The 2024 Harold Ford Memorial Lecture

Company law and trusts law: The use and misuse of principle

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Company directors have long been subjected to duties by statute and pursuant to the constituent corporate documents — originally royal charters, later deeds of settlement, still later memoranda and articles of association, and now for most Australian companies, corporate constitutions pursuant to federal statute. These might seem to be unpropitious foundations for equity. Yet this is equity's heartland. This paper inquires into various accounts of how 'modern' company law came into existence, with an emphasis on how directors were regarded as, or analogous to, trustees, using the example of claims to recover company property improperly disposed of by directors. It illustrates the need to read judgments contextually, especially when assessing submissions based on legal history.

Introduction

Learned Hand observed that history teaches scepticism about any easy explanations.[1] Lawyers, and perhaps especially judges, should beware of easy explanations, especially when faced with a submission based on legal history.

In recognition of Harold Ford's outstanding contributions to company law and the law of trusts, this paper seeks to illustrate and demonstrate that proposition by reference to an area at the intersection of those fields. Part I summarises a variety of accounts of 'the birth of modern company law'. It seeks to explain how from time to time, directors have been called trustees, and how equity has come to regard directors who improperly dispose of company property as trustees.

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[1] Testimony to the Senate Committee on Labour and Public Welfare, 28 June 1951, in Irving Dilliard (ed), *The Spirit of Liberty: Papers and Addresses of Learned Hand* (Knopf 1952) 225, 249.

[194] The 'birth of modern company law'[2] is regularly associated with the English joint stock companies legislation between 1844 and 1856,[3] although to be fair, authors who use that term tend nonetheless to be conscious that the relevant history extends to mediaeval guilds and chartered corporations and deed of settlement companies. But any approach which starts with mid-19th century English statutes must suffer from two limitations: geographical and temporal. Both limitations are significant. An approach confined to mid-19th century English statutes sidelines autochthonous developments in the Australian colonies. This is an aspect of what Paul Finn styled the 'colonized cast of mind'.[4] A deal of more recent work is rectifying these gaps,[5] just as it is shedding light on colonial innovations in a range of areas.[6] But this paper's focus is upon the second, temporal, limitation.

[195] If indeed it be correct that the 'modern' law commences in the mid-19th century, then the relationship between directors and trustees is readily explained. Hence Gower's account, which makes it seem so easy:

> It is often stated that directors in addition to being agents are also trustees for the company. It is easy to see how this idea arose. Prior to 1844 most joint stock companies were unincorporated and depended for their validity on a deed of settlement vesting the property of the company in the directors as trustees for the members. Hence directors were in the fullest sense trustees and it was right and inevitable that they be so described. With incorporated companies this description was not strictly appropriate, but it was not unnatural that the courts should extend it to them by analogy. For one thing, the duties of the directors should obviously be the same

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[2] See, eg, Tom Bathurst, 'The Historical Development of Corporations Law' (2013) 37 Australian Bar Review 217, 223; James Taylor, *Boardroom Scandal* (Oxford University Press, 2013) 78; Gary Wilson and Sarah Wilson, 'Responsible Risk-Takers: Notions of Directorial Responsibility – Past, Present and Future' (2001) 1 Journal of Corporate Studies 211, 219.

[3] Notably, the Joint Stock Companies Act 1844, the Limited Liability Act 1855 and the Joint Stock Companies Act 1856.

[4] Paul Finn, *Law and Colonial Government in Colonial Australia* (Oxford University Press 1987) opening of ch 1.

[5] See Aaron Graham, 'Incorporation and Company Formation in Australasia, 1790-1860' (2019) 60 Asia-Pacific Economic History Review 322; Phillip Lipton, 'A History of Company Law in Colonial Australia: Economic Development and Legal Evolution' (2007) 31(3) Melbourne University Law Review 805; Chantal Game, 'Accountability of Early Western Australian Banks (1837-1880)' (PhD thesis, Curtin University 2022) and Rob McQueen, 'Limited Liability Company Legislation in the Colonies: The Australian Experience 1864-1920' in Rob McQueen, *A Social History of Company Law: Great Britain and the Australian Colonies 1854-1920* (Ashgate 2009) ch 8. See also Geoffrey Nettle, 'The Changing Position and Duties of Company Directors' (2018) 41(3) Melbourne University Law Review 1402, citing Michael Whincop and Mary Keyes, 'Corporation, Contract, Community: An Analysis of Governance in the Privatisation of Public Enterprise and the Publicisation of Private Corporate Law' (1997) 25 Federal Law Review 51, 88 and Michelle Welsh, 'Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia' (2014) 42 Federal Law Review 217, on the 'notion of the public enforcement of directors' duties by state authorities was, and to an extent remains, unique to Australia and arguably has been the most substantial factor in shaping the subsequent development of company law in this country'.

[6] Without being remotely exhaustive, see by way of three examples: (1) torts (Mark Lunney, *A History of Australian Tort Law 1901-1945: England's Obedient Servant?* (Cambridge University Press 2018); Mark Leeming, 'Colonial Innovation in the Australian Law of Torts' in David Rolph et al, *Australian Tort Law in the 21st Century* (Federation Press 2024)); (2) procedure (see Shaunnagh Dorsett, 'Procedural Reform in the Nineteenth Century British Empire: The Failure of Barron Field in Gibraltar' (2019) 7(2) Comparative Legal History 130; 'The First Procedural Code in the British Empire: New Zealand 1856' (2017) 27 New Zealand Universities Law Review 690); and (3) property law, excluding the ubiquitous example of Torrens title (Shaunnagh Dorsett, 'The Court of Claims and the Resolution of Informal Land Claims in New South Wales 1833-1835' (2014) 4 Property Law Review 5; John Hamilton, *Adjudication on the Gold Fields in New South Wales and Victoria in the 19th Century* (Federation Press 2015)).

> whether the company was incorporated or not; for another, courts of equity always tend to apply the label "trustee" to anyone in a fiduciary position. Besides, it was for long believed that the property of an incorporated company was held on trust for the members, and since it would be the directors who managed this property they would become constructive trustees of it.[7]

This paper contends that that explanation is attractive, coherent, yet quite misleading as a general account of how directors came to be regarded as trustees who owed fiduciary obligations. Straightforward accounts of legal concepts with lengthy, complicated, contingent histories should be treated cautiously. Lawyers should be sceptical of easy explanations.

Part II considers, in light of that historical background, how the recipient of company property transferred by a director in breach of duty came to be regarded as a constructive trustee, and the various explanations that have been given for that conclusion. It examines how courts have used and misused authority, principally through a failure to have sufficient regard to context. In particular, it draws upon what was said by the United Kingdom Supreme Court in December 2023 about the basis for imposing a constructive trust upon a knowing recipient of company property:

> In such a case the company starts out as legal and beneficial owner of the misapplied property. Courts of equity have proceeded upon an analogy between the control which directors as fiduciaries have over company property, and the title which trustees have to trust property, so that a misapplication of the company's property by the directors leaves the beneficial ownership with the company, for the purpose both of equitable proprietary claims and claims in knowing receipt. The best-known attempts to explain this conundrum are to be found in *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555, 1575-1577 per Ungoed-Thomas J and in *Belmont Finance Corpn v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, 405, per Buckley LJ.[8]

The conclusion reached in that appeal was that a Saudi Arabian law which gave clear title to shares transferred to a knowing recipient operated as a complete defence not only to any proprietary claim but also to the beneficiary's claim that the knowing recipient account *personally* for the shares. The position in New South Wales is precisely the opposite.[9] But this **[196]** paper is not so much concerned with the *result* reached in *Byers v Saudi National Bank*, in an area where English and Australian law have diverged,[10] as with the *reasoning* deployed to reach that result. The reasoning matters, because historical analyses such as those considered in this paper continue to be advanced in, and relied on

[7] Laurence C B Gower, *Principles of Modern Company Law* (Stevens & Sons 1954) 136–37.

[8] *Byers v Saudi National Bank* [2023] UKSC 51, [2024] AC 1191 [31].

