emblin and Reid considered the transaction to be lawful under Jersey law and had there been, they would have been cross-examined and the Beneficiaries would have had an opportunity to challenge that assertion. That he says is fatal to this ground of appeal. He also adds, that in his submission, *Z Trusts* is not authority for the proposition for which it is relied upon.

60. Furthermore, he says that this is not a case in which this issue was decided on the burden of proof in the sense in which it is used by FS Capital. It was not a case where the evidence was inconclusive and the judge resorted to the burden of proof to decide the issue. Instead, FS Capital failed to adduce the evidence required to make out an important element of its case, which it sought to run for the first time in closing submissions.

61. Even if that were not the case, Mr Miall says that the judge was right to find that FS Capital had actual knowledge of the breach of trust. He reminded us that it is agreed that a defendant will have actual notice of a breach of trust if it appreciates that the relevant transaction was probably improper: *Sinclair Investments* at [98] and [100]. The defendant is required to prove, therefore, that it did not have notice of the probable impropriety of the transaction in question. There is no need to have a detailed knowledge of the law itself.

62. He says that the judge rejected the argument that FS Capital did not have actual notice of the breach of trust because it did not appreciate that, as a matter of Jersey law, the Disposal was a breach of trust for two reasons: first, it had not presented its evidence on the basis that it was unaware that the facts of the Disposal amounted to a breach of trust as a matter of Jersey law [303]; and secondly, that it had full knowledge of all the facts of the Disposal and intended that the interests of the Beneficiaries should be disregarded and was not satisfied that it was legitimate to do so [304] and [305].

63. He submits that the judge's factual findings leave no room for concluding that FS Capital did not know that the facts amounted to a breach of trust as a matter of Jersey law. The judge found at [299] that it was quite clear to him that neither Mr Emblin nor Mr Reid "was or could have been satisfied that it was legitimate to disregard the interests of the Beneficiaries". Accordingly, the judge addressed their belief as well as their knowledge of the underlying facts. Those conclusions are consistent with the requirement of actual knowledge of probable impropriety in the *Sinclair* case and in *Papadimitriou*. The distinction is one without a difference and even if actual knowledge of the details of Jersey law was necessary, that was not made out on the evidence.

64. Furthermore, he submits that the judge was correct to find that FS Capital had actual notice of the breach of trust in the light of the following unchallenged findings: (i) FS Capital collaborated in the design of the Disposal and, in particular, in the design of the components of the Disposal which resulted in it being made for an improper purpose (see [299] and [304]); (ii) Messrs Emblin and Reid knew that the deferred consideration had been capped at the level of the sums owing to trust creditors despite knowing that the trust assets could have a substantial value such that the beneficiaries retained an economic interest in the Trusts which was being disregarded in the Disposal ([91], [297] and [298]); and (iii) despite "looking for ways to justify their design of the Disposal" Messrs Emblin and Reid were not satisfied that it was legitimate to disregard the interests of the beneficiaries ([299] and [305]).

Discussion and conclusions

65. There can be no doubt that it is for the party claiming to be a bona fide purchaser for value without notice to prove that they gave valuable consideration and had no notice to the appropriate standard. Foxton J set out the principle at [149] in the *Serious Fraud Office* case and supported the proposition with the dicta of Lord Collins MR in *In re Nisbet and Pott's Contract* [1906] 1 Ch 386, 404 and a passage in the judgment of Mummery LJ in *Barclays Bank plc v Boulter* [1998] 1 SLR 1, 8 to the same effect. Lord Collins said:

> "Has the appellant, the present vendor, shewn – as the burden is upon him to shew – that, having bought this land for value, he bought without notice of this incumbrance?"

Mummery LJ stated as follows:

> "On the authority of Lord Browne-Wilkinson's speech in the O'Brien case [1994] 1 AC 180 and on well-established equitable principles, the burden is not on Mrs Boulter to plead and prove that the bank had constructive notice: it is on the bank to plead and prove that it did not have constructive notice … It is well-

> established at this level of decision that the doctrine of bona fide purchaser for value without actual or constructive notice is a defence which can be raised to defeat a claim of an equitable right or interest and that the burden is on the person raising that defence to plead and prove all its elements: it is a 'single defence'…"

66. It was for FS Capital, therefore, to plead and prove all the elements of the bona fide purchaser for value defence as it applied in the context of Jersey law. It was pleaded that "the Trusts were insolvent so that they were to be administered in the interests of creditors". Nothing was said about whether FS Capital, through Messrs Emblin and Reid, believed that, accordingly, there was nothing improper about the Disposal or that, as a result of the insolvency, that they believed the Disposal to be lawful. To put the matter in plain terms, if one intends to rely upon a lack of knowledge of anything improper, it behoves one to plead the relevant facts and to prove them. It seems to me that FS Capital did not attempt to do so. There was no evidence that Messrs Emblin and Reid were aware of the *Z Trusts* case or that they believed that what they were doing was legitimate as a matter of Jersey law. Neither did they place any reliance upon the two emails to which we were referred.

67. It is almost too obvious to state that the party who relies on a particular fact, or in this case, a state of knowledge or lack of it, in support of his case must prove it. The judge found at [303] – [306] that FS Capital had not done so and he was entitled to come to that conclusion. As Mr Miall submitted this is fatal to these grounds of appeal.

68. The requirement to prove the elements of a claim or defence should not be confused with the "evidential" burden of proof. That concept was explored by Mustill LJ in *Brady (Inspector of Taxes) v Group Lotus Car Companies plc* [1987] 3 All ER 1050, the facts of which are far from this case. It was concerned with estimated assessments to corporation tax, often referred to as "best of judgment" assessments. The General Commissioners had taken the view that the assessments could be justified only if there had been fraud on the part of the taxpayer companies, that the onus was on the Inland Revenue to prove the fraud and that they had failed to discharge that burden: see 1054. That decision was overturned on appeal. In the Court of Appeal, Dillon LJ said at 1055 that "[w]here the assessments are made in time, … the burden lies on the taxpayer from the start to displace the assessments". Balcombe LJ similarly considered that "the burden of proof remained on the taxpayer companies throughout": see 1062. Mustill LJ concurred on this aspect of the case while dissenting on another issue. What is relevant for our purposes are his observations about the term "evidentiary burden of proof" at 1059. He stated that the phrase "simply expresses a notion of practical common sense and is not a principle of substantive or procedural law". He went on:

> "It means no more than this, that during the trial of an issue of fact there will often arrive one or more occasions when, if the judge were to take stock of the evidence so far adduced, he would conclude that, if there were to be no more evidence, a particular party would win. It would follow that, if the other party wished to escape defeat, he would have to call sufficient evidence to turn the scale. The identity of the party to whom this applies may change and change again during the hearing and it is often convenient to speak of one party or the other as having the

> evidentiary burden at a given time. This is, however, no more than shorthand, which should not be allowed to disguise the fact that the burden of proof in the strict sense will remain on the same party throughout, which will almost always mean that the party who relies on a particular fact in support of his case must prove it. I do not see how this fact of forensic life bears on the present case."

The *Brady* case was followed in the Court of Appeal in *Award Drinks Ltd v Revenue and Customs Commissioners* [2021] EWCA Civ 1235, [2021] STC 1576.

69. I also agree with Mr Miall that the circumstances of this case are entirely different from those of *Verlander v Devon Waste Management* [2007] EWCA Civ 835. That was a case about the circumstances in which a judge can resort to the burden of proof where there is contradictory and inconsistent evidence about an event from both sides to a dispute. In this case, the judge found that on the evidence, FS Capital had failed to establish that despite being aware of the facts, Messrs Emblin and Reid were ignorant of the fact that they constituted a breach of trust.

70. Further, and in any event, as Mr Miall pointed out, the judge set out the evidence in relation to the value of the Loan Assets at [89] – [91]. He noted in particular, at [91] that the sentiments expressed by Mr Reid as to the value of the Loan Assets in his email of 25 July 2019, that they had a notional value at best, was undermined by exchanges of emails on 30 September 2019 in which he stated that "[A] huge commercial opportunity [was] being lost" if 800 individuals supposedly settling with HMRC were not transferred to FS Capital. He went on to draw conclusions from the primary facts at [299], [304] and [305].

71. In particular, at [299], he expressly rejected the submission that Messrs Emblin and Reid had been entitled to take the view and had been advised that it was legitimate to put the interests of the creditors first. The judge stated that he could not accept that argument and that it was quite clear to him from the evidence and the contemporaneous documents "that neither Mr Emblin nor Mr Reid <u>was</u> or could have been <u>satisfied</u> that it was legitimate to disregard the interests of the Beneficiaries" (emphasis added). The judge decided, therefore, on the totality of the evidence, that neither Mr Emblin nor Mr Reid was satisfied that it was legitimate to disregard the interests of the Beneficiaries.

