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FIDUCIARY GOOD FAITH AND THE TAXONOMY OF DUTIES IN THE SINGAPORE COURT OF APPEAL

Credit Suisse Trust Limited v Ivanishvili, Bidzina and others

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In *Credit Suisse Trust Limited v Ivanishvili, Bidzina and others*, the Singapore Court of Appeal rejected the proposition that a fiduciary's duty of good faith is exclusively proscriptive, holding that this duty is not only a fiduciary duty but also has several prescriptive dimensions. This Comment examines the theoretical and practical implications of the decision both as regards the duty of good faith and the broader taxonomy of fiduciary duties and remedies in Singapore law.

I. Introduction

The Singapore Court of Appeal decision in *Credit Suisse Trust Limited v Ivanishvili, Bidzina and others*[1] ("*Ivanishvili*") marks the latest development in an increasingly autochthonous law of equity in Singapore. For some time now, the Singapore courts have begun to blaze their own trail in areas of both commercial and domestic significance. Consider cases such as *Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)*[2] (holding that bribes are held on constructive trust); *Chan Yuen Lan v See Fong Mun*[3] (setting out the still-regnant framework[4] on constructive and resulting trusts in the family homes context); *Lau Sheng Jan Alistair v Lau Cheok Joo Richard*[5] (on illegality in the trust context); and, of particular significance for the law of fiduciaries, *Sim Poh Ping v Winsta Holding Pte Ltd*[6] ("*Winsta Holding*") (setting out the framework on remedies for breach of trust and fiduciary duty). These important cases have featured doctrinally and theoretically

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1 [2024] 2 SLR 164 (CA(I)) [*Ivanishvili*].

2 [1994] 3 SLR(R) 312 (CA) [*Pertamina*].

3 [2014] 3 SLR 1048 (CA).

4 See for recent commentary Hang Wu Tang, "Broken kinship: family property disputes and the common intention constructive trust in Singapore" (2024) 38 Intl' JL Pol'y & Fam 1.

5 [2023] 5 SLR 1703 (HC).

6 [2020] 1 SLR 1199 (CA) [*Winsta Holding*].

complex areas of equity jurisprudence, and should be of interest to those writing and advising on Singapore trust law.

Ivanishvili is the most recent example of this trend. In a case featuring a litany of missteps by a professional trustee resulting in immense losses to the trust fund, the Court of Appeal rejected outright the proposition that a fiduciary's equitable duty of good faith is purely proscriptive. Instead it may, in the right circumstances, contain prescriptive obligations to take affirmative actions for the benefit of the beneficiaries. This appears extremely significant at first sight, since, while the nature and scope of the equitable duty of good faith has always been shrouded in academic debate, the prevailing orthodoxy was that the duty is essentially a proscriptive duty that prevents a fiduciary from acting in bad faith.[7] Yet it is suggested that, on a careful reading, the Court's decision may not be quite so far-reaching, and may in fact provide salutary clarification on the nature and scope of a fiduciary's duty of good faith. *Ivanishvili* also provides important insight into the framework of equitable claims and remedies following *Winsta Holding*, particularly into the nature of a trustee-fiduciary's custodial duties. This comment considers the theoretical and practical significance of the *Ivanishvili* decision from these perspectives.

II. Background

Among the controversial areas of equity mentioned above, perhaps the most controversial of all, and the one with the greatest commercial significance, is the law on remedies for breach of trust and fiduciary duty. Indeed, the subtleties of the decision in *Ivanishvili* cannot be understood apart from the context set by *Winsta Holding*. To briefly recapitulate, the Court of Appeal in *Winsta Holding* seemed hesitant to follow the modern English position, respecting which but-for causation must be shown in claims for breach of trust and breach of fiduciary duty alike.[8] In a wide-ranging and magisterial judgment, the Court in *Winsta Holding* eschewed the amalgamation of these two types of breach.[9] Moreover, the Court identified two sub-types of each. Thus, breaches of trust may be categorised as (i) breaches of the custodial stewardship duty (that is, a misapplication of trust assets, in respect of which the Court appeared to endorse the traditional approach entitling the beneficiaries to falsify the trust account); or (ii) the management stewardship duty (a breach of the equitable duty of care, which would entitle the beneficiaries to surcharge the trust account).[10]

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7 See Part V below, particularly the references at note 63.