[9] See *Sze Tu v Leow* [2014] NSWCA 462, (2014) 89 NSWLR 317 [243], approving a statement by Black J in *Break Fast Investments Pty Ltd v Giannopoulos (No 5)* [2011] NSWSC 1508 [102]–[103]; *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6, (2012) 200 FCR 296 [253]–[254]; *McFee v Reilly* [2018] NSWCA 322 [108]; *Turner v O'Bryan-Turner* [2022] NSWCA 23, (2022) 107 NSWLR 171 [101]–[103]; *Blue Mirror Pty Ltd v Tan & Tan Australia Pty Ltd (in liq)* [2024] NSWCA 253 [30]. The general line now taken at least in New South Wales, that a statutory bar to a proprietary claim does *not* prevent a personal claim against a knowing recipient, was anticipated by White J in *Super 1000 Pty Ltd v Pacific General Securities* [2008] NSWSC 1222, 221 FLR 427 [213]–[237].

[10] See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 230 CLR 89 [163]–[164], rejecting the modifications of *Barnes v Addy* effected by *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 and subsequent decisions.

by, courts called on to resolve novel questions of law. When doing so advocates may be inviting the court to deploy, or courts may be relying on, what Cardozo famously termed the 'Method of History'.[11] It is important to appreciate the limitations of this approach, not least of which is the need to read decisions contextually, for judgments may not bear their literal meaning. Further, an advocate's role is to win a case, which means that the historical research presented to a court may be the opposite of disinterested. Complexity tends to be sacrificed for a simple narrative that suits the litigant's interests in that case. Lawyers should be sceptical of easy explanations.

In fact, the process of understanding legislation and decisions in context is far more quotidian — it applies every time a case is relied on in a court for a proposition of law. But the dangers are greater when older cases are cited. In Sir John Baker's words, 'we need to be able to switch our minds over to the same thought processes as the lawyers of the period in which we are working',[12] and the older the decision, the harder it tends to be to appreciate the context and indeed the shifts in language.

Part I: Various accounts of the 'birth of modern company law'

The birth of corporations law in the 15th–17th centuries?

How if at all is Gower's account reproduced above to be reconciled with statements by historians such as:

> England in the Middle Ages was awash with forms of corporation for ecclesiastical (charitable) and civil purposes.[13]

[197] Briefly, an account of the ecclesiastical purposes may be found in Maitland's essay 'The Corporation Sole', deprecating the introduction at a very early stage of that notion to the Church of England parson, and observing that its extension to bishops, deans and prebendaries 'did some harm to our legal theories'.[14] The civil purposes are described in the classic account of the incorporation of English and British boroughs,[15] the first half of which culminates in 'The Classic Age of Incorporation' around 1440, and which also emphasises that the towns behaved as collective personalities long before they were recognised as such.[16] Another way of seeing the prevalence and

[11] See Benjamin Cardozo, *The Nature of the Judicial Process* (Yale University Press 1921) ch 2, a point discussed more generally in Mark Leeming, 'Lawyers' Uses of History, from *Entick v Carrington* to *Smethurst v Commissioner of Police*' (2020) 49 Australian Bar Review 199; and Mark Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (Federation Press 2023) 185–88.

[12] John Baker, *Collected Papers on English Legal History*, vol I (Cambridge University Press 2013) Introduction, 7.

[13] Colin Cooke, *Corporation, Trust and Company: An Essay in Legal History* (Harvard University Press 1951) 51.

[14] In Harold Hazeltine (ed), *Maitland: Selected Essays* (Books for Libraries Press 1936) 73, 82–83.

[15] Martin Weinbaum, *The Incorporation of Boroughs* (Manchester University Press 1937).

[16] A reviewer noted that this derived from Maitland and therefore Gierke: G Lapsley, (1938) 22 *History* 355.

significance of incorporation in the 15th century is to observe that the Statute of Mortmain 1391 extended the earlier 1279 statute to non-religious corporations such as guilds, fraternities and boroughs, so that any institution with a 'perpetual commonalty' which owned land (such as a hall) had to obtain a licence from the king.[17] Interestingly, the notion of incorporation preceded the formal idea of a charter; how else were public goods such as halls to be maintained and controlled? Thus 'Oxford, for example, had been making [contracts in its own right] under its common seal for some four hundred years before being formally incorporated in 1605'.[18] However, in the 15th century, a 'profound change' occurred, and towns sought formal incorporation of their mayors, burgesses and commonalty, with the view, according to Stoljar, to creating a legal person which was separately liable, thereby excluding the joint and several liability of its members.[19] The result was said to be that a 'mature form' of English corporation law had been reached by 1659, when Shepheard's treatise was written.[20]

True it is that these corporations seem to be well removed from 'modern' company law. The ecclesiastical and civil corporations did not have joint stock capital. Nor did they have transferable shares. Nor were they formed in order to make profits. For those and other reasons, it might be thought that those very ancient forms of corporations do not greatly bear on 21st century corporations law.

However, those distinctions do not necessarily exclude those early corporations from an important role in the development of some modern corporate ideas. Some aspects of corporate law are older than others. These early centuries do not greatly inform, say, the law of winding up. But contrast **[198]** what Edelman J regarded as 'the first major decision, and probably the most influential, concerning the duties of company directors',[21] namely, that of Lord Hardwicke in *Charitable Corporation v Sutton*,[22] one of a handful of decisions still regularly cited nearly three centuries after it was delivered. The 'Charitable Corporation for the Relief of the Industrious Poor by Assisting them with Small Sums at Legal Interest' — to give the corporation which had been formed by Royal Charter in 1707 its full name — was unavoidably involved in commerce, through accumulating capital and making small

[17] Samuel Stoljar, *Groups and Entities: An Inquiry into Corporate Theory* (Australian National University Press 1973) 29.
[18] ibid.
[19] ibid 31–32. Hence the dozens and probably hundreds of cases in the law reports brought by or against the corporation created by statute under the name 'The Mayor, Aldermen and Burgesses of [place]'.
[20] William Shepheard, *Of Corporations, Fraternities and Guilds or a Discourse, Wherein the Learning of the Law Touching Bodies-Politique is Unfolded* (London 1659), quoted in Joan Williams, 'The Invention of the Municipal Corporation: A Case Study in Legal Change' (1985) 34 *American Universities Law Review* 369, 373.
[21] *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023, (2016) 336 ALR 209 [417]–[421].
[22] (1742) 2 Atk 400, 26 ER 642.

loans to the 'industrious poor'. It was an unusual, and perhaps unique, 'early foray into microfinance'.[23] Ultimately, its accumulated capital was abused by officeholders, leading to the famous case heard by Lord Hardwicke, who said of the directors:

> Now where acts are executed within their authority, as repealing bye-laws and making orders, in such cases though attended with bad consequences, it will be very difficult to determine that these are breaches of trust.
>
> For it is by no means just in a judge, after bad consequences have arisen from such executions of their power, to say that they foresaw at the time what must necessarily happen ; and therefore were guilty of a breach of trust.
>
> Next as to mal-feasance and non-feasance.
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> To instance, in non-attendance; if some persons are guilty of gross non-attendance and leave the management intirely to others, they may be guilty by this means of the breaches of trust that are committed by others.
>
> By accepting a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence, and it is no excuse to say that they had no benefit from it, but that it was merely honorary ... ; and therefore they are within the case of common trustees.[24]

Nearly 300 years ago, one can see a sensitivity to what we would today regard as the business judgment rule, and concern as to liability for pure economic loss through inaction by a director, the latter developing by way of analogy with a trustee. Parts are quite contemporary, calling into question whether all aspects of 'modern' company law were born in the 19th century. Significantly for present purposes, the Chancellor had no difficulty in ordering those who had committed actual breaches of trust (passing notes and signing notes for loans which had not been paid) and those concerned in the breaches liable.[25] The language deployed is that of trust, for the word 'fiduciary' was not at this stage used in this context, but that does not stand in the way of recognition of the contemporaneity of the principles applied by the Chancellor.

