

Legal Submissions

“Duties of trustees generally

3.2 It is the paramount duty of trustees “to exercise their powers in the best interests of the present and future beneficiaries of the trust”. “ It is thus stated at page 31 paragraph 32 of the Report of the Law Commission: Trustees’ Powers and Duties (July 1999) citing, at footnote 3:

“*Cowan v Scargill* [1985] Ch 270, 286, 287, *per* Megarry V-C. The same principle applies to trusts for purposes which are either charitable or are within one of the exceptional categories of non-charitable purpose trusts which are valid”.

1. Steep Parish Council as corporate trustee holding for and on behalf of its beneficiaries the legal estate of the Church Road allotments (until it was replaced as trustee) was at all material times under a fiduciary duty to act bone fide in the best interests of both the current and future beneficiaries of the trust ¹.

Steep Parish Council, holding for and on behalf of the beneficiaries, the legal estate of the Memorial land as corporate trustee of SVWMC, was at all material times under a fiduciary duty to act bone fide in the best interests of the current and future beneficiaries of that trust.

2. In each such case, that duty was paramount and overrode such other duty or interest which the Steep Parish Council may have had as an organ of local government or otherwise. It is an inflexible rule of a Court of Equity that a trustee or a person in a fiduciary capacity is not allowed to put himself or herself in a position where his interest and duty conflict. The foundation of the equitable jurisdiction assumed over trustees and fiduciaries lies in the cynical view of human nature: Lord Herschell observed²:

"It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based upon the consideration that, human nature being what it is, there is danger of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule".

3. The critical feature of the relationship between trustee and beneficiaries (as with any fiduciary relationship) is that the trustee or the fiduciary *"undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion*

¹ In *Fassihi v Item Arden* LJ said: “This duty of loyalty is the “time-honoured” rule: *per* Goulding J in *Mutual Life Insurance Co of New York v Rank Organisation Ltd* [1985] BCLC 11, 21. The duty is expressed in these very general terms, but that is one of its strengths: it focuses on principle not on the particular words which judges or the legislature have used in any particular case or context. It is dynamic and capable of application in cases where it has not previously been applied but the principle or rationale of the rule applies. It reflects the flexible quality of the doctrines of equity. As Lord Templeman once put it “Equity is not a computer. Equity operates on conscience ...” (*Winkworth v Edward Baron Development Co Ltd* [1986] 1 WLR 1512, 1516.)”

² *Bray v Ford* [1896] AC 44, at 51-52.

to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position"³ [emphasis added].

4. Steep Parish Council as such trustee was the entity which protected the interest of the beneficiaries of both trusts (the allotments and the Memorial Land) from anyone who might wish to take and develop those parcels of land thereby extinguishing, in the case of the allotments, the right of the beneficiaries and residents of the Parish to obtain, upon request, the grant of a lease of a plot at the allotments in Church Road. These allotments had been held and safeguarded from April 1819, first by the Steep Parish (to use the words set out in the Tithe Award of 1851 identifying the "Landowner") and, after the Local Government Act of 1894, by the Steep Parish Council.

Steep Parish Council acknowledged, to use its own written words, "SPC [Steep Parish Council] is under a legal duty to provide allotments if requested"⁴. Steep Parish Council was under the paramount obligation (i) in the case of the Steep allotments to preserve the designated land for the purpose of allotments; and (ii) (in the case of the Charity of the SVWMC to preserve the Memorial Land.

5. The Courts have held fiduciaries " ... *to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honour most sensitive, is then the standard of behaviour*"⁵.

*"Much more is expected from trustees acting for a permanent charity than can be expected from the ordinary prudence of a man in dealings between himself and other persons. A man acting for himself may indulge his own caprices, and consider what is convenient or agreeable to himself as well as what is strictly prudent, and his prudent motives cannot be separated from others who may have governed him. Trustees of a charity, within the limits of their authority, whatever they may be should be guided **only** by a desire to promote the lasting interest of the charity*"⁶.

6. In *Fassihi*⁷, the Court of Appeal held, per Arden LJ (as she then was), at §44 "... there is no basis on which Mr Fassihi [the fiduciary] could reasonably have come to the conclusion that it was not in the interests of Item [the beneficiaries] to know of his breach of duty. In my judgment, he could not fulfil his duty of loyalty in this case except by telling Item about his setting up of RAMS, and his plan to acquire the Isograph contract for himself".

Arden LJ said at para 41:

"This duty of loyalty is the "time-honoured" rule: per Goulding J in *Mutual Life Insurance Co of New York v Rank Organisation Ltd* [1985] BCLC 11, 21. The duty is expressed in these very general terms, but that is one of its strengths: it focuses on principle not on the particular words which judges or the legislature have used in any particular case or context. It is dynamic and capable of application in cases where it has not previously been applied but the principle or rationale of the rule applies. It reflects the flexible quality of the doctrines of equity. As Lord Templeman once put it "Equity is not a computer. Equity operates on conscience ..."

³ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 97-97 per Mason J (Australia).

⁴ As set out in paragraph 8 of Steep Parish Council's application for a scheme under the Commons Act 1899 and submitted to the Charity Commission in 2013.

⁵ *Meinhard v Salmon* (1928) 164 N.E. 545 (US) per Cardozo J.

⁶ *The Law and Practice relating to Charities*, 3rd Edition, Hubert Picarda, 484.

⁷ *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244.

(*Winkworth v Edward Baron Development Co Ltd* [1986] 1 WLR 1512, 1516.)

7. Throughout the events which have happened, the Steep Parish Council as such trustee, being required to comply with its duty to act bona fide in the best interests of the beneficiaries, the residents of the Parish of Steep, should have concluded that there was no basis on which the Council [fiduciary] could reasonably have come to the conclusion that it was not in the interests of the beneficiaries:
 - a. Not to know what the trustee was (i) contemplating doing; (ii) what the trustee intended to do; and (iii) what the trustee had in fact done; and
 - b. Not to know in sufficient detail (including the actual reasons for particular proposals and sufficient information as to the legal and factual effects of such proposals) to allow the beneficiaries to give intelligent consideration to such proposals)
 - c. Not to be provided, upon request, documents held by the trustees which were not available on the trustee's website.
8. In the letter dated 8 October 2020 sent to the Commission on my behalf by my Solicitors on that date, they said (and the same point still applies as of July 2021):

