Michaelmas Term
[2025] UKSC 43
On appeal from: [2024] EWCA Civ 423

JUDGMENT

Mitchell and another (Joint Liquidators of MBI International & Partners Inc (In Liquidation)) (Respondents) *v* Sheikh Mohamed Bin Issa Al Jaber (Appellant); Mitchell and another (Joint Liquidators of MBI International & Partners Inc (In Liquidation)) (Appellants) *v* Sheikh Mohamed Bin Issa Al Jaber (Respondent) No 2

before

Lord Hodge, Deputy President
Lord Briggs
Lord Sales
Lord Stephens
Lord Richards

JUDGMENT GIVEN ON
24 November 2025

Heard on 13, 14 and 15 May 2025

Appellant – UKSC 2024/0075; First Respondent – UKSC 2024/0076
Philip Rainey KC
Marc Glover
Andrew Martin
Sami Allan
(Instructed by Spencer West LLP)

Appellant – UKSC 2024/0076; First and Second Respondents – UKSC 2024/0075
Tom Smith KC
Joseph Curl KC
Jon Colclough
(Instructed by Clyde & Co LLP (London))

Second Respondent – UKSC 2024/0076
James Fennemore
(Instructed by Troutman Pepper Locke UK LLP (London))

LORD HODGE, LORD BRIGGS AND LORD SALES (with whom Lord Stephens and Lord Richards agree):

1. This appeal concerns a dispute between the liquidators of a company incorporated in 1990 in the British Virgin Islands, MBI International & Partners Inc ("the Company"), and Sheikh Mohamed Bin Issa Al Jaber ("the Sheikh") arising out of the dishonest transfer by the Sheikh of 891,761 shares ("the 891K shares") which the Company owned in another BVI company, JJW Hotels & Resorts Holding Inc ("JJW Inc"), after the Company had entered into liquidation. Those shares were transferred for no consideration to JJW Ltd, a company registered in Guernsey ("JJW Guernsey"), of which the Sheikh was a director at all relevant times and which is also now in liquidation. The liquidators of the Company ("the Liquidators") have sued the Sheikh and JJW Guernsey for equitable compensation, for breach of fiduciary duty in the case of the Sheikh and as a knowing recipient of the Company's property in the case of JJW Guernsey. Since 8 June 2019 the Joint Liquidators have been Greig Mitchell and Kenneth Krys.

2. The Sheikh is an international businessman and the founder and chairman of many companies which operate in various areas of business including commercial property, finance, hospitality and the food industry. Some of those companies incorporate the letters "MBI" in their names, which, as the Sheikh explained in his written evidence, is derived from "Mohamed Bin Issa" in his own name. The relevant transactions occurred between companies which are associated with him in the MBI group and of which he or members of his family appear to have ultimate beneficial ownership and control.

3. In summary, after the dishonest transfer of the 891K shares in JJW Inc which the Company owned, the Sheikh was involved in the transfer of all the assets and liabilities of JJW Inc to JJW Hotels & Resorts UK Holdings Ltd ("JJW UK"). In the courts below the parties argued their cases on the basis that that transfer of assets and liabilities denuded the shares in JJW Inc of any value and the Sheikh submitted that the Company had as a result suffered no loss from the earlier transfer of the Company's shares in JJW Inc to JJW Guernsey.

4. The appeals by the Liquidators and by the Sheikh against the orders of the Court of Appeal, which we discuss below, give rise to two principal questions, which break down into three principal issues. They are:

> (1) Did the Sheikh in making the dishonest transfer of the Company's 891K shares in JJW Inc act in breach of a fiduciary duty owed to the Company when, under BVI company law, the winding up had removed his powers as a director of the Company? (Issue 1)

(2) If so, does the Company have a remedy against the Sheikh in equitable compensation for loss suffered as a result of the transfer of those shares? This question involves two separate matters.

(3) The first matter relating to the calculation of loss is whether the Company suffered no financial loss from the transfer of the 891K shares in JJW Inc because, as the Sheikh argues, the Company acquired those shares subject to unpaid vendor's liens. (Issue 2)

(4) If Issue 2 is answered in the negative, the second matter is how to calculate the loss of the value of the Company's 891K shares in JJW Inc when (as the parties argued in the courts below), after their transfer, the value of those shares was destroyed by the subsequent transfer of all JJW Inc's assets and liabilities to JJW UK. (Issue 3)

(1) The background facts

5. To understand the context of the challenged transactions we set out some of the corporate history of the relevant companies.

6. The Company was incorporated on 24 July 1990. At all material times the Sheikh has been one of the Company's directors and its sole shareholder. In 2004 the Company became a "business company" under the provisions of the BVI Business Companies Act 2004 ("BCA 2004"). In around 2008 the Sheikh was considering a restructuring of the companies associated with him. The restructuring was to involve an initial public offering of shares ("the IPO") in JJW Inc, which was incorporated in September 2008. The Sheikh was the only director of JJW Inc until 23 December 2016.

7. From 23 December 2016, the sole directorship of JJW Inc was held in succession by BVI companies. Initially, MBI International Holdings Inc ("MBI International Holdings") was the director and after February 2018 MBI International Holding Group Inc took on that role.

8. In January 2009, in the context of the proposed IPO, the following shares in JJW Inc were issued:

(1) 129,100 shares ("the 129K shares") in favour of the Company;

(2) 8,038,120 shares ("the 8M shares") in favour of the Sheikh, who was until December 2011 the majority shareholder in JJW Inc;

(3) 567,556 shares ("the 567K shares") in favour of JJW Guernsey; and

(4) 324,205 shares ("the 324K shares") in favour of JJA Beteiligungsverwaltungs GmbH ("JJAB").

As explained below, the 891K shares, which were later the subject of the dishonest transfer from the Company, comprised the 567K shares and the 324K shares which were initially issued to JJW Guernsey and JJAB.

9. The Company acquired the 567K shares and the 324K shares from JJW Guernsey and JJAB under two share purchase agreements ("the SPAs"), which were in materially identical terms, on 18 March 2009 ("the March 2009 transfers"). The 567K shares were transferred from JJW Guernsey in consideration of €56,755,600 "to be paid on demand by [the Company] to [JJW Guernsey] in such way that is mutually agreed by [the Company] and [JJW Guernsey]". The SPA involving JJAB was in the same terms, while referring to JJAB rather than JJW Guernsey. The March 2009 transfers were intended to enable the Company to generate returns from the IPO, and to use those returns to pay JJW Guernsey and JJAB the consideration due for the 891K shares transferred under the SPAs. The IPO did not proceed. JJW Guernsey and JJAB never demanded payment under the SPAs nor was any agreement reached as to how such payment would be made. The consideration due under the SPAs was never paid.

10. As a result of the March 2009 transfers the Company held 1,020,861 shares in JJW Inc, comprising items (1), (3) and (4) in para 8 above, which was 11.27 percent of JJW Inc's total share capital.

11. On 23 December 2011 the Sheikh transferred his 8M shares in JJW Inc to MBI International Holdings.

12. The Company was wound up by order of the Eastern Caribbean Supreme Court on a creditor's application on 10 October 2011 at a time when it was the registered owner of the shares in JJW Inc referred to in para 10 above. In October 2013 the Sheikh applied unsuccessfully for the BVI court to terminate the winding up and on 14 January 2015 the Eastern Caribbean Court of Appeal dismissed his appeal against that refusal.

13. Section 175(1) of the BVI Insolvency Act 2003 ("the IA 2003") provides that, on the commencement of a company's winding up,

> "(a) the liquidator has custody and control of the assets of the company;
>
> (b) the directors and other officers of the company remain in office, but they cease to have any powers, functions or duties other than those required or permitted under this Part;".

As a result of the winding up therefore, the Sheikh's powers as a director of the Company came to an end.

14. That notwithstanding, on or around 29 February 2016, without the knowledge of Ms Charlotte Caulfield who was the liquidator of the Company at that time, the Sheikh signed two undated share transfer forms for the transfer of the 567K shares and the 324K shares from the Company to JJW Guernsey. He purported to sign the share transfer forms "for and on behalf of [the Company]" as its "Director". The Sheikh's case at trial was that the transfer forms had been signed in 2010 before the commencement of the winding up of the Company. The trial judge did not accept that and found that the Sheikh had signed the share transfer forms in 2016 and that in so doing he did not act honestly or in good faith. The Sheikh effected the registration of JJW Guernsey as the shareholder of the 891K shares in JJW Inc by his written resolution dated 29 February 2016 as the sole director of JJW Inc ("the 29 February 2016 resolution"). JJW Guernsey was registered as the holder of the 891K shares in JJW Inc's share register on 8 March 2016. The 29 February 2016 resolution, which appears to be a document prepared by lawyers, states that the director (ie the Sheikh) had reviewed the share transfer instruments and had "ascertained that the Instruments of Transfer were signed for and on behalf of the transferor on the 6th day of July 2010 (the 'Signing Date')" so that "beneficial ownership of the Transferring Shares transferred to [JJW Guernsey] on the Signing Date". The trial judge found that the Sheikh in taking these steps had acted dishonestly and in bad faith and that he did not act in the best interests of the Company. The Sheikh and JJW Guernsey did not appeal those findings. We refer to these transactions as "the 2016 Share Transfers".

15. On 8 May 2017 Ms Caulfield applied for recognition in the United Kingdom of the BVI liquidation as a foreign main proceeding under the Cross-Border Insolvency Regulations 2006 (SI 2006/1030). Ms Caulfield's BVI lawyers informed the Sheikh of the application by letter dated 22 May 2017. On 9 June 2017, Registrar Derrett granted the application recognising the Company's liquidation in the BVI as a foreign main proceeding and thereby enabling Ms Caulfield to obtain relief from the courts of Great Britain to protect the Company's assets and the interests of its creditors. On 23 June 2017 JJW Guernsey transferred the 891K shares to MBI International Holdings, another company which is part of the MBI group.

16. In July 2017 all JJW Inc's assets and liabilities were transferred to JJW UK which was at all relevant times owned by MBI International Group Holdings UK Ltd ("MBI IGH"), another MBI group company. We refer to this transaction as "the 2017 Asset and Liability Transfer". The transaction took place in the following way.

17. Minutes of a meeting of JJW Inc dated 17 July 2017 record that JJW Inc owed €600 million to MBI International Holdings evidenced by the 2016 accounts of JJW Inc. A letter dated 30 June 2017 from MBI International Holdings, signed by the Sheikh, to JJW Inc demanded settlement of the debt within 21 days. The minutes recorded that JJW Inc was not able to pay that debt. On 27 July 2017 the Board of Directors of JJW Inc met. The preamble to the minutes of that meeting record that MBI International Holdings had assigned that debt to JJW UK. The minutes also record that, on the advice of its auditors, it was in the best interest of JJW Inc to "proceed with the offer to acquire 100% of [JJW Inc], taking over all the assets and liabilities by [JJW UK]". At this time the Sheikh was neither a director nor shareholder of JJW UK or of its parent company. He was nevertheless registered as a "person with significant control" of the parent company, MBI IGH, until 29 April 2022. The Sheikh in his fourth witness statement acknowledged that he had attended the meetings of 17 and 27 July of MBI International Holdings' parent company. It is common ground that at this time JJW UK took over all JJW Inc's assets and liabilities. As Newey LJ records in his judgment in the Court of Appeal, the Sheikh provided no satisfactory explanation for this transaction because, according to JJW Inc's accounts for the year ending 31 December 2016, its assets exceeded its liabilities by a considerable margin, having net assets of nearly €682million. It was also common ground and was recorded in the statement of facts and issues in this court that because of the 2017 Asset and Liability Transfer the 891K shares became worthless.