Lord Hardwicke also referred to 'the great companies: the Bank, South-sea, &c'. In the 17th century, two centuries before incorporation became widely and readily available, those companies were the occasion to develop notions **[199]** of separate corporate identity, limitation of shareholder liability, and separation between ownership and management through a board.[26] For in the 16th and early 17th centuries, various companies were formed by royal charter in order to trade. Examples included the Company of the Staple and the Company of Merchant Adventurers. Each member traded on his own behalf, but was subject to the by-laws of the company. These companies may broadly be understood

[23] See Peter Brealey, 'The Charitable Corporation for the Relief of Industrious Poor: Philanthropy, Profit and Sleaze in London, 1707–1733' (2013) 98 *History* 708, 709.
[24] *Charitable Corporation v Sutton* at 405-406.
[25] ibid at 403.
[26] What follows is informed by the recent and accessible account in Professor Susan Watson's book, *The Making of the Modern Company* (Hart Publications 2022). See also John Turner, 'The Development of English Company Law before 1900' (2017) QUCEH Working Paper Series No 2017-01.

as the successors to guilds, with the corporation being given an exclusive privilege such as the right to export wool, or to trade with the Russian Tsar — hence the irony for those who regard the modern corporation as a laissez faire institution, because some of its roots are tied to monopolies granted by the Crown. Indeed, it has been argued that 'monopoly became an almost inherent characteristic of the early business corporations, and a major factor in their future development'.[27]

Indeed, so far as I am aware, the first use of the term 'director' to describe a member of the governing body of a corporation is found in a Parliamentary Commission from 1604, reporting on the Muscovy Company which enjoyed the exclusive right to trade with the Russian Tsar:

> The Muscovy Company, consisting of eight score, or thereabouts, have fifteen directors who manage the whole trade; these limit to every man the portion of stock he shall trade for, make one purse and stock of it all, and consign it into the hands of one agent at Musco, and so again, at their return, to one agent at London … A whole Company, by this means, is become as one man.[28]

Note the reference to making 'one purse and stock of it all' as a result of which 'the whole Company … is become as one man'. This is the 'joint stock', which is a key distinction between corporation and joint venture. As one commentator put it:

> Each participant in the regulated trading companies of the sixteenth and seventeenth centuries trade on his own account and kept his own stock. The stock was a several stock. It was distinct from the company's joint stock, from which no participant had a claim to a conveyance or to delivery of any particular asset. In England, men of business particularly sought to employ the joint stock mechanism from the eighteenth century onwards.[29]

[200] It was relatively soon established that members were not liable on the chartered corporation's debts.[30] That is one of the 'modern' aspects of company law with clear roots in the 17th century.

Perhaps the most important 17th century company was the East India Company. It was established by charter granted by an ageing Queen Elizabeth on 30 December 1600, giving it the 'exclusive privilege of trading to the East Indies'. By chance (because a plague caused a second voyage to be sent out),[31] rather than winding up the venture after the ships returned and dividing the capital, the investment from the first and second voyages was combined. Ultimately, the Second Joint Stock was

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[27] Ron Harris, *Industrializing English Law: Entrepreneurship and Business Organization, 1720-1844* (Cambridge University Press 2000) 41. Also, '[it is] shocking how non-laissez-faire are the roots of the corporation – a quintessentially laissez-faire institution'; Susan Woodward, 'The Struggle for Fungibility of Joint-Stock Shares as Revealed in W R Scott's Constitution and Finance of English, Scottish, and Irish Joint-Stock Companies to 1720' (1985) UCLA Working Paper No 377, 12.

[28] See Cooke (n 13) 58.

[29] Peter Turner, 'Equitable Doctrines in Business Associations' in Peter Turner (ed), *Equity and Administration* (Cambridge University Press 2016) 149, 167.

[30] See Stoljar (n 17) 107–08, citing *Edmunds v Brown and Tillard* (1668) 1 Lev 237 and *The Case of the City of London* (1680) 1 Vent 351.

[31] For other contributing influences, such as a temporary glut of pepper seized by the Crown, see Giles Milton, *Nathaniel's Nutmeg* (Farrar, Straus and Giroux 1999) 103–04.

issued in 1616 and not wound up until 1629, while the third Joint Stock, due to terminate in 1636, did not do so until 1642. This permitted the company to build factories and forts for the purposes of its trade, and indeed the original petition for a charter stated that 'a trade so far remote cannot be managed but by a joint and united stock'.[32] More importantly for present purposes, it distinguished the position from the ad hoc partnerships to trade and make profit from a single trading voyage.

When trading was successful, the rewards could be immense. The Muscovy Company gave dividends of 40% in 1608, 30% in 1609, 20% in 1610, but 90% in each of 1611 and 1612.[33] The East India Company enjoyed enormous profits, including 87% on its First Joint-stock.[34] After losses in the 1620s and 1630s, in the second half of the 17th century, the East India Company became wildly profitable (50% dividends were paid in 1680, 1682, 1689 and 1691), and its shareholding became widely held. In 1657, the freemen of the Company, who were also called 'adventurers',[35] did not need to own shares in order to participate, but by 1693, membership required owning shares, and members no longer had to swear an oath of admission to the company.[36] According to Stoljar, the accounting from a profitable voyage gave rise to the first regular use of the word 'capital' in a corporate context:

> So if a venture succeeded, with (say) a profit of 50 per cent, apparently not an uncommon event, the dividend would be called 'a capital and a half', which incidentally also seems to be the first regular use of the word 'capital'.[37]

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Developments in the 18th and 19th centuries: Deed of settlement companies and legislation

As is well known, the Bubble Act 1720[38] prohibited the formation of Joint Stock Companies, and had a chilling effect on the granting of corporate charters.[39] The consequence of the Bubble Act was to encourage the creation of deed of settlement companies. In a deed of settlement company, assets were settled on a trust, and the roles of directors and trustees were distinct (although often the same men were both directors and trustees) — so that the trustees were trustees for beneficiary shareholders,

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[32] Cited in Kriti Chaudhuri, *The English East India Company 1600-40* (Routledge 1965) 26.

[33] Chester Dunning, 'James I, the Russia Company, and the Plan to Establish a Protectorate over North Russia' (1989) 21 Albion 206, 213.

[34] See Chaudhuri (n 32) 22.

[35] Both terms reflect the fact that the members enjoyed the privilege and risk of trading in accordance with the company's charter.

[36] For details, see John Kaye, *The Administration of the East India Company* (2nd edn, Bentley 1853) 109–22.

[37] Stoljar (n 17) 106, citing William Scott, *The Constitution and Finance of English, Scottish and Irish Joint Stock Companies to 1720* (Cambridge University Press 1910) 158.

[38] 6 Geo I c 18. See Ron Harris, 'The Bubble Act: Its Passage and Its Effects on Business Organization' (1994) 54 Journal of Economic History 610.

[39] Watson (n 26) 112.

but the directors were not. Typically the deed provided that the board of directors had responsibility for 'the entire management and superintendence over the affairs and concerns of the company'.[40] Deed of settlement 'companies' were in point of law partnerships, but resembled incorporated bodies (in a way not dissimilar from the resemblance between modern listed companies and unit trusts).[41]

The Joint Stock Companies Act 1844 prohibited the formation of partnerships with more than 25 members, and provided a system of incorporation by registration.[42] But even then, company members could be held liable, until three years after they had transferred their shares. Limited liability was introduced by the Limited Liability Act 1855, which provided that members' liability could be limited to the nominal amount of the shares held by them, on condition that 'Limited' was in the company's title and there were at least 25 members holding 10 pound shares paid up to 20%. The Joint Stock Companies Act 1856 was in part a consolidation of the Joint Stock Companies Act 1844 and the Limited Liability Act 1855, but it also streamlined the process of incorporation and relaxed the requirements for paid up capital. Banking and insurance companies were excluded, and were addressed separately, but the Companies Act 1862 consolidated the existing law, including that applying to banks and winding up. Nor did change cease with the consolidated Companies Act 1862. In particular, it was not until 1907, post *Salomon*,[43] that single-person companies were recognised.[44]

A broader perspective on the origins of company/corporations law?