"Our client has, compared to the Parish Council, very limited access to documents and information, most of which is in the custody, possession or control of the Parish Council. Accordingly, for reasons of not having all the relevant documents and information, our client's research and conclusions must necessarily be regarded as inconclusive and should not be relied upon by others; it will be for others to make their own investigations into the matters of title and the other matters which are set out in this letter and enclosures. As to the available documents, it should be mentioned that a request for a copy of the Allotment Rent Ledger or Ledgers from 1962 was made by us on behalf of our client to the solicitors acting for the Parish Council (our correspondence to the Parish Council are enclosed at Appendix 4). This was met with the response: "...that the allotment ledgers currently in the Clerk's office⁸ are large, bulky items and not easy to photocopy - these will therefore be deposited at the Hampshire Records Office as soon as it is appropriate...". We have not been informed that they have been so deposited". (An allotment ledger was ultimately provided redacted one year later and was not, when I last made enquiries, lodged in the Hampshire Record Office.)
9. Requests made to the Steep Parish Council for documents upon the basis set out in *O'Rourke v Darbyshire*⁹ as explained by the Supreme Court in *Schmidt v Rosewood Trust Ltd*¹⁰ were met with a statement to the effect that such requests would be answered on the footing that they were made under the Freedom of Information Act 2000: so such documents which were disclosed under the FOIA were redacted and omitted categories of documents which, it is submitted, would fall to be disclosed in full answer to a request made by a beneficiary of the trustee especially in the light of the factual material set out in the Statement of Case and in the light of the decisions such as *Williams v Quebrada Railway, Land & Copper Co*¹¹, *O'Rourke v Darbyshire*

⁸ The Clerk's office is her home in Ridge Common Lane, Steep.

⁹ [1920] AC 581.

¹⁰ [2003] UKPC 26.

¹¹ [1895] 2 Ch 751.

itself and the decision of a strong Court of Appeal in *Gamlen v Rochem*¹² which approved the decision in *Williams v Quebrada Railway*.

10. Of the concerns expressed in the Statement of Case, Steep Parish Council, it appears, did the following acts in breach of trust whilst trustee of the allotments in Church Road until the Council resigned as trustee:

- 1) it “managed” the Church Road allotments in such a way for a prolonged period so that the allotments came to be regarded by the residents as not available as allotments: in short (citing words contained in the Government Guidance dated February 2002 set out in paragraph 68 of the Statement of Case) “the authority [Steep Parish Council] has actively created the impression that [the Church Road] allotments are not available because the land is to be disposed of”;
- 2) it failed to manage the allotments as set out in the document “Steep Parish Council failures 3” to such an extent as to evince an intention not to allow the Church Road allotments to be used as allotments;
- 3) Steep Parish Council acknowledged, to use its own written words, “SPC [Steep Parish Council] is under a legal duty to provide allotments if requested”¹³. This duty gives a resident of the parish a contingent property right to have a vacant allotment: a property right to a vacant allotment contingent upon the resident making a request of the Steep Parish Council. Yet, notwithstanding numerous requests made of Steep Parish Council by residents from November 2007 to about September 2010, every single such request was refused; thereby
- 4) Steep Parish Council denied each such resident the right to a lease of an allotment in accordance with section 23 of the Small Holdings and Allotments Act 1908 as amended and in the events which happened, such rights were destroyed without the consent of the Secretary of State as required by the Allotments Act;
- 5) Acted in breach of the Council’s duty to give full and frank disclosure in its application to the Charity Commission under the Commons Act 1899 as set out in the Statement of Cases showing that such duty arose under four bases: (a) the fact that the application (a) was made to the Commission; (b) was made ex parte; (c) was made by the Council as trustee; and (d) was under a duty to comply with that set out in the Alfred Nobel¹⁴, namely “Applicants must put their case honestly, fairly, candidly and fully before the Court.

In this context, the Court of Appeal held in *Bank Mellat v. Nikpour*¹⁵ that if material non-disclosure is established the court will be “astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure...is deprived of any advantage

¹² (7 December 1979) unreported.

¹³ As set out in paragraph 8 of Steep Parish Council’s application for a scheme under the Commons Act 1899 and submitted to the Charity Commission in 2013.

¹⁴ [1918] P 293 at 296.

¹⁵ 1985] FSR 87.

he may have derived by that breach of duty:" see per Donaldson LJ in *Bank Mellat v. Nikpour* , at p.91, citing Warrington LJ in the *Kensington Income Tax Commissioners'* case [1917] 1 KB 486, 509;

- 6) Made statements in the Council's application under the Commons Act 1899 which appear to be at odds with the documents and the facts and matters as set out in the Statement of Case;
- 7) Acted¹⁶, in the case of the (a) Church Road allotments from about 2002 to July 2012, in the interests of the Steep Parish Council as a Council, and not those of the beneficiaries of the allotments Charity; and (b) Steep Village War Memorial Club ("SVWMC") in the interests of Steep Parish Council as a Council and not those of the beneficiaries of the Charity: so far as Steep Parish Council is and was concerned, the interest of the Council qua Council were paramount; in short:
- 8) undertaking, as trustee of the Church Road allotment on the part of the trust, the work which was that of the Council. In the words of a flyer in the Referendum campaign of 2010, "The council is under great pressure to provide affordable housing" and the East Hampshire District Council (the then planners) was responsible for that pressure: the minutes of the meeting with the Church Road Representatives held on the 26 October 2009 states:
"Nick [Hurst, a Parish Councillor] said that his perception is that the Parish Council is acting as a facilitator for the Affordable Housing scheme which is being driven by EHDC": the reality was, to paraphrase the words just quoted, that in relation to affordable housing "the Steep Parish Council as trustee and as Council was acting as such facilitator and as a provider of land which it held only as trustee: all in breach of its obligation as trustee, acting for and on behalf of the beneficiaries, to safeguard the allotment land for its designated purpose of providing allotments for the benefit of the trust's beneficiaries and to safeguard the Memorial Land held by the SVWMC trust. Further, as hinted by a trustee of Steep in Need in her speech at the public meeting which took place on 1 February 2020 where the transcript shows that she said quoting a letter to her from the Charity Commission dated 14 April 2010 : "It went on to say, the Charity Commission [s.l¹⁷. arguing 00:35:15] for a change in projects of, on the grounds that there were no poor in Steep. They might, and I speculate here, argued that the provision of nine affordable homes on the allotment land would be the best way of relieving poverty and would be consistent with government policy".; in short:
- 9) took away the allotments in Church Road to the detriment of the residents of the Parish of Steep without the knowledge or consent of those residents and without the knowledge or consent of the Secretary of State;

¹⁶ In breach of the guidelines set out in the Charity Commission's document "Local authorities as charity trustees

Local authorities as charity trustees - Guidance for local authorities which are sole corporate trustees for charities in their area.

¹⁷ "s.l" denotes "sounds like".

10) did the acts set out in the document headed “Statement of Case”.