8 *Target Holdings v Redferns* [1996] AC 421 (HL, Eng); *AIB v Mark Redler* [2015] AC 1503 (SC, Eng). *Cf*, *eg*, the critical commentary in Simone Degeling and Jason Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Oxford: Hart Publishing, 2017).

9 *Winsta Holding*, *supra* note 6 at [99]–[103].

10 *Ibid* at [100]. Falsification is the accounting procedure by which the beneficiary is entitled to disregard unauthorised misapplications of trust assets, holding the fiduciary personally liable for any shortfall under a primary duty to reconstitute the trust fund. Surcharging the trust account, in this context, follows the taking of a trust account on the basis of wilful default, and requires the trustee to restore to the trust fund what it should have contained, but for the breach of duty. Other commentators similarly understand *Winsta Holding* as preserving these traditional accounting remedies in Singapore: see *eg*, Weiming Tan, "Unpacking The Enigma of Equitable Compensation for Breaches in Equity" [2022] 5 J Bus L 407 at 413.

As for breaches of fiduciary duty, they involve an element of "infidelity or disloyalty which engage the conscience of the fiduciary".[11] They may be categorised as (iii) custodial; or (iv) non-custodial breaches of fiduciary duty.[12] *Winsta Holding* itself, the Court held, involved non-custodial breaches of fiduciary duty,[13] and in respect of such breaches the court adopted a novel burden-shifting approach to causation aimed at balancing the vulnerability of the beneficiaries against the concern of overcompensation.[14]

Despite its undoubted significance, *Winsta Holding* is but the first step towards a fully-developed law of equitable remedies. *Winsta Holding* conspicuously left open the treatment of the causation requirement for both (i) breaches of the custodial stewardship duty; and (ii) custodial breaches of fiduciary duty. More broadly, *Winsta Holding* did not resolve the interaction and conceptual overlap between breaches of the custodial stewardship duty and custodial breaches of fiduciary duty.[15] These issues are clearly significant ones, since a claimant will often raise more than one cause of action in the pleadings. This was precisely the case in *Ivanishvili*.

III. The Decision

The trust in *Ivanishvili* was set up in 2004 by Bidzina Ivanishvili ("BI"), the first-named plaintiff in the case, with Credit Suisse Trust Singapore ("CS Trust") as the trustee, and BI and a number of his family members as beneficiaries.[16] BI deposited over US$1.1bn into the custody of CS Trust[17] which, pursuant to the terms of the trust, CS Trust placed under discretionary portfolio management agreements with Credit Suisse Bank ("CS Bank") to be managed independently in accordance with the investment profile specified by BI.[18] In June 2006, one Patrice Lescaudron ("PL") was appointed as BI's relationship manager at CS Bank.[19] In what became a startlingly consistent practice, PL began to make unauthorised transactions using some of the BI accounts at CS Bank. Some of these transactions were withdrawals to unspecified accounts,[20] which were known to CS Trust and flagged as "Unauthorised Payments Away".[21] In other cases, PL purchased securities at an overvalue or without authority altogether,[22] and traded on the trust account recklessly and without authority.[23] When queried, PL occasionally relied on forged

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11 *Winsta Holding*, *supra* note 6 at [101].
12 *Ibid* at [104]–[110].
13 *Ibid* at [122].
14 *Ibid* at [238]–[253].
15 See particularly, *ibid* at [110]–[122].
16 *Ivanishvili, Bidzina and others v Credit Suisse Trust Ltd* [2023] 5 SLR 59 (HC(I)) ("*Ivanishvili (HC)*").
17 *Ibid* at [70]–[71].
18 *Ibid* at [137]–[156].
19 *Ibid* at [164].
20 *Eg, ibid* at [171]–[181].
21 *Ibid* at [166]–[170].
22 *Ibid* at [212]–[230].
23 *Ibid* at [217]–[219].

signatures,[24] sometimes his bare claim to speak for BI,[25] but most of the time simply ignored CS Trust's queries.[26] Despite all of this, CS Trust did not act to remedy the situation by requesting that the Bank have PL removed, or by directly checking with BI on the veracity of the transactions.[27] In the result, the trust fund suffered massive losses from the combination of PL's unauthorised withdrawals and unauthorised trading activity.