18. Thus, in summary, the appeal is concerned with three transactions and their legal effects. First, the Company acquired the 891K shares in *the March 2009 Transfers* in the context of a planned IPO. This is the context of Issue 2 concerning the assertion that there were unpaid vendor's liens. Secondly, after the Company went into liquidation in 2011 on a creditor's application, *the 2016 Share Transfers*, which purported to give effect to a transaction which predated the winding up of the Company, transferred the 891K shares from the Company to JJW Guernsey. This is the context of Issue 1: whether the Sheikh was in breach of his fiduciary duty to the Company in effecting the 2016 Share Transfers. Thereafter, following the recognition in the United Kingdom of the BVI liquidation of the Company, the 891K shares were transferred to MBI International Holdings in June 2017. Thirdly, in July 2017 JJW Inc's assets and liabilities were transferred to JJW UK by *the 2017 Asset and Liability Transfer*. This is the context of Issue 3: whether the 2017 Asset and Liability Transfer meant that the Company suffered no financial loss from the Sheikh's alleged breach of fiduciary duty.

(2) The legal proceedings

19. Ms Caulfield, as liquidator, commenced proceedings in May 2019 pursuant to section 212 of the Insolvency Act 1986. So far as relevant to this appeal she advanced three claims: (i) that the 2016 Share Transfers were void, (ii) that the Sheikh in bringing about the 2016 Share Transfers acted in breach of a post-liquidation fiduciary duty or in breach of trust, and (iii) that JJW Guernsey was the knowing recipient of the 891K shares.

20. The Liquidators took the place of Ms Caulfield and continued the action. The trial commenced on 3 February 2021 before Joanna Smith J and lasted 19 days, but because of repeated adjournments did not end until 14 October 2022.

21. In her detailed and thorough judgment ([2023] EWHC 364 (Ch)) the trial judge found on the question of liability (i) that the 2016 Share Transfers were void, (ii) that the Sheikh owed a duty of fiduciary stewardship during the winding up and had acted in breach of that duty by signing the share transfer forms and putting the 2016 Share Transfers into effect, and (iii) that JJW Guernsey was a knowing recipient of the 891K shares.

22. On the question of remedy, the trial judge held that the Liquidators were entitled to equitable compensation on a substitutive basis and that the loss to the Company was the value of the 891K shares which had been transferred from its ownership by the 2016 Share Transfers, that value being assessed using hindsight and common-sense. In assessing that value Joanna Smith J looked to JJW Inc's accounts for the year ended 31 December 2016 which showed that it had net assets of €681.9 million. Using that figure as an approximation of the value of JJW Inc when the 2016 Share Transfers took place, she calculated the pro rata proportion of JJW Inc's value to be attributed to the 891K shares in the amount of €67,123,403.36. She found that the Sheikh and JJW Guernsey were jointly and severally liable to pay equitable compensation in that sum.

23. The trial judge held that it was not necessary to determine whether Ms Caulfield would have sold the 891K shares before the 2017 Asset and Liability Transfer. To the extent that it was necessary so to determine, she held that Ms Caulfield was "doing what she could to progress the Liquidation in the face of stonewalling from the Sheikh" and that "had she been provided with accurate information she would have taken appropriate steps 'to take control' of the 891K shares and to realise them for the benefit of the creditors".

24. The Sheikh and JJW Guernsey appealed against Joanna Smith J's order. The Sheikh argued that she had erred (i) in finding that he had been in breach of fiduciary duty by effecting the 2016 Share Transfers and (ii) in making the order for equitable compensation. He argued against the order for equitable compensation on two grounds:

(a) that the 2017 Asset and Liability Transfer had denuded the 891K shares of any value and (b) that the Company had suffered no loss as the 891K shares were subject to an unpaid vendor's lien which exceeded the sum ordered as equitable compensation. JJW Guernsey appealed against the order for equitable compensation on the two grounds which the Sheikh advanced.

25. The Court of Appeal (Newey, Arnold and Snowden LJJ) in a judgment dated 26 April 2024 ([2024] EWCA Civ 423; [2024] BCC 934) allowed the appeals only on the ground that the Liquidators had failed to establish any loss. Newey LJ gave the sole substantive judgment, with which the other members of the court agreed.

26. The Court of Appeal rejected the Sheikh's first ground of appeal. It held that the Sheikh, by claiming that the share transfer forms were executed in 2010, had purported to exercise a power to effect the 2016 Share Transfers which a director would have had in 2010. He had thereby intermeddled with the property of the Company and was liable as a fiduciary. The fact that the Sheikh did not himself receive the 891K shares was not an objection to the Liquidators' claim. Causing the title of company property to be transferred elsewhere can amount to intermeddling regardless of whether the intermeddler receives the property.

27. The Sheikh succeeded on his second ground of appeal. The Court of Appeal held that the substitutive approach to equitable compensation required the court to assess the existence of loss at the time of the trial. By then, the 891K shares had become worthless because of the 2017 Asset and Liability Transfer. The question then was whether the Liquidators could sustain the trial judge's decision on the basis that, but for the misappropriation of the 891K shares, Ms Caulfield as liquidator would have sold them at a time when they were still valuable. The trial judge had not found that the 891K shares would have been sold before the 2017 Asset and Liability Transfer and the evidence would not have entitled her to do so. As a result, the Company would not have been better off if the 2016 Share Transfers had not taken place. It had therefore not suffered any loss from the Sheikh's breach of fiduciary duty.

28. The Court of Appeal rejected the Sheikh's other ground of challenge to the order for payment of equitable compensation. It upheld the trial judge's finding that the March 2009 Transfers (para 9 above) did not give rise to an unpaid vendor's lien. The Court of Appeal considered that the trial judge was wrong in holding that the written terms of the March 2009 Transfers had excluded the existence of such a lien but held that she had been correct that the existence of an unpaid vendor's lien would have been inconsistent with the object of the transaction which was to facilitate the IPO and thereby obtain the funds to pay the vendors.

(3) The appeal to this court

29. The Liquidators and the Sheikh now appeal to this court. JJW Guernsey, acting through its liquidators since 31 July 2020, also formally joins issue in respect of the Liquidators' appeal. JJW Guernsey accepts that the knowledge of the Sheikh, as a director, was attributable to it and that, if the Sheikh is held to be in breach of fiduciary duty and is liable to pay equitable compensation, it will be liable in knowing receipt for the same sum. It also accepts liability as a knowing recipient of the 891K shares on another basis. The finding of the trial judge that the 2016 Share Transfers were void because the share transfer forms were signed after the Company had been put into liquidation was not challenged and the Court of Appeal's order declared its knowing receipt in taking registered title to the 891K shares. JJW Guernsey is only concerned to establish whether the Company is a creditor in its liquidation and makes no substantive submissions in this appeal.

30. We recorded in para 4 above the three issues which are raised on this appeal. We address each in turn.

(i) Issue 1: Whether the Sheikh was in breach of fiduciary duty in effecting the 2016 Share Transfers?

31. The first issue is one of the two matters on which the Sheikh appeals the order of the Court of Appeal. Philip Rainey KC for the Sheikh acknowledges the trial judge's finding of dishonesty and its unattractiveness. The Sheikh's case, however, is that he did not owe any fiduciary duty to the Company. In his grounds of appeal when seeking permission to appeal to this court, the Sheikh focussed his challenge on the argument that he could not be liable as an intermeddler in the Company's affairs unless he had received and held title to the Company's property. In the Sheikh's written case in this court and in Mr Rainey's oral submissions that argument was presented only as an answer to a case which based his liability on an analogy with a trustee de son tort (ie a trustee in his own wrong). It was submitted that the Court of Appeal, in imposing liability because the Sheikh had intermeddled by pretending to be a fiduciary, had adopted "an entirely novel approach" by imposing liability on the Sheikh as if he were a trustee de son tort and treating as irrelevant that he had never received the Company's property.

32. The principal focus of the appeal has moved to an argument that liability as an intermeddler or de facto fiduciary would arise only if a person voluntarily assumed the office of a fiduciary. A person could only become accountable for the functions and duties of a fiduciary if those functions and duties were legally capable of being discharged. It was asserted that a person cannot owe fiduciary duties if he does not have fiduciary powers. The Sheikh had no such powers because his powers as a director of the Company

had ceased to have effect on the commencement of the winding up pursuant to section 175 of the IA 2003.

33. The Sheikh also argues that a single indivisible act (ie signing the share transfer forms for the 2016 Share Transfers) cannot both create a fiduciary duty and be a breach of that duty.

34. Further, the Sheikh challenges the idea that he had caused the 2016 Share Transfers. It is argued, first, that while the Sheikh had signed the share transfer forms on behalf of the Company and it was only that act which could conceivably be characterised as a breach of fiduciary duty, that act had no legal effect as he had no power to act and the share transfer forms were void. Secondly, article 4 of JJW Inc's articles of association and section 54 of the BCA 2004 provided that a share transfer was effected only when JJW Inc entered the transferee's name in its register of members. It was that act of JJW Inc through its company registration agents which required it to treat JJW Guernsey as the owner of the 891K shares. It was the act of the Sheikh in his capacity as a director not of the Company but of JJW Inc in signing the 29 February 2016 resolution that caused the company registration agents to update JJW Inc's register.

35. We are satisfied that there is no substance in those challenges to the judgment of the Court of Appeal on this issue. Before discussing the circumstances in which the Sheikh came under a fiduciary duty to the Company we deal very briefly with the argument in para 34 above which suggests that the Sheikh had not caused the 2016 Share Transfers and could not be in breach of fiduciary duty for anything done in his capacity as a director of JJW Inc. That suggestion is wrong. The purpose of the Shiekh's signing of the share transfer forms to JJW Inc in his purported capacity as a director of the Company and his signing of the 29 February 2016 resolution in his capacity as a director of JJW Inc was clearly to protect the 891K shares from the claims of the Company's creditors. Both steps were part and parcel of the same dishonest transaction and cannot be separated as the Sheikh seeks to do. As we explain below, the Sheikh owed a fiduciary duty to the Company in his purported exercise of a fiduciary power in transacting with its property. That fiduciary duty to the Company extended to having regard to the interests of its creditors in the context of its insolvency: *BTI 2014 LLC v Sequana SA* [2022] UKSC 25; [2024] AC 211 (sub nom *BAT Industries plc v Sequana SA*).

36. The challenge based on the absence of a power to transact on behalf of the Company is also without substance.

37. The paradigm of a fiduciary is the trustee acting under an express trust, who holds legal title to property in which the cestui que trust or trust beneficiary has the beneficial interest. But fiduciary duties have been extended by analogy with such a trustee to several offices and roles, including directors of companies: *Fraser v Whalley* (1864) 2 H & M 10

(71 ER 361); *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461; *In re Lands Allotment Co* [1894] 1 Ch 616.

38. Fiduciary duties are however not confined to well established categories of relationship such as trustee and beneficiary, company director and company, principal and agent, and solicitor and client. Fiduciary duties can arise ad hoc. Millett LJ helpfully summarised the position of a fiduciary in *Bristol and West Building Society v Mothew* [1998] Ch 1, 18, in a passage which this court has quoted with approval in both *Recovery Partners GP Ltd v Rukhadze* [2025] UKSC 10; [2025] 2 WLR 529 ("*Rukhadze*"), para 17 and *Hopcraft v Close Brothers Ltd* [2025] UKSC 33; [2025] 3 WLR 423 ("*Hopcraft*"), para 89:

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary."