11. Paraphrasing the statement set out above of Donaldson LJ that the court will be “astute to ensure that” an applicant who obtains relief “without full disclosure is deprived of any advantage he may have derived by that breach of duty”, that statement is an example of the fundamental principle of our law that no man can take advantage of his own wrong.¹⁸ To put it differently, it is a settled principle of law that a man cannot be permitted to take undue and unfair advantage of his own wrong. To take but two of the breaches set out above, (a) the reason why the Church Road allotments were not used was because the Parish Council refused to allow those entitled to allotments under section 23 of the 1908 Acts as amended to have an allotment; and (b) the Council made statements in the Council’s application under the Commons Act 1899 which appear to be at odds with the documents and the facts and matters as set out in the Statement of Case. Steep Parish Council, in seeking from the Charity Commission advice and assistance in and around the making of the application for a scheme under the Commons Act 1899, was required to give the Commission full disclosure of the circumstances on which that advice is sought: it appears that the Council did not comply with such duty of full disclosure.
12. The Steep Parish Council was trustee at all material times of the SVWMC and of the allotments at all material times until the Council resigned as corporate trustee of the allotments: the grounds of relief and causes of action included:
- a. Making misstatements¹⁹ whether negligently or otherwise in the Council’s application under the Commons Act 1899;
 - b. Failing to comply with Steep Parish Council’s duty of full and frank disclosure as arose under the four bases set out in the Statement of Case;
 - c. Placing itself in and acting in conflict of interest, such being in breach of trust;
 - d. Failing to put the interest of each trust over and above the interest of Steep Parish Council as an organ of local government so that the latter was paramount: such being in breach of trust;
 - e. Failing to inform²⁰, in breach of trust, the residents and beneficiaries of Steep timeously of the contents of the meeting between Steep Parish Council and the SDNPA of the 14 November 2016 including the fact that the SDNPA proposed (i) that the Settlement Boundary be changed so as to include the Church Road allotments thereby giving rise to a presumption of development; and (ii) the allocation on the Church Road allotments of 10-16 houses; and failing to consult the residents and beneficiaries of such proposals before agreeing to them, as Steep Parish Council duly did by letter to the SDNPA dated the 19 December 2016;

¹⁸ For example, *Alghussein Establishment v Eton College* [1988] 1 WLR 587.

¹⁹ “if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue. Upon that part of the case, my Lords, I apprehend that there is no doubt”- per Lord Cairns in *Reese River Silver Mining Co. Ltd v Smith* (1869) LR 4 HL 64, at 79.

²⁰ *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244.

- f. Failing to explain, in breach of trust, to the residents and beneficiaries the significance of such proposals;
- g. Failing to conduct a consultation in compliance with the Gunning Principles in respect of the SDNPA proposals and of the intention of Steep Parish Council to agree to such proposals.
- h. Failing to inform, in breach of trust, the residents and beneficiaries of Steep Parish Council's agreement set out in the letter to the SDNPA dated 19 December 2016 until, so far as it has been possible to ascertain, about 11 months later;
- i. Failing to appoint independent trustees of the SVWMC but rather appointed persons who were also Parish Councillors as set out in the document headed "Complaint to Commission of 8 June";
- j. Failing to comply with its "legal duty to provide allotments if requested" in breach of section 23 of the Small Holdings and Allotments Act 1908 as amended by the Land Settlement (Facilities) Act 1919: such also being in breach of trust;
- k. Each of the above was also in breach of trust in that in so doing, the Steep Parish Council was not acting as regards the designated lands in the best interest of the beneficiaries of each such trust.

13. These acts done by Steep Parish Council were done as trustee. A trustee is required, amongst other things, to comply with the law including (a) complying with the Common Law obligation regarding the conducting of consultations; and (b) complying with its "legal duty to provide allotments if requested". Trustees are required, in everything each of them do including making an application to the Commission, to adhere to the high standards of trustees: the Courts have held fiduciaries "... to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honour most sensitive, is then the standard of behaviour".^[2] In order to comply with this high standard, Steep Parish Council should have complied with this same duty of full and frank disclosure towards the beneficiaries and residents of Steep.

14. Viscount Haldane LC said in *Nocton*²¹ v *Lord Ashburton*²²:

"[W]hen fraud is referred to in the wider sense in which the books are full of the expression, used in Chancery in describing cases which were within its exclusive jurisdiction, it is a mistake to suppose that an actual intention to cheat must always be proved.

A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent, even in such a case as a technical fraud on a power. It was thus that the expression "constructive fraud" came into existence. The trustee who purchases the trust estate, the solicitor who makes a bargain with his client that cannot stand, have all for several

^[2] *Meinhard v Salmon* (1928) 164 N.E. 545 (US) per Cardozo J.

²¹ *Nocton* was Lord Ashburton's solicitor and the case dealt with the obligation of a fiduciary, the solicitor.

²² [1914] AC 932 at 954.

centuries run the risk of the word fraudulent being applied to them. What it really means in this connection is, not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience".

Nocton v Lord Ashburton concerned "the obligation of a fiduciary to indemnify his principal for prejudice suffered from following advice which was fraudulent in the equitable sense of the term"²³

15. In *Torrance v Bolton* J(1872) LR 8 Ch App 118, James LJ said at 124:

It was very strongly impressed upon us that Lord *St. Leonards* had said in his book that contracts for sale, although they might not be enforced in this Court, could only be set aside on the ground of fraud. The word "fraud" there is *nomen generalissimum*²⁴, and it must not be construed so as to mislead persons into the notion that contracts for the sale and purchase of lands are in any respect privileged, so as to be free from the ordinary jurisdiction of the Court to deal with them as it deals with any other instrument or any other transactions, in which the Court is of opinion that it is unconscientious for a person to avail himself of the legal advantage which he has obtained. Indeed the books are full of cases in which the Court has dealt with contracts of that kind—contracts obtained by persons from others over whom they have dominion, contracts obtained by persons in a fiduciary position, contracts for the sale of shares obtained by directors through mis-representation contained in the prospectus, in respect of which it was never necessary to allege or prove that the directors were wilfully guilty of moral fraud in what they had done. A contract for sale, like every other contract, is subject to the ordinary rules and jurisdiction of this Court, and that passage of Lord *St. Leonards* must be understood as meaning that the same kind of case must be made when a party comes here to set aside a contract for sale as must be made in setting aside any other contract or dealing between the parties.

16. In the words of Meagher, Gummow and Lehane^{25 26}, "Fraud remains, in the language of Professor Sheridan, 'the residuary legatee of what offends the conscience': *Fraud in Equity*²⁷..."

17. Lord Neuberger²⁸ has written:

"As that great English equity judge and lawyer, Peter Millett, has expressed it extra-judicially, an institutional constructive trust "arises whenever the circumstances are such that it would be unconscionable for the owner of the legal title to assert his own beneficial interest and deny the beneficial interest of another". (Accordingly, a constructive trust may arise after acquisition if and when the requisite circumstances arise after the acquisition – eg if knowledge is required, it may be that the acquirer gets the knowledge sometime after acquisition)".