In the aftermath of the fraud, the plaintiffs commenced proceedings, *inter alia*, against CS Trust in Singapore. In the course of the trial before the Singapore International Commercial Court ("SICC"), CS Trust admitted that it had breached its duty to "safeguard the Trust assets", and did not "dispute causation in this regard".[28] However, CS Trust maintained that it was only liable for the funds misappropriated by PL, and not the other losses suffered by the plaintiffs.[29] Rejecting this position, the SICC held that CS Trust had failed to "act honestly and in good faith in compliance with its duty to safeguard the Trust Assets";[30] that, had CS Trust acted in accordance with its duties, it would have disclosed PL's conduct to the plaintiffs by March 2008;[31] that, had that been done, the plaintiffs would have ended their relationship with CS Trust and CS Bank;[32] and that CS Trust was accordingly liable to the plaintiffs for the difference between the value of the portfolio, had it been transferred to the management of a professional and competent trustee, and the value of the portfolio actually managed by CS Trust.[33]

On appeal, CS Trust continued to frame its breach of duty as a tortious breach rather than a breach of fiduciary duty, seeking to rely on the usual tortious principles such as causation, remoteness, contributory negligence.[34] The Court of Appeal rejected this characterisation in favour of the plaintiffs' contention that CS Trust had breached its fiduciary duties, considering that this would render those tortious principles inapplicable.[35] The Court of Appeal held that the duty to operate the trust honestly and in good faith in the interests of the beneficiaries imposed prescriptive obligations in both an "adjectival" and an "actuating" sense,[36] both of which CS Trust had breached. CS Trust had committed breaches in the "actuating" sense by its inaction in the face of its knowledge of PL's unauthorised activities, and in the "adjectival" sense by failing to perform in good faith its duty to safeguard the trust assets.[37] The Court (and the parties) proceeded on the basis that the breach was a non-custodial one, with the result that the burden-shifting approach in *Winsta*

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24 *Ibid* at [229].
25 *Eg, ibid* at [200]–[201], [241]–[246].
26 *Eg, ibid* at [194].
27 See *Ivanishvili*, *supra* note 1 at [14]–[23].
28 *Ivanishvili (HC)*, *supra* note 16 at [389].
29 *Ibid* at [389].
30 *Ibid* at [524].
31 *Ibid* at [538].
32 *Ibid* at [541].
33 *Ibid* at [547].
34 *Ivanishvili*, *supra* note 1 at [2].
35 *Ibid* at [2].
36 *Ibid* at [44]–[53]. These terms are further discussed in Part V below.
37 *Ibid* at [39]–[61].

Holding applied.[38] Despite making some adjustments to the quantification process, the overall decision of the SICC was upheld.[39]

IV. The Taxonomy of Fiduciary Breaches

Even though the parties and the court proceeded on the basis that the breach was non-custodial, *Ivanishvili* sheds useful light on the overall framework of fiduciary remedies in Singapore. Why was the claim framed as one for breach of the duty of good faith, rather than a breach of the custodial stewardship duty? Why was the claim regarded as a non-custodial rather than a custodial breach, despite the fact that PL's transactions with the trust assets were unauthorised? And what are the implications of how the claim is framed, particularly with respect to the available remedies and their causation requirements? These questions implicate the very structural distinction set out in *Winsta Holding* and therefore deserve serious consideration.

At the outset, it seems correct that the claim could not have been brought for a breach of the custodial stewardship duty. As the Court explained in *Winsta Holding*, such a breach involves the misapplication of trust assets,[40] as where a trustee uses trust assets to acquire an unauthorised investment.[41] In *Ivanishvili*, the unauthorised transactions involving the trust assets were the doing of PL, an employee of CS Bank, and therefore could not be attributed to CS Trust itself. In fact, it was clear that CS Trust's initial establishment of the discretionary portfolio management agreements with CS Bank was authorised.[42] Since CS Trust and CS Bank were distinct entities, as far as CS Trust was concerned, the trust fund had not been misapplied or lost. The trust fund continued to consist of the choses in action constituted by the accounts at CS Bank, which had simply declined (albeit egregiously) in value. The issue, therefore, was what duties CS Trust owed in relation to the supervision and monitoring of the trust accounts, and the nature and scope of those duties.

