shams), the extent of his ability to control the trust assets meant that the *effect* of the instruments was not to manifest an intention to transfer the beneficial interest in the assets to anyone else, and thus the intention necessary to create a trust was missing. This analysis corresponds with equity's usual analytical framework and helps to explain Lord Kitchin's conclusions.

Although the moniker "illusory trust" has been used to describe the failure of a trust for reasons similar to those given in *Webb* (e.g. *Re AQ Revocable Trust* [2010] 13 I.T.E.L.R. 260 (Bermuda)), its invocation in this context was deprecated in *Clayton v Clayton* [2016] NZSC. 29, at [123] (obiter dicta) and *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* (2017) 20 I.T.E.L.R. 905, at [169]. Counsel for Mrs. Webb did not rely on the "illusory trust" concept at first instance ([2017] CKHC 31, at [55]), and although both cases were cited in the Court of Appeal, neither it nor Lord Kitchin addressed the issue in these terms. Perhaps this unhelpful and distracting label has itself turned out to be illusory.

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WHAT DOES IT MEAN TO BE A FIDUCIARY?

IN *Lehtimäki v Cooper* [2020] UKSC 33, the Supreme Court applied a hitherto unauthoritative test for when ad hoc fiduciary relationships arise. It also suggested that the scope of fiduciary obligations is wider than previously established.

When their marriage collapsed, the co-founders of the Children's Investment Fund Foundation (UK) ("CIFF") – Sir Christopher Hohn and Jamie Cooper – agreed that it should pay $360,000,000 to Big Win Philanthropy ("BWP"). BWP would be the vehicle for Cooper's future benevolence. CIFF was a charitable company limited by guarantee. Its directors were Hohn, Cooper and several third parties. Its members were Hohn, Cooper and Marko Lehtimäki.

CIFF's planned disbursement constituted "a payment for loss of office . . . to a person connected with a director" under section 215 of the Companies Act 2006. It therefore required the approval of CIFF's members (s. 217) and the Charity Commission's consent (Charities Act 2011, s. 201). CIFF sought that consent. However, rather than provide it, the Commission authorised the bringing of proceedings to obtain the court's endorsement of the transaction and any necessary directions regarding a members' resolution.

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At first instance, Sir Geoffrey Vos C supported the payment: [2018] Ch. 371. He also ordered that Lehtimäki must vote in favour of it (ibid., at [146]–[156]). (Because of respective conflicts of interest, neither Hohn nor Cooper would take part in that decision). The Court of Appeal disagreed: [2019] Ch. 139. The Chancellor's direction was not unprincipled, but the proper threshold for intervention had not been met. Consequently, Lehtimäki was free to choose whether to support the section 217 resolution.

Concerned that Lehtimäki might stymie CIFF's restructuring, Cooper appealed. Agreeing with her, the Supreme Court unanimously held that the trial judge was entitled to make the direction he did and restored his order.

Giving the lead judgment, Lady Arden said that the case raised three issues. First, whether, as a member of CIFF, Lehtimäki was a fiduciary. Second, whether, with respect to the s 217 resolution, any circumstances had arisen "in which the court [could] exercise [a] jurisdiction … in relation to [him]" (at [36]). Third, whether section 217 allowed the court to direct a member of a charitable company how to exercise a discretion arising under it. Lord Briggs, with whom Lord Wilson and Lord Kitchen agreed, endorsed this analysis and her Ladyship's conclusions on each point. However, he disagreed with Lady Arden's explanation of why the second issue fell in Cooper's favour.

For three reasons, the most challenging part of the court's decision is that on whether Lehtimäki was a fiduciary. To begin with, eschewing any more established standard, Lady Arden applied a "legitimate expectation" test derived from the Privy Council's decision in *Arklow Investments Ltd. v Maclean* [2000] 1 W.L.R. 594 and the Australian case of *Grimaldi v Chameleon Mining NL (No 2)* (2012) 287 A.L.R. 22. She thereby held that, as being a member of CIFF involved undertaking a role which gave rise to a reasonable expectation that he would not utilise his position in a way which favoured his own interests, Lehtimäki was a fiduciary (at [47], [91]).

Besides *Bolton v Madden* (1873–74) L.R. 9, 55 (Q.B.), in which Blackburn J. held that "the subscriber to a charity may … give his votes as he pleases" (ibid., at 57), this development is problematic on two levels. The first concerns the uncertainty that attends the "legitimate expectation" test. In the abstract it is hard to say when it will be reasonable for one person to expect that another will set aside his own interests in A's favour. More importantly, the test is difficult to apply in practice. At times, Lady Arden focused on what Lehtimäki himself thought (at [91]). At others, she considered the Charity Commission's view on the matter (at [48]) and speculated as to what members of the public would expect (at [91]). This is unsatisfactory. Parties are entitled to know if the law takes a subject-focused or detached approach to this issue, and whether the Commission's opinion is now legally binding. Her Ladyship *did* say that what applied to Lehtimäki would apply "to all other members of charitable

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guarantee companies which … in general prevent members receiving profits from the company" (at [78]). However, no more generally applicable guidance was given. The second way in which the "legitimate expectation" test will cause problems is that it does not apply in every case (at [48]). The Supreme Court thus gave its imprimatur to a previously unauthoritative test for when someone will be an ad hoc fiduciary without clearly delineating its scope. This will generate litigation.