Millett LJ went on to endorse the statement in Dr Paul Finn's classic work, *Fiduciary Obligations* (1977), p 2, that the fiduciary is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to those duties that he is a fiduciary.

39. As this court has recently explained in *Hopcraft* para 82ff, equity recognises the existence of fiduciary duties by analysing objectively the relationship between the parties to ascertain whether it involves a relationship of trust and confidence because a party has, or is treated as having, undertaken to act with the loyalty of which Millett LJ spoke in *Mothew*. The relationship of trust and confidence is the consequence, and not the cause, of a fiduciary duty. The fiduciary duty exists because, looking at the matter objectively, the fiduciary has undertaken not to pursue his own interests. As Lord Woolf MR said in *Attorney General v Blake* [1998] Ch 439, 454, "the relationship of trust and confidence … arises whenever one party undertakes to act in the interests of another".

40. There is support for this view of the law in other common law jurisdictions. The High Court of Australia in *Hospital Products Ltd v United States Surgical Corpn* (1984)

156 CLR 41 recognised that a fiduciary duty can arise where a person agrees to act on behalf of another person and exercises a discretion which can affect the interests of that other person. In an influential statement of the law Mason J stated (at pp 96-97):

> "The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions 'for', 'on behalf of', and 'in the interests of' signify that the fiduciary acts in a 'representative' character in the exercise of his responsibility, to adopt an expression used by the Court of Appeal."

41. In *Galambos v Perez* [2009] 3 SCR 247, a judgment of the Supreme Court of Canada, there is a similar emphasis on the undertaking of the fiduciary to act in a disinterested manner. Cromwell J stated (para 75) that "what is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her." He continued (para 76):

> "Thus, what is required in all cases of ad hoc fiduciary obligations is that there be an undertaking on the part of the fiduciary to exercise a discretionary power in the interests of that other party. To repeat what was said by McLachlin J in *Norberg*, [*Norberg v Wynrib* [1992] 2 SCR 226] 'fiduciary relationships … are always dependent on the fiduciary's undertaking to act in the beneficiary's interests' (p 273). As Dickson J put it in *Guerin* [*Guerin v The Queen* [1984] 2 SCR 335], fiduciary duties may arise where 'by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another' (p 384)."

An undertaking to act only in the interests of the other need not be express but could be implied in the particular circumstances of the parties' relationship (paras 79 and 80).

42. Equity, however, does not require an express or implied undertaking to act in a disinterested manner in all circumstances. As the case law which we now discuss shows, equity will recognise in the objective circumstances of a case the undertaking of a fiduciary duty by the putative fiduciary in circumstances where he or she has not made

any conscious undertaking or considered the interests of the person to whom that duty is owed and indeed has acted contrary to that person's interests. This can arise where a stranger to a trust or an agency relationship arrogates to himself a power or purports to exercise a power which carries with it fiduciary obligations and may properly be described as a fiduciary power.

43. In *Soar v Ashwell* [1893] 2 QB 390, a case about whether a claim was barred by limitation or was preserved because the defendant was a trustee, the Court of Appeal recognised that where a person takes on a role or exercises a power which, if exercised by a trustee or agent, would carry with it fiduciary obligations, the person's so acting causes him or her to undertake fiduciary duties. In that case trustees, acting under a will settlement in favour of two life tenants and their respective families, employed a solicitor to invest the trust estate. The solicitor invested the trust fund in an equitable mortgage in his own name and, when the mortgage was paid off, paid one half of the proceeds to the family of one life tenant who had by then deceased, and did not pay the other half to the trustees but kept it for himself. The surviving trustee later sought an account from the estate of the by then deceased solicitor. The solicitor's estate was held liable to account as he had been a fiduciary agent of the trustees. The court stated the principle broadly. Lord Esher MR said (p 394):

> "The cases seem to me to decide that, where a person has *assumed, either with or without consent*, to act as a trustee of money or other property, ie, to act in a fiduciary relation with regard to it, and has in consequence been in possession of or has exercised command or control over such money or property, a Court of Equity will impose upon him all the liabilities of an express trustee, and will class him with and will call him an express trustee of an express trust." (emphasis added)

Bowen LJ (p 396) stated:

> "The doctrine that time is no bar in the case of express trusts has been extended to cases where a person who is not a direct trustee nevertheless assumes to act as a trustee under the trust: *Life Association of Scotland v Siddal* [(1861) 3 De G F & J 58; 45 ER 800]. This extension of the doctrine is based on the obvious view that *a man who assumes without excuse to be a trustee ought not to be in a better position than if he were what he pretends*." (emphasis added)

44. There is long standing authority for this approach in the older case law concerning liability arising when a person acts as an executor de son tort or a trustee de son tort. In *Gawton and the Lord Dacres Case* (1589) 1 Leo 219; 74 ER 201 which concerned the question whether bailiffs acting for Lord Dacre in relation to his estate were liable to account to his auditors, Anderson CJ stated: "if one become my bailiff of his own wrong, without my appointment, he is accomptable to me." By intermeddling without authority in the assets of a deceased or the affairs of a trust or a company a person can incur liability as if he were an executor, trustee or director. See *Vickers v Bell* (1864) 4 De G, J & S 274, a case concerning an alleged executor de son tort, per Turner LJ at p 283; *Gibson v Barton* (1875) LR 10 QB 329, a case concerning a defectively appointed director; *Mara v Browne* [1896] 1 Ch 199, a case about a trustee de son tort; and *Lyell v Kennedy* (1889) 14 App Cas 437, a case of an agent de son tort (or "self-constituted agent") who had by his acts made himself a trustee in relation to the rents which he had collected. See also *Phipps v Boardman* [1965] Ch 992 in which Lord Denning MR, at pp 1017-1018, treated the defendants as self-appointed agents for the trustees and thereby liable to account to the trustees on the basis of agency. Although the House of Lords decided the case on a broader basis ([1967] AC 46), their Lordships did not criticise Lord Denning's approach.

45. In summary, if persons, although not appointed as trustees, take upon themselves the custody and administration of property on behalf of others, they are actual trustees and are fully subject to fiduciary obligations: *Taylor v Davies* [1920] AC 636, 651 per Viscount Cave; *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48; [2003] 2 AC 366, para 138 per Lord Millett, who described such persons as de facto trustees. In *Williams v Central Bank of Nigeria* [2014] UKSC 10; [2014] AC 1189, para 54 Lord Neuberger of Abbotsbury cited with approval a passage from the 18th edition of *Lewin on Trusts* (now para 42-101 of the 20th edition (2020)):

> "A trustee de son tort closely resembles an express trustee. … The principle is that a person who assumes an office ought not to be in any better position than if he were what he pretends."

46. In relation to a person purporting to be a director of a company, it is relevant to consider what Blackburn J stated in *Gibson v Barton*, above (p 338):

> "There are many instances in which a person who de facto exercises an office cannot defend himself by saying, when he is called upon to bear liability in consequence of his wrong, 'I am not rightfully in the office, there is another man who may turn me out'. An executor de son tort is an instance in which a man incurs all the liabilities of an executor as to third persons, and he is not permitted to say, 'I am not executor; there is another man who may take out probate.' The answer is, 'Your liability as to a third person rests upon your being executor de

> son tort; you have usurped the office and must bear the liabilities.'. … So, if a director were to set up in answer to a penalty under section 27 [a statutory penalty on directors of a company for failure to compile and send to the registrar of companies an annual list of the company's shareholders], that he was not a director, that he was illegally elected, the answer would be, 'You have acted as director, and were a director in your own wrong'."

47. One can be a director in his own wrong. Thus, self-appointed directors, such as those who do not qualify as directors under the articles of association of a company but have acted as such, are treated as taking on the obligations, including fiduciary obligations, of de jure directors: *In re Canadian Land Reclaiming and Colonizing Co* [1880] 14 Ch D 660, 670 per James LJ.

48. The doctrines of executor de son tort and trustee de son tort are common law doctrines in their origin: see Charles Harpum, "The Stranger as Constructive Trustee (Part 1)" (1986) 102 LQR 114. The common law principle from which the doctrine of trustee de son tort derived was that a person who wrongfully intermeddled with the assets of the deceased and thereby usurped the functions and assumed the authority of an executor was liable as an executor de son tort to the extent of the property that came into his hands.

49. Nonetheless, the common law has developed. As Newey LJ records in paras 44-46 of his judgment, there is case law which holds that an intermeddler does not need to have title to or possess property to incur liability as an executor de son tort. In *New York Breweries Company Ltd v The Attorney General* [1899] AC 62 the House of Lords addressed a test case on liability to probate duty where an English company had transferred title to some of its shares and debentures to the American executors of a deceased shareholder domiciled in New York at their request when it should have transferred them to an English executor if one had been appointed. The case was concerned principally with the interpretation of provisions in the Stamp Act 1797 (37 Geo 3 c 90), the Crown Suits Act 1865 (28 & 29 Vict c 104) and the Customs and Inland Revenue Act 1881 (44 Vict c 12), but the Earl of Halsbury LC at pp 68-69 and 71 and Lord Shand at p 76 treated the company as an executor de son tort which had intermeddled with the shares and debentures by registering them in the names of the American executors. Similarly, in *Inland Revenue Comrs v Stype Investments (Jersey) Ltd* [1982] Ch 456, which concerned a claim by the Revenue for payment of capital transfer tax, the transfer by the Jersey-based nominee of the late Sir Charles Clore of the proceeds of sale of land in England to his personal representatives in Jersey and not to his personal representative in England amounted to intermeddling, making the defendant liable to the tax as an executor de son tort. See Templeman LJ giving the judgment of the Court of Appeal at p 474.

50. It is not necessary that a person who has arrogated to himself a fiduciary power to deal with property has title to or possession of the property before he can come under a fiduciary duty. As Lord Esher MR stated in *Soar v Ashwell* it is sufficient that he has "exercised command or control" over it. In *English v Dedham Vale Properties Ltd* [1978] 1 WLR 93 a proposed purchaser of land during the negotiation of its purchase applied in the name of the vendor and without the vendor's knowledge or consent for a planning permission which would enhance the value of the property. He obtained that permission but did not disclose it to the vendor, who learned of it only after the sale had been completed. Slade J held that the purchaser by acting as a self-appointed agent in making the planning application had created a fiduciary relationship between himself and the vendor which imposed on him a duty of disclosure before the sale was completed, and, because of his non-disclosure, a duty to account for the profits received from obtaining the planning permission. The purchaser's liability as a fiduciary predated the purchaser's acquisition of the property.

51. In any event, directors of a company do not have title to or possess the property of the company but have only powers of administration over that property, yet they are treated nonetheless as if they were trustees of the funds of the company under their control: *In re Lands Allotment Co*, above, p 631 per Lindley LJ; *Belmont Finance Corpn v Williams Furniture Ltd (No 2*) [1980] 1 All ER 393, 405 per Buckley LJ; *Byers v Saudi National Bank* [2023] UKSC 51; [2024] AC 1191, para 56 per Lord Briggs. They are subject to fiduciary duties and, as discussed in *Byers* (Lord Briggs, paras 56-61, and Lord Burrows, paras 175-188), are treated as trustees of the company's property. The Sheikh pretended to be a director with authority to transfer the 891K shares. The fact that the recipient of the misappropriated 891K shares was a company under the Sheikh's control rather than the Sheikh is irrelevant to his liability as a fiduciary in respect of that transaction.