²³ Meagher, Gummow and Lehane "Equity Doctrines & Remedies" Fourth Edition 2002 at [2-150].

²⁴ A name which applies generally to a number of things.

²⁵ Meagher, Gummow and Lehane *ibid* at [12-035].

²⁶ So there is no doubt that equity is alive and well in New South Wales, and it is a thoroughly principled system of equity, not a general liberty for the court to decide cases as it thinks fair. The principles are to be found in that remarkable work of scholarship which still, I am glad to see, bears the names Meagher, Gummow and Lehane" per Lord Walker in ""Dishonesty and Unconscionable Conduct in Commercial Life - Some Reflections on Accessory Liability and Knowing Receipt" [2005] SydLawRw 9; (2005) 27(2) Sydney Law Review 187.

²⁷ L A Sheridan, *Fraud in Equity*, Pitman, London, 1957, page 210: "

²⁸ Lord Neuberger at the Banking Services and Finance Law Association Conference, Queenstown. The Remedial Constructive Trust Fact or Fiction, 10 August 2014

To put the matter in another way, a court of Equity will impose itself whenever the circumstances are such that it would be unconscionable for the owner of the legal title to assert his own beneficial interest and deny the beneficial interest of another.

18. Millett J (as he then was) said in *Lonrho v Fayed* [1992] 1 WLR 1 at 10:

"In Homeward Bound Gold Mining Co. v. McPherson (1896) 17 N.S.W.L.R. 281 the plaintiff held a mining lease from the Crown. It inadvertently failed to make a payment of rent, whereupon the defendants by fraudulent misrepresentations to the relevant minister brought about the forfeiture of the lease and a grant of a new lease to themselves. The court declared that the defendants held the new lease in trust for the plaintiff. The decision was based on the finding that, but for the fraud, the land would still have remained the property of the plaintiff. The principle on which the court proceeded, set out at p. 319, was that "equity will not permit any person ... to hold a benefit [derived by fraud] *as against the person who, but for the fraud, would be entitled.*" (Emphasis added.)

19. Mr Tony Hanlan in a letter to the Charity Commission dated 23 March 2010 set out at length the then conduct of the Steep Parish Council and asked for an investigation into the breach of trust which he alleged: at pages 6 to 7, there were set out 11 potential breaches of trust. We understand that no substantive reply was sent to Mr Hanlan (we stand to be corrected) and that no investigation took place. The letter of the 23 March 2010 raised suspicions and concerned such that I, through my solicitors, wrote to the solicitor of the new trustees in December 2019 saying that:

"Where the person accepting the office of Trustee is a new trustee of an existing charity, he must investigate any suspicious circumstances tending to suggest that there has been a prior breach of trust. The material set out in the attached documents suggest (as is plain in particular from the letter dated 23rd March 2010 to the Charity Commission) breaches of trust by Steep Parish Council over a long period. To the extent that you have not investigated this matter, you are under an obligation to do so". The suggestion was not taken up by the new trustees.

20. Underhill's Law of Trusts and Trustees²⁹ has this: **"Inquiries into acts of predecessors** New trustees should further ascertain ... that their predecessors have not committed breaches of trust which ought to be set right. If, through not inquiring suspicious circumstances, the trust estate should suffer, a new trustee may be liable, although he himself took no part, and could have taken no part, in committing the original breaches of trust".

It is submitted that, in the words of Kekewich J in *Williams v Quebrada Railway*³⁰ "... where there is anything of an underhand nature or approaching to fraud, especially in commercial matters, where there should be the veriest good faith, the whole transaction should be ripped up and disclosed in all its nakedness to the light of the Court". In this way, it will be possible to ascertain what happened to the Church Road allotments and how did it come about that the residents of the Parish of Steep lost the Church Road land which had been designated as allotments and had been used since 1819 as allotments.

What is the impact of unconscionable conduct on the part of Steep Parish Council

²⁹ Underhill's Law of Trusts and Trustees, 13th Edition 1979

³⁰ [1895] 2 Ch 751.

21. The conduct of Steep Parish Council set out above constitutes unconscionable conduct to the prejudice of the residents of the Parish of Steep. Such conduct included a wrong, namely the breach of the "legal duty to provide allotments if requested" which duty the Steep Parish Council acknowledged in its application to the Commission under the Commons Act 1899. In that application, mis-statements were made by Steep Parish Council whether innocently or otherwise. In this connection, it is relevant to note that in *Reese River Silver Mining Co. Ltd v Smith* (1869) LR 4 HL 64, Lord Cairns said at 79:

"I hardly think it was gravely argued at the Bar that in this case a fraud had not been committed against the Respondent. When I say a "fraud," I do not enter into any question with regard to the imputation of what may be called fraud in the more invidious sense against the directors. I think it may be quite possible, as has been alleged, that they were ignorant of the untruth of the statements made in their prospectus. But I apprehend it to be the rule of law, that if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue. Upon that part of the case, my Lords, I apprehend that there is no doubt."

22. But for the unconscionable conduct (described in the Statement of Case and here) on the part of Steep Parish Council, the land at Church Road would have remained designated for the purpose of providing allotments and would still have remained within the beneficial ownership of the residents of Steep and the residents of Steep would still have the right to have a lease of a vacant plot at Church Road upon requesting.

23. In *Homeward Bound Gold Mining Co v McPherson*, the judgment of the Court (The Chief Justice, Manning J and Cohen J) was delivered by the Chief Justice in which he said:

"The case of *Luttrell v. Lord Waltham*³¹ is not reported ; it is, however, referred to in 11 Ves. 608 and in 14 Ves. 290. There Lord Waltham held a certain estate as tenant in tail with remainder to the wife of one Luttrell in tail. Lord Waltham, when on his deathbed, was desirous, of barring this entail, so as to make provision for Lady Waltham, and to dispose of the property in another channel; Luttrell, it is said, by force and management, prevented the recovery being suffered, Mrs. Luttrell, the next tenant in tail, being no party to the transaction. Lord Thurlow sent an issue to be tried, the jury found that the recovery had been fraudulently prevented. Lord Thurlow held that it was against conscience that one person should hold a benefit which he derived through the fraud of another, and dealt with the property as if a recovery had been duly suffered by Lord Waltham, thus depriving Mrs. Luttrell of the estate tail to which she was entitled, and which so far as she was personally concerned she had done nothing to forfeit. That appears to be a very strong case. It, however, carries out the principle that equity will not permit any person, however innocent, to hold a benefit which he derives in consequence of the fraud of another person as against the person who, but for the fraud, would be entitled. ...".