But even those various approaches are far from complete. For one thing, wholly omitted are the colonial corporations, formed to colonise North **[202]** America, whose charters proved highly influential in developing notions of judicial review;[45] these had some influence in the Australian colonies, too.[46] For another, some distinguished scholars have seen merit in providing much more generalised accounts. Harold Ford, who contributed as much to Australian company law as anyone,

[40] See ibid 113, citing the deed of settlement for the London Ale Brewing Company in John Collyer, *A Practical Treatise on the Law of Partnership: With an Appendix of Forms* (Sweet 1832).

[41] See Nuncio D'Angelo, *Commercial Trusts* (LexisNexis Butterworths 2014), 3. This seems at least in part to explain the shift in language between 'company law' and 'corporations law', a full analysis of which would also address the United States usage of 'trust' (including in 'Anti-trust' legislation) and 'corporation'.

[42] First provisional registration, and then incorporation.

[43] *Salomon v A Salomon & Co Ltd* [1897] AC 22.

[44] Companies Act 1907.

[45] See in particular Mary Bilder, 'The Corporate Origins of Judicial Review' (2006) 116 Yale Law Journal 502, 534–35; and Mark Leeming, *Resolving Conflicts of Laws* (Federation Press 2011) 100–06.

[46] In addition to the South Australia Company and the New Zealand Company (as to which see Matthew Birchall, 'History, Sovereignty, Capital: Company Colonization in South Australia and New Zealand' (2021) 16 Journal of Global History 141), see the efforts made by the Clergy and School Lands Corporation discussed in Samuel McCulloch, 'The Attempt to Establish a National System of Education in New South Wales, 1830-1850' (1959) 28 Pacific Historical Rev 19.

wrote a doctoral dissertation at Harvard on unincorporated associations.[47] Similarly, Frederic Maitland and Samuel Stoljar also proceeded on the basis that it is unduly narrow to have regard only to incorporated institutions. Maitland's deeply insightful paper 'Trust and Corporation', replete with long slabs of German quotation and which assumes a deep familiarity with many German jurisprudential concepts, was described by Joshua Getzler as his 'late, great, sprawling and challenging essay'.[48] One of Maitland's points was that telling the history of corporations is but a part of the story of bodies. In a fashion anticipating the legal realists, he emphasised that every judge was a member of an Inn — and most probably a club — both of which were unincorporated associations, and the history of these societies is an integral part of the history of corporations, while at the same time explaining the profoundly haphazard structure of the common law.[49]

> The technical machinery which has made the existence of 'unincorporated bodies' of many kinds possible and even comfortable deserves the attention of all who desire to study English life or any part of it. What the foreign observer should specially remember (if I may be bold enough to give advice) is that English law does not naturally fall into a number of independent pieces, one of which can be mastered while the others are ignored. It may be a clumsy whole, but it is a whole, and every part is closely connected with every other part. For example, it does not seem to me that a jurist is entitled to argue that the English county, being unincorporate, and having no juristic personality, can only be a 'passive' *Verband*, until he has considered whether he would apply the same argument to, let us say, the Church of Rome (as seen by English law), the Wesleyan 'Connexion', Lincoln's Inn, the London Stock Exchange, the London Library, the Jockey Club, and a Trade Union. Also it is to be remembered that the making of grand theories is not and never has been our strong point.

Likewise, Samuel Stoljar's monograph, *Groups and Entities: An Inquiry into Corporate Theory*,[50] extends to family, town, guild, clubs and societies, trade unions and friendly societies and trade unions.

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Conclusion of Part I

The 'typical' corporation changed substantially over the centuries sketched above. One commentator captured the position thus:

> A typical 17th-century corporation was an overseas trading corporation, the East India Company being the prime example. A typical early 18th-century corporation was a financial corporation such as the Bank of England, the South Sea Company or the Royal Exchange Assurance. A typical late 18th-century corporation was a canal company. A typical mid-19th century corporation was a railway company.[51]

It may be added that a 'typical' late-19th century company incorporated pursuant to the Companies Act 1862 and had only a small number of shareholders.[52]

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[47] Published as Harold Ford, *Unincorporated Non-Profit Associations* (Clarendon Press 1959).

[48] Joshua Getzler, 'Frederic William Maitland – Trust and Corporation' (2016) 35(1) UQLJ 171.

[49] In Harold Hazeltine et al, (eds), *Frederic William Maitland: Selected Essays* (Books for Libraries Press 1936), 141, 218.

[50] Stoljar (n 17).

[51] Ron Harris, 'The Private Origins of the Private Company: Britain 1862-1907' (2013) 33 Oxford Journal of Legal Studies 339, 342.

[52] By 1892, 72% of companies had fewer than 50 shareholders: see ibid 350–51.

There are many ways in which an account of 'modern' company law can be told. To say that it was born in the mid-19th century may be appropriate in some circumstances, but in others it may be a very substantial distortion. Some aspects of 'modern' company law are older than others. Sometimes the origins of a particular principle or doctrine may be seen in the Victorian era, but sometimes they may be centuries earlier. One example may be seen in Pollock's account of the growth of the notion of corporate personality.[53] Another is *Re Westbourne Galleries*, where the issue was the meaning of 'just and equitable' in the statutory power to wind up a company.[54] Lord Wilberforce explained that the power derived not merely from the Companies Act 1862 but earlier, from the Joint Stock Companies Winding-up Act 1848, and was informed by the general law of partnership which preceded and was reflected in s 25 of the Partnership Act 1892. Earlier antecedents are elusive, making the timeframe selected by Lord Wilberforce the appropriate one.

On the other hand, contrast the controversial negative, obiter suggestion in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*:

> In recent times it has been assumed, but rarely if at all decided, that the first limb [of *Barnes v Addy*] applies not only to persons dealing with trustees, but also to persons dealing with at least some other types of fiduciary. Since the appellants did not contend that the first limb was incapable of applying on the ground that neither Farah nor Mr Elias was a trustee, the correctness of this assumption need not be examined.[55]

The footnote identified two decisions from the 1970s and 1990s when that assumption had been made.[56] One thing that is clear from decisions going back at least as far as *Charitable Corp v Sutton* is that a director who takes company **[204]** property without authorisation or in breach of duty will have to account as a constructive trustee, and it is a small step to conclude that a third person who takes with knowledge of the breach will be in the same position. It is respectfully suggested that this is an area where a longer historical perspective would have been appropriate if a definitive view were being expressed.[57]

If one thing is clear from the above, it is that the history is one of complexity and detail and nuance,

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[53] Frederick Pollock, 'Has the Common Law received the Fiction Theory of Companies?' (1911) 27 Law Quarterly Review 219.
[54] [1973] AC 360.
[55] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (n 10) [113].
[56] *DPC Estates Pty Ltd v Grey and Consul Development Pty Ltd* [1974] 1 NSWLR 443, 459–60 (Jacobs P); *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685, 700 (Hoffmann LJ). But see *Kalls Enterprises Pty Ltd (in liq) v Baloglow* [2007] NSWCA 191 [152]–[160].
[57] That said, and to be fair, in what effectively is merely a cautionary aside, the passage does not imply that the position has been considered comprehensively.

rather than simplicity, and the word 'modern' provides merely illusory clarity, and upon examination, may be deceptively ambiguous.

Part II: Various ways in which courts deploy earlier cases

Selangor United Rubber Estates Ltd v Cradock (No 3) was described in December 2023 as one of two 'best-known attempts to explain' knowing receipt.[58] The judgment contains the following proposition:

> A credit in a company's bank account which the directors are authorised to operate are moneys of the company under the control of those directors and are held by them on trust for the company in accordance with its purpose.[59]

Sometimes plain words are appropriate. That passage is nonsense, if it is read literally. The 'credit in the company's bank account' is nothing more nor less than the debt owed by the bank to the company. That debt was owned by the company. It was not owned by the directors on trust for the company, and we would (I hope) not reward any student who displayed such a casual approach in answering an examination question.