72. Nor do I consider that the judge erred in law, as Mr Morgan submits. The judge made reference to the guidance in the *Sinclair* case at [102] – [108] about the circumstances in which it is appropriate to impute knowledge of legal consequences from knowledge of the relevant facts. That passage includes the following:

> "104. In my view, despite what was apparently assumed in the *Belmont Finance Corpn* case, it seems to me that it is not possible to be as categorical as Mr Miles suggests. Just as in some cases but not in others a defendant ought to make further inquiries as to the facts, so in some cases but not in others it may be that a defendant should be taken to know the law. In my opinion, once a person knows certain facts, he should only be treated as appreciating the legal consequences if he actually

> knew of those consequences, or if in all the circumstances he ought reasonably to have appreciated those consequences."

In that light, the judge went on at [304] to state that on the facts of the case he was not convinced that the separation of the knowledge of the facts from the knowledge of the breach of trust was justified. He did so on the basis that "the eyes of Mr Emblin and Mr Reid were not shut."

73. In this case, having considered all the evidence, including the design of the Disposal itself which, as the judge noted, was intended to leave no surplus so that the Trusts could be terminated, the judge concluded that neither Mr Emblin nor Mr Reid was or could have been satisfied that it was legitimate to disregard the interests of the Beneficiaries. It seems to me, therefore, that this was a case, as Lord Neuberger described it, in which Messrs Reid and Emblin should be taken to have known the law. The judge had found that they were aware the Loan Assets had a significant value and yet as part of the design of the scheme as a whole, they were transferred for no more than the value of the outstanding debts. In those circumstances, although he might have expanded his reasoning, the judge applied the law correctly in the circumstances.

74. For the sake of completeness, I should also address the two emails to which Mr Morgan referred and which he accepted were the "high point" of his case in relation to lack of knowledge of a breach of trust as a matter of Jersey law. Even if it were appropriate to consider them in isolation, I do not consider them to be of real assistance.

75. In the email of 13 May 2019 email, Mr O'Shea stated that if his law firm invoiced the trustee for its WIP, "the trusts will therefore "arguably" be 'insolvent'". He did not make reference to *Z Trusts* or Jersey law in general, or any entitlement on the part of the trustee to disregard the interests of the Beneficiaries. In fact, he stated that £1 million would be a "more realistic purchase price" and would be "potentially more reflective of the market etc". It seems to me that this is an example of the protagonists looking for ways to justify their design of the Disposal, as the judge noted at [299] of his judgment.

76. On the face of it, the second email of 9 October 2019 email from Mr O'Shea to Mr Reid, (copied to Mr Emblin) is of more assistance. Mr O'Shea stated that the trustee had calculated "the 'consideration'" by reference to the sums owing to the creditors, and that "this is the main way the trustee can justify the sale and the setting aside of the best interests of the beneficiaries, as the creditor rights arguably usurp those of the beneficiaries". It is of note that Mr O'Shea placed consideration in inverted commas and only stated that the rights of the beneficiaries were "arguably usurp[ed]". Once again, however, the email does not mention *Z Trusts* or support a conclusion that the protagonists believed that what they were doing was in accordance with Jersey law, or that they did not believe that it was contrary to that law.

77. In any event, as I have already mentioned, I do not consider that it is appropriate to consider these emails separately. We are being encouraged to engage in island hopping. The judge was aware of the emails and quoted them in his judgment. In the context of the evidence as a whole, he found as he did. It was obviously open to him to do so. There is nothing to suggest that the judge's findings of fact were plainly wrong in the *Volpi v Volpi* sense. I should add that he did so having heard the passages of re-examination to which we were referred and to which there is no need to refer in detail.

78. I should add that I am in some doubt as to whether the principle in the *Z Trusts* case is directly applicable here, in any event. First, the *Z Trusts* case was concerned with very different circumstances. It was concerned with the validity of the appointment of trustees. Secondly, the Commissioner stated at [28] that the court had come to the conclusion that in the context of a trust, the test for insolvency was cash-flow insolvency, despite the fact that the matter had not been canvassed at the hearing. Thirdly, the trusts in that case were both balance sheet and cash flow insolvent. It is not clear to me, therefore, that Messrs Emblin and Reid and FS Capital in turn would necessarily have been able to rely upon it.

79. It seems to me that, for all the reasons set out above, these grounds of appeal fail.

The Respondent's Notice – constructive notice of breach of trust

80. The first point taken in the Respondent's Notice was that the judge ought to have decided, as a matter of Jersey law, that FS Capital was required to prove that it had neither actual nor constructive notice of the breach of trust. It turned upon the proper construction of Articles 54(3) and 55(1) of the 1984 Law. Article 54(3) makes mention of a "bona fide purchaser for value without notice of a breach of trust" whereas Article 55(1) applies in relation to a "bona fide purchaser for value without **actual notice** of any breach of trust" (emphasis added). In the light of my conclusions in relation to grounds 1 and 2, it is not necessary to consider this question of construction.

FS Capital Appeal - ground 3 – Was the Disposal void or voidable? Respondent's Notice – presumption of similarity

81. The issue on this ground of appeal is perhaps, the most substantial of all of the matters on this appeal. It arises in the circumstances in which FS Capital is unable to rely upon the defence of bona fide purchaser for value without notice. The question is whether, as a matter of Jersey law, a transaction completed as a result of the use of a fiduciary power for an improper purpose is void or merely voidable. That question is not addressed in the 1984 Law, nor is there any Jersey authority which deals with the issue directly. The experts in Jersey law in this case agreed that the matter is not settled in Jersey law.

82. Mr Lewison submits that, in the circumstances, it is necessary to decide what the most senior Jersey court, the Privy Council, would decide on what he says is this developing area of law. In this regard, he relies upon passages in the judgment of Foxton J in the *Serious Fraud Office* case at [511] and [529]:

> "511. In Yukos Capital Sarl v OJSC Oil Company Rosneft [2014] EWHC 2188 (Comm), [2014] 2 CLC 162, [29-30] Simon J discussed the approach the court should adopt when determining the content of foreign law. I was referred to the following paragraphs:
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> > "28. Thirdly, in determining the question of foreign law the court is entitled, and may be bound, to look at the source material on which the experts express their opinion. This is true of any expert evidence which comes before the court, and if authority were required for the proposition in relation to

foreign law it can be found in Dicey (see above) at 9–017 and the cases at footnote 91.

29. Fourthly, the claimant (for reasons which I will come to) submitted that the relevant issue would have to be resolved in the 'supreme court' of the foreign jurisdiction; and that therefore the relevant question is: what would the 'supreme court' decide if the matter were before it? Mr Pollock relied in support of this proposition on: Re Duke of Wellington, Glentanar v Wellington [1947] Ch 506 (Wynn-Parry J at p. 519); Rendall v Combined Insurance Company of America [2005] 1 CLC 565 (Cresswell J) and Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan [2008] EWHC 1901 (Comm) (Aikens J at [103]). I accept that this may be the right approach in some circumstances, but it will not be the right approach in every case. The legal issue may, for example, have been plainly decided by a court which is inferior in jurisdiction to the 'supreme court'. I have concluded that the law is correctly stated in Dicey at 9–020:

> 'Considerable weight is usually given to the decisions of foreign courts as evidence of foreign law … But the court is not bound to apply a foreign decision if it is satisfied, as a result of all the evidence, that the decision does not accurately represent the foreign law. Where foreign decisions conflict, the court may be asked to decide between them, even though in the foreign country the question still remains to be authoritatively decided.'

30. Fifthly, a further issue may arise where the foreign law is going through a period of change (as the claimant contended in the present case). The question is then the extent to which the English court can anticipate the 'trajectory' of the developing law. Mr Pollock referred to a passage in the judgment of Beatson J in Blue Sky One Ltd v Blue Sky Airways LLC [2010] EWHC 631 (Comm) at [88] in support of his contention that it can. In that case Beatson J was considering a particular problem: that the decisions of the Iranian courts are seldom referred to, the views of commentator[s] are seldom relied on and only decisions of the supreme court sitting in banc constitute legally binding precedent. In these circumstances I am not persuaded that Beatson J's reference to the 'trajectory of Iranian law' bears the weight that Mr Pollock sought to attach to it. To the extent that he was submitting that the English court should decide what conclusion a foreign court would reach on a developing area of the law, the point is unobjectionable. If he was intending to invite me to make findings which went beyond

> the present state of Russian law and to anticipate a rational development of it, his invitation must be declined."
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> . . .
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> 529. This is clearly an interesting point of Jersey law concerning the interaction of property and trusts law in the context of trustee fraud which is not subject to any direct Jersey authority, and on which there is much to be said on both sides. As Simon J held in Yukos Capital, the role of the court in these circumstances is to decide what conclusion the foreign court would reach on a developing area of the law, not to seek to anticipate a rational development in the foreign law or decide what the law should be. In deciding this issue, I have sought to arrive at a conclusion which best fits with the Jersey law materials which are available to me, paying appropriate regard to the evidence of the only expert before the court."