Assuming that CS Trust owed a fiduciary duty to perform these supervisory functions in good faith, which was breached, why was that breach assumed to be non-custodial? In fact, *Winsta Holding* leaves some doubt as to the precise distinction between a custodial and a non-custodial breach of fiduciary duty. The Court stated that a custodial breach of fiduciary duty "involve[s] the stewardship of assets" and "result[s] in the misapplication of the principal's funds or trust funds",[43] and the example was given of a director with control over the disposal of the company's assets who misapplies funds by dissipating them for the director's own benefit.[44] But what exactly is the scope of a breach involving the "stewardship of assets", and in particular, could it extend beyond misapplication of trust assets to: (i) a misuse of trust assets; or (ii) an egregious failure to safeguard trust assets? As to the former,

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38 *Ibid* at [62]–[64].

39 *Ibid* at [159]–[161].

40 *Winsta Holding*, *supra* note 6 at [100].

41 *Ibid* at [102]. The remedy is the falsification of the trust account, leaving the trustee personally liable to reconstitute the trust fund: [112].

42 *Ivanishvili (HC)*, *supra* note 16 at [137]–[156].

43 *Winsta Holding*, *supra* note 6 at [106].

44 *Ibid*.

Winsta Holding implicitly suggests that misuse does not suffice, by treating the decision of *Quality Assurance Management* (where a director used the company's premises and equipment to fulfil orders that he had diverted to his own company)[45] as involving a non-custodial breach of fiduciary duty.[46] And *Ivanishvili* now indicates that the latter, too, will not suffice, since it suggests that as long as a fiduciary deals with the principal's assets in an initially authorised manner, even subsequent acts which knowingly ignore obvious risks to the assets will not constitute a custodial breach of fiduciary duty. *Winsta Holding* and *Ivanishvili* taken together therefore seem to imply that a custodial breach of fiduciary duty requires a strict requirement of misapplication. In turn, this means that a custodial breach of fiduciary duty would always also involve a breach of the custodial stewardship duty (since an unauthorised misapplication of assets itself amounts to a breach of that duty). The converse, however, is not true: the custodial stewardship duty could be breached in circumstances involving no breach of fiduciary duty.[47] In other words, one might see a custodial breach of fiduciary duty as a sort of factual "subset" of breaches of the custodial stewardship duty, insofar as the former will always amount to the latter, but not *vice versa*.

So much for the distinction between custodial breach of fiduciary duty and breach of the custodial stewardship duty. Does *Ivanishvili* tell us anything about the remedy for a custodial breach of fiduciary duty? On this point, one aspect of the decision in *Ivanishvili* may easily be misconstrued and is therefore worth clarifying. The Court observed that neither party had advanced the position that a custodial breach of fiduciary duty had occurred. However, the Court stated that if the breach had been a custodial one, BI "would have a choice and [could] *elect* to seek a reparative remedy".[48] This statement ought to be taken with caution. It can be read to suggest that a custodial breach of fiduciary duty entitles the claimant to elect between a reparative remedy (that is, a claim for loss) and a substitutive remedy (that is, a claim to falsify the trust account), in the same way that a claimant who establishes a breach of contract can elect between reliance and expectation damages. This cannot be what the Court intended. First, the passage from *Winsta Holding* that the Court cites does not refer to any such proposition. As we have seen, *Winsta Holding* did not concern a custodial breach of fiduciary duty, and the Court was extremely cautious in stating that it was not resolving the applicable principles. What the Court there did say was this: "The resolution of the question may, however, be a matter of choice for the principal, *ie*, it is dependent on which set of remedial principles he seeks."[49] That proposition seems correct. As we have just seen, the material facts which give rise to a custodial breach of fiduciary duty will necessarily also establish a breach of the custodial stewardship duty. The Court in *Winsta Holding* was, therefore, simply observing that the claimant might, on the same facts, allege *both* a breach of the custodial stewardship duty *and* a custodial breach of fiduciary duty. These are consistent claims, so it is trite that they may be brought in the alternative, with the claimant

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45 *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 (HC) at [15].

46 *Winsta Holding*, *supra* note 6 at [138].

47 See the example given in *Winsta Holding*, *ibid*, at [102].

48 *Ivanishvili*, *supra* note 1 at [64] (emphasis in original).

