Clifford Chance

BRIEFING

UK Supreme Court finds director owes fiduciary duties even after liquidation and awards liquidators substantial equitable compensation

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In what circumstances will a director whose powers have ceased continue to owe fiduciary duties to the company? When will a vendor's lien be excluded from a sale? And how should a beneficiary's losses be assessed in a claim for equitable compensation for misappropriation of its property? These are the questions the UK Supreme Court was concerned with in its recent decision in *Mitchell and another v Al Jaber* [2025] UKSC 43.

In this briefing, we examine the circumstances in which fiduciary duties arise for directors and how equitable compensation is assessed in misappropriation cases. The facts of the case were unusual: the director acted some five years after liquidators had been appointed and, despite his formal powers having ceased, purported to transfer shares belonging to the company. The Supreme Court held him liable for misappropriating those shares and, reversing the conclusion of the Court of Appeal, awarded the company substantial equitable compensation.

More broadly, the decision is a useful reminder that fiduciary duties can be assumed by anyone who exercises—or even purports to exercise—fiduciary powers. The Court confirmed that liability for breach of fiduciary duty may arise even from a single act where the wrongdoer assumes a fiduciary role. This contrasts with shadow directorship, which requires a demonstrable pattern of conduct (see refresher on directors' duties below).

Key issues

1. Fiduciary duties can arise where a person exercises (or purports to exercise) fiduciary powers, even where those powers have not been formally granted or have been removed.

2. Whether a vendor's lien exists depends on the intentions of the parties to the sale. In ascertaining that intention, the court can look beyond

the sale contract and other documentary evidence to consider broader sources of evidence.

3. Where a fiduciary has misappropriated property from a beneficiary, the burden falls on the fiduciary to establish that the beneficiary's entitlement to equitable compensation should be reduced based on some event that the fiduciary claims would have occurred had the property not been misappropriated.

4. Where a fiduciary had a hand in the supervening event which they seek to rely upon to, they will need to provide a clear and convincing innocent explanation for it, in the absence of which it is unlikely to be accepted.

Background

MBI International & Partners Inc (the "**Company**") is a company incorporated in the British Virgin Islands ("**BVI**"). At the relevant time, Sheikh Mohamed Bin Issa Al Jaber (the "**Sheikh**") was its sole shareholder and one of its directors. The Company was part of a wider group of companies beneficially owned by the Sheikh (the "**MBI group**"). From 2009, the Company held shares in another company, JJW Inc (the "**Shares**").

In 2011, a BVI court made a winding-up order in respect of the Company. Upon commencement of the winding up, in accordance with BVI insolvency law, the Sheikh ceased to have any powers as a director. Nevertheless, some 5 years later, in 2016, the Sheikh (without the knowledge or authority of the liquidator) effected the transfer of the Shares from the Company to another company, JJW Guernsey, of which he was also a director (the "**2016 Share Transfer**"). Subsequently, in 2017, all of JJW Inc's assets and liabilities were transferred to another company in the MBI group (the "**2017 Transfer**"). The parties agreed that this rendered the Shares worthless.

Having earlier had the BVI liquidation recognised in the UK as a foreign main proceeding under the Cross Border Insolvency Regulations, the liquidator brought a claim in the High Court alleging that the Sheikh had acted in breach of a fiduciary duty or in breach of trust in effecting the 2016 Share Transfer and that the transfer was void. A claim was also brought against JJW Guernsey as a knowing recipient of the Shares. The liquidator sought equitable compensation for the loss of the Shares.

At trial, the judge found that the Sheikh owed fiduciary duties to the company and that he breached those duties by acting dishonestly and in bad faith and not in the best interests of the Company in effecting the 2016 Share Transfer. The judge awarded equitable compensation of around €67 million, which reflected the value of the Shares around the time they were misappropriated.

The Sheikh appealed to the Court of Appeal, which upheld the trial judge's finding that the Sheikh breached his fiduciary duties to the Company.

However, it held that the liquidator had failed to establish that the misappropriation of the Shares caused the Company to suffer any loss. This followed from its finding that even if the Shares had not been misappropriated, the 2017 Transfer would have happened in any event, which would have rendered the Shares worthless in the Company's hands. The Court of Appeal therefore awarded no equitable compensation.