83. Mr Lewison submits that, as the judge held, there is no room for the presumption of similarity here. He says that the principle in the *Brownlie v FS Cairo (Nile Plaza)* case operates only until evidence of the foreign law is adduced and in this case both parties adduced expert evidence to the effect that the void/voidable question was not settled in Jersey law and that the position is currently reflected in the English case law to which a Jersey court might refer when considering the issue. In England, on the other hand, at present, it is answered by *Cloutte v Storey* in the Court of Appeal. He says that *Cloutte* is merely a decision to be considered by the Jersey court and that it carries little weight because, amongst other things, it is poorly reasoned, conflicts with prior English authority, conflicts with principle and is not well respected.

84. Mr Miall, on the other hand, says that the presumption of similarity applies here and that accordingly, Jersey law should be assumed to be the same as English law and accordingly, that the Jersey courts at the highest level would follow the *Cloutte* decision. He drew attention to the fact that in the *Brownlie* case, at [125], Lord Leggatt JSC stated that the court will apply the presumption of similarity which requires a party seeking to argue that an application of foreign law is materially different from English law to adduce evidence to prove that fact and that it will be more likely to be appropriate to apply the presumption where the applicable law is another common law system, and the relevant domestic law is not contained in statute [144] and [145].

85. He says that this a paradigm case for the application of the presumption because as Lord Hodge explained in the *Investec* case, the law of trusts in Jersey is an import from England and only differs where it has been modified by Jersey statute or would conflict with established principles of Jersey customary law. He says that there is no evidence that Jersey law is different in this respect. There is no Jersey case in which the point has been argued and the ones in which it is mentioned accept the English position that the appointment is void. He says that there is no evidence of what Jersey law on the point is and therefore, the presumption applies and the court is bound by *Cloutte v Storey*. Lastly, in this regard, he says that the *Serious Fraud Office* case is of no assistance to FS Capital because that was a case in which the presumption could not arise in relation to the issue in dispute because it involved the application of provisions of the 1984 Law

and issues of the Jersey law of real property, governed by Jersey customary law, rather than the common law.

Does the presumption of similarity apply?

86. In the *Brownlie* case, Lord Leggatt JSC with whom Lords Reid, Briggs, Burrows and Lloyd-Jones JJSC agreed in relation to this issue, stated that:

> "125. A third important factor is that the presumption of similarity does not itself determine any legal issue. It only ever operates unless and until evidence of foreign law is adduced. Nor does the presumption alter the legal burden of proof. Where the presumption applies, it merely places the burden of adducing evidence on a party who wishes to displace it. It is always open to a party to adduce evidence of the applicable foreign law showing that it is in fact materially different from English law on the point in issue.
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> 126. These factors provide good pragmatic reasons for applying the presumption in a range of cases, but they also determine its proper limits. There is no warrant for applying the presumption of similarity unless it is a fair and reasonable assumption to make in the particular case. The question is one of fact: in the circumstances is it reasonable to expect that the applicable foreign law is likely to be materially similar to English law on the matter in issue (meaning that any differences between the two systems are unlikely to lead to a different substantive outcome)?
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> . . .
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> 143. Because the application of the presumption of similarity is fact-specific, it is impossible to state any hard and fast rules as to when it may properly be employed. In light of the authorities discussed above, however, the following observations may be made.
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> 144. First, for reasons already given, as a matter of broad generalisation the presumption is more likely to be appropriate where the applicable foreign law is another common law system rather than a system based on Roman law. There are, however, "great and broad" principles of law which are likely to impose an obligation in all developed legal systems.
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> 145. Second, also as a matter of broad generalisation, the presumption is less likely to be appropriate where the relevant domestic law is contained in a statute, but this depends on the nature of the statute and, more specifically, the relevant statutory provision. There is a difference between a statute which codifies general principles and one which introduces a local scheme of regulation. The fact that the events in question are not actually

> within the scope of the domestic statute, for example because it does not have extraterritorial effect, is not a bar to relying on the presumption - as the question is not whether the domestic statute itself applies but whether it is reasonable to presume, unless and until the contrary is shown, that the foreign system of law contains a materially similar rule. That may depend upon the particular aspect of the statutory rule on which a party is seeking to rely. . . .
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> 146. Third, it is in the nature of the test that its application may often be uncertain so that it is difficult to predict whether a judge will consider that the presumption can be relied on in a particular case. I do not think this problematic, however, given that reliance on the presumption is always a matter of choice. It is always open to the party who is asserting a claim or defence based on foreign law to adduce direct evidence of the content of the relevant foreign law rather than take the risk of relying on the presumption. Equally, it is always open to the other party to adduce such evidence showing that the foreign law is materially different from the corresponding English law rather than take the risk that the presumption will be applied.
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> . . .
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> 149. The essential point is that the presumption of similarity is only ever a basis for drawing inferences about the probable content of foreign law in the absence of better evidence. . . ."

87. In this case, evidence of Jersey law was adduced. The experts are agreed that the issue is open under Jersey law. It seems to me, therefore, that despite the fact that it is accepted that this issue is not dealt with in statute in Jersey and that save where the 1984 Law or other express authorities provide, Jersey trust law is, for the most part, imported from England (see *Investec*), this is not a case in which the presumption applies.

Does the exercise of a fiduciary power for an improper purpose, render the exercise void or voidable as a matter of Jersey law?

88. Before turning to the question of what the effect of the exercise of a fiduciary power for improper purposes would be as a matter of Jersey law, it is helpful to have the position in England and Wales in mind. In this jurisdiction, *Cloutte v Storey* is binding Court of Appeal authority for the proposition that such an exercise of fiduciary power is void in equity. That case was concerned with appointments of capital out of a marriage settlement. After successive life interests to themselves, Mr and Mrs Harvie had a joint power of appointment over personal property vested in the trustees of the settlement in favour of the issue of their marriage. They had seven children of whom the eldest attained 21 on 2 October 1899. On 14 October 1899, Mr and Mrs Harvie by deed, appointed £4,000 to him subject to their own life interests and shortly thereafter, the son mortgaged that sum. In 1901, the parents appointed the residue of the wife's reversionary interest subject to the £4,000, to the same son. Later that year the son assigned both appointed sums to a company which subsequently assigned their interest

to the defendants in the action. Both the appointments were made subject to a secret arrangement with the parents for their benefit and were frauds on the power (made for an improper purpose). The purchasers had no knowledge of the improper purpose, nor did they have the legal title. Neville J held that the appointments were void.

89. The purchasers appealed. Farwell LJ with whom Cozens-Hardy MR and Fletcher Moulton LJ agreed, dismissed the appeal and held by reference to *Duke of Portland v Topham* (1864) 11 H.L.C. 32, 44, 45, 61 that, in equity, the appointments were void. At 30 - 31, Farwell LJ made the distinction between the position in law and in equity:

> "Now the power in this case is equitable only; i.e., it has no direct operation on the legal interest and could not have been enforced or challenged in any common law Court; the trustees in whom the legal title is vested must have transferred the property in order to give legal effect to the appointments. In such a case the difference between void and voidable is of little, if any, importance. Equity administers the trusts of the settlement and has regard only to equitable interests and equities: the appointments operate only in equity and are mandates to the trustees as to the mode of dealing with the legal title: there is nothing to be set aside or delivered up to be destroyed before effect can be given to the rights of the parties, because the Court has all the materials in its own hands and deals with the parties according to their rights in equity only. It would be otherwise if the power enabled dealings directly affecting the legal estate—
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> . . .
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> Any questions of a fraud on the power would be for equity only: Sugden on Powers, 8th ed., pp. 602 and 606. In such a case the appointee would have the legal estate, and it would be necessary to set aside the appointment in order to get rid of the legal estate which had passed thereunder ; and in an action for that purpose the plea of purchase for value without notice passing the legal estate would be a good defence : *M'Queen v. Farquhar*.(l) But in equity the appointment is void, not voidable : see *Duke of Portland v. Topham* (2), where the order of the Court of Appeal was affirmed by the House of Lords, and in the second case of *Topham v. Duke of Portland* (3) ; although by reason of the immateriality of the distinction in equitable transactions "voidable" is sometimes used when "void" would be more accurate."