49 *Winsta Holding*, *supra* note 6 at [64].

only having to elect as to the preferred remedy by the time of judgment.[50] This is an entirely different proposition from the suggestion that a single breach – a custodial breach of fiduciary duty – might entitle a beneficiary to elect between reparative and substitutive remedies at the remedial stage, in a manner akin to contractual damages. It is submitted that the Court of Appeal in *Ivanishvili* must be understood as affirming no more than the trite position set out in *Winsta Holding*, that is, that a claimant may bring alternative claims based on the same facts provided that they are mutually consistent.

But where does all of this leave the dichotomy between custodial and non-custodial breaches of fiduciary duty? If a custodial breach of fiduciary duty always permits the beneficiary to mount a concurrent claim for a breach of the custodial stewardship duty, it is hard to see the work that is done by the custodial/non-custodial distinction (within breaches of fiduciary duty). The Court of Appeal may have been concerned that the falsification process would not be available in respect of a non-trustee fiduciary, such as a company director. So, in *Winsta Holding*, the Court observed that "non-trustee fiduciaries…can commit breaches of fiduciary duty, but not breaches of trust, although *custodial* breaches of fiduciary duty have been treated by some cases as akin to breaches of the custodial stewardship duty of a trustee".[51] But with respect, even though it must by definition be correct that non-trustee fiduciaries cannot commit *breaches of trust*, it seems precipitate to assume that trustees are the only types of fiduciaries who owe duties to *account*. After all, it is the accounting obligation that creates the custodial stewardship duty and therefore underpins the falsification remedy. In an earlier decision, the Court of Appeal itself stated that an accounting relationship arises where a party has "custody of a fund which it is obliged to administer for the benefit of another",[52] and the question is whether the party "received property in circumstances sufficient to import an equitable obligation to handle the property for the benefit of another".[53] Thus, it is submitted that directors who have control over the company's property can properly be regarded as accounting parties, as Charles Mitchell has argued.[54]

If this is correct, there seems to remain no principled reason to distinguish between custodial and non-custodial breaches of fiduciary duty in relation to the causation requirement. Indeed, it is submitted that doing so would be a mistake. A custodial breach of fiduciary duty is wrong in two distinct ways: it is a breach of the duty to avoid conflict, which arises from the fiduciary's duties *as a fiduciary*, *and* it is a breach of the duty to account, which arises from the fiduciary's duties *as an accounting party*. These are distinct duties, as James Penner has persuasively shown.[55] What *Winsta Holding* calls a "custodial breach of fiduciary duty" is therefore better understood as two distinct breaches of duty giving rise to two different sets of claims and remedies: (i) equitable compensation for loss suffered from the breach of fiduciary duty (which is governed by *Winsta Holding*'s burden-shifting

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50 See *eg*, *Tang Man Sit v Capacious Investments Ltd* [1996] 1 AC 514 (PC).

51 *Winsta Holding*, *supra* note 6 at [103] (emphasis in original).

52 *Chng Weng Wah v Goh Bak Heng* [2016] 2 SLR 464 (CA) at [21].

53 *Ibid* at [23].

54 Charles Mitchell, "Stewardship of Property and Liability to Account" [2014] Conv 215 at 219–220.

55 See James Penner, "Distinguishing fiduciary, trust, and accounting relationships" (2014) 8 J Eq 202.

approach); and (ii) falsification of the trust account, compelling the accounting fiduciary to replace misapplied assets (governed by the traditional falsification rules).

V. A Positive Duty of Good Faith

Perhaps the most notable line in the *Ivanishvili* judgment is this:

> While the "proscriptive" description of fiduciary duties has been the subject of lively academic debate (discourse which has been *referred* to by this court in *Tan Yok Koon* at [192]), it is *not* the law in Singapore that fiduciary duties are exclusively proscriptive.[56]

The interpretive challenge following *Ivanishvili* is to determine how far the Court of Appeal has gone in establishing a doctrine of prescriptive fiduciary duties.

On one possible reading, which I will refer to as the "Broad Reading", the Court has established a broad and open-ended duty upon trustees and fiduciaries to take active steps in good faith. Thus, according to *Ivanishvili*, "[t]o act in good faith, a trustee must not simply *refrain* from acting in bad faith, something more is required."[57] Indeed it is "unsurprising that they are *positively* required to act in the interests of their principals".[58] But, as to what exactly a trustee must do: "what is required of a fiduciary depends on the specific facts and circumstances",[59] and "what good faith entails is invariably contextual".[60] Of course, this idea cannot be taken too far. As Lionel Smith has pointed out, the suggestion that a fiduciary is obliged to "give all his time, and wealth, to his beneficiary" is "obviously wrong".[61] Still, it is not difficult to imagine that such an open-ended and contextual duty could be marshalled in support of a claim that a fiduciary ought to have taken any number of different specific actions at particular points in time, in order to comply with their duty of good faith. Such a fiduciary would be drawn into disputes over whether particular acts were, or were not, required to achieve compliance. That question would ultimately be resolved, as the quotations above indicate, by a contextual inquiry in an exercise of judicial discretion.

