accommodate the interests of all those affected by their operations. This ideal of justice provides a basis on which to explain why judges have attached increasing importance to freedom of expression in the last two decades.

There is much in this state of affairs that is murky. For judges have not, while altering the contours of defamation law, dwelt on the relationship between corrective and distributive justice. This is unsurprising. Substantive and procedural complexities abound in defamation law. A further layer of complexity will have little appeal to judges dealing with cases such as *Singh*. But a failure fully to explain the character of the changes that have occurred in the last two decades is itself a matter of public concern.

RICHARD MULLENDER

CONSEQUENTIAL ECONOMIC LOSS AND THE TRUST BENEFICIARY

THE biggest peacetime explosion in Europe occurred when a petroleum vapour cloud created by the leakage of 250,000 litres of petroleum ignited one Sunday morning in December 2005. The explosion, which occurred at a fuel depot in Buncefield, Hertfordshire, registered 2.4 on the Richter scale. Remarkably no one was killed. But people were injured, nearby homes damaged, and local businesses and property values harmed. Five companies involved in operating the site were later convicted of safety and environmental offences, and civil litigation arose. As between two of the companies, Shell and Total, a novel question of negligence and trust law arose. Fuel pipelines had been held on trust by UKOP and WLPS for Shell, Total and others. Total conceded that the damage which occurred to the pipelines was a reasonably foreseeable consequence of its negligence. Was Total liable to compensate Shell for the consequential economic loss it thereby suffered as a trust beneficiary?

In *Shell UK Ltd.* v. *Total UK Ltd.* [2010] EWCA Civ 180, [2010] 3 All E.R. 793 the Court of Appeal answered with a confident "yes", holding (at [142]):

> that a duty of care is owed to a beneficial owner of property (just as much as to a legal owner of property) by a defendant, such as Total, who can reasonably foresee that his negligent actions will damage that property. If, therefore, such property is, in breach of duty, damaged by the defendant, that defendant will be liable not merely for the physical loss of that property but also for the foreseeable consequences of that loss, such as the extra expenditure to which the beneficial owner is put or the loss of profit which he incurs. Provided that the beneficial owner can join the legal owner

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> in the proceedings, it does not matter that the beneficial owner is not himself in possession of the property.

This holding does a disservice to tort and trust law.

Once the court decided that Shell's pure economic loss should be compensable, several sub-questions remained. Should Shell have an independent right of action? If so, Total would owe duties of care both to the trustee and beneficiaries and Total could be sued, in separate actions, by each of them in their own name. Or should the trustee have the only cause of action but be allowed to recover damages (*i*) for Total's infringement of the trustee's common law rights of possession in the pipes *and* (*ii*) for consequential economic loss thereby caused to the beneficiaries? If the trustee should have the only cause of action, would the action properly be brought in the trustee's or a beneficiary's name? As the quoted passage indicates, the Court of Appeal did not grapple with these distinctions.

A clear set of answers could have been reached by extending the principles discussed in *The Albazero* [1977] A.C. 774 (HL), regarding the analogous problem in contract law. Recovery of damages for breach of contract generally requires the innocent party to demonstrate actual loss. Accordingly, losses sustained by beneficiaries consequent upon a third party's breaching a contract with the trustee were once irrecoverable. An ancient exception affirmed in *The Albazero* allows a trustee to recover damages in contract reflecting the beneficiaries' loss: *e.g. Robertson* v. *Wait* (1853) 8 Ex. 299 (Exch.Ch.). The trustee is accountable to the beneficiaries for any proceeds recovered. Since it is the trustee's duty to sue, it is generally he who does so. Only if he fails to do so may the beneficiaries sue the third parties. The beneficiaries then exercise the trustee's legal rights, not their own.

While the court in *Shell* may have thought it was simply extending these principles, it instead produced a strange hybrid of tort and trust law. For while Total was found to owe a duty of care towards the trust beneficiaries, that action could apparently *only* be pursued to judgment if the beneficiary joined the legal owner in the proceedings. Statute apart, other duties of care in negligence do not suffer that imperfection. Indeed, if the contractual principles discussed in *The Albazero* had been faithfully extended into tort, Total would not have owed a duty of care to Shell as a trust beneficiary at all. The trustees simply would have been able to recover for damage which they did not themselves sustain.

Two influences which led the court to its destination are apparent. First, Total was said to owe the stated duty of care to Shell because (among other reasons) to hold otherwise would have been "legalistic". Presumably, it would also have been "legalistic" to hold that a duty of

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care in respect of goods was not owed by a third party to the beneficiary of a trust of those goods, because such a duty could only be owed to someone (*e.g.* a trustee) with a possessory title to the goods. Yet the House of Lords so held in *The Aliakmon* [1986] A.C. 785, 809. The ground on which the Court of Appeal distinguished that case – that it concerned *physical*, not *economic*, loss – is insubstantial. In each case the prior question of duty was materially the same. Whether *The Aliakmon* is "legalistic" seems doubtful, but clearly attaching that label did not facilitate a considered application of authority and principle in *Shell*.

Secondly, the Court of Appeal did not discuss or apply the principle that only in "special circumstances" will a trust beneficiary be entitled to sue in his own name a person who, for example, commits a tort in respect of trust property. Since *Shell* was decided, the Supreme Court has reaffirmed this principle: *Roberts* v. *Gill & Co Solicitors* [2010] UKSC 22, [2010] 2 W.L.R. 1227, [22]. Had the principle been attended to in *Shell*, the duty of care which the court formulated would not have been melded with an important but separate principle about the enforcement of trusts.

A final effect of these influences is to make the scope of duties of care in negligence harder to define. Several passages in the judgment can be understood as meaning that Total owed co-extensive duties of care *both* to the trustee and to the trust beneficiaries (at [142]–[144]). It seems unlikely that the Court of Appeal would have intended this. What they probably intended was simply to extend *The Albazero* to a similar problem arising in tort. It is to be hoped that future courts will come to "rationalise" *Shell* along those lines.

P. G. TURNER

RESTITUTION OF VOID LOANS

IN *Sinclair* v. *Brougham* [1914] A.C. 398 the House of Lord held that money lent pursuant to a contract which the borrower lacked capacity to make could not be recovered in "quasi-contract" as money had and received. This was doubted by some of the judges in *Westdeutsche Landesbank Girozentrale* v. *Islington L.B.C.* [1996] A.C. 669, but that was in the context of a claim for money paid pursuant to a void interest-rate swap contract rather than a loan. It remained unclear whether there is a policy against allowing restitution of money lent. Such a policy was identified in *Sinclair* v. *Brougham*, because restitution was considered only to be available by means of an implied contract, and the implication of a contract would enable the lender to

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