90. He went on, also at 31 to state as follows:

> "The law may be stated thus: an appointment under a common law power, or a power operating under the Statute of Uses by which the legal estate has passed, is voidable only, and a purchaser for value with the legal estate and without notice is not affected by the fraudulent execution of the power; but an appointment in fraud of an equitable power, i.e., not operating so

> as to pass the legal estate or interest, is void, and a purchaser for value without notice but without the legal title can only rely on such equitable defences as are open to purchasers without the legal title who are subsequent in time against prior equitable titles."

91. Before turning to the authorities, it is also important to be precise about the circumstances which are under consideration. The issue is whether the exercise of a power which is within the scope of the power itself, but is exercised for an ulterior motive should be treated, for all purposes, as if it had never taken place or should be valid until set aside. The situation was described in the *Grand View* case as follows:

> "55. By contrast, the proper purpose rule, which Clarke P called the improper purpose rule, involves identifying the purpose for which the power has been exercised and asking whether such purpose is a purpose for which the power has been given. While identification of the purpose of a power may well be relevant to the construction of the provision conferring it, the question raised by the proper purpose rule arises only once the scope of the power has been determined and once it has been determined that the exercise of the power was within the terms, or "scope", of the power. This was made clear by Lord Sumption in Eclairs Group Ltd v JKX Oil & Gas plc [2015] UKSC 71, [2015] Bus LR 1395 (Eclairs) at paras 15 and 30:
>
>> "15…The important point for present purposes is that the 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 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."
>
> On this, as on all other matters considered by Lord Sumption to which the Board refers in this judgment, the other members of the Supreme Court were in agreement.
>
> 56. In the past, the proper purpose rule was generally referred to as "fraud on a power", a phrase that is still sometimes used. However, as repeatedly made clear in the authorities, it is not confined to cases involving some reprehensible conduct on the part of a trustee or other fiduciary but extends to any case where a fiduciary power is used for a purpose not falling within the purposes for which the power has been conferred, even though the trustee may have acted in good faith and genuinely with a

> view to benefiting the beneficiaries. "Fraud on a power" has been described as "historical language" (Kain v Hutton [2008] 3 NZLR 589, para 46) and Lord Sumption remarked in Eclairs at para 15 that it was an inappropriate term. The Board considers that there is much to be said for discarding this historical language and referring instead to the proper purpose rule."

92. What is the position as a matter of Jersey law? As I have already mentioned, the experts stated that there was no Jersey authority directly on the point. The Jersey courts, have, however, stated the proposition of law contained in the *Cloutte* case and applied it. In *Vatcher v Paull* [1915] AC 372, the Privy Council, on appeal from the Royal Court of Jersey, overturned a finding on the basis that there had been no fraud on the power at all. Lord Parker explained the term "fraud on a power" and its effect at 378 in the following terms:

> "The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power. Perhaps the most common instance of this is where the exercise is due to some bargain between the appointor and appointee, whereby the appointor, or some other person not an object of the power, is to derive a benefit. But such a bargain is not essential. It is enough that the appointor's purpose and intention is to secure a benefit for himself, or some other person not an object of the power. In such a case the appointment is invalid, unless the Court can clearly distinguish between the quantum of the benefit bona fide intended to be conferred on the appointee and the quantum of the benefit intended to be derived by the appointor or to be conferred on a stranger: see Sadler v. Pratt (1) and In re Perkins. (2)"

93. In *In the Matter of the Bird Charitable Trust* [2008] JRC 013, the Deputy Bailiff, sitting in the Royal Court of Jersey, Samedi Division, summarised the principle of a fraud on a power at [71] by setting out a passage from paragraph 19.01 of Thomas & Hudson "*The Law of Trusts*" and then went on to quote the passage from the judgment of Lord Parker in *Vatcher v Paull* which is set out above. The passage from *Thomas & Hudson* states, amongst other things, that:

> "The donee of a limited power must exercise it bona fide for the end designed by the donor, which requires that the power can be exercised only in favour of the objects of that power and in furtherance of the purpose for which was conferred. If the donee, in good faith, exercises a power in favour of a stranger or in some other way which is not consistent with the terms and scope of his power, such exercise is excessive. If, however, the donee deliberately attempts to secure the effect of an excessive execution without actually making one, the exercise of the power is not simply excessive; it is fraudulent and void. The donee:-

> "……. must act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power and not for the purpose of accomplishing or carrying into effect any bye or sinister object (sinister in the sense of being beyond the purpose and intent of the power).""

94. In 2014, the Court of Appeal in Jersey in *Crociani & Ors v Crociani & Ors* [2014] JCA089 merely noted at [58] that in the circumstances of that case, it was unnecessary to enter into a debate as to whether *Cloutte v Storey* was "dead, moribund or vigorously alive". I agree with Mr Miall that nothing can be gleaned from this, save that the Jersey courts were not bound by the authority. In the *Crociani* case in the Privy Council, on appeal from the Court of Appeal of Jersey, reported in the same year at [2014] UKPC 40, Lord Neuberger who delivered the judgment of the Board, noted at [41] that there were numerous trust law issues which arose, the great majority of which would be governed by Jersey law and that two of those issues were the law on fraud on a power and the correctness of *Cloutte v Storey*. As Mr Miall submitted, this observation is consistent with the issue being open in Jersey law.

95. The next authority is the *Z Trusts* case, in the Jersey Royal Court in 2015. It was concerned with the validity of the appointment of additional trustees in circumstances where the trust was insolvent. At [26], the Commissioner set out a series of principles "drawn from the authorities and commentators" to be applied in relation to the exercise of fiduciary powers. The first such principle was that "an exercise of a power to appoint a new trustee which is a fraud on the power is void". The second was that the leading judicial statement as to what is meant by fraud on a power is that of Lord Parker in *Vatcher v Paull*.

96. In 2017, in *Crociani v Crociani* [2017] JRC 146, in the Jersey Royal Court, the Commissioner noted at [345] that:

> "An excessive execution, being outside the scope of the trustees' powers, is void (Lewin 29-240) and as the English authorities now stand, a power which is vitiated as a fraud on the power is void in equity. That authority is Cloutte v Storey [1911] Ch 18, which Lord Walker at paragraph 93 of Pitt v Holt described as a difficult case without overruling it, but none of the parties before us sought to argue that we should not follow it. Article 47(H) of the Trusts Law allows the Court to declare the exercise of the power as voidable and having such effect as the Court may determine, or as having no effect from the date of its exercise."

Thereafter, the *Cloutte* case was cited by the Jersey Court of Appeal in *BNP Paribas v Crociani* [2018] JCA 136. It stated at [146] that whilst the conclusion in *Cloutte* is "not universally accepted" it was one which it was "content for the purposes of [its] judgment to accept".

97. The position in Jersey law, therefore, is that although the Jersey courts have not been required to determine whether *Cloutte* is correct, they have been content to quote the proposition for which it stands and apply it despite the criticism it has received. There are no authorities in Jersey in which the exercise of a fiduciary power for improper purposes has been held to be voidable rather than void.

98. It is clear from the *Investec* case at [57] – [58] and *Re The Esteem Settlement* at [84], that Jersey trust law is a recent import from English law and that the Jersey courts will look to English trust law unless it is contrary to the 1984 Law or other statute, or Jersey customary law. On the face of it, it would seem, therefore, that there is no reason to conclude that the Jersey courts would take a different view from the English courts on this issue. Mr Lewison says, however, that the *Cloutte* case conflicts with prior authority, was not logically reasoned, conflicts with principle and is not well respected and for those reasons it would not be followed.

The prior authorities

99. The earliest authority to which we were referred was *Aleyn v Belchier* (1758) 1 Eden 132, 28 E.R. 634. The headnote states that a power of jointuring having been executed in favour of a wife but with an agreement that the wife should only receive a part as an annuity and that the remainder should be applied for the payment of the husband's debts was a fraud upon the power and the execution was set aside. In fact, the Lord Keeper stated that the question was whether the transaction was void in toto or in part. The whole transaction was on the basis of the agreement and the Lord Keeper stated at 637 that "no point is better established than that, a person having a power, must execute it *bona fide* for the end designed, otherwise it is corrupt and void." The outcome was the same in *Daubeney v Cockburn* (1816) 1 Mer. 626, 35 E.R. 801. In that case, an appointment to one child under a settlement for one or more children of the settlor, which was made upon a secret understanding that the child would re-assign part of the fund in favour of a stranger to the trust, was void.

100. *In re Marsden* (1859) 4 Drew. 594, 62 E.R. 228 was to the same effect. The court held at 231 that if the design in exercising the power was to confer a benefit, not upon himself but upon some other person not being an object of the power, the motive just as much interferes with and defeats the purpose for which the trust was created, as if it had been for the personal benefit of the donee himself. The exercise of the power of appointment was held to be void.