At trial and before the Court of Appeal, the Sheikh also argued, unsuccessfully, that the Shares were subject to a vendor's lien in favour of the entities which sold the Shares to the Company in 2009, as the Company had never paid the sellers the agreed consideration, such that the Company had not suffered any loss by the misappropriation of the Shares.

On appeal to the Supreme Court, the Sheikh appealed the Court of Appeal's conclusions on fiduciary duties and the (non-)existence of the vendor's lien, and the liquidators appealed the Court of Appeal's conclusion on the quantum of equitable compensation.

Issues

Three issues arose for the Supreme Court's determination:

1. Firstly, whether the Sheikh owed and breached fiduciary duties to the Company.
2. Secondly, whether the Company's ownership of the Shares was subject to a vendor's lien.
3. And thirdly, how the Company's loss should be calculated for the purposes of the liquidators' claim for equitable compensation.

Decision

In a unanimous judgment, the Supreme Court dismissed the Sheikh's appeal on issues 1 and 2 and allowed the liquidators' appeal on issue 3, reinstating the trial judge's order that the Sheikh pay compensation of €67 million to the Company.

Issue 1: Fiduciary Duties

The Supreme Court rejected the Sheikh's argument that he could not owe fiduciary duties in circumstances where his fiduciary powers had been removed following the commencement of the Company's winding-up.

The Supreme Court recognised that fiduciary duties can arise ad hoc, including where a person "*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*".

The Supreme Court also rejected the Sheikh's argument that he could not owe fiduciary duties to the Company in respect of its property in circumstances where he had not received and held title to the property. It is sufficient that a person who has arrogated to himself a fiduciary power to deal with property has "*exercised command or control*" over it. In this regard, the Supreme Court highlighted that directors are treated as fiduciaries of the company's property, even though they do not hold title to the property.

The Supreme Court did not consider it relevant in determining the Sheikh's liability that the recipient of the Shares was a company controlled by the Sheikh, rather than the Sheikh himself. Nor was there any reason why the arrogation of a fiduciary power may not itself involve a breach of fiduciary duty at the same time.

As a result, the Supreme Court concluded that "*the Sheikh falls to be treated as if he were a director of the Company whose powers had not been removed*".

Issue 2: Vendor's Lien

The Supreme Court held that the Shares were not subject to a vendor's lien.

A vendor's lien gives the seller of property an equitable interest in the property while the purchase consideration remains unpaid. It arises "*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*".

When determining whether a vendor's lien has been excluded, the key question is whether there is "*a clear and manifest inference that it was the parties' intention*" to do so (per Millett LJ in *Barclays Bank Plc v Estates & Commercial Ltd* [1997] 1 WLR 415).

In ascertaining that intention, documents executed by the parties will be a significant form of evidence. However, the Supreme Court held that the parties' intention may be deduced from other evidence surrounding the transaction, although it will need to be "*closely related to the transaction in question*".

In this case, the Sheikh had given evidence that the context of the 2009 sales of the Shares to the Company was that the Company intended to sell the Shares as part of an IPO of JJW Inc and use the returns from the IPO to pay the agreed consideration. This evidence regarding the background circumstances of the sales, along with the Sheikh's pleaded case, was regarded as "*the critical feature of the case*" leading to the conclusion that a vendor's lien was excluded.

Issue 3: assessment of loss

The Supreme Court held that the Company's losses should be assessed at the time the Shares were misappropriated.

When awarding equitable compensation where the beneficiary's property (including that of a company or principal) has been misappropriated by a trustee or fiduciary and cannot be returned to it, a court will seek to restore the value of the misappropriated property to the beneficiary. This involves a "but for" analysis of the position that the beneficiary would have been in had the property not been misappropriated (the counterfactual scenario).

The Sheikh argued that because the 2017 Transfer (which the parties agreed rendered the Shares worthless) would have happened regardless of whether the Shares were misappropriated, the Company was in no worse position as at the date of the trial than it would have been had the Shares not been misappropriated.