52. The Sheikh also prays in aid a judgment of the Supreme Court of Victoria, *Nolan v Nolan* [2004] VSCA 109. But that does not assist him. The case concerned a family dispute over three paintings by Sir Sidney Nolan. The claimant asserted that they formed part of the estate of Lady Nolan, Sir Sidney's first wife and the claimant's mother, and that Sir Sidney had converted them shortly after her death and not delivered them to her executors. The case concerned the application of limitation statutes as the claim was made about 30 years after Lady Nolan's death. The court rejected the assertion that Sir Sidney was an executor de son tort or a trustee de son tort at common law, because he never purported to act as executor or trustee in relation to the paintings but had acted in his own right. Ormiston JA (para 18) characterised as the main vice of the claimant's reply to the limitation defence the assumption that Sir Sidney could be an executor de son tort or a trustee de son tort without having performed acts which could be construed as asserting a right to act as either executor or trustee. By contrast, in this case the Sheikh purported to sign the share transfer forms as a director of the Company and facilitated the registration of JJW Guernsey's ownership of the 891K shares by the dishonest assertion that the share transfers had conferred a beneficial interest on JJW Guernsey at a time when he could exercise power as a director of the Company. In signing the share transfer forms

he purported to exercise the power of a director of the Company to transfer part of its assets.

53. Mr Rainey also submits that before a person can be treated as a fiduciary there needs to be in existence something like a trust. In this case in 2016 the Company held both the legal title and beneficial interest in the 891K shares. The Sheikh, while remaining a director de jure, had ceased to have any discretionary powers in relation to the Company's property through the operation of section 175 of the IA 2003. Absent such powers, he submitted, there could be no trust. He referred to the Canadian case of *Galambos v Perez* (above) which concerned a claim by the bookkeeper of a firm of solicitors, who had paid about $200,000 of her own money into the firm without the firm being aware of her investment, when the firm was in financial difficulty. When the firm went into receivership she claimed that she was entitled to be repaid the sums on the basis that the partners were her fiduciaries. The Canadian Supreme Court rejected her claim both because there had been no undertaking by the relevant partner, Mr Galambos, to act only in her interests as regards the advances (see para 41 above) and because he had no discretionary power over Ms Perez's interests that he could exercise unilaterally or otherwise and that was fatal to the claim that he owed an ad hoc fiduciary duty to act solely in her interests (see the judgment of Cromwell J at paras 83-87).

54. This second ground of defence in the *Galambos* case does not assist the Sheikh because that case is far removed from the line of authority which we have discussed above in which a person has arrogated to himself a power which is fiduciary in nature. It is inherent in this line of authority that the person is *not* an executor, trustee or director and so does not, as a matter of law, possess the power which he or she purports to exercise. But the principle is as stated by Bowen LJ in *Soar v Ashwell* (para 43 above) and by *Lewin on Trusts* (para 45 above), that a person who assumes an office ought not to be in a better position than if he were what he pretends. That principle when applied to this case means that the Sheikh falls to be treated as if he were a director of the Company whose powers had not been removed by section 175 of the IA 2003. The pretence by the Sheikh in signing the share transfer forms in the 2016 Share Transfers was that he had power as a director to transfer the 891K shares. He cannot hide behind the statutory provision which removed his power as director (section 175(1)(b) of the IA 2003, quoted in para 13 above) as that is contrary to his pretence and, indeed, it was the effect of that provision which he was seeking to avoid by using his pretence.

55. Finally, in his written case the Sheikh argues that the same act cannot be both an assumption of duty and a breach of that duty. He submits that the court must first identify whether a person has assumed fiduciary duties before inquiring whether there are any acts of breach. The Court of Appeal erred, he submits, in conflating accountability and liability by treating his signature of the share transfer forms in the 2016 Share Transfer as both rendering him a fiduciary and amounting to a breach of that duty. We do not agree. The arrogation to oneself of a fiduciary power may render a person accountable as a fiduciary without involving any breach of fiduciary duty. But there is no reason why that arrogation

of a fiduciary power may not itself involve a breach of fiduciary duty at one and the same time.

56. We conclude, essentially for the reasons set out by the Court of Appeal, that the Sheikh fails on issue 1.

57. We turn then to the issues concerning the quantification of the Company's claim.

(ii) Issue 2: Whether the Company suffered no loss because it acquired the 891K shares subject to unpaid vendor's liens?

58. As a defence to the Liquidators' claim, the Sheikh contends that the 891K shares are subject to unpaid vendor's liens arising in equity in favour of the entities which sold them to the Company pursuant to the two SPAs dated 18 March 2009, as to €56,755,600 in respect of the agreed price for the 567K shares sold by JJW Guernsey to the Company and as to €32,420,500 in respect of the agreed price for the 324K shares sold by JJAB to the Company. The price was never paid by the Company for the shares under those respective transactions. On the basis that at the date of the 2017 Transaction the 891K shares were charged with unpaid vendor's liens for sums totalling €89,176,160, the Sheikh submits that the Company suffered no loss as a result of that transaction.

59. We leave to one side any evaluation of the Liquidators' riposte to this that, even if such liens existed over the 891K shares, the Company suffered loss as a result of the 2017 Transaction because it remained liable for the contract price under each respective Share Purchase Transaction and, by that transaction, lost the value of assets which would otherwise have been available to generate the funds to pay those agreed sums. We focus on the reasons given by the courts below for rejecting this defence.

60. The judge rejected this defence of the Sheikh for two reasons, the first based on her construction of the SPAs and the second based on her more general assessment that the parties intended to exclude an unpaid vendor's lien in respect of both transactions. The Court of Appeal disagreed with the first reason but endorsed the second.

61. As is recorded in the agreed statement of facts and issues, JJW Inc was incorporated in September 2008 and it was intended that there would be an IPO of its shares. It was in the context of the proposed IPO that the 567K shares were issued and allotted to JJW Guernsey and the 324K shares were issued and allotted to JJAB. Then on 18 March 2009 both lots of shares were transferred to the Company pursuant to the Share Purchase Agreements ("the March 2009 Transfers"). As recorded in the statement of facts and issues, the March 2009 Transfers were intended to enable the Company to generate returns from the IPO and to use those returns to pay JJW Guernsey and JJAB the

consideration for the 891K shares under the SPAs. This part of the statement of facts and issues reflects findings made by the judge which in turn reflect uncontested evidence given by the Sheikh.

62. The Share Purchase Agreements were in materially identical terms. In the JJAB agreement, clause 2 provided:

> "2. TRANSFER OF SHARES
>
> 2.1 The Seller [ie JJAB] hereby irrevocably transfers its legal and beneficial interests in the Company Shares [ie the 324,205 shares in JJW Inc] to the Buyer [i.e. the Company] free from Encumbrance in consideration for €32,420,500.00 (the 'Consideration') to be paid on demand by the Buyer to the Seller in such way that is mutually agreed by the Buyer and the Seller.
>
> 2.2 Upon receipt of the Consideration by the Seller, completion of the transfer of the Company Shares pursuant to this Agreement shall take place immediately, when
>
> 2.2.1 the Seller shall deliver to the Buyer a share transfer [form] duly executed by the Seller in respect of the Company Shares in favour of the Buyer and procure that the Company shall register such transfers and issue and deliver to the Buyer a certificate representing the Company Shares in the name of the Buyer; and
>
> 2.2.2 the Seller shall, at the request of the Buyer, do and execute or procure to be done and executed all such acts, deeds, documents and things as may be reasonably necessary to give effect to this Agreement."

63. Clause 3.2 of each agreement provided for it to be governed by Guernsey law, which in relevant part has been taken to be the same as the law of England and Wales. Clause 1.1 of each agreement stated that "Encumbrance" includes "any mortgage, charge, pledge, lien, hypothecation, security interest, trust arrangement, option or other third party interest whatsoever". The Court of Appeal, differing from the judge on this point, construed this as limited to encumbrances in favour of third parties, so that on its proper construction clause 2.1 did not include an express promise to negative the existence of an

unpaid vendor's lien. There is no appeal in relation to this part of the Court of Appeal's judgment.

64. The judge also found (para 479) that the evidence before her, in particular in the form of explanations for the share purchase transactions given by the Sheikh in his witness statements, showed that the intention behind the transfer of the shares in those transactions was to enable the IPO to take place and that the Company would use the returns from the sale of the 891K shares in the IPO to pay the consideration for the transfers. This finding was also supported by the Sheikh's pleaded case and his written closing submissions. The Sheikh pleaded in his re-amended points of defence that the "entire rationale and purpose of the [March 2009 transfers] was to enable the Company to generate returns in the BVI from the IPO and to use those returns to pay the [consideration for the shares] to JJW Guernsey and [JJAB]".

65. The judge had evidence about the IPO and the way it was intended to be carried into effect. At para 488 she made a specific finding in relation to the Sheikh's contention that there were unpaid vendor's liens in equity which affected the 891K shares: "The existence of the lien would have prevented a sale of the 891K shares by the Company in the IPO and use of the proceeds of sale to pay the consideration, thereby thwarting the purpose and rationale for [the March 2009 Transfers]".

66. That finding was not challenged by the Sheikh on his appeal to the Court of Appeal. We can see no proper basis on which it can be disputed at this stage.

67. Newey LJ, at para 100, did not dispute that finding or suggest that it was in issue. He said that the clear inference from the circumstances of the March 2009 Transfers was that the parties intended to exclude a lien "which would at best complicate the intended sale of the shares through the IPO". It might have been possible, by careful drafting, to fashion a form of unpaid vendor's lien which did not impede the transfer of the shares to purchasers in an IPO free of any encumbrance in the form of a lien in favour of others, but so that the lien would at the stage of onward transmission of the shares to such purchasers attach instead to the proceeds of sale arising from the IPO. Be that as it may, there was nothing in the evidence or the case presented by the Sheikh that this was contemplated; nor did the evidence in the case show that it was thought that the purchasers in an IPO would regard this as acceptable or as sufficient to eliminate any risk to themselves from having a lien attached to the shares in the first place. On the contrary, as mentioned above, the judge found that the existence of the lien would have had the effect of making the IPO impossible. Newey LJ endorsed the judge's finding that the inference from the circumstances surrounding the March 2009 Transfers was that the parties intended to exclude any unpaid vendor's lien. He considered that the peculiar drafting of clause 2.1 (namely that the price for the shares in question should be "paid on demand by the Buyer to the Seller" but "in such way that is mutually agreed by the Buyer and the Seller") supported this inference, in that it showed that the Company as purchaser was

intended to have a degree of control over when the consideration should be paid, which married up with the Sheikh's account that this was only to happen once the IPO had taken place.

68. In our view, the findings and conclusion of the judge and the Court of Appeal on this issue cannot be faulted.

69. Newey LJ said (para 100) that the judgment of Millett LJ in *Barclays Bank Plc v Estates & Commercial Ltd* [1997] 1 WLR 415 ("*Barclays*") (the leading modern authority), "shows that the key question is whether there is 'a clear and manifest inference that it was the parties' intention to exclude [the unpaid vendor's lien]'" (at p 421).

70. In *Barclays* Millett LJ explained (p 420):

> "The lien arises by operation of law and independently of the agreement between the parties. It does not depend in any way upon the parties' subjective intentions. It is excluded where its retention would be inconsistent with the provisions of the contract for sale *or with the true nature of the transaction as disclosed by the documents*. It is also excluded where, on completion, the vendor receives all that he bargained for …" (our emphasis).