101. The same conclusion was reached in *Topham v Duke of Portland* (1862) 31 Beav 525, 54 E.R.1242 before the Master of the Rolls, Sir John Romilly and in the House of Lords ((1864) 11 H.L. App. Cas. 32, 11 E.R. 1242). In that case, the Duke of Portland wished to prevent one of his daughters from marrying Sir William Topham. Under a settlement he had an exclusive power to appoint a fund to his children. In order to prevent the marriage, he appointed part of the fund to his son, Lord Henry, who, shortly thereafter, settled it on discretionary trusts in favour of the daughter, with the intention of preventing the marriage. The Master of the Rolls held that the whole appointment was void. The same was held in the House of Lords. The Lord Chancellor stated as follows:

> "[54] Without farther dwelling on the matter, inasmuch as your Lordships concur in opinion, I think we must all feel that the settled principles of the law upon this subject must be upheld, namely, that the donee, the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of

> its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power. I think it would be endangering the whole of the established principles of our law upon this subject if we were to permit a transaction of this kind to stand, or to hold that it is a transaction which can be reconciled with the faithful, sincere, just, and honest exercise of the power committed to the appointor, and which he is to exercise as a trustee. . . ."

Mr Lewison points out that the appointed fund was in the hands of Lord Henry and no third party rights or equitable defences had intervened. The void/voidable question was not therefore, directly in issue.

102. *In re Perkins* [1893] 1 Ch 283 to which we were also referred, is to the same effect. The facts are complicated. A power of appointment was exercised by a testatrix. She appointed a greater part of the relevant fund to her daughters and the remaining part to her sons in equal shares on condition that they should give up all claim to the proceeds of the sale of the furniture in the house she had occupied and sign a release to her executors in relation to all claims to such proceeds within three months of her death. If such a claim were made or such a release were not given within the period of three months, she appointed the sum to one of her daughters absolutely. The furniture had been bequeathed to her for life with remainder to her sons in equal shares. She had power to sell it but if she did so, the proceeds were held on the same trusts. In fact, she had sold the furniture and had received the proceeds of sale so that her sons had a claim against her estate for the proceeds. It was held that the appointment could not be severed from the condition; that it was made for the purpose of increasing the estate of the testatrix for the benefit of the residuary legatee; and consequently was void as a fraud on the power.

103. On the face of it, *Attorney-General v Clack* (1839) 1 Beav. 467 might be a contrary authority. There was no discussion of fraud on a power or improper purposes, however. It was concerned with the appointment of new trustees to a charitable trust. Despite the fact that proceedings had been commenced which would have enabled the appointment to take place under the supervision of the court, the remaining trustees went ahead with the appointment. The headnote states that: "though this was neither a contempt nor an act altogether void, yet it imposed upon the trustees the necessity of proving, by the strictest evidence, and at their own expense, that what had been done was perfectly right and proper and the case not appearing altogether clear, the appointment was set aside and the trustees were ordered personally to pay all the extra costs occasioned by their act." The Master of the Rolls, Lord Langdale, held that the appointment, after the filing of the application to court (the information) was "not to be considered as an act altogether void in itself (see *Webb v. Early of Shaftesbury,* 7 Ves. 480)", notwithstanding that the circumstances of the appointment represented an "extremely improper act" on behalf of the existing trustees. It was held that the burden was on them to prove that what they had done was "perfectly right and proper" and that they had not discharged that burden and that the appointments "ought not to stand at all, but ought to be set aside". It seems to me that little can be gleaned from this save that the Court was exercising its jurisdiction to supervise a charitable trust, which would allow it to remove trustees to the extent they had been validly appointed, in circumstances where

it remained unclear whether the appointments had been valid. It is not authority in relation to the issue with which we are concerned and I do not find it helpful.

104. The same is true of *Campbell v Home* [1842] 1 Y & CCC 664. In that case, the court decided that there was no evidence before it to suggest that there had been any misconduct in relation to the exercise of a power of appointment and accordingly, the appointment was valid. The Vice-Chancellor added that "[I]f it can ever be shewn that this deed was executed from improper motives, those who are interested in doing so can apply to set it aside." It seems to me that the use of the phrase "set it aside" in an observation which was not necessary for the decision, in circumstances in which there was no evidence of impropriety, is insufficient to support the conclusion that this is an authority which is contrary to *Cloutte v Storey*.

105. In summary, in *Preston v Preston* (1869) 21 LT 346, a power of appointment under a marriage settlement in favour of one or more of the children of the marriage, was exercised on a number of occasions by deed poll nominally in favour of various children. In reality it was for the parents' benefit. Parts of the trust fund which had been appointed were subsequently sold to reversionary societies and the proceeds, after payment of mortgage debts, were divided amongst the four youngest children of the marriage, to whom no appointment had been made. By a deed to which all the children of the marriage were parties and which they all executed, the appointments were subsequently ratified and confirmed. A child who had not reached his majority at the date of the deed of confirmation but had executed it some months after he came of age, applied to set aside the appointments and the deed of confirmation.

106. Lord Romilly MR stated at 348 that had the matter been concerned purely with the exercise of the power of appointment for an improper purpose, there would "be no doubt that that the two appointments were bad and invalid as being in fraud of the power, and exercised in some measure for the benefit of the father, and not for the benefit of the appointees." He repeated that conclusion also at 348, but then went on to consider the effect of the deed of confirmation. He stated that:

> "…the appointment was not ipso facto void, but that it was only voidable. As the appointments stand alone on the deed polls they are good and valid; it is only the discovery of the purpose for which they are made that renders them invalid, and this purpose must be proved by the person who seeks to impugn the appointments. I therefore hold it to be clear that they were only voidable and consequently that they were capable of being confirmed."

Lord Romilly MR held that the claimant had failed to prove that he was induced by undue influence, misrepresentation or other fraud to ratify the appointments, that he did so deliberately and had taken no step to seek to set it aside for nearly seven years. Accordingly, he could not "rip open the transaction".

107. *Preston* was considered in *Cloutte* at first instance. Neville J considered that the dicta were obiter and not necessary to the decision because in that case, the deed of confirmation vested the funds in the appointees and effect would be given to it in equity. He went on at 25:

> "I think a Court of Equity would hold such a deed to mean that it was an assignment of their interest by the persons entitled in default of appointment and a release of his power by the appointor, because, as we know, the appointor is not a trustee of the power and can release it if he pleases. In the deed in *Preston v. Preston* (1) the appointor had actually released the power, and I think the intention of the parties under that deed was sufficiently plain, and the conclusion must have been precisely the same whether such appointment is void or only voidable."

In upholding Neville J's decision in the Court of Appeal, Farwell LJ founded his decision on *Duke of Portland v Topham,* in the House of Lords, which had not been cited in *Preston*.

108. It seems to me, therefore, that other than the first instance decision in *Preston*, which can be explained on the basis of the deed of confirmation which was executed in that case, all of the earlier cases, including the *Duke of Portland* case in the House of Lords, are consistent with *Cloutte*.

Criticism of Cloutte, reasoning and possible conflict with principle

109. The decision in *Cloutte* was criticised in *Pitt v Holt* [2013] 2 AC 108. *Pitt v Holt* was concerned with what had traditionally but rather inaccurately been referred to as the Rule in *Hastings-Bass.* The "rule" applies where trustees fail to give proper consideration to relevant matters when making a decision which is within the scope of the relevant power. Lord Walker described such a situation as "inadequate deliberation". Such an exercise of the power is voidable rather than void. (As Lloyd LJ explained in *Pitt v Holt*, the *Hastings-Bass* case was, in fact, a case of excessive execution, that is an exercise of a power in a manner which is beyond the scope of the power. Such an exercise is void.)

110. In *Pitt v Holt,* Lord Walker noted that the decision in *Cloutte* had been described as problematic by Lightman J in *Abacus Trust Co (Isle of Man) v Barr* [2003] Ch 409 and by Lloyd LJ in *Pitt v Holt* itself and stated that he too shared their reservations. He went on to note, also at [62]:

> ". . . It is hard to know what to make of Farwell LJ's observations [1911] 1Ch 18, 31:
>
> > "If an appointment is void at law, no title at law can be founded on it; but this is not so in equity: the mere fact that the appointment is void does not prevent a Court of Equity from having regard to it: e g, an appointment under a limited power to a stranger is void, but equity may cause effect to be given to it by means of the doctrine of election."
>
> The decision in *Cloutte v Storey* may have to be revisited one day. For present purposes it is sufficient to note that a fraudulent appointment (that is, one shown to have been made for a positively improper purpose) may need a separate pigeon-hole

> somewhere between the categories of excessive execution and inadequate deliberation."

