

## Limitation and Loss:

### Concurrent Liability for Negligence and Breach of Trust

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1. The problem:

- (i) From beneficiary's perspective: resident in UK; enjoys benefits in the form of use of property, but gets no money from the trust; finds himself liable to more than £100k of CGT. Section 87, TCGA 1992.
- (ii) From trustees' perspective: Jersey trust, subject to Jersey law; property sold in the UK to reinvest by purchasing another property; both were proper decisions taken on appropriate advice.

Note two important differences between Jersey Law and UK Law: (1) Jersey limitation period is three years from date of sale; (2) Under Jersey Law you cannot exclude liability for gross negligence or wilful default.

2. We can start by ruling out a claim for breach of trust. Two reasons—

- (i) Not a claim for breach of trust because no wrong has been done to the trust and it has suffered no loss.
- (ii) Limitation: if the only claim is against the trustees in Jersey, it is already time-barred.

Is there a separate claim in tort? Is there indeed any duty at all? If the trustees' have to take into account the tax circumstances of each individual beneficiary, is there not a conflict of interest?

3. In *Langlands v SG Hambros*, the argument that no duty was owed by the trustees to the beneficiary was rejected by the judge, who held that it was "at least arguable" that a trustee "who foresees or ought to foresee that the impact of a transaction may be to impose a tax liability on a particular beneficiary should take reasonable care to avoid that result; however, if he cannot do so consistently

with his primary duty to manage the trust property, then he is not in breach of the duty in proceeding with the transaction, notwithstanding its unfortunate effect.”

4. What about loss? In the problem, the trustees failed altogether to consider the question of CGT. What would have happened if they had considered it? They might have decided, quite properly, to go ahead with the transaction anyway. If that had been the case, their failure to consider caused no damage.
5. In *Langlands v SG Hambros*, the beneficiary’s position was rather stronger. The trustees had in fact sought UK tax advice, but the advisers had not responded and the trustees failed to follow it up. It was therefore difficult for the trustees to say that they had no obligation even to consider the matter, and it might have been possible for them to purchase the new property without triggering the CGT charge. There was no evidence before the court one way or the other. Ordinarily, this would have been fatal to the claim, but the judge held that the relevant information was in the hands of the trustees alone. In those circumstances, he would have been prepared to make an order for disclosure and adjourn the hearing until the necessary evidence could be provided.
6. Gross negligence. The trust deed in *Langlands* included a special indemnity clause. This raised the question whether, under Jersey law, the clause covered the kind of damage, and if so whether it was effective under Jersey law. The effect of such clauses is a separate topic and is not explored in this talk. See *Armitage v Nurse* [1998] Ch 241.
7. Limitation. Because of the very short Jersey limitation period, the beneficiary’s claim will fail unless it can be brought in England applying English law. This question depends on sections 11 and 12 of the Private International Law (Miscellaneous Provisions) Act 1995. Where different elements of the tort occur in different countries, the applicable law is that of the country “in which the most significant element or elements” occurred. However, this rule may be displaced if it is “substantially more appropriate” for some other law to apply.
8. In *Langlands* the judge decided: (1) that all the elements of the tort of negligence were relevant, (2) that both the duty of care (by setting up the trust) and the breach (the decision to sell) had occurred in Jersey, but (3) that the damage (the assessment to tax) had occurred in England. On that footing, the balance clearly came down in favour of Jersey. Furthermore, even if this had not been the case, he would have held that it was “substantially more appropriate” for Jersey law to apply.
9. One of the issues raised in the case was whether the law recognised the existence of concurrent liability for negligence and breach of trust. As the judge pointed out, this question did not need to be decided in this case, because the beneficiary’s case was not that the trustees had been liable in

relation to the trust, but that they owed him an additional duty of care in relation to his own personal affairs. Nevertheless, the more general question is, perhaps, the most interesting feature of the case.

10. Problems of concurrent liability in tort and contract. Used to be controversial: see *Tai Hing Cotton Mill v Liu Chong Hing Bank*. Also *Simms Jones Ltd v Protochem Trading New Zealand Ltd* [1993] 3 NZLR 369, 381: “if the parties have chosen a contractual bed they should ordinarily be expected to lie in it alone, without the seductive company of tort.”
11. Settled in *Henderson v Merrett*. “...in truth the duty of care imposed on bailees, carriers, trustees, directors, agents and others is the same duty: it arises from the circumstances in which the defendants were acting, not from their status or description.” This supports the idea that a trustee may owe concurrent duties in trust and in tort; but there is no decision directly on the point. How might it arise?
12. Different limitations periods; different measures of damage; scope of trustee exoneration clause. Or, as here, there may be some feature of foreign law which gives a jurisdictional advantage if the claim can be framed in tort.
13. Note also that the language in which the duty of care is now framed under the Trustee Act 2000 is indistinguishable from the tort of negligence.
14. What if the trustees in fact took advice on UK tax but were negligently advised—would the beneficiary have a claim against the adviser? In *Langlands* there was, in fact, such a claim, but the decision in that case was concerned only with the trustees’ application to set aside the leave to serve out of the jurisdiction. Since the advisers were in the jurisdiction, the action against them did not require leave. However, it was argued by the trustees that there was no arguable claim against the advisers, so the judgement contains a brief discussion of this issue. The judge appears to have had little difficulty in concluding that the beneficiary had at least an arguable claim against the advisers under *White v Jones*.
15. This conclusion in fact masks a substantial difficulty. In *White v Jones*, Lord Goff and Lord Browne-Wilkinson specifically restricted the decision in that case to testamentary arrangements. Since then, there has been no decision that finally determines the question. In *Hemmens v Wilson Browne*—which was heard when *White v Jones* was between the Court of Appeal and the House of Lords—it was held that a solicitor acting for the donor in an *inter vivos* gift did not owe the intended donee a duty of care. The crucial feature of that case was the mistake was discovered while the donor was still alive, and could therefore have repaired the mistake (but he had changed his mind).

16. In *Hughes v Colin E.G. Richards*, a chartered accountant had acted for the parents in setting up an offshore trust intended to be for the benefit of their children. The trust was unsuitable and lost all its money. In a claim brought by the parents and the children, the accountant sought to strike out the children's claim on the grounds that his only duty of care was owed to the parents. The judge declined to strike out the claim, and the Court of Appeal refused to interfere.
17. Nevertheless, the CA recognised that in the light of the authorities there was "a strongly arguable case" that the children could not claim. Peter Gibson LJ held that the implications of *White v Jones* were still being explored, and it would be wrong to strike a case such as this on the basis of assumed facts. The law was in a state of development, and should be allowed to go to trial.
18. Jacob LJ agreed, and added an additional argument of his own. He suggested that, as the children were under age, the transaction could be interpreted as one in which the accountant had been advising both the donors and the donees. This would remove the difficulty, since the children would be able to claim in contract. At first sight it looks like a rather elegant solution to the problem, but it is respectfully submitted that the analysis is unsatisfactory. It would lead to arbitrary and unjust results. Consider, for example, two cases: in one, the children are of full age; in the other, they are infants. If it is necessary to rely on Jacob LJ's argument, the claim by the adult children will fail, while the otherwise identical claim by the infants would succeed. The injustice is even clearer if one considers a case in which some of the intended donees are adults and some are children. It would be arbitrary in the extreme to give a remedy to the infant beneficiaries but not the children.

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