71. The lien arises by operation of law according to equitable principles, in that it is usually just and fair that the vendor should have a lien over his property until the price for it has been paid. This means that the test to be applied is more flexible and responsive to the equities of the case than the strict test governing the implication of terms in an agreement (as explained in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742); hence Millett LJ's comment that the lien arises independently of the agreement between the parties. Just as the test for implication of a term does not have to be satisfied for the lien to arise, so also it does not have to be satisfied in order to find that the lien does not arise but is in fact excluded. The whole debate regarding the existence or otherwise of such a lien takes place by reference to the equitable principles which govern this aspect of the law.

72. The focus in the present case is on the words we have highlighted above. Millett LJ says that the true nature of the transaction has to be "disclosed by the documents"; and later (at p 421, in the same sentence in the quotation by Newey LJ referred to in para 67 above) he said that *Winter v Lord Anson* (1827) 3 Russ 488 was authority that "the intention of the parties is to be objectively ascertained from the documents they have executed". However, the comments in that case were directed to its particular facts. In our view, since equitable principles govern here, it is not necessary that the relevant

contrary intention should be made out only from documents executed by the parties to the sale transaction. It is possible that there may be other evidence from the circumstances surrounding the transaction which is sufficient to demonstrate clearly that the joint intention of the parties, on an objective assessment, was that there should be no lien, having regard to the "the true nature of the transaction" (which includes its purpose). As a matter of general approach, equity has never confined itself just to looking at documents, or documents executed by the parties to a transaction, but will also take account of other sources of evidence as may be appropriate to determine the relevant issue in accordance with fairness and the justice of the case. The equitable doctrine of rectification of written instruments is but one example of this: see *Tyne and Wear Passenger Transport Executive (trading as Nexus) v National Union of Rail, Maritime and Transport Workers* [2024] UKSC 37; [2025] AC 1222.

73. Later in his judgment (p 422), Millett LJ's formulation was slightly different: "The lien arises by operation of law unless its exclusion can be objectively inferred from the terms of the documents and the nature of the transaction". At p 420 he cited with approval a passage from *Williams on Vendor and Purchaser*, 4th ed (1936), vol 2, p 984, dealing with implied waiver or abandonment of an unpaid vendor's lien, which stated that "the question is one of the parties' intention, to be determined by the documents they have executed *and the circumstances of the case* …" (our emphasis); and he said, "the authorities demonstrate the test is an objective one. The question is: what intention is to be attributed to the parties from the transaction into which they have entered?". Turning to the facts of the case before him he said (p 424) that the unpaid vendor "retained the lien by operation of law unless there was something in the transaction itself which would lead to the necessary inference that the parties must objectively be taken to have excluded the lien". All these formulations are consistent with the wider application of equitable principles which is appropriate in this area and are not tied to what appears from the documents themselves (although obviously the documents executed by the parties and exchanged by them will be an important source of relevant evidence about the joint intention in relation to the transaction in issue). The way in which Newey LJ formulated the question at para 100 (see para 67 above) reflects this interpretation of the law, and rightly so in our view.

74. At pp 422-424 Millett LJ considered *Kettlewell v Watson* (1884) 26 Ch D 501. In that case vendors sold land (with part of the purchase price remaining unpaid) to estate agent purchasers who intended to sell it on in lots to sub-purchasers on the footing that they were able to do so free from any charge or lien. The vendors, through their agent, were aware that this was the proposed scheme and could have intervened to stop the purchasers from selling on in this way, but did not do so. Later, the vendors sought to assert an unpaid vendor's lien against the sub-purchasers. Their claim was dismissed by the Court of Appeal. Lindley LJ explained (pp 509-510) that the conduct of the vendors' agent induced the sub-purchasers reasonably to believe that the estate agent purchasers had power to deal with the land as absolute owners free from any lien, which meant that the vendors were not entitled to enforce their lien against the sub-purchasers. Millett LJ pointed out that this was not a case where the unpaid vendor's lien was excluded, but

rather was one where it was postponed to the equitable interest of the sub-purchasers of the lots because of the way the vendors, through their agent, had conducted themselves: p 424. However, it shows that the operation of an unpaid vendor's lien is subject to ordinary equitable principles applicable in light of the general circumstances of a case, and in our view there is no good reason why the position should be any different in relation to the question whether such a lien arises in equity in the first place. Indeed, one could say that the reason that an unpaid vendor's lien does not arise in equity is closely related to that identified in *Kettlewell v Watson*, namely because the circumstances of the transaction are such as ought to lead both vendor and purchaser reasonably to understand that no such lien would be given effect.

75. Millett LJ also reviewed (pp 421-422) *In re Brentwood Brick and Coal Co* (1876) 4 Ch D 562 ("*Brentwood Brick*"). In that case, pursuant to an agreement for sale of the leasehold of a brick-works made by the owner and a trustee for a company in the process of formation, and later adopted by the company, the vendor executed a conveyance of the leasehold to the company which was stated to be in consideration of a sum of £6000 in cash to be paid later in accordance with the payment terms set out in the conveyance and £2000 in fully paid up shares. The conveyance stated that 50% of all sums received by the company on the sale of its shares and 50% of all sums borrowed by it as capital should be paid to the vendor until the £6000 cash amount had been paid off. The company was not successful and failed to raise any money on the sale of shares or by borrowing, so the £6000 remained unpaid. The company was wound up and the brick-works were sold, with the proceeds of sale paid into court. The vendor claimed a lien on those proceeds for the unpaid purchase money, but the claim was dismissed. James LJ (with whom Brett JA agreed) said (p 565) that this was not a simple agreement to sell for £6000 and that "the nature of the transaction excludes [a] vendor's lien", continuing as follows:

> "No doubt the vendor got a higher price by agreeing to accept payment in the way he did, and taking his chance of capital being subscribed or capital being borrowed to an amount sufficient to pay him. He says in fact, 'Half of the first capital moneys that come in to the extent of £6000 is to be my purchase-money.' No day for payment was named: he agreed to receive his purchase-money if and when capital should come in. He got for his property a charge upon and a right to the capital of the company to the extent of £6000 when it came in. To my mind it is clear that he intended to rely on that fund for payment, and intended that the company should have the means of borrowing. This is quite inconsistent with a lien which would probably make the company unable to pledge their property."

76. There are two strands in the reasoning of James LJ: (i) the parties intended that the purchase price would be paid from a particular source, and from that source alone, namely the funds to be raised by share sales and borrowing of capital (and see p 565 per Baggallay

JA: “it is evident that the party selling did not intend to rely on the security of the estate but on the funds of the company”); and (ii) the parties intended that the company should be able to borrow the funds needed to pay the cash amount, and a lien would have constituted a serious impediment to this as it would likely have made it impossible for the company to use the brick-works it was buying as security to borrow the funds required (the company was a new venture without an established business or cashflow which could not have supported borrowing in any other way). In combination, they were fatal to the vendor’s claim for a lien. We consider that each of them by itself would have been fatal.

77. Millett LJ pointed out (p 422) that there would have been a vendor’s lien if the consideration had been £6000 simpliciter, even if it had been obvious to both parties that the company would have no means of paying this unless it was able to borrow money or issue shares to that amount. Something more was required than that they contemplated that the purchase price was to be paid in that way. He said that what was determinative was that “the consideration expressed in the conveyance was not £6000 simpliciter but £6000 to be paid if and when the company borrowed or issued shares to that amount”.

78. We consider, in agreement with Millett LJ, that it is clear that something more was required to prevent a vendor’s lien from arising than the mere contemplation that the purchaser would be using certain sources of finance to pay the price. It had to be found that the parties had a positive joint intention either that the price was to be paid from a certain source or sources, with no obligation to have recourse to or right to call for recourse to be had to any other source (including by way of lien in relation to the property being sold) and/or that they had a positive joint intention that there should be no vendor’s lien because it would constitute an unwarranted and excessive impediment for the raising of funds to constitute the agreed source for payment. In our view, it was not critical to the reasoning in *Brentwood Brick* that these inferences as to joint intention were based on what was written in the conveyance. In fact, the second point made by James LJ was not set out in the conveyance and in any event the conveyance was a document executed by only one of the parties (some time after the agreement, which was the document executed by them jointly but which was not drafted in such specific terms as the conveyance). A focus in the cases on documentary materials is justified by the fact that documents executed by the parties (in particular, if executed jointly) are a particularly significant form of evidence from which the relevant inference as to their joint intention may be drawn. But other forms of evidence are not excluded. Otherwise, this category of case would tend to collapse back into the narrower question of an examination of whether the existence of an unpaid vendor’s lien is inconsistent with the terms of the contract, whether express or implied; but, as we have said and as the authorities indicate, the nature of the inquiry in equity is wider than that.

79. We would make three comments. First, given the very specific inference as to joint intention which has to be drawn (see para 78 above), the evidence which is relevant will need to be closely related to the transaction in question. Mere evidence of the background to the transaction, in abstract terms remote from the specific detail of what was agreed or

jointly intended by the parties, is very unlikely to be sufficient to negative an unpaid vendor's lien.

80. Secondly, the evidence regarding joint intention in this case was particularly strong and compelling. The SPAs were entered into as part of a general restructuring exercise within the corporate group owned by the Sheikh. The Sheikh stood on both sides of each of the agreements and could speak to the joint intention of the parties which underlay the transactions in each case. His evidence about that intention was very specific. The judge was entitled to make the finding she did in the light of that evidence and other evidence before her about the nature of the transactions.

81. Thirdly, as Newey LJ pointed out (para 100), there is a close analogy between the present case and *Brentwood Brick*. On the evidence of the Sheikh and the finding of the judge, both elements identified by James LJ in *Brentwood Brick* (para 75 above) were present. The inference that, in light of the nature of the March 2009 Transfers, the joint intention of JJW Inc and JJW Guernsey in the one case and JJW Inc and JJAB in the other was that there should be no unpaid vendor's lien which attached to the 891K shares was a strong one. Newey LJ drew attention to the fact that there was some trace of the underlying joint intention in the odd drafting of clause 2.1, which certainly was a relevant factor. However, the critical feature of the case was the evidence given by the Sheikh and his pleaded case regarding the background circumstances, rather than this aspect of the drafting of clause 2.1.

82. There is nothing in the other cases cited on this aspect of the appeal which affects the analysis we have set out. Mr Marc Glover, who presented this part of the submissions for the Sheikh, relied in particular on *George Wimpey Manchester Ltd v Valley and Vale Properties Ltd* [2012] EWCA Civ 233; [2012] 2 EGLR 113. In that case, in giving the lead judgment in the Court of Appeal, Arden LJ found that there was no unpaid vendor's lien by focusing on an inconsistency between the alleged lien and the terms of the contract of sale: paras 34-40. At para 38 she stated, "on a true interpretation of the sale agreement, the unpaid vendor's lien is excluded in this case". That is one of the types of cases identified by Millett LJ in *Barclays* in which such a lien will be excluded (see para 70 above), but it is not the only one and Arden LJ did not say that it was. At para 35 Arden LJ also said that an unpaid vendor's lien was excluded by the nature of the transaction, and that (referring to Millett LJ's judgment in *Barclays*) this was "to be determined by an objective assessment of the parties' intentions as expressed in their agreement". But as we have explained above, neither *Barclays* nor the other authorities support such a narrow approach.