The criticisms both from Lloyd LJ in the Court of Appeal and Lord Walker in the Supreme Court stem from what appears to be opaque reasoning at 31 in *Cloutte*. I agree that the reasoning is somewhat compressed and as a result, is difficult to follow. It is explained in *Snell's Equity* 34th ed at 10-031 as stemming from the difference between the position in equity and at law. The appointment was a fraud on the power and the beneficiaries in default of appointment claimed that they were still entitled to the fund as against the assignee of the purported appointee. They succeeded. As the authors of *Snell* explain: "The appointment was void, and so created no equitable title to the fund. The Court of Appeal recognised, however, that if legal title to the trust assets had been transferred to the purported appointee, that would have been effective, and an assignee of that legal title might be able to make out a defence of bona fide purchaser of the legal title for value without notice, so as to defeat the equitable rights of the beneficiaries in default of appointment."

111. Although the reasoning may be compressed and difficult to follow to the modern eye, neither Lloyd LJ nor Lord Walker went as far as to state that *Cloutte* should not be followed. The decision has remained unchallenged since 1911 and nothing has come of the criticisms made over a decade ago. In those circumstances, it seems to me that whilst taking those criticisms into account, it is unlikely that the Jersey court would find them sufficiently persuasive to render it necessary to diverge from the decision in *Cloutte*.

112. Nor do I consider that a Jersey court would conclude that *Cloutte* conflicts with principle or policy. Although Lord Walker wondered whether a separate category should be created for fiduciary powers exercised for an improper purpose, he did not go on to express a definitive view as to whether such an exercise should be treated as void or voidable or consider whether the context of the exercise of the power of appointment was relevant.

113. There is nothing to suggest that principle or policy would weigh against the conclusion that an exercise of a power of appointment in circumstances such as those which apply in this case, is close to an excessive execution, in the sense of an exercise of power which is outside the scope of the power itself. An excessive execution, is for obvious reasons, considered to be void. It seems to me that in these circumstances, the Jersey court would consider it to be contrary to principle and policy were an attempt to achieve the same result by the back door, by exercising the power within its scope but subject to an improper motive, merely voidable. This approach is consistent with the view of all the major textbook writers other than Professor Virgo KC in "*The Principles of Equity and Trusts"* 5th ed, who considers that the policy ought to be different.

114. I accept that as Sir Robert Walker, as he then was, commented in a lecture entitled "The Limits of the principle in Hastings-Bass", given at King's College, London and revised to form an article published in Private Client Business (P.C.B. 2002, 4, 226-240), if an appointment is void despite having been, to all outward appearances, arrived at and recorded in a proper manner, uncertainty may ensue. Such an outcome, it seems to me, is insufficient to overcome the principle to which I have referred.

115. I also come to this conclusion despite the very recent decision of the Privy Council in an appeal from Court of Appeal of the Cayman Islands in *Tianrui (International)*

Holding Company Ltd v China Shanshui Cement Group Ltd [2024] UKPC 36 to which Mr Lewison referred briefly. That case was concerned with whether a shareholder, including a minority shareholder, has a personal claim against a company when the directors of that company allot shares for an improper purpose. At [74], the Board stated that the power to allot and issue shares is "only rendered voidable (rather than void) by an equitable impropriety in its exercise, and why a challenge to its exercise may be ineffective against a bona fide purchaser of the issued shares without notice of the impropriety: see again *Residues*, at pp 1162-1163." It seems to me: first, that the Board was concerned with Company law and the corporate contract arising from the company's memorandum and articles; and secondly, that the issue arose in the legal and statutory context relevant to the allotment and issue of shares.

116. Bringing all of these strands together, I agree with the judge that: there is nothing in Jersey law to suggest that the *Cloutte* decision would not be followed there; there is nothing to suggest that *Cloutte* itself is built upon unsure foundations; and despite the doubts expressed by Lord Walker more than a decade ago, it has yet to be overturned in England and Wales or in Jersey. It seems to me, therefore, that the judge was right to decide as he did. In the absence of good reason to the contrary, Jersey law would follow English law in this respect. There is no good reason not to do so. I agree, therefore, that as a matter of Jersey law, the exercise of the power in this case would be held to be void.

FS Capital Appeal - ground 4 – should the judge have refused to set the Disposal aside?

117. In the circumstances, this question does not arise. I will address it in outline, nevertheless. On appeal, Mr Morgan takes two points, He says that had the Disposal been held to be voidable rather than void, the Respondent Beneficiaries should have been refused relief to set it aside on the basis that they had been participating in a tax avoidance scheme and that the judge should have given this aspect of the matter some weight rather than none. Secondly, he says that the practicalities are such that the relief should have been refused.

118. Mr Morgan says that this was a tax avoidance scheme which went wrong. He took us to *Bhaur & Ors v Equity First Trustees (Nevis) Ltd & Ors* [2023] EWCA 534 which was concerned with an artificial tax avoidance scheme in relation to which at [105] Lewison LJ noted Lord Walker's observations in *Pitt v Holt* that artificial tax avoidance is a social evil and concluded that it was a very weighty factor against the grant of any relief. Mr Morgan says that in this case, the Beneficiaries want to reconstitute the trust and want to take advantage of the tax scheme. He accepted that he was not seeking a balance between the Respondent Beneficiaries' interests and those of FS Capital which had received the Loan Assets transferred in breach of trust, but that the interests of the Respondent Beneficiaries should be weighed against public policy.

119. In this regard, I agree with Mr Miall. It seems to me that the judge was right when he held at [360] that the obvious answer to this argument is that the Respondent Beneficiaries were not seeking to extricate themselves from a tax avoidance scheme which had gone wrong or to seek to benefit from it in the future. The scheme had been rendered ineffective by the Loan Charge legislation. As the judge pointed out, there was nothing to suggest that setting aside the Disposal would improve the Respondent Beneficiaries' tax position. As he also pointed out, what they would be seeking to do would be to set aside/avoid a transaction which disregarded their interests as

beneficiaries and as a result was unlawful. By the time the Disposal took place the tax avoidance scheme had already become ineffective. FS Capital should not be protected from the consequences of acting in breach of trust because the original scheme had been set up for tax avoidance purposes.

120. As I have already mentioned, the second reason which FS Capital raises is the practical difficulty. FS Capital points out that the Respondent Beneficiaries have, so far, been unable to find a replacement trustee. The judge stated at [370] that if he had decided that the Disposal was voidable when considering whether it should be set aside, he would have required further argument on what he should do in the absence of a suitable trustee. His order provided at paragraph 2 that the re-transfer of the Loan Assets should take place on the appointment of the new trustee.

121. It seems to me that this matter would have had to have been remitted to the judge. However, it would be surprising were relief refused on the basis that the 2011 and 2012 Trusts lacked a trustee. Although there was no evidence about the position in Jersey or elsewhere, generally, the court is unlikely to allow a trust to fail for want of a trustee. Depending on the circumstances, it might be possible, for example, for the Court or the Jersey Court to make an administration order or to appoint the Judicial Trustee or an equivalent, if no new trustee could be found. Accordingly, although the details are not before us, it seems to me that it would be unlikely that the failure to find a new trustee would be a sufficient reason for refusing to exercise the discretion to set aside the Disposal made in breach of trust, had it been voidable.

Pinotage Appeal – retirement to facilitate a breach of trust

122. The Pinotage Appeal is in relation to the judge's conclusion that Pinotage retired as trustee "to facilitate a breach of trust". It goes to the costs order and the determination of the quantum of personal liability should that issue arise. It is relevant to the 2011 Trust and the 2012 Trust.

123. Mr Flavin, on behalf of Pinotage, says that the judge's primary findings of fact in relation to this matter are at [386], [388] and [394] of the judgment and that the judge's conclusions drawn from the application of the law to the primary facts as found, are at [394] and [395]. Mr Flavin says that the judge's conclusion at [395] and in the final sentence of [396] were not justified on the facts. For ease of reference I repeat [395] here:

> "395. Returning to Mr Flavin's argument, it is true, as I have said, that the Second Defendant retired as trustee by reason of its regulatory concerns. This is however, as I have said, an incomplete statement of what occurred. The breach of trust which, as I have found, was constituted by the Disposal, was not merely the outcome of the retirement of the Second Defendant as trustee. The whole purpose of putting Pinotage PTC in place as new trustee was to allow the sale of the Loan Assets, on terms which excluded the interests of the Beneficiaries, to proceed to completion, with the Second Defendant still dealing with the administration of the sale, but not having to deal with the regulatory issues which would or might arise if it continued as the actual trustee of the Trusts. Put more simply, Pinotage PTC

> was put in place as trustee in order to ensure that the Disposal would proceed, and would not be frustrated by the Second Defendant's regulatory concerns. These facts seem to me to be about as far from the facts of *Head v Gould* as they could be."

The judge's conclusion at the end of [396] was that the facts demonstrated and he found that Pinotage retired in order to facilitate the breach of trust in the form of the Disposal.