³¹ The case of *Luttrell v Lord Waltham* was approved in *In Middleton v Middleton* 1 Jac & W 94, where Lord Eldon LC held at page 96:

"If a person be fraudulently prevented from doing an act, this Court will consider it as if that act had been done, as in the case on Lord Waltham's will (in this case, stated by the Lord Chancellor in 11 Ves. 638, under the name of *Luttrell v Olmies*, Lord Waltham, a tenant in tail, having been fraudulently prevented from suffering a recovery, the estate was treated as if the recovery had been suffered, though in favour of a volunteer, and against one not a party to the fraud) ...".

24. The background³² to the claim in *Walker v Webb* (1845) Legge 253³³ was that the New South Wales Parliament had passed a Court of Claims Act in 1833 for the purpose of appointing Commissioners to make recommendations as to the making of Crown Grants. The plaintiffs alleged that the defendants had made wilful non-disclosure to the Commissioners which resulted in the Commissioners recommending a Crown Grant in favour of the defendant Webb which under the legislation in the absence of fraud ought to be conclusive. In *Walker v Webb* (1845) a'Beckett J said (at 263):

"It was argued ... that, admitting the defendant Webb to have obtained the Grant by false representations, he could not be dealt with as a trustee for the plaintiffs not sustaining any fiduciary character in regard to them".

However, his Honour said:

"What the defendant is charged with is the unconscientious retention of an advantage which has been obtained to the prejudice of the Plaintiff's rights, and until he surrenders it, the court will consider him in the position of a trustee, not on the ground of any fiduciary duty, but for the purpose of compelling him to discharge that which it considers, on his part, to be a conscientious one. The 'court' [says Mr Jeremy in his work on Equity Jurisdiction, p 94] will imply a trust upon what it ascertains to be the conscientious duty of a party, and will, in accordance with its general principles, compel him to the performance of that which natural Justice demands'. It is upon this principle I decide this case - a broad principle, I admit but one which, in a court of equity, would be nugatory, if it were not capable of embracing every state of circumstances in which it could be fairly applied. In seeking to apply it here, I ought not to be deterred by the absence of any cases in point: for in a colony like this, it is inevitable that contracts and dealings will take place, for which no analogy can be found at home If the present case is new, its novelty is no reason why the court should not deal with it, and, if necessary, mould its decision according to its peculiar exigency. In so doing, I but follow the rule laid down by Lord Cottenham" [in *Taylor v Salmon* ((1838) 41 ER 53 at 56)]".

25. Lord Cottenham in *Taylor v Salmon* supra said at page 56

"I have before taken occasion to observe that I thought it the duty of this Court to adapt its practice and course of proceeding as far as possible to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not, from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice, and to enforce rights for which there is no other remedy".

26. In *Lonrho v Fayed*, Millett J said at 10: "The two last-mentioned cases *Homeward Bound* and *Walker v Webb* are examples of a fraud which was practised on the plaintiff even though it consisted of falsehoods told to a third party. In each case the plaintiff succeeded because he was the victim, and he recovered property which, but for the fraud, would have belonged to him or which, if the defendant had acted honestly, would have been acquired for him".

³² As set out in The Last Page (1992) ALJ Vol 66 at 872.

³³ The Law report listing the cases mentioned in this decision of *Lonrho v Fayed* has the reference for *Walker v Webb* as "(1845) Res. & Eq. 19" which is incorrect: the correct reference to the case is *Walker v Webb* 1 Legge 253 – it is a decision of a Beckett J in the Supreme Court of New South Wales (Equity) in 1845.

27. Steep Parish Council transferred the legal title to the allotments to Steep in Need for no consideration. Steep in Need have sold two of the three allotments: Church Road allotments remain unsold.

Two considerations arise. Having regard to the unconscionable conduct of Steep Parish Council, Steep in Need, however innocent it may be, cannot assert a claim to the Church Road allotments. Steep in Need are in the same position as Mrs Lutteral in the case of *Lutteral v Lord Waltham* cited in *Homeward Bound*. If Steep in Need, knowing that which is set out in this document and the Statement of Case, asserted or attempted to assert ownership of the Church Road allotments, it would amount to “the unconscientious retention of an advantage which has been obtained to the prejudice of the Plaintiff’s rights”. For the intervention of a Court of equity, all that is necessary is that the recipient’s state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt.

28. In *Homeward Bound*, the Court held at 318:

“Fortunately Courts of Equity are competent to take from even innocent third persons’ property which they would not possess but for the fraud of some individual who, for his own purposes, caused it to be vested in them:

29. The case of *Bridgeman v. Green* (Wilmot's Opinions, p. 58.) is a good illustration of this wholesome principle. There a man by the exercise of undue influence over the mind of the plaintiff, who was a man of weak understanding, obtained benefits, not only for himself and his attorney, but also for the benefit of his family and a son of the attorney.

The Lord Comm. *Wilmot* said:- "There is no pretence that Green's brother or his wife was party to any imposition, or had any due or undue influence over the plaintiff; but does it follow from thence that they must keep the money? No! whoever receives it must take it tainted and infected with the undue influence and imposition of the person procuring the gift, his partitioning and cantoning it out amongst his relatives and friends will not purify the gift and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet if it come., through a polluted channel the obligation of restitution will follow it."

30. So in *Huguenin v. Baseley* 14 Ves. 288., where a man by undue influence had obtained the execution of deeds which, not only benefited him, but also his wife and children. (The wife and children do not appear to have been parties to the suit, perhaps, because, when the bill was filed, their interests were in remainder.) Lord *Eldon* said, " With regard to the interest of the wife and children of the defendant, there was no personal interference on their part in the transactions. If, therefore, their estates are to be taken from them, that relief must be given in reference to the conduct of other persons; and I should regret that any doubt could be entertained whether it is not competent to a Court of Equity to take away from third persons the benefits which they have derived from the fraud, imposition or undue influence of others."

31. Meagher, Gummow & Lehane³⁴ at 12-050 has this:

The following are all treated as examples of fraud [in equity]: ... (f) Agreements which are bona fide between the parties but in fraud of third persons; this jurisdiction was described by Lord

³⁴ Meagher, Gummow and Lehane “Equity Doctrines & Remedies” Fourth Edition 2002, 453.

Hardwycke LC as the fourth category of fraud in *Earl of Chesterfield v Janssen* (1751) 2 Ves. Sen 125 at 156:

“A [fourth] kind of fraud may be collected or inferred in the consideration of this court from the nature and circumstances of the transaction as being an imposition and deceit on the other persons to the fraudulent agreement. ... In most of these cases it is done with their eyes open, and knowing what they do: but if there is fraud therein, the court holds it infected thereby, and relieves”.