83. In *Re Albert Life Assurance Co* (1870-71) LR 11 Eq 164 an unpaid vendor's lien was found to be excluded because it "would frustrate the very object of the arrangement", so it was "impossible to infer that, consistently with that intention, any such lien as [that contended for] could have been contemplated" (p 179). Bacon V-C said (p 178): "the rule

of law upon which the doctrine of an unpaid vendor's lien depends must be very frequently influenced by the particular circumstances of each case in which it is said to arise". This supports our analysis of the nature of the doctrine and of the evidence which is relevant in applying it, as does this further passage (at pp 178-179):

> "there is one plain principle which guides and governs [the doctrine's] application in all cases. If it be expressed, *or can be safely and properly inferred from documentary or other evidence, or from the nature of the contract,* that it was the intention of the parties that the sale or transfer, however absolute in its terms, was subject to the condition that the purchase-money should be paid, or that the thing contracted to be done by the vendee should be performed, the lien will prevail. If, on the other hand, no such inference can be properly drawn – if the performance of the thing contracted to be done by the vendee was not the condition upon which the transfer was made, but the engagement to do the thing was the consideration for the transfer, the vendor, having accepted that engagement, has the very thing he bargained for, and cannot say that the consideration has not passed to him. In such cases the lien cannot prevail" (our emphasis).

84. We would add that, since reference to evidence about the circumstances of a transaction is permitted and may often be necessary for the purposes of assessing whether the narrow test for implication of terms in a contract is met, it could not sensibly be thought that this is not permissible when applying the wider equitable principles in issue here.

85. The Sheikh's appeal on Issue 2 therefore fails.

(iii) Issue 3: How to calculate the loss of the value of the Company's 891K shares in JJW Inc when (as the parties argued in the courts below), after their transfer, the value of those shares was destroyed by the subsequent transfer of all JJW Inc's assets and liabilities to JJW UK?

86. The trial judge quantified the Company's loss, attributable to the Sheikh's misappropriation of the 891K shares in the 2016 Share Transfers at €67,123,403.36. She did so by reference to what she regarded as the best evidence of value made available to her, namely the statement of shareholder value in JJW Inc's 2016 Accounts, as at 31 December 2016. This date was, as she noted, only a few months after the 2016 Share Transfers, and the Sheikh did not challenge the calculation of the amount derived from

those accounts, as a matter of mathematics, or because no minority discount was applied to what was of course a small minority holding in JJW Inc.

87. The Court of Appeal reduced that quantification to zero, on the basis that, by the time of trial, the value of the 891K shares had been reduced to nil by the 2017 Asset and Liability Transfer. Relying upon an inference (not challenged on appeal to this court) that but for the 2016 Share Transfers the Liquidators would not have sold any of the Company's shares in JJW Inc before July 2017, they concluded that, valuing them at the trial date, as part of a trial date assessment of loss, they were worthless. Therefore, the Company suffered no loss by reason of their misappropriation by the Sheikh in 2016. In so doing they treated the 2017 Asset and Liability Transfer as a key element in the counterfactual scenario required to be erected by assessing what would the shares have been worth to the Company by the time of trial if the breach of duty constituted by the 2016 Share Transfers had not occurred. They were much encouraged in reaching that conclusion by the fact that the Liquidators had not sold the Company's 129K shares in JJW Inc which had not been misappropriated in 2016, and those shares had (as was common ground at least by the time of the hearing in the Court of Appeal) been rendered worthless to the Company by the 2017 Asset and Liability Transfer.

88. These radically different outcomes, based on relatively straightforward and largely uncontested facts, appear to have resulted from a different application of the legal principles relating to the construction of counterfactuals, in deciding what would have happened but for the breach of fiduciary duty by the Sheikh in bringing about the 2016 Share Transfers. The general importance of those legal principles was a main reason why the Liquidators were given permission to appeal to this court. It is therefore necessary to consider those principles (or at least those which are decisive of this appeal) in some detail. But first it needs to be borne in mind how the Sheikh's case about the counterfactuals changed between trial and the hearing in the Court of Appeal.

89. The judge carefully set out the elements of the counterfactuals relied upon by the Sheikh before her, before rejecting all of them. At paragraph 559 of her judgment she identified four (one of which she classified as an alleged intervening act). They were:

(i) That JJW Guernsey always had a right to enforce its lien;

(ii) That the Liquidators never tried or wished to realise the shares;

(iii) That the Liquidators never wanted to investigate title to the Company's shares in JJW Inc; and

(iv) That the loss was caused (as an intervening act, breaking the chain of causation) by the Liquidators' failure to "take control" of the Company's shares in JJW Inc.

90. Striking by its absence from the judge's list of counterfactuals or intervening events was any allegation by the Sheikh that the 2017 Asset and Liability Transfer was itself an intervening event which broke the chain of causation by reducing the value of the shares to zero. This was all the more striking because, as the judge noted at para 557(iii) it was clear, and asserted by the Liquidators, that that transaction reduced the value of the shares in JJW Inc to zero. This omission was not a mistake by the judge. No such case was pleaded, proved or relied upon in submissions by the Sheikh. It was only before the Court of Appeal that the 2017 Asset and Liability Transfer itself became a plank (indeed the main plank) in the Sheikh's case that the shares were to be regarded as worthless, so that the Company suffered no loss by their misappropriation.

91. There appears to have been no opposition to this late introduction of a new point in the Court of Appeal, without it having been pleaded, proved or subjected to forensic examination at trial. Furthermore, Newey LJ was by no means satisfied that the Sheikh had made a clean breast (by full disclosure) as to how the 2017 Asset and Liability Transfer had come about, what was its purpose or his role in it, or whether it really did reduce the value of the shares in JJW Inc to zero. He said (at para 57):

> "I have to say that I would not myself regard it as obvious that the transfer of JJW Inc's assets and liabilities to JJW UK made shares in JJW Inc worthless. The 2016 Accounts reported that, as at 31 December 2016, JJW Inc had liabilities totalling €775million, including €595 million owing on 'Owners' current account', but also that the company had assets amounting to €1,457 million and, hence, net assets of nearly €682 million. It is far from clear how, in the circumstances, all JJW Inc's assets could properly have been transferred away in return for no more than JJW UK assuming responsibility for JJW Inc's (much smaller) liabilities. Even assuming that such a transaction could have been sanctioned with the unanimous consent of JJW Inc's members, it cannot have received it since the Company held 129,000 shares and had no knowledge of the transfer. *Nor has the Sheikh provided any satisfactory explanation (or, really, any explanation at all) for what was done*. The Judge noted in the Judgment that Ernst & Young, Cairo, had said in a letter dated 30 June 2017 that by the end of 2016 they had been so concerned about JJW Inc's status that they had been unable to continue as the company's auditors in the absence of a restructuring, that minutes of a meeting of JJW Inc dated 17 July 2017 mention a person at the meeting

> declaring that JJW Inc was not in a position to pay its debt to MBI International Holdings and that 'all possible avenues would need to be explored': see paragraphs 114 and 117. The Judge also referred to 'contemporaneous evidence as to the commercial considerations which caused various inter-connected companies to restructure their affairs at this time': paragraph 541. To my mind, however, there remain unanswered questions as to the propriety of the transfer of JJW Inc's assets, whether JJW Inc might have a valuable claim in respect of it and whether a shareholder could bring a derivative claim or seek relief on an unfair prejudice basis. It is not inconceivable that the Company could even now put itself in a position to mount a valuable claim by having JJW Inc's register of members rectified in its favour." (our italics).

92. Nonetheless the Court of Appeal felt compelled to treat the 2017 Asset and Liability Transfer as an event which reduced the value of the misappropriated shares to zero because (a) that was the Liquidators' case before the judge and (b) they did not challenge that approach in the Court of Appeal. We will return to this question after examining the relevant law.

93. Where a trustee misappropriates trust property or (as here) a fiduciary misappropriates property under his management and control, then there is little doubt as to the general objective of a court of equity in awarding compensation to the beneficiary (or the principal: here, a company) if the misappropriated property cannot be returned in specie (and at a fair reflection of its value to the beneficiary or the company, according to the principles discussed below). It is to restore to the trust fund at the expense of the defaulting trustee or fiduciary (or to the company where its property is misappropriated by a director) the value of the property misappropriated. Looking backward from the time of trial, and with the full benefit of hindsight, the court asks what would have been the value of that property to the beneficiary (or company) if it had not been misappropriated. There are numerous well-known judicial statements to that effect both in cases of misappropriation and, by analogy, other cases of breach of trust. They include *In re Dawson, decd; Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211, and *Libertarian Investments Ltd v Hall* [2013] HKFCA 93; (2013) 17 ITELR 1 ("*Libertarian*"), which were about misappropriation, and *Target Holdings Ltd v Redferns* [1996] AC 421 ("*Target*") and *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58; [2015] AC 1503 ("*AIB*"), which were not, although they did involve the unauthorised payment of trust money.

94. The principle that the court looks back from the date of trial is a concept regarding the information to be taken into account by the court when it makes its evaluation of the value of what the trust fund or the company has lost. This does not in itself answer the question of what is the relevant date at which the value of the property to the trust fund

or the company should be assessed. That gives rise to a distinct issue of principle, namely what is the date of valuation of the property which appropriately reflects the justice or equity of the case?

95. In many cases where there is an issue as to the value to be attributed to the property misappropriated, the court has regarded it as just and equitable to value the property as at the date of trial. Thus if it has appreciated since misappropriation (or would have if retained in the trust fund) the defaulting trustee will justly be chargeable with that increase. Similarly if it has (or would have) declined in value by reason of matters having nothing to do with the conduct of the defaulting fiduciary (including custodianship of the property) following misappropriation, such as a fall in the property market or, in the case of shares, a fall in the value of the company in which those shares are held due to general market conditions (*Thanakharn Kasikorn Thai Chamkat (Mahachon) v Akai Holdings Ltd* (2010) 13 HKCFAR 479 – "*Akai Holdings*" – is an example), then the defaulting fiduciary will not be chargeable for that diminution in value, unless the beneficiary can show that the property would have been sold in the meantime, at a price reflecting a higher value than if retained until trial (the position in *In re Ahmed* [2018] EWCA Civ 519; [2018] BPIR 535). If events occur diminishing the value of the property which are extraneous to the relationship between beneficiary and trustee (or between company and director) and which would have had the same effect if the property had remained in the hands of the trust fund or the company, there is no sound justification for holding the trustee or director responsible for that loss of value. On the other hand, where the fall in value of the property is caused by misconduct by the trustee or director there may be justification for holding the trustee or fiduciary responsible for it.

96. In this respect this general tendency of equity to assess quantum (including value) at the date of trial departs from the common law, which traditionally quantified loss as at the date of breach. But neither is a fixed or invariable rule. *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha* [2007] UKHL 12; [2007] 2 AC 353 and *County Personnel (Employment Agency) Ltd v Alan R Pulver & Co* [1987] 1 WLR 916, CA show how the supposed breach date rule at common law may be departed from to meet the justice of the case, in contract and tort respectively. Cases about equitable compensation which demonstrate that there is no fixed or inflexible trial date rule include *Satyam Enterprises Ltd v Burton* [2021] EWCA Civ 287; [2021] BCC 640 and *Cassegrain v Gerard Cassegrain & Co Pty Ltd* [2015] NSWSC 851. Counsel on both sides of this appeal were agreed that there is no inflexible rule as to the date for assessment of value lost, either at common law or in equity. The fact that there is no fixed rule means that the question which date is appropriate to use to assess the value of what has been misappropriated is an open one, which requires consideration of what is just and equitable as between the beneficiary and the trustee (or the principal, such as a company, and the fiduciary).

97. It is unnecessary to decide why the common law and equity appear to start from opposite ends of a possible spectrum of time for assessing loss or value (between breach and trial dates), when both are pursuing broadly the same compensatory objective. It may

be that the explanation given by Street J in *In re Dawson*, adopted in *Libertarian* by Ribeiro PJ, namely that unlike the common law, equity is not concerned with issues of remoteness, foreseeability and mitigation, comes nearest to a satisfying explanation. But a firm conclusion about the reasons for that divergence of approach between common law and equity is for another day.