124. Mr Flavin submits that the evidence before the court did not reasonably warrant a conclusion that "Pinotage PTC was put in place as trustee in order to ensure that the Disposal would proceed". He says that the point put and conceded in cross-examination was that Mr O'Shea (and by implication the other decision makers at Pinotage) knew when Pinotage retired that all being well the sale would proceed, and intended that would happen. He says that it does not follow from that that the principle applies. That the breach of trust was contemplated - in the sense of "envisaged" is necessary but not sufficient. He says that the retirement as a trustee must be causative of the breach of trust.

The principle in Head v Gould

125. The principle to be applied is to be found in *Head v Gould* [1898] 2 Ch 250 at 267 – 274. The first paragraph of the headnote reads as follows: "[T]o make a retiring trustee liable for a breach of trust committed by his successor, it must be proved that the very breach of trust which was in fact committed was not merely the outcome of or rendered easy by the retirement and new appointment, but was contemplated by the former trustee when the retirement and appointment took place."

126. The case was concerned with solicitors who were trustees of two family settlements. Properties were held on trust for sale and to hold the proceeds upon trusts for Mr and Mrs Head successively for life with power of appointment in favour of their children and in default of appointment for their children at 21 or marriage in equal shares, subject to a "full discretion on the part of the trustees to apply the same moneys for the benefit of the infant children presumptively entitled thereto." Mr Head died and the trustees made numerous advancements of capital from the trust fund to Mrs Head. By the middle of 1894 the whole of the daughter's one-third share of the trust properties had been advanced to her or her mother and her brother had also received his one-third share having made repeated requests for advances both for himself and to assist his mother.

127. In August 1894, the daughter attained 21 and made further urgent appeals to the trustees to make advances to her mother. In response, one of the trustees wrote to her stating that the trustees had gone to the utmost limit of payments to Mrs Head and the only further suggestion that the trustees could make was that they should be released from the trusteeship. After a further request for an advance the trustee replied that "the only way we can assist you is by handing over the trust to others as we are most desirous of doing." After enquiries about how new trustees might assist, the trustee replied that "by getting new trustees to help you in the way you ask us to do . . . We decline the risk and responsibility: others may be inducted to accept it and to assist you."

128. In summary, the allegation was that the trustees had asserted that no further advances could properly be made without a breach of trust and in order to relieve themselves and to assist Mrs and Miss Head they suggested, or assented to the appointment of new

trustees who, the outgoing trustees knew, would be more accommodating, and contemplated, if they did not actually intend, that which the outgoing trustees had properly declined to do. In those circumstances, Kekewich J had no doubt that the former trustees would be liable for the loss to the trust estate caused by the breach of trust which they themselves had not committed.

129. In fact, Kekewich J held that on the evidence, he could not blame the outgoing trustees for the appointment of new trustees which they made and he did not think that they had any reasonable ground for believing or that they believed that the trusts would be otherwise than secure in the hands of their successors. On the evidence, he concluded that he did not believe that the trustees contemplated any breach of trust at all [273].

130. Kekewich J set out the rationale for the principle at 268 - 269:

> "It is the duty of trustees to protect the funds intrusted to their care and to distribute those funds themselves or hand them over to their successors intact, that is, properly invested and without diminution, according to the terms of the mandate contained in the instrument of trust. This duty is imposed on them as long as they remain trustees and must be their guide in every act done by them as trustees. On retiring from the trust and passing on the trust estate to their successors —and this whether they appoint those successors or merely assign the property to the nominees of those who have the power of appointment—they are acting as trustees, and it is equally incumbent on them in this ultimate act of office to fulfil the duty imposed on them as at any other time. If therefore they neglect that duty and part with the property without due regard to it, they remain liable and will be held by the Court responsible for the consequences properly traceable to that neglect."

He noted that it was surprising that there was so little authority on a point of such importance but noted at 269 that "no one presumes to cast a doubt on the doctrine, which may be regarded as an integral part of accepted legal lore."

131. He went on to consider the three authorities which had been discovered and to which we were referred. They were *Webster v Le Hunt* 8 W.R.534, 9 W.R.918, *Palairet v Carew* 32 Beav 564 and *Clark v Hoskins* 36 LJ (Ch) 689. *Webster v Le Hunt* contains a statement of principle by Lord Westbury, the then Lord Chancellor, which Kekewich J cited at 268 – 269. It is in the following form:

> "Trustees denuding themselves of trust funds, if they did so under circumstances that warranted any reasonable belief of the insecurity of the trust funds in the hands of those to whom they committed them, should not be considered in this Court as having validly discharged themselves of the custody of the trust funds, or released themselves from responsibility. About the principle of the Court there could be no doubt."

132. At 270, Kekewich J noted that the *Palairet* case would not be relevant but for the observations of Lord Romilly. It was concerned with an application to remove a trustee

who refused to concur in the sale of trust properties without the sight of certain documents in relation to another trust (to which he was not entitled) or to resign in order to facilitate the sale. Kekewich J noted that having noticed that the defendant declined to accede to a certain request on the ground that if a trustee surrendered up a trust to a person who committed a breach of trust, he might be made liable for the consequences arising from the misconduct of the new trustee, Lord Romilly added:

> "That, no doubt, is correct to this extent: - If a trustee be called upon to commit a breach of trust and refuses, and his cestuis que trust say, "There is A. B. who will; will you resign and surrender your trust to him ?" and, the old trustee accede to that proposal, and transfers the property to the new trustee, for the purpose of enabling him to commit a breach of trust, in that case the old trustee would probably be visited very severely by the Court."

Mr Flavin's point is that the paradigm example of the doctrine is where the trustee resigns in favour of another in order that the latter will commit the breach of trust. He says that that is not the case here.

133. The other authority referred to by Kekewich J was *Clark v Hoskins* where trustees past and present were accused of deliberate fraud. On appeal it was held that the new trustees might have acted improperly but that the outgoing trustees were not asked to assist in committing the fraud and that they should not be liable for the consequences when:

> "it was not in their contemplation that such a fraud was to be perpetrated, but it was in their contemplation simply that a sum was to be raised as against cestuis que trust which it would be improper for the trustees in the execution of their duty to raise."

134. Kekewich J explained what he understood the Master of the Rolls in *Clark v Hoskins* to have meant – that "in order to make a retiring trustee liable for a breach of trust committed by his successor you must shew, and shew clearly, that the very breach of trust which was in fact committed was not merely the outcome of the retirement and new appointment, but was contemplated by the former trustee when such retirement and appointment took place. That is clearly the doctrine of *Clark v. Hoskins*. (1) It will not suffice to prove that the former trustees rendered easy or even intended, a breach of trust, if it was not in fact committed. They must be proved to have been guilty as accessories before the fact of the impropriety actually perpetrated."

135. Mr Flavin submits that the principle in *Head v Gould* applies where the former trustee retires *so that* the incoming trustees can do the act complained of. In this case, he says that the retirement of Pinotage was as a result of regulatory concerns and not so that the breach of trust could be committed. He also emphasises that there is nothing in the note of a meeting on 12 March 2019 and the email of 23 May, referred to at [82] – [84] of the judgment or Mr O'Shea's evidence in cross-examination referred to at [390] and [393] which would justify the conclusion that Pinotage PTC was appointed as trustee in order to ensure that the Disposal would proceed rather than Pinotage being concerned with what might happen to it. He says therefore, that the conclusion that Pinotage is caught by the principle in *Head v Gould* was not open to the judge on the evidence before him.

Discussion and conclusion

136. First, as Mr Fennemore, on behalf of the Representative Beneficiaries, submitted, it seems to me that it is clear from *Head v Gould* itself that a former trustee is liable for its successor's breach of trust if it is proved that the former trustee *contemplated* the breach of trust of its successor at the time of the retirement. As Kekewich J explained, the basis for the principle is that when retiring, a trustee must have due regard to its duties as trustee, and in particular, to its duty to safeguard the trust fund for the beneficiaries. If the retiring trustee knows that the act of retiring imperils the fund because it contemplates a breach of trust by its successor, which is actually committed, the former trustee will remain liable and will be responsible for the consequences of its retirement. In such circumstances, the outgoing trustee should seek directions from the court rather than simply retiring and allowing the contemplated consequences to occur.

137. Even if the outgoing trustee has legitimate reasons for wanting to retire, it cannot rely upon those reasons as a means of avoiding its duty to safeguard the trust fund. Those legitimate reasons for retirement cannot allow the trustee to jeopardise the safety of the trust fund by retirement in favour of a new trustee which it contemplates will act in breach of trust and who does so. It is inherent in Kekewich J's explanation of what the Master of the Rolls said in the *Clark v Hoskins* case that the retiring trustee must have the breach of trust which was committed within their *contemplation* at the time of the retirement from the trusteeship.