32. From the matters set out in the Statement of Case it appears that the Steep Parish Council had been adamant from about 2002 that the Church Road allotments would be disposed of for development. The result of the May 2010 referendum rejecting the then proposal for development of the Church Road allotments and part of the Memorial Land held by SVWMC appears to have prompted the Council to resolve not to put the decision again to the resident beneficiaries as a referendum for fear of losing again: that is an available inference to be drawn from the events set out in the Statement of Case. Only an investigation will be able to show what actually happened behind the scenes. In this context, an investigation will be able to ascertain whether the Steep Parish Council:

(a) failed in its duty to give full and frank disclosure in its application to the Charity Commission under the Commons Act 1899 and whether such failure was wilful; and

(b) made material mis-statements in its application to the Commission intentionally or negligently; and

(c) failures of Steep Parish Council as set out in the document headed “Steep Parish Council failures 3” together with the consistent refusal in breach of duty to grant leases of allotments at Church Road for years were intentional so as to bring about a situation described in the Government Guidelines of February 2002³⁵, in short has Steep Parish Council, **“the authority ... actively created the impression that allotments are not available because the land is to be disposed of?”**; and

(d) took the steps as trustee so as to achieve the result of being able to develop the Church Road allotments without fully and properly informing or consulting the residents and beneficiaries, such steps included, it appears, the obtaining of a change in the Settlement Boundary in the circumstances set out in the Statement of Case so as to give rise to the presumption of development.

33. The actual result of such actions which the Council as trustee and as a Council took was that the residents were denied the designated land comprising the Church Road allotments as allotments and the rights in relation thereto without their knowledge or consent and without the knowledge³⁶ or consent of the Secretary of State. Steep Parish Council may have “violated,

³⁵ “ Ministers have been concerned that it is possible that demand may not exist because local people are unaware that allotments are available. In some cases it has even been suggested that the authority has actively created the impression that allotments are not available because the land is to be disposed of”.

³⁶ See the letter 25 November 1983 from the Hampshire Association of Parish Councils where Steep Parish Council was advised: “Thank you for your letter of 11th November, 1983. I consulted our Honorary Legal Adviser. Here is his Opinion:-

“The appropriation by a Parish Council for other purposes of land acquired or appropriated by them for allotments seems to be governed by two Acts of Parliament. The first is The Land Settlement Facilities Act 1919. Under Section 22 a Parish Council may appropriate for allotments land held by them for other purposes

however innocently because of [its] ignorance, an obligation which [it] must be taken by the Court to have known” and in that sense and in the sense described by Viscount Haldane LC in *Nocton v Lord Ashburton* the actions of Steep Parish Council as described in the Statement of Case were a fraud in equity as against the residents and beneficiaries of the Parish of Steep.

34. In a recent case, *Lewis and others v Tamplin*³⁷, the beneficiaries made numerous requests to the trustees for information about the trust as they believed that distributions of trust money had been made to other beneficiaries but not to them. The trustees refused to respond on the basis that the beneficiaries had enough information. However, the court decided the beneficiaries had the right to disclosure as they wanted the information to hold the trustees to account – and that was a valid reason. The enforcement of the trustee duty to account lies at the heart of Equity as does disclosure (not discovery – which concerns disclosure of another’s documents) of documents and information held by the trustee in support of such enforcement.
35. Steep Parish Council as trustee is required to account for the actions which it took: in order to hold a trustee to account, it follows that the beneficiaries need to be told that which the Steep Parish Council actually did. In order to find out what the Steep Parish Council as trustee actually did, the Steep Parish Council needs to give full and proper discovery of documents and information. My attempts to obtain the disclosure of documents from the trustee, Steep Parish Council, are set out in the document headed “Chronology of the effort to obtain documents and information relating to the Allotments” and were based on that which a beneficiary is entitled under *O’Rourke v Darbishire* [1920] AC 581, where Lord Wrenbury had said (at 626-27):

"If the plaintiff is right in saying that he is a beneficiary and if the documents are documents belonging to the executors as executors, he has a right to access to the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right. The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in this sense his own. Action or no action, he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else's documents. The proprietary right is a right to access to documents which are your own."

The Privy Council per Lord Walker in *Rosewood Trust v Schmidt* [2003] 2 AC 709, considered that that case did not decide that only a beneficiary with a proprietary interest in the trust assets was entitled to disclosure about the trust and its assets. Lord Walker said:

"50. ... The Board does not find it surprising that Lord Wrenbury's observations have been so often cited, since they are a vivid expression of the basic distinction between the right of a beneficiary arising under the law of trusts (which most would regard as part of the law of property) and the right of a litigant to disclosure of his opponent's documents (which is part of the law of procedure and evidence). But the Board cannot regard it as a reasoned or binding decision that a beneficiary's right or claim to disclosure of trust documents or information must always have the proprietary basis of a transmissible interest in trust

and vice versa. Garner says that such action would require the consent of the Secretary of State, but I have been unable to find his authority for this statement". ...

I have been unable to find any requirement that the Secretary of State consent be obtained, but the council might think it wise to confirm this with the D.o.E."

³⁷ [2018] EWHC 777 (Ch).

property. That was not an issue in *O'Rourke v Darbishire*."

At paragraph 51, Lord Walker said:

"Their Lordships consider that the more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts. The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion".

36. There needs to be full and proper disclosure of documents and information especially where there is equitable fraud and where the acts complained of were done by an express trustee, namely Steep Parish Council, where the documents held by Steep Parish Council as trustee belong in equity to the beneficiaries. The following cases illustrate the power of a Court of equity to make orders designed to ascertain what the trustees did.

37. In *Williams v Quebrada Railway, Land & Copper Company* [1895] 2 Ch 751 Kekewich J held at 755:

"... where there is anything of an underhand nature or approaching to fraud, especially in commercial matters, where there should be the veriest good faith, the whole transaction should be ripped up and disclosed in all its nakedness to the light of the Court". As set out above, the Steep Parish Council was trustee and accordingly was to act thus: "Not honesty alone, but the punctilio of an honour most sensitive, is then the standard of behaviour".^[2]

Williams v Quebrada Railway was approved by the Court of Appeal in *Gamlan v Rochem* (7 December 1979) unreported (a case involving, amongst other things, the defendants' breach of fiduciary duty; namely breach of "their express or implied contractual obligations and their duty of good faith towards their employers", the Plaintiffs) in which Templeman LJ (as he then was) held:

"In *Williams -v- Quebrada Railway, Land & Copper Company* (1895) 2 Chancery at page 751, Mr Justice Kekewich rightly held that the same principle applies the case of civil fraud and this was finally clearly recognised and established by two cases in the House of Lords from which the learned Judge [Mr Justice Goulding] quoted fairly extensively in his judgment. They are *Bullivant -v- Attorney General for Victoria* (1901) Appeal Cases, 196, and *Q'Rourke -v- Darbishire* (1920) Appeal Cases 581. I think it is sufficient for my purpose if I cite only the last of the extracts which appear in the learned Judge's judgment, and that is reading from Lord Wrenbury, at page 633 of the *O' Rourke* case:

"If I venture to express this in my own words I should say that to obtain discovery on the ground of fraud the plaintiff must show to the satisfaction of the Court good grounds for saying that prima facie a state of things exists which, if not displaced at the trial, will support a charge of fraud. This may be done in various ways -- admissions on the Pleadings of facts which go to show fraud -- affidavits in some interlocutory proceeding which go to show fraud -- possibly even without admission or affidavit allegations of fact which, if not disputed or met by other facts,

^[2] *Meinhard v Salmon* (1928) 164 N.E. 545 (US) per Cardozo J.

would lead a reasonable person to see, that there was fraud, may be taken by the Court to be sufficient. Every case must be decided on its merits The mere use of the word 'fraud' or the prefix of the adverb 'fraudulently' from time to time throughout the narrative will not suffice". And I will add that mere non-use of those words will not be fatal if what is disclosed is in truth a prima facie case of fraud".

38. As mentioned above, Millett J said in *Lonrho v Fayed* (at page 10) said of the decision in *Homeward Bound Gold Mining Co v McPherson*³⁸, that "the decision was based on the finding that, but for the fraud, the land would still have remained the property of the plaintiff". In *Homeward Bound* itself, the Court said³⁹, referring to the case of *Luttrell v Lord Waltham*:

"That appears to be a very strong case. It, however, carries out the principle that equity will not permit any person, however innocent, to hold a benefit which he derives in consequence of the fraud of another person as against the person who, but for the fraud, would be entitled".

39. In *Black v Freedman* [1910] 12 CLR 105 (a decision of the High Court of Australia), it was held:

"Therefore the doctrine of equity is applicable. The money is identified; it came into her [the wife of the person who stole the money] hands as a volunteer, and she is liable to repay it. It was pointed out by Sir George Jessel, in a well known case, that a man may at a certain stage be innocent, but that, if he knows that he has got the advantage of a fraud to which he was no party and says that he will keep it, then he becomes himself to a party to the fraud and is liable to the jurisdiction of the Court of Equity. In the present case the wife says she holds the money for her separate use and claims it for herself, knowing now, at any rate, the circumstance under which it came to be given to her".

That well known case is, it appears, *Redgrave v Hurd* (1881) 20 Ch D 1, where Jessel MR said at 12: "According to the decisions of Courts of Equity it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. It was put in two ways, either of which was sufficient. One way of putting the case was, "A man is not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say, for the purpose of civil jurisdiction, that when he made it he did not know it to be false; he ought to have found that out before he made it." The other way of putting it was this: "Even assuming that moral fraud must be shewn in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists on keeping that contract".

40. In *Armstrong v Jackson* [1917] 2 KB 822 McCardie J said at 825: "Now it is undoubted that where a vendor has procured the sale of his property by misrepresentation the purchaser can set aside the contract of purchase, prior to completion, even though the representation was innocent: see per Jessel MR in *Redgrave v Hurd* (1881) 20 Ch D 1 at 12; per Lord Bramwell and Lord Herschell in *Derry v Peak* (1889) 14 App Cas 337, 347. 359".

41. In *Blake v Mowatt* (1856) 21 Beav, 603, 613 Sir John Romilly said: "It is the leading principle of the equity administration of this Court, that truth should govern all transactions, and that one who deludes another in a contract, or permits him to be deluded, and takes advantage of that

³⁸ (1896) 17 N.S.W.L.R. 281

³⁹ At 319.

delusion cannot afterwards complain, that, if the contract be set aside, he will be in a worse situation than if the contract had never been entered into".

42. In *McCallum v McCallum* [1901] 1 Ch 143, Rigby LJ held at 156:

"It was against conscience that one person should hold a benefit which he had gained through the fraud of another ... the principle was wide enough to extend to every case of an innocent person claiming when his right is shown to depend upon a fraud committed by another Where once a fraud has been committed, not only is the person who committed the fraud precluded from deriving any benefit from it, but every other person is so likewise, unless there has been some consideration from himself".

Submissions concerning "Labouring Poor"

43. The submissions concerning "Labouring Poor" is set out in the document headed "Labouring Poor before and after 1919 Act and in practice". The document headed "The Statutes" provide a synopsis of the relevant statutes in Table form.

The remedy

44. In *Ortigosa v Brown*⁴⁰ Sir Charles Hall VC said:

"In *Rice v, Rice*⁴¹ Sir Rd. Kindersley said "In all cases of contest between persons having equitable interests the conduct of the parties and all the circumstances must be taken into consideration in order to determine which has the better equity."

The Court ascertains that which occurred as set out in the Statement of Case and asks (per Lord Millett as approved by Lord Neuberger, *supra*):

Are the circumstances such that it would be unconscionable for the owner of the legal title to assert his own beneficial interest and deny the beneficial interest of another? As mentioned above, Millett J in *Lonrho v Fayed*⁴², "The principle on which the court proceeded, set out at p. 319, was that "equity will not permit any person ... to hold a benefit [derived by fraud] *as against the person who, but for the fraud, would be entitled.*"

This applies not only to Steep Parish Council but to all, even the innocent, who through the Council has received the benefit of the unconscionable conduct, including Steep in Need except for the person (if any) who acquired the benefit for consideration and who was a bona fide purchaser for value without notice of the circumstances giving rise to the conclusion of the Court that the conduct was unconscionable.

45. The remedy is to unravel the scheme which was the result of the Steep Parish Council's application under the Commons Act 1899 and, on the assumption that Steep in Need is innocent, the scheme for which Steep in Need made application to the Commission. Equity is inordinately flexible where there is a need to do justice. "Traditionally, equity has been

⁴⁰ 1874 47 LJ Ch 168, at

⁴¹ 2 Drew. 73; R. c, 23 Law J. Rep. Chanc. 289.

⁴² [1992] 1 WLR 1 at 10.

characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.⁴³ Chief Justice Burger said in *Lemon v Kurtzman*⁴⁴,

"In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding those interests have constitutional roots."