98. It is fair to say that in both *Target* and *AIB* there are dicta which, read out of context, appear to treat a trial-date assessment of loss as a given when awarding equitable compensation. They are quoted by the Court of Appeal in the present case. But neither case was in substance about misappropriation of trust property for the trustee's benefit, and in neither case was it necessary to defer the assessment until trial, even if it was (at least in *Target*) necessary to escape from a slavish breach date assessment.

99. *Target* was a case in which the defendant solicitors' client account was used to hold the claimant's money on trust until exchanged by way of loan against the taking of specific security. It was paid out in June 1989, a month before the specified security was provided and hence in breach of duty. The summary judgment hearing took place over three years later. By then it was clear that the client lender's loss was attributable either to a general fall in the property market which affected the value of the security, to the overvaluation of the security or to the borrowers' fraud, and had nothing whatever to do with the defendant solicitors' default in paying out the loan money a month before receiving the security. The fact that the security was in fact received shortly after the money was paid out and at a time when it had the same value that it would have had if it had been taken at the time of the loan, as was supposed to happen, meant that the commercial object of the trust arrangement was fulfilled. The assessment of no loss implicitly depended on the fact that the property had not diminished in value between the date of payment of the money and the date of getting the security.

100. *AIB* was another case of an essentially negligent failure by solicitors acting for a lender to do their job properly. The breach of duty consisted of paying out the loan money held on a client trust account against a mortgage of property while failing to ensure that a prior security over the same property in favour of a third party was simultaneously discharged. The client's loss was assessed as at the date when the new security was realised and was quantified at the amount due to a third party on the earlier security which had not been discharged. It was another case in which the wisdom of hindsight available by the time of trial enabled the client's loss (assessed on a just and equitable basis) to be quantified, but not one in which there needed to be any trial-date valuation of property misappropriated, or indeed any valuation at all (since the amount due to the third party and covered by the prior security was determined by other circumstances).

101. Where a trustee or fiduciary has misappropriated trust property (or property under his fiduciary control) and the beneficiary (or principal) can prove that the property had value when misappropriated, the beneficiary suffers an immediate loss of value. In such

a circumstance, if the defaulting fiduciary wishes to rely upon a supervening actual or counterfactual event breaking the chain of causation between the breach and the beneficiary's loss, on an assessment looking at all the information available to the court at trial, the burden lies squarely upon the fiduciary to prove that supervening event and to show that it should be treated as having that impact on the analysis of the causative link between the breach of duty and the loss suffered by the beneficiary. This is firmly laid down in the following three authorities and has never been doubted.

102. The first is *In re Brogden; Billing v Brogden* (1888) 38 Ch D 546. Trustees of a marriage settlement failed, in breach of trust, to pursue executors for payment of a legacy, but rather took security for payment which later proved valueless because of the failure of the business over which the security had been taken. But the surviving trustee, a Mr Budgett, alleged that taking proceedings against the executors would have left the beneficiaries no better off and the question arose as to who bore the burden of proof. Affirming the trial judge, the Court of Appeal held the trustee liable. Both Cotton and Fry LJJ said that the burden of showing that the breach of trust caused no loss to the beneficiaries lay squarely on the trustee. At pp 572-573 Fry LJ put it this way:

> "But then it is said by Mr Budgett that no loss has accrued to the cestuis que trust by reason of his want of diligence:- he says that if he had been diligent, no greater good would have come to the Billing family than has come to them. In my judgment, the burden of sustaining any such argument as that rests distinctly upon the trustee who sets it up. When the cestui que trust has shewn that the trustee has made default in the performance of his duty, and when the money which was the subject of the trust is not forthcoming, the cestui que trust has made out, in my judgment, a prima facie case of liability upon the trustee, and if the trustee desire to repel that by saying that if he had done his duty no good would have flowed from it, the burden of sustaining that argument is plainly upon the trustee."

103. The second case is *Carruthers v Carruthers* [1896] AC 659, a Scottish appeal. One of the trustees of a deceased's estate was allowed by his co-trustees to act as a factor in collecting rents due to the estate and absconded with sums he had collected. The beneficiary sued the co-trustees for failing to require the factor to deliver regular accounts for audit, as required by the trust deed as a condition of the appointment of one of their number as factor. This was held to be a *culpa lata*, a severity of default equivalent to gross negligence, not covered by the trustees' indemnity in the trust deed. The defendants asserted that the obtaining of accounts from the factor and their auditing would not have prevented the loss of the moneys misappropriated by the factor. Rejecting that defence as unproven, Lord Herschell said, at p 665:

> "Then what is the extent of their liability? They are liable, as it seems to me, for all the results naturally flowing from the breach of duty on their part; and I think where this culpa lata is shewn, and it might be reasonably concluded that the trust would not have suffered as it did if the duty had been observed, it lies with the trustees to shew, if they seek to absolve themselves on that ground, that no benefit would have accrued to the trust if they had discharged their duty, and that the loss would have been precisely the same, and must have been precisely the same whether they did so or not. I do not think they are entitled to insist upon the Court speculating as to whether it is or is not possible that, even if the trustees had done their duty, the loss would equally have resulted."

In re Brogden was one of the authorities relied upon by the successful beneficiary.

104. The same conclusion about the burden of proof was reached by the Hong Kong Court of Final Appeal in *Libertarian.* The claimant Mr Woods had entrusted his business partner Mr Hall with money to be used to buy shares in a company (TSE), but Mr Hall misappropriated the money for his own purposes in breach of fiduciary duty. Having followed *In re Dawson* in explaining that by assessing loss as at the date of trial the court is enabled to use the full benefit of hindsight, and to take account of changes in value of the trust property following breach, Ribeiro PJ continued, at 17 ITELR 1, para 93:

> "Where the plaintiff provides evidence of loss flowing from the relevant breach of duty, the onus lies on a defaulting fiduciary to disprove the apparent causal connection between the breach of duty and the loss (or particular aspects of the loss) apparently flowing therefrom."

Later, at para 117, he described the consequences of that burden as requiring the defence to be pleaded, proved by evidence and put in cross-examination to any opposing witness who might be supposed to have relevant knowledge about it.

105. Neither *In re Brogden* nor *Carruthers* were cases about a misappropriation of trust money by the defendant trustee. Rather, they were about breaches of trust consisting of failure to take steps to prevent foreseeable loss to the trust fund. But they both imposed a burden on the defendant, in effect to disprove an apparent connection between breach and loss, in the context of a "but for" and therefore counterfactual analysis. In short, they required the defendant to prove that, even if there had been no breach of trust, the same loss would have been incurred. It is noteworthy that the courts in both those cases acknowledged that a "but for" counterfactual analysis was an appropriate way of

assessing loss, a century before *Target* and *AIB*. Thus it cannot be said that the principle as to the burden of proof which they laid down was overtaken by the requirement to carry out a counterfactual analysis in either of those much more recent cases.

106. By contrast *Libertarian* followed *Target* in time and as an authority. It was a relatively straightforward case of misapplication of trust money by the trustee, where the loss caused was, at least at first sight, the value of that property at the time of the misappropriation. We see no reason why the burden of proof set out in *In re Brogden*, *Carruthers* and *Libertarian* should not continue to be regarded as a firmly established principle in the law of equitable compensation for breach of trust or fiduciary duty.

107. So, for example, in *Barnett v Creggy* [2016] EWCA Civ 1004; [2017] Ch 273 Sales LJ referred to the guidance in *Target* and summarised its effect at paras 44-45: "where a beneficiary has a claim against his trustee to require the trustee to restore trust property improperly disposed of by him, 'the basic rule is that a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss' (*Target* … [1996] AC 421, 434C, per Lord Browne-Wilkinson, and also see p 437C), but subject to the compensation payable being referable to loss actually suffered by the trust estate: pp 432E-433A, 437C-E. …"; the claim "is restitutionary in nature (in the sense of being designed to restore the trust fund), albeit capable of being defeated if the defendant trustee can show that no loss was caused".

108. Applied to the present case, this means that, following his misappropriation of the 891K shares by the 2016 Share Transfers and by procuring the registration of JJW Guernsey as their owner in the books of JJW Inc, the Sheikh caused what is on the face of it an immediate loss to the Company of the whole of the then value of those shares, which the judge valued, as at a slightly later date, at about €67.1 million. It was for the Sheikh to prove that the 2017 Asset and Liability Transfer was a subsequent event which defeated the prima facie causative relevance of the 2016 Share Transfers by reducing the value of those shares to zero in a manner which allowed the Sheikh to take the benefit of it. This required proof not merely that the 2017 Asset and Liability Transfer actually had that effect upon the value of the shares, (something which was not in issue, because for very different reasons the Liquidators positively asserted it), but also that it was a legitimate intervening event for the Sheikh to insert into the "but for" causation analysis.

109. It is not every supervening event which a defendant may pray in aid, either as breaking the chain of causation or as fit for inclusion in a counterfactual "but for" analysis. For example, it is no good for the trustee to say: "if I had not misappropriated the property, someone else would have done so later": see per Lord Toulson in *AIB* at para 58. This is because the actual loss was caused by the trustee's misappropriation, and the hypothetical later loss would have had a different cause, for which someone else might have been liable. The law has always been careful not to permit a wrongdoer to seek to reduce the

extent of a loss for which he is responsible by pointing to the possibility or likelihood of wrongdoing by another person as a relevant extraneous event for the purposes of analysis of causation. The claimant should not be deprived of the full benefit of its claim against the original wrongdoer by virtue of the fact that the claimant might have acquired a different right of action in respect of the same loss against someone whom it might be impossible or difficult to find or to sue and who might prove not to be in funds to meet the claim. To do so would allow the original wrongdoer to take the benefit of a putative obligation owed to the claimant, whereas the right to rely on obligations owed to the claimant is that of the claimant itself and the existence of such an obligation should not be capable of being used to undermine the claimant's interests in this way.

110. Generally speaking, looking at the decided cases, supervening events also appear to be unlikely to qualify if the defendant fiduciary had a hand in them, in the absence of a clear and convincing innocent explanation provided by the fiduciary. In line with the principle referred to by Lord Toulson in *AIB*, a wrongdoing fiduciary could not rely on any later wrongdoing by himself to reduce the loss regarded as flowing from his initial wrongdoing; and, if the fiduciary has not discharged the burden of proof on him, one cannot be sure that his later actions are not affected by wrongdoing. Counsel could think of no case in which a supervening event had qualified for inclusion in the legal causation analysis, in diminution of the loss, in which the defendant fiduciary had been (or may have been) actively involved.

111. A fiduciary, as steward of his principal's property or affairs, to whom he owes a duty of loyalty, has the responsibility to account for and explain what has happened in relation to them (and, if necessary, the principal is entitled to ask for a formal account without the need to show any breach of duty, as Lord Millett NPJ explained in *Libertarian* at para 167). The decision of the majority of this court in *Rukhadze* (above) that the equitable obligation to account for profits is a duty and not just a remedy is consistent with this responsibility. The principle in *In re Brogden*, *Carruthers* and *Libertarian* that the fiduciary has the onus of explaining what has happened and establishing that no loss has in fact occurred has developed in recognition of this fundamental aspect of the fiduciary relationship. It also recognises that there is typically information asymmetry as between fiduciary and principal, with the fiduciary being in possession of all the relevant facts.