138. That is clear from the language used in *Clark v Hoskins* itself. It seems to me that it is also inherent in the short reasons given by the Lord Chancellor, Lord Westbury, in *Webster v Le Hunt*. He referred to circumstances which warranted the "reasonable belief" of the insecurity of the trust funds. It seems to me that that reasoning is also consistent with the knowledge or contemplation of the retiring trustee. The words used in *Pailaret* are that of purpose, rather than contemplation, however. In that case it was not suggested that the proposed sale would be in breach of trust and it seems to me that Lord Romilly's dicta were obiter. They were an extreme example of how the principle might apply. Given the approach in the other cases, I do not consider that they delimit its application. It seems to me that such a conclusion is also consistent with wider policy. If Mr Flavin were correct and a retiring trustee was only liable for the breach of trust of their successor where their retirement had been for the purpose of facilitating the breach, the protection of the trust fund and the beneficiaries and the duty of the trustee to safeguard the fund which is at the root of the principle would be diminished. It is for this reason that even if a trustee has a good reason to want to retire, they will remain liable for the breach of trust committed by a successor, if that breach was within their contemplation.

139. In this case, the judge found that at the point when Pinotage resigned in favour of Pinotage PTC, Pinotage "very clearly contemplated" the Disposal and that the retirement in favour of Pinotage PTC was to enable the breach of trust to go ahead [394] and [395]. At [395] he stated that "the whole purpose" of putting Pinotage PTC in place as a new trustee was to allow the sale of the Loan Assets on terms which excluded the interests of the Beneficiaries.

140. It seems to me, therefore, that the judge applied the correct legal test and found on the evidence both that the breach of trust was within the *contemplation* of Pinotage and that one of the *purposes* of the retirement was to enable the breach of trust to take place. On

the basis of the judge's findings of fact, he drew inferences which were wide enough to render Pinotage potentially liable for the breach of trust, even if one were to adopt Mr Flavin's interpretation of the authorities. There is nothing to suggest that the judge's findings of fact or the inferences which he drew were plainly wrong in the sense discussed in *Volpi v Volpi* at [2]. The judge appreciated and acknowledged at [395] that Pinotage retired "by reason of its regulatory concerns". He went on to make clear, however, that that was "an incomplete statement of what occurred." In the circumstances, therefore, it seems to me both that the legal test was met and that the judge was entitled to find as he did.

Conclusion

141. For all of the reasons set out above, I would dismiss both the FS Capital Appeal and the Pinotage Appeal.

LORD JUSTICE COULSON:

142. I agree with both judgments.

LORD JUSTICE MALES:

143. I agree that these appeals should be dismissed for the reasons given by Lady Justice Asplin. In view of the skilful arguments addressed to us, I add two comments.

The bigger picture

144. The first concerns the bigger picture. It is worth standing back because, although the background is complex, its essential features are stark.

145. In circumstances where the Trusts were cash flow insolvent, but with what were believed to be substantial assets in the form of the Loan Assets, Messrs Emblin, Reid and O'Shea devised a scheme to cut out the beneficiaries and to divert those assets to a company under their control. In order to implement this scheme, they caused the trustee (Pinotage Trustees Sarl, a company of which Mr O'Shea was the sole director) to retire, appointing a new trustee (Pinotage (PTC) Limited, another company of which Mr O'Shea was the sole director). They then caused the new trustee to sell the Loan Assets to FS Capital Limited, a company ultimately owned and controlled by Messrs Emblin and Reid, for what they believed to be a fraction of their true value, even though they did not know for sure what the Loan Assets were worth. They saw this as 'a huge commercial opportunity', as Mr Reid's email of 30th September 2019 to Mr O'Shea and Mr Emblin makes clear.

146. Mr Emblin had been an inspector of taxes and had worked for major firms of accountants as a senior tax manager. Mr Reid is an English solicitor and a former partner in a well-known firm. Mr O'Shea is a Jersey advocate and a solicitor qualified in England and the British Virgin Islands, with over 20 years of legal experience. If any of them had thought that this was a legitimate way for trustees to behave, they should have known better. In fact, on the judge's findings, they did know better. The judge found that none of them thought that it was legitimate to disregard the interests of the beneficiaries in disposing of the Loan Assets in this way. Nevertheless, with Mr O'Shea, they designed and implemented the scheme precisely in order to ensure that

the beneficiaries got nothing and to divert the 'huge commercial opportunity' to themselves.

147. They did so by causing the new trustee to exercise its power to dispose of the Loan Assets for an improper purpose – what used to be called, in the archaic and inaccurate language of equity, by carrying out 'a fraud on a power', although in this case the old term seems fairly apt.

148. The ultimate issue on these appeals is whether Messrs Emblin, Reid and O'Shea are entitled to keep for themselves the value of the Loan Assets, whatever that may turn out to be. There would in my judgment be something wrong with the law of Jersey if they were entitled to do so. In the event, however, as Lady Justice Asplin has demonstrated, they are not.

Void or voidable?

149. The second matter on which I wish to comment is whether the exercise of a power for an improper purpose is void or voidable, although I cannot think, on the facts of the present case, that this would make any difference to the ultimate outcome.

150. If it were our task to devise a system of equity from scratch, there might be something to be said for a rule that the improper exercise of a power is voidable rather than void. That would enable courts to do justice in the circumstances of the particular case, albeit at some cost to certainty and predictability. But that is not our task. Our task is to decide whether the judge was entitled to conclude, as a matter of fact, that under the law of Jersey the improper exercise of a power is void.

151. Although the appellants place some emphasis on the evidence of the Jersey law experts that the law of Jersey on this issue is not settled, by which I understand them to have meant that there is no case which actually decides the issue, that does not mean that Jersey law on the point cannot be ascertained, or that a Jersey court would have a free hand to decide the point however it wished to do so. On the contrary, the relevant principle of Jersey law is that Jersey trust law will follow English law, except where it conflicts with established principles of Jersey customary law or has been modified by Jersey statutes. As Lord Hodge explained in *Investec Trust (Guernsey) Limited v Glenalla* [2018] UKPC 7, [2019] AC 271 at [57] and [58], a decision of the Privy Council as the apex court in the Jersey legal system, this is a deliberate choice by Jersey law, because Jersey has a significant financial services industry and the international appeal of Jersey trusts is to a significant extent dependent on the certainty which it derives from English case law.

152. It has not been suggested that there is anything in Jersey customary law or a Jersey statute which bears on the question whether the improper exercise of a power is void or voidable. Accordingly Jersey will follow English law on this issue.

153. In English law the issue has been settled for almost 300 years. As long ago as 1758, in *Aleyn v Belchier* (1758) 1 Eden 132, the Lord Keeper (Lord Northington) said that:

> 'No point is better established than that, a person having a power, must execute it *bona fide* for the end designed, otherwise it is corrupt and void.'

154. As Lady Justice Asplin has shown, a series of cases in the nineteenth century proceeded on this basis, including *Topham v Duke of Portland* (1862) 31 Beav 525, (1864) 11 HL App Cas 32), where the Lord Chancellor in the House of Lords described the position as 'settled' and said that 'it would be endangering the whole of the established principles of our law upon this subject if we were to permit a transaction of this kind to stand'. While there are statements in some cases which appear to suggest that the exercise of a power for an improper purpose may be voidable, the clear weight of nineteenth century authority is that such an exercise is void.

155. The point then arose directly for decision in *Cloutte v Storey* [1911] 1 Ch 18, where it was held by the Court of Appeal that the exercise of a power for an improper purpose is void. That decision is binding on all courts below the Supreme Court. Although its reasoning has been criticised, including by Lord Walker in *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108, it is notable that the decision was not overruled. In the event, it has stood as English law for over a century and is explained in the leading textbook (*Snell's Equity*, 34th Ed (2020) at para 10-031).

156. In these circumstances English law is indeed settled. Although it would be open to the Supreme Court to conclude that the improper exercise of a power is voidable rather than void, that would involve jettisoning authority going back over 300 years in an area of law which has traditionally attached importance to certainty and predictability. Sometimes it is more important that the law should be certain and predictable than that it should be perfect.

157. Moreover, although the issue has not arisen directly for decision in Jersey, Jersey courts have also proceeded on the basis that the exercise of a power for an improper purpose is void (see in particular *Vatcher v Paul* [1915] AC 372, *In the Matter of the Bird Charitable Trust* [1008] JRC 013, and the *Z Trusts* case [2015] JRC 196C), although the issue was noted by the Privy Council in *Crociani v Crociani* [2014] UKPC 40.

158. In the circumstances the judge was entitled, in my judgment, to conclude that under the law of Jersey the exercise of a power for an improper purpose is void.