How has that proposition been received? For the most part it has been put to one side. For example, the other 'best-known' case explaining knowing receipt was the decision of Buckley LJ (with whom Goff and Waller LJJ agreed) in *Belmont Finance Corp Ltd v Williams Furniture Ltd (No 2)*,[60] in which reliance had been placed on Ungoed-Thomas J's proposition,[61] to which the following must surely be seen as a polite response:

> A limited company is of course not a trustee of its own funds: it is their beneficial owner; but in consequence of the fiduciary character of their duties the directors of a limited company are treated as if they were trustees of those funds of the company which are in their hands or under this control, and if they misapply them they commit a breach of trust.[62]

This is an example – which is far from uncommon – of an appellate court restating the law in a way which is necessarily inconsistent with a first instance decision, but refraining from stating explicitly that the first instance decision is wrong. That approach may be sufficient to prevent future distortion **[205]** of the law, whilst at the same time diplomatically avoiding direct criticism of the court at first instance. That approach leaves open the possibility that other courts will follow the earlier decision

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[58] *Byers v Saudi National Bank* (n 8) [31].
[59] *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555, 1577.
[60] [1980] 1 All ER 393, 405.
[61] See the 'Cases also cited' section at 396, and note that argument proceeded over *ten* days in March 1979, at a time when lengthy recitation of authority was endemic.
[62] [1980] 1 All ER 393, 405.

M Leeming, "Company law and trusts law: The use and misuse of principle" (2025) 18 *J of Eq* 193

uncritically, as indeed has occurred in the case of the passage from *Selangor United Rubber Estates*.[63] In Australia, the position is clearly stated in *Grimaldi*, and perhaps more clearly, by using the term 'fiduciary' as opposed to referring to directors as if they were trustees:

> It is well settled as already noted that, though a company is the beneficial owner and not the trustee of its own funds, those funds are treated for the purposes of *Barnes v Addy* as 'trust property' and this because of the fiduciary character of the duties of the directors under whose control those funds are held ...[64]

The difference explained in *Belmont Finance* and *Grimaldi* is between directors *being* trustees of company property, and being treated *as if* they were trustees. It is not especially subtle – the "tell-tale words 'as if'" make it plain that a legal fiction is involved[65] – but it is fundamental.

It is interesting, by way of case-study, to see how this came about. Ungoed-Thomas J commenced the legal analysis in his reasons in *Selangor United Rubber Estates*, under the heading 'Directors as trustees of their companies' funds':

> On occasion directors have been said to be trustees and on occasion not to be trustees. Like so many interminable arguments in philosophy, economics and everyday life, its resolution depends largely upon definition of terms, in this case of 'trustees' and then on the ambit of its proper application to directors.[66]

I respectfully prefer Gageler J's aphorism: 'Nothing that has a history can be defined',[67] echoing Hart's observation about what, in his inaugural lecture, he called 'the great anomaly of legal language', namely, 'our inability to define [law's] crucial words in terms of ordinary factual counterparts'.[68] I shall return to this.

Ungoed-Thomas J cited three 19th century judgments: those of Sir George Jessel MR in *Re Forest of Dean Coal Mining Co* and *Russell v Wakefield Waterworks Co*, and the Court of Appeal in *Re Lands Allotment Co.* Both decisions of the Master of the Rolls dismissed claims brought against directors in circumstances where the defendants were not, or were only scarcely, called upon.

In *Re Forest of Dean Mining Co*,[69] a liquidator sued not only the promoter but also a director who, some three years before becoming a director, had known that some of the funds paid to the company

[63] See the reasoning of the New Zealand Court of Appeal in *Fish Man Ltd (in liq) v Hadfield* [2017] NZCA 589, [2018] 2 NZLR 428 [57] and *Intext Coatings Ltd (in liq) v Deo* [2016] NZHC 2754 [54].
[64] *Grimaldi* (n 9) [275].
[65] As Lord Hoffmann NPJ observed in *Hui Chun Ping v Hui Kau Mo* [2024] HKCFA 32 at [15]-[16].
[66] *Selangor United Rubber Estates* (n 55) 1574–75.
[67] *Minister for Home Affairs v Benbrika* [2021] HCA 4; (2021) 272 CLR 68 [66].
[68] H Hart, 'Definition and Theory in Jurisprudence' (1954) 70 Law Quarterly Review 37, 41.
[69] (1878) LR 10 Ch 450.

had been paid to **[206]** the promoter in what the Master of the Rolls described as a 'gross fraud'.[70] The liquidator invoked the summary jurisdiction under s 165 of the Companies Act 1862, pursuant to which a director could be ordered to pay compensation 'for any misfeasance or breach of trust in relation to the company'.[71] The liquidator contended that the director was 'in the position of a trustee who has been guilty of wilful default'.[72] The claim against the director was dismissed.

The summary of submissions in the law report is brief, but evidently submissions that the directors were trustees were advanced, leading to this response from Jessel MR, upon which Ungoed-Thomas J relied:

> Again, directors are called trustees. They are no doubt trustees of assets which have come into their hands, or which are under their control, but they are not trustees of a debt due to the company. The company is the creditor, and, as I said before, they are only the managing partners. In my opinion it is extravagant to call them trustees of a debt when it has not been received. You may of course have an actual trust of a debt, as in the case I put before, where trustees have assigned to them a debt to get in, but that is not the case with directors of a company. A director is the managing partner of the concern, and although a debt is due to the concern I do not think it is right to call him a trustee of that debt which remains unpaid, though his liability in respect of it may in certain cases and in some respects be analogous to the liability of a trustee.[73]

That analysis proceeded on the basis, favourably to the liquidator, that the claim against the promoter was a debt,[74] and confirmed explicitly that the director was not a trustee of a debt due to the company, such as the company's bank account. The contrast with 'assets which have come into their hands' is properly to be understood as a reference to company assets which have been transferred to the director — this after all was a case of gross fraud where company funds had been paid to a promoter. It is true that 'assets which are under their control' is ambiguous when considered in isolation, but in context it is best understood as a further reference to assets no longer owned by the company. The main point for present purposes is that despite reliance on that passage in *Selangor United Rubber Estates*, it does not support the proposition that a director was a trustee of money in a company's bank account,

[70] ibid 455.

[71] Section 165 of the Companies Act 1862 provided: 'Where, in the course of the winding-up of any company under this Act, it appears that any past or present director, manager, official or other liquidator, or any officer of such company, has misapplied or retained in his own hands or become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of any liquidator, or of any creditor or contributory of the company, notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of such director, manager, or other officer, and compel him to repay any moneys so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the Court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust as the Court thinks just'.

[72] See at 451 (in argument).

[73] At 453.

[74] The reasons later observed that this was 'not an admitted debt' but would have led to a 'protracted and very hostile litigation': at 457.

M Leeming, "Company law and trusts law: The use and misuse of principle" (2025) 18 *J of Eq* 193 whilst it confirms that a director's liability was sometimes "analogous" to that of a trustee. The court was called upon to rule on a statute drafted on the basis that **[207]** a director could commit a breach of trust, and the Master of the Rolls confirmed that that statute did not convert every director into a trustee.[75]

Russell v Wakefield Waterworks Co[76] turned upon parties. The shareholders of a utility company sued the company's directors and the promoters of a rival waterworks company, alleging that the utility company's money had been used to buy off the competition. The defendants demurred. Sir George Jessel said that '[a] great deal of the argument in this case' turned upon the following characterisation:

> It was said that this is a bill to make a stranger pay back money belonging to a company which the stranger has illegally or improperly possessed himself of, or appropriated to his own use, and that any person who takes possession of a trust fund is liable to be sued in equity by the owner of the trust fund if he had notice at the time that it was a trust fund; and although he gave value, still in that way the bill can be maintained against him.[77]

The claimed characterisation of the company money as a trust fund, and the demurrer that the plaintiff shareholders were not the proper plaintiff, forced a clear decision on whether company funds were trust funds and whether directors were trustees. The Master of the Rolls said:

> The stranger has nothing whatever to do with the individual corporators and although in a sense it is their property, because individual corporators make up the corporation, yet in law it is not their property but the property of the corporation, and therefore the right person to sue is the corporation, who is the *cestui que trust* or equitable owner of the fund. That I take to be the general rule of this Court. In this Court the money of the company is a trust fund, because it is applicable only to the special purposes of the company in the hands of the agents of the company, and it is in that sense a trust fund applicable by them to those special purposes; and a person taking it from them with notice that it is being applied to other purposes cannot in this Court say that he is not a constructive trustee.[78]

Once again the Master of the Rolls was dealing peremptorily with a submission that sought to latch onto the perceived incongruity between a third party being accountable as a constructive trustee and the company having legal and beneficial title to its money. The reasoning recalls the problem stated by Holmes J about the use and misuse of language and labels in legal reasoning: 'As long as the matter to be considered is debated in artificial terms, there is a danger of being led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the

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[75] As has been pointed out, the formulation of 'breach of trust' by directors in s 165 reflected earlier decisions, including *Bryson v The Warwick and Birmingham Canal Co* (1853) 4 De G M & G 711, 730–31: see William Gummow, 'The Equitable Duties of Company Directors' (2013) 87 Australian Law Journal 753, 754.
[76] (1875) LR 20 Eq 474.
[77] ibid 478–79.
[78] ibid.

grounds on which the name was applied.'[79] It is tolerably clear that in both those ex tempore decisions the Master of the Rolls described the position of a director as *analogous* to a trustee, not as a trustee.[80]

[208] In *Re Lands Allotment Co*,[81] the question was whether a liquidator's claim against directors who had caused the company to acquire shares in satisfaction of a debt was statute barred, making the assumption that the acquisition was *ultra vires*. The reasoning of Wright J and the Court of Appeal was to the effect that because directors were regarded as liable for the *ultra vires* transaction as if they were trustees, then they should be entitled to the protection of the new 1888 statute which protected trustees in the absence of fraud or fraudulent breach of trust.[82] True it is that the Court of Appeal made statements confirming that directors were express trustees 'of money which comes to their hands or which is actually under their control',[83] or 'they are only trustees qua the particular property which is put into their hands or under their control'.[84] Those propositions are expressed in general terms, but were made in connection with a narrow dispute concerning a limitation defence, and need to be read in context.

In *Selangor United Rubber Estates*, Ungoed-Thomas J also recited a passage from Romer J in *Re City Equitable Fire Insurance Co Ltd* to the effect that the statement that directors were trustees might be accepted if it meant no more than that they were fiduciaries, but otherwise it could not be accepted.[85] It seems likely that his Lordship was pressed with a submission that there could be no *Barnes v Addy* liability unless the directors were trustees, a submission based on the precise words in which Lord Selborne had framed liability in a case which concerned trustees.[86] But it is a fundamental error to read the words of a judgment as if they were a statute.[87]

There is a simpler and more attractive alternative analysis: third parties who receive company assets from directors with the requisite knowledge hold the assets on constructive trust, not because the

[79] *Guy v Donald*, 203 US 399 (1906).
[80] A point confirmed in another s 165 decision, *Re Exchange Banking Company (Flitcroft's case)* (1882) 21 Ch D 519, 534 (styling directors '*quasi* trustees', once again to establish a right to assets improperly paid away).
[81] [1894] 1 Ch 616.
[82] For the Trustee Act 1888, see *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189 [20]–[23]. Before then, a trustee had no limitation defence.
[83] *Re Lands Allotment Co* (n 76) 631 (Lindley LJ).
[84] ibid 639 (Kay LJ).
[85] At 1576, citing [1925] 1 Ch 407, 426.
[86] At 1579 ('I come now to the question how far a stranger to the trust can become liable as constructive trustee in respect of a breach of the trust').
[87] See *Hasler v Singtel Optus Pty Ltd* [2014] NSWCA 266, (2014) 87 NSWLR 609 [66]–[67], [80], [95]–[96]; and Leeming, *Common Law, Equity and Statute* (n 11) 104–10.

company assets are in fact held by the directors as trustees — a proposition which is obvious as soon as it is said, for the company is the legal owner of company assets — but because that is part of equity's response to directors' breach of fiduciary duty. And indeed, that view was shared by Ungoed-Thomas J himself! Later in his Lordship's reasons is the following emphatic statement:

> It seems to me imperative to grasp and keep constantly in mind that the second category of constructive trusteeship (which is the only category with which we are concerned) is nothing more than a formula for equitable relief. The court of equity says that the defendant shall be liable in equity, as though he were a trustee. He is made liable in equity as trustee by the imposition or construction of the court of **[209]** equity. This is done because in accordance with equitable principles applied by the court of equity it is equitable that he should be held liable as though he were a trustee.[88]

That is a powerful indication that — when the reasons are read as a whole, as they must be — the earlier statements that a director was in fact a trustee of company funds are not to be taken literally. It illustrates the danger in taking an isolated passage of a judgment without attending to the dispositive reasoning — which danger is heightened if it is a long oral judgment delivered over two days in May 1968 after 59 days of trial occupying most of January, February and March 1968.

The reasoning in *Byers v Saudi National Bank*

A deal of this paper has addressed the reasoning in a first instance Chancery Division decision delivered 55 years ago. It has done so because similar reasoning appears in *Byers v Saudi National Bank*. Lord Briggs summarised many of the passages above, for the purpose of addressing the submissions which had been made as follows:

> The above dicta fall short of providing a completely neat and satisfying explanation of how the knowing receipt doctrine works in relation to the property of companies. It is common ground that there is no pre-existing trust or separation of legal title from beneficial interest for as long as legal title remains vested in the company. Mr Crow submits that the repeated application of the knowing receipt doctrine to such a situation demonstrates that a continuing equitable interest in the misapplied property cannot be an essential condition for its operation. In response, once he squarely addressed the point, Mr Green submitted that equity applied the knowing receipt doctrine by treating corporate property as subject to a trust by analogy. Later he firmed up his analysis by submitting that a trust, with a concomitant splitting of legal title from the company's continuing beneficial interest in the misapplied property occurred at the moment of the transfer which constituted the misapplication. Legal title passed to the transferee, but the equitable beneficial interest remained with the company. Therefore the company retained the equitable interest sufficient to support a proprietary claim to the property or its traceable proceeds, and a knowing receipt personal claim against any recipient who had received the property with notice of the misapplication, subject to any overriding of its equitable interest in the meantime.
>
> I consider that Mr Green's final submission on this issue is correct. It best fits with all the dicta summarised above. First, the analysis in *In re Lands Allotment* speaks of the trust arising when the misapplication of company property takes place. The same analysis is also supported by Millett J in *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 290 D-F. Secondly Ungoed-Thomas J is at pains to emphasise that this is a real trust and not just a breach of fiduciary duty treated like a breach of trust merely by analogy. Thirdly and decisively Buckley LJ implicitly recognises a continuing equitable interest remaining in the company after the transfer because of his acknowledgment that the company's knowing receipt claim may be defeated by a recipient with a better equity.

[88] *Selangor United Rubber Estates* (n 55) 1582.

> That would of course include equity's darling, and that is I think what Buckley LJ had in mind.[89]

[210] With great respect, this is a far more elaborate account than is necessary to explain a centuries-old phenomenon: that third parties to whom directors transfer company property in breach of fiduciary duty hold that property on constructive trust for the company if they have sufficient knowledge of the breach. The elaborate analysis is important if in order to hold there to be a constructive trust, it is necessary first for the company to have a beneficial interest in the property which is retained. That might appear 'neat and satisfying' but even if so, that is not how the common law (including equity) has developed. As earlier noted, the submission to the contrary advanced by Jonathan Crow QC reflects the law in New South Wales, but even accepting that this is an area where there are leeways of choice in the development of the law, it still seems strangely artificial if, in order to adhere to this hypothesised requirement, a trust comes into existence 'at the moment' of the misapplication of property. If the problem is that there must first be a trust, it is an unconvincing solution to magic a separation of legal and beneficial estate into existence a nanosecond before it is required.