A second difficulty with the court's account of fiduciaries might flow from Lady Arden's conclusion that Lehtimäki owed his duty, "not to [CIFF], *but to* [*its*] *charitable purposes*" (at [50], emphasis added). This appears unprincipled because private law duties are owed to individuals who hold rights correlating to them. As Roxburgh J. said in *Re Astor's Settlement Trusts* [1952] Ch. 534, 541: "[One] would not [expect] to be subject to an equitable obligation unless there was somebody who could enforce a correlative equitable right." It does not make sense to say that obligations are owed to purposes.

The best interpretation of her Ladyship's words could therefore be as referring to the nature of Lehtimäki's obligation. She was saying that his duty *to CIFF* was to act in a certain way vis-à-vis the purposes it existed to advance (not in a certain way vis-à-vis CIFF itself). This seems right because, subject to the below, it is hard to say that causing a company to suffer a $360,000,000 loss is in its best interests. Such an arrangement would also be valid in principle (see e.g. *Beswick v Beswick* [1968] A.C. 58).

The third challenge posed by the court's reasoning results from its conclusion as to the content of Lehtimäki's fiduciary obligation, to whomever it was owed. Both Lady Arden and Lord Briggs held that he was under a "subjective" duty "to do that which he [considered] to be in the best interests of the objects of the charity" (at [180], [218]). Unfortunately, there is little authority in support of this proposition. Over time the scope of fiduciary obligations *has* expanded from a prohibition on acting in conflict of interest and duty, to include restrictions on acting in conflict of duty and duty, and – perhaps – on making unauthorised profits even in the absence of a conflict. Yet it has not gone further.

At one point, Lady Arden justified classifying the duty to act in best interests as fiduciary by saying that it made it "easier for the court to exercise its inherent jurisdiction [in this case]" (at [93]). However, that is to allow the tail to wag the dog. It is tolerably clear that, unlike each genuinely fiduciary prohibition, a duty to act in another's best interests is not common to all fiduciaries. Lady Arden noted that section 172 of the Companies Act 2006 *does* impose such a duty on company *directors*, but, even if that could be used as a springboard from which to generalise such an obligation, her Ladyship must have been incorrect to say that section 178 makes that duty a fiduciary one (at [46]). All section 178 provides is that the consequences of a breach of section 172 are the same as they would be if the corresponding

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non-statutory rule applied, and that it is enforceable accordingly. In law, as in life, a stream cannot rise higher than its source.

Of course, the Supreme Court was entitled to find that Lehtimäki was subject to a positive duty to "exercise [his] powers [as member of CIFF] in the way that *he* [decided], in good faith, would be most likely to further [its] purposes" (at [218]). However, consistently with the High Court of Australia's decision in *Breen v Williams* (1996) 186 C.L.R. 71, that should not have been due to an application of fiduciary law. The choicest view of this part of the judgment might thus be that, while it entails some general development of English company law, it does not involve a genuine expansion in the scope of fiduciary obligations.

Two points must be made on whether any circumstances had arisen with respect to the section 217 resolution which entitled the court to exercise jurisdiction over Lehtimäki. First, although Lady Arden and Lord Briggs agreed that in general "the court does not intervene in the exercise by a fiduciary of a discretion" (at [36], [216]), they differed over why it could in this case. His Lordship relied on the (settled) breach or threatened breach of duty exception. Her Ladyship, who thought that neither event had occurred, said that the court could intervene nonetheless "if the circumstances [attained] a sufficient level of exceptionality and seriousness" (at [123]). That this was a minority view should be welcomed. If authorised, it would raise uncertainty over when the courts will review the exercise of powers and undermine the hard-won breach rule established in *Pitt v Holt* [2013] UKSC 26.

The second point concerns whether there was a relevant breach or threatened breach of duty at all. Lord Briggs held that, since the Chancellor concluded that the $360,000,000 payment was in CIFF's best interests, its members were obliged to agree (at [217]–[218]). Any attempt by Lehtimäki to exercise an independent judgment would thereby risk default on his part. Lady Arden rightly identified this reasoning as circular (at [183]). To make the direction he did, there must have been justification for the trial judge to depart from the non-interventionary principle in the first place. A wrong or threatened wrong consequent on the making of that direction cannot have provided it. On its own terms, then, the court may have erred in allowing the appeal.

The fifth judge, Lord Reed, said it was "with some reluctance, … but in deference to the unanimity of the other [Justices]', that he concurred in the order proposed (at [236]). He consoled himself by observing that the facts were "unlikely ever to be replicated". Nevertheless, considering the above, His Lordship's decision not to dissent might still be regretted.

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