The Supreme Court explained that while it will look backwards from the date of trial, with the benefit of hindsight, when determining what the beneficiary has lost, this does not determine the date at which misappropriated property is to be valued and the beneficiary's loss is to be assessed. There is no fixed rule as to when the beneficiary's loss should be assessed; the issue "*requires consideration of what is just and equitable as between the beneficiary and the trustee*"

The Supreme Court reasoned that where the beneficiary can prove that the property had value when it was misappropriated, the beneficiary will have suffered an immediate loss of that value. If the fiduciary then wishes to say that some event would have happened in the counterfactual scenario which would have diminished the value of the property (in this case, the 2017 Transfer), so as to reduce the loss for which the beneficiary is entitled to be compensated, then the burden lies on the fiduciary to prove both (i) the supervening event; and (ii) that it should properly be inserted into the counterfactual analysis:

1. The first point requires the fiduciary to prove that the supervening event would have had the effect on the value of the property in the counterfactual scenario that they claim. Here, because the parties accepted that the 2017 Transfer rendered the Shares worthless and there was no evidence that the Company would have sold them had they not been misappropriated, this point was not in issue in the case.
2. In relation to the second point, the Supreme Court distinguished between supervening events in which (i) the fiduciary played no role and to which the beneficiary would have been equally exposed had the property not been misappropriated, and (ii) where the fiduciary plays a part. Where the supervening event is unconnected with the fiduciary's actions, such as where the market value of the property falls (and the beneficiary would not have sold it, had it not been misappropriated), then it may be taken into account in reducing the beneficiary's loss. But where the fiduciary had a hand in the supervening event, either because they participated in it or, for example, caused or increased the exposure of the property to the risk of loss of value, the fiduciary will need to provide a clear and convincing innocent explanation for it, if they are unable to do so then it is unlikely to qualify for inclusion in the counterfactual analysis.

The Court considered that if the Sheikh wished to rely on the 2017 Transfer in reducing the Company's loss, it was incumbent on him to prove that he played no significant part in it and derived no significant benefit from it. In circumstances where the Sheikh had not provided any satisfactory explanation of the circumstances surrounding the 2017 Transfer, the Sheikh failed to discharge this burden. The Court therefore held that the Shares were to be valued, and the Company's loss assessed, around the time of the misappropriation

Refresher on directors' duties

Under the Companies Act 2006 ("**CA 2006**"), references to a "director" include any person occupying the position of director, by whatever name called. This includes:

a) **de jure directors:** anyone officially appointed to the board;

b) **de facto directors:** anyone not officially appointed to the board, but who nonetheless act as a director; and

c) **shadow directors:** anyone who is not a director, but whose directions or instructions the directors of a company are accustomed to act in accordance with. This definition generally excludes "professional advisers" (for example, lawyers or accountants) but could potentially include lenders or shareholders.

All directors owe certain legal and fiduciary duties to their company. The general duties are codified in sections 171 to 177 of the CA 2006. These duties are personal and cannot be delegated, and although management functions may be delegated, it remains the directors' duty to monitor and supervise the discharge of those functions.

Breach of directors' duties can attract proprietary and personal claims by the company against the directors. In certain insolvency scenarios, where the interests of the company's creditors become paramount, directors may also face wrongful trading claims by the company's liquidators or administrators under sections 214 and 246ZB of the Insolvency Act 1986. Fraudulent trading is also an available remedy where a business has been carried on with intent to defraud creditors under sections 213 and 246ZA of the Insolvency Act 1986. In liquidations, the company's liquidators or creditors can also apply to the court under section 212 of the Insolvency Act 1986 to bring a misfeasance claim against the company's directors. This was the mechanism through which the Company's liquidators brought their claim against the Sheikh in this case.

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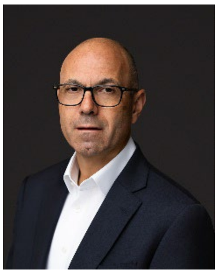

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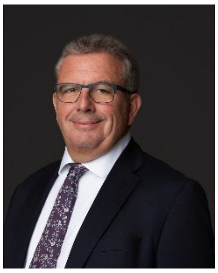

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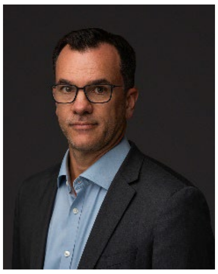

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