Do the authorities cited in *Byers* compel or even suggest such a solution? Millett J in *Agip (Africa) Ltd v Jackson* was addressing a different problem — namely, authority suggesting that tracing in equity was only available where there was a fiduciary obligation, and the gravamen of the passage relied upon is to hold that a director's undoubted fiduciary obligation is sufficient; it does not support the proposition relied upon save only if the concluding sentence is divorced from its context.[90] There is no suggestion in any of the 19th century cases of any such instantaneous creation of a trust. To the contrary, the 19th century decisions were alive to the difference between the existence of a trust, and treating the directors *as if* they were trustees for the purposes of making third parties liable. The accounts given by Romer J and Buckley LJ are explicitly to the contrary, as is the latter passage in the reasons of Ungoed-Thomas J, emphasising that a director is liable 'as though he were a trustee'.

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[89] At [60]–[61].

[90] The passage in full is as follows: 'The requirement is, however, readily satisfied in most cases of commercial fraud, since the embezzlement of a company's funds almost inevitably involves a breach of fiduciary duty on the part of one of the company's employees or agents. That was so in present case. There was clearly a fiduciary relationship between Mr Zdiri and the plaintiffs. Mr Zdiri was not a director nor a signatory on the plaintiffs' bank account, but he was a senior and responsible officer. As such he was entrusted with possession of the signed payment orders to have them taken to the bank and implemented. He took advantage of his possession of them to divert the money and cause the separation between its legal ownership which passed to the payees and its beneficial ownership which remained in the plaintiffs. There is clear authority that there is a receipt of trust property when a company's funds are misapplied by a director and, in my judgment, this is equally the case when a company's funds are misapplied by any person whose fiduciary position gave him control of them or enabled him to misapply them.'

Translating these dicta to different areas

It is one thing to apply, uncritically, statements in 19th century decisions into current litigation arising in substantially the same context. It is another to transplant such dicta into a different context which is further removed from **[211]** the original issues to which they were directed. The following example resonates with the intersection of company and trust law which is this paper's subject.

In *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd*,[91] Lord Diplock writing for the House of Lords held that when a company was ordered to be wound up the effect was to divest it of 'the beneficial ownership' of its assets within the meaning of s 17(6) of the Finance Act 1954 (UK) since it could not use them for its own benefit. He continued:

> The nature of a company's interest in its assets after a winding-up order had been made first fell to be considered by the Court of Chancery under the *Companies Act 1862*. It was, perhaps, inevitable that the court should find the closest analogy in the law of trusts.[92]

Lord Diplock then cited Lord Cairns' statement in *The Delhi Bank's case*:

> … the assets of the company from the moment of winding up … become fixed and inalienable; the executive and the direction of the company are unable to alienate them or to part with them for any purpose; they become fixed and impressed with the trust declared by the 98th section, - (which corresponds to section 257(1) of the Act of 1948) - a trust by which all the assets of the company are to be applied in discharge of the liabilities of the company.[93]

But the effect of s 98 of the Companies Act 1862 and s 257 of the Companies Act 1948 was simply that as soon as may be after making a winding up order, the court shall settle a list of contributories, and shall cause the assets of the company being wound up to be collected and applied in discharge of its liabilities.[94]

The House of Lords was driven to this for a purpose quite different from anything hitherto mentioned in this paper. The question had nothing to do with claiming corporate assets from third parties. The question was whether the successor of the company in liquidation, which was a subsidiary, could take advantage of accumulated tax losses under s 17(6) of the Finance Act 1954, and that required a continuity of 'beneficial ownership'. That is far removed from the statements to which the House was taken, notably, the reasons of James and Mellish LJJ in *Re Oriental Inland Steam Co* which concerned the enforceability of foreign attachment by local judgment creditors, as was explained in *Linter*

[91] [1976] AC 167.
[92] ibid 170.
[93] (1871) 15 SJ 923.
[94] cf Corporations Act 2001 (Cth) s 478.

Textiles.[95] Lord Diplock said that the references to 'trust' in earlier cases were not to be understood literally:

> All that was intended to be conveyed by the use of the expression 'trust property' and 'trust' in these and subsequent cases (of which the most recent is *Pritchard v M.H. Builders Ltd* [1969] 1 WLR 409) was that the effect of the statute was to give to the property of a company in liquidation that essential characteristic which distinguished trust property from other property, *viz*, that it could not be used or **[212]** disposed of by the legal owner for his own benefit, but must be used or disposed of for the benefit of other persons.[96]

The reasoning extracted above reflects a recurring phenomenon in law. Statute commonly uses a term from general law, which is then sought to be accompanied by glosses from general law that are not necessarily incorporated, even if the term bears its technical meaning. There is an understandable tendency to deploy passages from judgments in order to construe similar text in a different statute with a different purpose. The advent of full-text searchability of databases of decisions, including 19th century decisions, has probably contributed to the phenomenon. But courts should be wary. There is almost always an intermediate step of logic, which is all too easily elided, namely, whether the context and purpose of the particular statute which is being construed accords with the gloss sought to be imposed from general law.

As Lord Diplock observed, even where statute uses the language of trust, a trust may not be indicated. Thus in *Bathurst City Council v PWC Properties Pty Ltd*,[97] the High Court emphasised, under a heading '"Trust" in a non-technical sense', that whether a council carpark was or was not held on charitable trust was not to the point: all that mattered was whether it was 'land subject to a trust for a public purpose' within the meaning of local government legislation. Examples may readily be multiplied.[98]

In short, it is very easy for an advocate or a judge to see a word like 'trust' in a statute and leap to the unwarranted conclusion that all aspects of that legal conception are incorporated into the provision, and thereby to pass over the issue — which may be the critical issue — of statutory construction, and whether the particular statute is one which picks up the particular aspect of the legal conception. It is also easy to read the word 'trust' in an 18th century or 19th century statute or judgment, in a context predating the use of the word 'fiduciary' and predating much of the systematisation of the law of trusts, and leap to the unwarranted conclusion that the reference supports a question of law that arises

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[95] *Commissioner of Taxation v Linter Textiles Australia Ltd* [2005] HCA 20, (2005) 220 CLR 592.
[96] At 180. See also *Linter Textiles* (n 90) [39], [49].
[97] [1998] HCA 59, (1998) 195 CLR 566.
[98] See further *Catholic Metropolitan Cemeteries Trust v A-G (NSW)* [2024] NSWCA 30. The analysis by Black J in *Re MF Global Australia Ltd (in liq)* [2012] NSWSC 994, (2012) 267 FLR 27 [25]–[40], [217]–[237] of the consequences of the 'statutory trust' over client monies created by s 981H of the Corporations Act is another illustration.

M Leeming, "Company law and trusts law: The use and misuse of principle" (2025) 18 *J of Eq* 193 in a 21st century context.

Conclusion

On one level, this paper is not so much about the famous papers echoed in its title,[99] but about the importance of reading in context. Judges need to bear firmly in mind that in most litigation involving a contestable question of law, it will normally suit at least one side to contend that some earlier decision should be read literally, rather than contextually. Such a submission can be very powerful, and it may well be right. However, courts should exercise care, in part because the statutory context will be different from the context of **[213]** similar words appearing in reasons for judgment, and also because it is quite possible that the reasons for judgment are not to be taken literally. The following six points, encapsulating points made in this paper, may be regarded as corollaries of that general proposition.

First, when evaluating the strength of a submission based on passages taken from earlier authorities, it is necessary to consider questions such as: (1) what did the judge really mean? (2) what was left unsaid (perhaps because it was so obvious it went without saying)? (3) what was the purpose for the reasoning (noting that very often, it is to resolve whether a statute applied)? (4) was the passage part of the reasoning leading to the orders resolving the controversy, or was it an inessential part of the reasoning, which may not have been framed especially precisely? (5) is the language to be read literally, or is it to be understood differently when read in context?

Secondly, a choice may be involved in selecting the appropriate timeframe in any historical account deployed to justify a legal conclusion, and that choice may be contestable. For example, the proposition that modern company law was born in the mid-19th century is certainly defensible in relation to certain principles, but much less so in relation to others. It is desirable to be alert to the existence of that choice.