112. It is easy by contrast to think of cases where a supervening event in which the defaulting fiduciary played no part at all was identified as the real cause of the loss. Thus in *Target*, the real cause of the loss, which would have occurred in the same way even if there had been no breach of trust by the solicitor trustees, was the fall in the market value of the security property due to a general decline in the property market. The same is true of the additional loss suffered by the claimant lender in *AIB,* over and above that attributable to the outstanding prior security. And in *Akai Holdings*, a decision much relied upon by the Court of Appeal in the present case, the loss in value of the misappropriated shares (until they were realised by the defendant) was caused by a

decline in the fortunes of the business of the company in which the shares were held (which was a subsidiary of the claimant), again not attributable to anything done or omitted to be done by the defendant bank, which was assumed to be liable to make equitable compensation for knowing receipt.

113. It is easy enough to see why a supervening event in which the defaulting fiduciary had no hand at all, and to the risk of which the principal would have been equally exposed even if there had been no breach of trust, should be taken into account in diminution or even extinction of the loss attributable to the breach, on a "but for" counterfactual analysis, for example on the basis that the beneficiary had retained the trust property which was in fact misappropriated. It is because the risk of that harm happening to the relevant trust property is properly and fairly to be allocated to the principal, not to the fiduciary.

114. By contrast, if the fiduciary plays some part in the happening of the supervening event, either by participating in it or causing or increasing the exposure of the trust property to the risk of harm being caused by it, then it is by no means clear (absent some good explanation being given by the fiduciary) that the risk of the harm caused by the event should fairly be allocated to the principal. The example was examined during argument of a valuable painting held on trust and hung in a public gallery. If the trustee misappropriated it (in the sense of claiming it as his own beneficially), but left it hanging in the gallery, which was later burned down, no one would doubt that (leaving aside insurance) the trustee's arrogation of ownership of the painting caused the beneficiary no loss, at least if the beneficiary would not have sold it in the meantime and taken the proceeds. But for the breach of duty the painting would still have remained in the gallery and would still have been destroyed in the fire. But if the trustee had removed the painting to his own home, which had later been burned down, equally plainly the trustee could not have prayed in aid the fire. The fair allocation of the risk of destruction by fire would have fallen upon the trustee, because his action in moving the painting had created its exposure to the risk of the fire which later occurred, even though he had no part at all in the fire itself.

115. It might be thought even more difficult to treat loss caused by a subsequent event as for the principal's account if the defaulting fiduciary played a significant part in the bringing of that event to pass. The court would be naturally concerned to examine that subsequent event with particular care, and to require the defendant fiduciary to prove that he played no sufficient part in it to disqualify him from relying upon it in diminution of the principal's loss, the burden of proof being upon him in accordance with the authorities analysed above. In a typical case where the fiduciary rather than the principal held the requisite knowledge (or relevant documents) about the subsequent event, the court would expect the fiduciary to make full disclosure, if seeking to rely upon it.

116. The Sheikh has not given full disclosure. Nonetheless, in order to demonstrate the sort of problem to which this absence of explanation gives rise, we consider that it is at this point helpful to look more closely at such evidence as there is about the 2017 Asset and Liability Transfer and the Sheikh's role in it. It consisted of what was described as a "restructuring" of the Sheikh's MBI Group of companies in which all the assets and liabilities of JJW Inc were transferred to JJW UK, wholly owned by another MBI Group company, MBIIGH. It took place shortly after the Company's then liquidator Ms Caulfield obtained recognition of the Company's BVI liquidation as a foreign main proceeding under the Cross-Border Insolvency Regulations 2006, by application made on 8 May 2017, notified to the Sheikh on 22 May and granted by Registrar Derrett on 9 June. Shortly thereafter the 891K shares were transferred from JJW Guernsey to MBI International Holdings, another MBI Group company. It is a reasonably safe inference that, save where interfered with by a liquidation, all the MBI group companies shared the Sheikh as their ultimate beneficial owner, as did JJW Guernsey.

117. As we have explained above, the 2017 Asset and Liability Transfer was triggered by a letter dated 30 June 2017 and signed by the Sheikh on behalf of "our company MBI International Holdings Inc" and addressed to JJW Inc, demanding payment within 21 days of an outstanding loan of €600 million, with an invitation either to pay up or enter into discussions about alternative arrangements. On 17 July the Board of JJW Inc noted the existence of the debt of €600 million to MBI International Holdings. On 27 July the Board of JJW Inc resolved to accept an offer from JJW UK to take on all JJW Inc's assets and liabilities. The judge said that the Sheikh had not been present at that meeting but the Sheikh had already acknowledged his presence in an affidavit. He was not cross-examined because he was too ill to attend trial, but there was no evidence to the contrary. We conclude that the judge's finding that he was not in attendance was an inadvertent error. Nonetheless the Sheikh does not appear to have been a de jure director of JJW Inc.

118. As at 27 July 2017 Ms Caulfield did not know that any of the Company's shares in JJW Inc had been purportedly transferred to JJW Guernsey, or that the 891K shares had been transferred by JJW Guernsey to MBI International Holdings. By the beginning of the trial on 1 February 2021 the Liquidators had been untruthfully informed (and the Sheikh had purported to verify in evidence) that all the Company's shares in JJW Inc had been transferred to MBI Group companies, and that in July 2017 all the shares in JJW Inc – as opposed to JJW Inc's assets and liabilities – had been transferred to JJW UK.

119. On the fourth day of the trial the Sheikh revealed for the first time that the 2017 transaction had involved a transfer of all JJW Inc's assets and liabilities, rather than its shares, and that the 129K shares in JJW Inc remained owned by the Company. But, as already noted, at no time during the trial did the Sheikh rely upon the 2017 Asset and Liability Transfer as an event relevant to quantification of the loss caused by the 2016 Share Transfers. Such evidence about the 2017 transaction as was available to the judge had to be dragged out of the Sheikh, and his attempts to explain it underwent fundamental changes over time.

120. For their part the Liquidators did pursue a case at trial that the 2017 Asset and Liability Transfer had been part of a dishonest conspiracy including the Sheikh against the Company, and that it had reduced the value of all the Company's shares in JJW Inc to zero. But the Liquidators failed to discharge the burden of proof upon them in relation to the conspiracy claim, or the Sheikh's part in the 2017 Asset and Liability Transfer, and the conspiracy claim was rejected by the judge.

121. When the matter reached the Court of Appeal the Sheikh simply relied upon the fact (effectively admitted by the Liquidators although doubted by the Court of Appeal) that the 2017 Asset and Liability Transfer had reduced the value of the 891K shares to zero, asserted that there was a rule that the value of misappropriated trust property had to be assessed as at trial in a claim for equitable compensation, and thereby succeeded in reversing the judge's award of €67m compensation. We agree with the observation of Newey LJ (quoted above) that the Sheikh had not provided any satisfactory explanation (or, really, any explanation at all) for what was done. The Court of Appeal did not think that mattered, but we respectfully disagree.

122. If the Sheikh had been a prime mover in the 2017 Asset and Liability Transfer, he could not in our view have prayed it in aid as a subsequent event in diminution or extinction of the loss which he had caused to the Company by the 2016 Share Transfers. It would have amounted to saying that if he had not destroyed the value to the Company of the 891K shares in 2016 he would in any event have succeeded in destroying that value a year later by the 2017 Asset and Liability Transfer, or at least have reaped the same benefit to himself, as the ultimate beneficial owner of the MBI Group. Using the analogy of the painting held on trust, he would actually have lit the fire which destroyed it. On any view the Sheikh appears to have been the prime beneficiary of the 2017 Asset and Liability Transfer, since it transferred the apparent net surplus of assets over liabilities of JJW Inc, in which the Company had a minority shareholding, to another MBI Group company of which he appears to have been the sole ultimate beneficial owner. And in the counterfactual world in which he had not already misappropriated the 891K shares the Sheikh would thereby have destroyed the value of the whole of the Company's original minority stake, in a zero-sum game where every Euro lost to the Company was a Euro gained by him.

123. That being so, it was incumbent upon the Sheikh, if he wished to rely upon the 2017 Asset and Liability Transfer in diminution of the loss apparently caused to the Company by his misappropriation of the 891K shares, to prove that he played no significant part in, and derived no significant benefit – at the expense of the Company – from that transfer. This he made no attempt to do, either at trial or in the Court of Appeal. There is amply sufficient evidence to disclose a case to answer that the Sheikh was more than just a bystander in relation to the 2017 Asset and Liability Transfer. He triggered the process which led to the transaction by signing the letter of demand. He attended the key board meeting of JJW Inc. He stood to benefit from it as already explained and, as the

ultimate owner of the MBI Group, there must be more than just a faint suspicion that he effectively controlled it.

124. An additional reason why the Court of Appeal thought that the assessment of a zero loss could be reached without any in-depth consideration of the appropriate counterfactuals is that the 891K shares were in fact rendered worthless by the 2017 Asset and Liability Transfer. Having considered in general terms whether a defendant can escape liability by invoking a counterfactual, Newey LJ continued, at para 66:

> "No such issue arises in the present case, however. The appellants are not seeking to lessen their liability by reference to what would have happened if the 891,761 shares had not been misappropriated. They emphasise that the shares have in fact become worthless."

125. Again, we respectfully disagree, for two reasons. First, the fact that a subsequent event happened in fact does not mean that its role in a particular loss assessment is to be regarded as not forming part of the relevant counterfactual picture which is the basis of that assessment. Generally, a counterfactual structure contains most of what did in fact happen after the relevant breach. A relevant normative question, and the vital one in this case, is whether a defendant can invoke to reduce or exclude his liability a particular factual event, as happens, for example, at common law where some event is treated as a *novus actus interveniens* (new intervening cause) in a counterfactual assessment for the purposes of assessing damages.

126. Secondly, and more fundamentally, the Sheikh *was* seeking to reduce his liability by reference to what would have happened if the 891K shares had not been misappropriated. The relevant assessment is not the value of the shares in the abstract, but the loss of their value to the Company. Their value to the Company was in the real world reduced to zero by the Sheikh's misappropriation of them in 2016. They may have retained the same value as shares, but thereafter it was a value to JJW Guernsey, and ultimately to the Sheikh as that company's ultimate beneficial owner. If A steals a car from B (and it cannot be found or reclaimed), then the value of the car to B is reduced to zero, but the car retains its value as a car, now enjoyed by A. So it was with these shares.

127. But the Sheikh wished to prove to the Court of Appeal that, if he had not destroyed the value of the shares to the Company in 2016, and they had remained vested in the Company, then in that counterfactual world they would have been reduced in value to the Company to zero by the 2017 Asset and Liability Transfer. In the real world, the Company lost all the value arising from ownership of the 891K shares when the Sheikh misappropriated them in 2016. By July 2017 the 891K shares were in the ownership of MBI International Holdings, and it was their value to that company that was actually

reduced to zero by the 2017 Asset and Liability Transfer. The point may be illustrated by a contrast with the smaller block of shares in JJW Inc which the Company still retained in July 2017. Their value to the Company really was reduced to zero by the 2017 Asset and Liability Transfer, because they had not by then already been misappropriated.

128. For those reasons we would allow the Liquidators' appeal against the reduction by the Court of Appeal of the amount of compensation payable by the Sheikh to zero, and restore the judge's order in that respect.

(4) Conclusion

129. We would dismiss the Sheikh's appeal on Issues 1 and 2 (the existence of a breach of fiduciary duty and the unpaid vendor's liens) and allow the Liquidators' appeal on Issue 3 (the calculation of the loss which the Company suffered as a result of the 2016 Share Transfers). The result is that the Order made by the judge, that the Sheikh pay compensation to the Company of €67,123,403.36, is to be reinstated.