46. The remedy in this case is to discharge the existing scheme in relation to the Church Road allotments by creating a new scheme such as the Church Road allotments and the many other allotments which are registered as charities with the Commission and the beneficiaries are to be "The residents of the Parish of Steep". Trusts in general terms for the inhabitants or a class of the inhabitants of particular localities which have been upheld include *Re Mann* [1903] 1 Ch 232 (a parish); *Wright v Hobert* [1723] 9 Mod Rep 64 (a village); *Re Norwich Town Charity* (1888) 40 Ch D 298; *Stanley v Norwich Corp*n (1887) 3 TLR 506 (a borough); *A-G v Carlisle Corp*n (1828) 2 Sim 437, *Mitford v Reynolds* (1842) 1 Ph 185 (a town). That nearly accords with the change which Parliament imposed after the Armistice by the Land Settlement (Facilities) Act 1919: Parliament, the Government and the People would all have been more than surprised if, a month after the coming into operation of this 1919 Act, those returning from the trenches were told that they had to prove that they were poor or from the labouring poor.

47. The Charity Commission's Caseworkers Bible at B.3 provides as follows:

"B13 Discharging a Scheme

We may come across a case where we have made a Scheme in error, either because we have been deliberately misled into making the Scheme or because we have made the Scheme by mistake. In this case we will usually discharge the Scheme and take whatever additional action is necessary.

B13.1 Where we have been misled into making the Scheme

Where we have made a Scheme as a result of misinformation given to us we can discharge this Scheme by making an Order within 12 months of the date of the original Scheme. If more than 12 months have passed, the Scheme can only be discharged by making a second Scheme. In either case, if we want to save any acts carried out under the authority of the original Scheme, we must specify this in the Order (or Scheme) discharging the original Scheme".

Under the New Scheme, new independent trustees should be appointed to hold the designated land at Church Road as allotments for the residents of the Parish of Steep: none of the new trustees should be Parish Councillors. The new trustees should be appointed from a list containing the names of persons who are known to be interested in self-sustainability, local produce, bio-diversity, similar green issues and reducing if not eliminating food miles,.

The credentials of the persons who are so listed should be made available to the residents of Steep well in advance of any such appointment.

48. As far as the legal title to the Church Road allotments is concerned, the transfer of the Church Road allotments by Steep Parish Council to Steep in Need is not an impediment to the

⁴³ *Hays v. Regents of University of Michigan*, 220 N.W.2d 91, 96 n.8 (Mich. Ct. App. 1974) (quoting *Brown v. Board of Education of Topeka*, 349 U.S. 294, 300 (1955)).

⁴⁴ 411 U.S. 192; 93 S Ct 1463; 36 L Ed 2d 151 (1973) (*Lemon II*).

restoration of the position as it stood in, say, 1998 since such transfer took place for no consideration and Steep in Need was not and is not a bona fide purchased for value without notice. Steep in Need by reading the Statement of Case and these Legal Submission now knows the circumstances in which the Commission came to propose a new scheme and, it is submitted, those circumstances amount on the part of the Steep Parish Council to unconscionable conduct such as to give rise to the intervention of Equity.

49. Disclosure sought from, but refused by, Steep Parish Council and Steep in Need is likely to throw light upon these events; it may show that such material which is set out in the Statement of Case and these Legal Submissions give the wrong impression. The cases cited in these Legal Submissions support the statement made by Lord Millett (approved by Lord Neuberger) which, paraphrasing, is that a Court of Equity will intervene and impose itself “:” whenever the circumstances are such that it would be unconscionable for the owner of the legal title [Steep in Need] to assert his own beneficial interest and deny the beneficial interest of another [the beneficiaries and residents of the Parish of Steep]”.

50. As Viscount Haldane LC said in *Nocton v Lord Ashburton*⁴⁵, a case of breach of trust:

“A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent, even in such a case as a technical fraud on a power”.

The principle, it is submitted, upon which the court proceeds, is set out at in *Homeward Bound Gold Mining Co. v. McPherson* (1896) 17 N.S.W.L.R. 281 at p. 319, namely that “equity will not permit any person ... to hold a benefit [derived by fraud] *as against the person who, but for the fraud, would be entitled*”. But for the unconscionable conduct of Steep Parish Council the beneficiaries and residents of the Parish of Steep would be entitled to the Church Road allotments.

The efforts to obtain disclosure of documents from the trustee, Steep Parish Council

51. As is set out above, requests made to the Steep Parish Council for documents upon the basis set out in *O’Rourke v Darbyshire*⁴⁶ as explained by the Supreme Court in *Schmidt v Rosewood Trust Ltd*⁴⁷ were met with a statement to the effect that such requests would be answered on the footing that they were made under the Freedom of Information Act 2000: such documents which were disclosed under the FOIA were redacted and omitted categories of documents which, it is submitted, would fall to be disclosed in full answer to a request made by a beneficiary of the trustee especially in the light of the factual material set out in the Statement of Case.

To give but one omission apparent from such failure to disclose, the minutes of the 14 June 2010 show that a Mr Venables “had been working closely with” the Chairman and the Clerk in relation to the allotments; Mr Venables spoke for and on behalf of the Steep Parish Council at a Parish Meeting answering questions from the public. No emails passing between Mr Venables and the Parish Council (which are known to exist) have been disclosed by the Steep Parish Council as

⁴⁵ [1914] AC 932 at 954.

⁴⁶ [1920] AC 581.

⁴⁷ [2003] UKPC 26.

trustee. It is thought that Mr Venables acted for and on behalf of the trustee, Steep Parish Council, from at least the 3 June 2010.

52. The material set out in the Statement of Case show that in the light of the decisions of *Williams v Quebrada Railway, Land & Copper Co*⁴⁸, *O'Rourke v Darbyshire* itself and the decision of a strong Court of Appeal in *Gamlen v Rochem*⁴⁹ which approved the decision in *Williams v Quebrada Railway*, there should be disclosure of documents.
53. The right of a beneficiary to the disclosure of documents is not based on the right to the discovery of documents in litigation.

As is set out in the document headed "Chronology of the effort to obtain documents and information relating to the Allotments", Steep Parish Council have shown reluctance to provide complete disclosure of those documents which a beneficiary is entitled to under the decisions (cited in paragraph 35 of this document) of *O'Rourke v Darbyshire* as explained by the Privy Council in *Schmidt v Rosewood Trust Ltd*. In the latter decision, Lord Walker said:

"Their Lordships have already indicated their view that a beneficiary's right to seek disclosure of trust documents, although sometimes not inappropriately described as a proprietary right, is best approached as one aspect of the court's inherent jurisdiction to supervise (and where appropriate intervene in) the administration of trusts".

54. The facts and matters set out in the Statement of Case and in the letter dated 23 March 2010 and the breaches of trust mentioned there, are, it is submitted, more than enough to give rise to the complete disclosure of the documents which have been requested of the corporate trustee, Steep Parish Council as part of the court's inherent jurisdiction to supervise in the administration of trusts.

Ian Geering QC (Rtd)

⁴⁸ [1895] 2 Ch 751.

⁴⁹ (7 December 1979) unreported.