Thirdly, when a contestable question of law arises, the question is highly likely to be one of statute. Most questions of law which are free of binding authority are questions arising under statute.[100] The

[99] G W Keeton, 'The Director as Trustee' [1952] Current Legal Problems 11; L Sealy, 'The Director as Trustee' [1967] Cambridge Law Journal 83.

[100] Some empirical evidence may be found in Mark Leeming, 'The Modern Approach to Statutory Construction' in Barbara McDonald, Ben Chen and Jeff Gordon (eds), *Dynamic and Principled: The Influence of Sir Anthony Mason* (Federation Press 2022) 45, 46–47 (of a sample of 23 novel questions of law determined in 2020, 21 were questions of statutory construction, and only 2 were questions of "pure" law).

nature of *Barnes v Addy* liability considered by Ungoed-Thomas J and Lord Briggs is an outlier insofar as it is relatively untouched by questions of statutory construction. In contrast, most of the 19th century cases to which their Lordships referred were statutory cases, as was *Re Westbourne Galleries*, which concluded that, as a matter of statutory construction, the power to wind up a company involved a large element of discretion.[101] Legal propositions resolving a question of statutory construction will usually be of only limited assistance in resolving a question of statutory construction in a different statutory context, even if the textual elements are similar. 'Trust' or 'trust property' in one statute may have a quite different legal meaning from the same words in a different statute. Likewise, decisions on judge-made law do not necessarily provide great assistance in resolving a question of statutory construction. Neither the term 'breach of trust' in s 165 of the Companies Act 1862 nor the same term in Lord Selborne's formulation in *Barnes v Addy* bears its literal meaning, and it is far from clear that a decision on the former will greatly assist in the latter, or that either will be of much assistance in construing the meanings of 'trust' in legislation regulating council's use of public land, or the way in which a **[214]** broker is required to hold client money, or a statute governing the creation and operation of a cemetery.[102]

Fourthly, while it is true that 19th century cases used the term 'trust' to describe a director, many of them did so in ways that made it quite clear that it was understood that the office was similar to but distinct from that of a trustee. I would go slightly further than a familiar statement of Lord Westbury:

> Another source of error in this matter is the looseness with which the word 'trustee' is frequently used. The surviving partner is often called a 'trustee', but the term is used inaccurately. He is not a trustee …
>
> The application to a man who is improperly, and by metaphor only, called a trustee, of all the consequences which would follow if he were a trustee by express declaration - in other words a complete trustee - holding the property exclusively for the benefit of the *cestui que trust*, well illustrates the remark made by Lord Mansfield, that nothing in law is so apt to mislead as a metaphor.[103]

I would add that if metaphors are the most misleading aspect of languages,[104] similes come a close second. The decisions mentioned in this paper alternate between metaphor and simile — a director either is, or is like, a trustee — and perhaps it is that shift which leads to confusion. It is the subject for another paper, yet my intuition is that those linguistic techniques are central to the way the law

[101] As may be seen from this 'modern' sounding passage at 374–75: '[T]here has been a tendency to create categories or hearings under which cases must be brought if the clause is to apply. This is wrong. Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances.'

[102] See the examples given in notes 97 and 98 above.

[103] *Knox v Gye* (1872) LR 5 HL 656, 676, cited in *Clay v Clay* [2001] HCA 9, (2001) 202 CLR 410 [41] (footnote omitted). See also Lord Hoffmann's observation in *Serco Ltd v Lawson* [2006] UKHL 3, [2006] 1 All ER 823 [19]: 'Experience shows that rules formulated in terms of metaphors always cause trouble when it comes to their interpretation and the more striking the metaphor, the more likely it is to distract attention from the real issues in the case.'

[104] See William Gummow and Aryan Mohseni, 'The Use and Misuse of Metaphors' (2024) 98 Australian Law Journal 738; Kim Lewison, 'Metaphors and Legal Reasoning' (2016) 12 The Judicial Review 375.

develops, accommodating change whilst maintaining a semblance of continuity. But it is important to be careful, and to understand the language of judgments in context, just as it is important to understand the language of statutes in context, lest serious mistakes occur.

Fifthly, a recent Chancery decision commented in relation to passage in a leading work to the effect that it is useful to understand 'something of the history of probate jurisdiction' in order to understand the duties owed by executors and administrators, that: 'To my mind, this is somewhat of a (cheerful) understatement'.[105] The judge added, after a careful examination of whether there was a separate doctrine of laches in probate, that:

> Language changes, and society (and the legal system) changes too. There is a danger of misunderstanding both archaic language and superseded procedures. Thus, for example, the idea of "praying a tales", as described by Dickens in The Pickwick Papers, Ch 34, would have been understood even by his lay readers at the time, despite its being incomprehensible to most lawyers today. Yet, even if the words are sometimes unfamiliar, and the institutions themselves change, the ideas with which **[215]** lawyers deal may remain the same. So too "praying a tales" lives on as a legal concept in the Juries Act 1974, section 6, even though rarely, if ever, used in civil cases nowadays.[106]

In some ways the difficulties posed by the language of 'trustee' in statutes and in judgments concerning the liability of directors are all the greater, because the word continues to be familiar, unlike the ancient practice of summoning additional jurors. It is not just archaic language which poses the danger of misunderstanding. When a term like 'trustee' continues, but has a different, more refined meaning, that it is especially necessary to be alert to the way is was previously used.[107] The longer the history, the greater the scope for different legal meanings to have been given to the same word. In the particular case of the liability of directors and third parties who receive company property improperly, the risks are heightened, in part because the liability we associate with *Barnes v Addy* preceded, by some centuries, a modern nomenclature, especially the notion of 'fiduciary', and judges employed instead the language of 'trustee', 'quasi trustee' and 'trust property'. When the judgments are read in context, the sense is clear enough, but if passages are taken out of context, serious errors can ensue.

Finally, parts of the complexity and nuance emphasised above recall much of James Allsop's

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[105] *James v Scudamore* [2023] EWHC 996, [2023] Ch 391 [156] (HHJ Matthews).

[106] ibid at [170].

[107] See, eg, 'privity', of which term it was observed in *Wollongong Coal Ltd v Gujarat NRE India Pty Ltd* [2019] NSWCA 135, (2019) 100 NSWLR 432 [58]: 'Like many legal terms, "privity" is used in a variety of ways in law, many of which are superseded. Palmer referred to "privity of condition", "privity of estoppel", "privity of bailment" and many other early usages at pp 10-11 of his monograph, and noted that it was remarkable that Coke, who identified privies in estate, in blood, in representation and in tenure, had failed to include privity of contract in his scheme. Holmes in an early paper, anticipating *The Common Law*, offered a chart of the common law classifying all legal duties in terms of privity: "The Arrangement of the Law – Privity" (1872) 7 *American Law Review* 46.'

provoking paper 'Thinking About Law: The importance of how we attend and of context', including this paragraph (from a somewhat different context) to which all lawyers should give heed:

> Clarity, certainty, definition and precise analysis are *protected*, not undermined, by an appreciation of the implicit, the uncertain, the ambiguous, complexity and the limits of text *when those matters cannot be avoided*. Not to appreciate and recognise these matters in thought and expression *when they cannot be avoided* only creates a false and arbitrary so-called-certainty which gives a felt sense of artificiality in textual expression that crumbles against reality.[108]

That may be a useful antidote to the statement at the commencement of the analysis in *Selangor United Rubber Estates* that the question is merely one of 'definition'. The sentiments recall two qualities which Gerald Gunther, speaking of Learned Hand J, identified as two of 'every judge's common obligations', namely, 'scepticism about clear-edged categories' and 'modesty in the face of precedent'.[109]

[108] Australian Academy of Law Tenth Annual Patron's Address (21 October 2021), reprinted in Ruth Higgins and Kevin Connor (eds), *The Humanity of Law: Selected Essays of James Allsop* (Federation Press 2024) 56, 67 (original emphasis).

[109] See D Souter, 'Gerald Gunther' (2002) 55 *Stanford Law Review* 635, 636.