This Broad Reading of the Court's decision would, it is suggested, represent a significant overhaul of the conventional understanding of a fiduciary's duty of good faith. Whilst the precise content of the duty of good faith has not often been the subject of rigorous judicial analysis,[62] the conventional view has been that the duty of good faith is best understood as "not so much a positive duty as a requirement

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56 *Ivanishvili*, *supra* note 1 at [43] (emphasis in original).

57 *Ibid* at [44] (emphasis in original).

58 *Ibid* (emphasis in original).

59 *Ibid* at [43].

60 *Ibid* at [44].

61 Lionel Smith, *Aspects of Loyalty*, (28 July 2017) (unpublished, available at SSRN: https://ssrn.com/abstract=3009894) at 5 [Smith, "Aspects of Loyalty"].

62 Smith, *ibid*, observes at 20 that "it is very rare that a case is decided on the sole basis of a breach of the duty of good faith".

not to act in bad faith".[63] As to what would amount to bad faith, Graham Virgo has suggested that it may be "equated with equitable fraud and dishonesty", and that the key test is whether the fiduciary or trustee "intended to pursue a course of action knowing that it was contrary to the best interests of the beneficiaries or being recklessly indifferent to their interests, regardless of whether the trustee intended to benefit from the conduct."[64] On this view, the duty of good faith prohibits "any intentional use of [the fiduciary's] powers that is not directed to the furtherance – the future development – of the principal's interests."[65] Even commentators who have proposed conceptualising the duty of good faith in a more robust manner have kept the duty closely circumscribed and have sought to clearly elucidate what is required. For example, Charles Mitchell has put forward a different conception of good faith under which good faith imports a duty of 'seriousness', which is objectively judged.[66]

These academic views reflect a number of concerns about the introduction of an open-ended, prescriptive duty of good faith. As Lionel Smith has observed, "one person cannot have an open-ended and undefined legal duty to further another's interests, because one could never know whether such a duty was fulfilled."[67] It is sometimes also said that the proscriptive view of fiduciary obligations is more historically faithful. Thus, Mitchell has suggested that on the understanding of 19th and 20th century judges and legal writers, fiduciary relationships were "governed by a set of proscriptive rules that disable fiduciaries from acting in certain ways, rather than a set of prescriptive rules requiring them to perform certain duties".[68]

If the Broad Reading of *Ivanishvili* were correct, all of this would be swept away, leaving fiduciaries subject to an open-ended and "invariably contextual" duty to take positive steps in the interests of their principals. Yet it is not clear when exactly action would be required, or how fiduciaries would satisfy themselves that their duties have been discharged. It is notable that the duty of good faith is usually

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63 Richard Nolan and Matthew Conaglen, "Good Faith: What does it mean for fiduciaries and what does it tell us about them?" in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Oxford: Hart Publishing, 2010) 324. The Court of Appeal itself noted in *Tan Yok Koon v Tan Choo Suan* [2017] 1 SLR 654 at [192] [*Tan Yok Koon*] that "it is often said that fiduciary duties are proscriptive and prophylactic, and seek to avert breaches of non-fiduciary duties". See further, *eg*, Smith, *supra* note 75; James Penner, "Trustees and Agents Behaving Badly" in Matthew Harding and Paul B Miller (eds), *Fiduciaries and Trust: Ethics, Politics, Economics and Law* (Cambridge: Cambridge University Press 2020). But *contra*, *eg*, Kelvin Low, "Fiduciary Duties: The Case for Prescription" (2016) 1 Trust L Intl 3.

64 Graham Virgo, *The Principles of Equity & Trusts*, 5th ed (Oxford: Oxford University Press, 2023) at 412.

65 Nolan and Conaglen, *supra* note 63 at 331.

66 Charles Mitchell, "Good faith, self-denial and mandatory trustee duties" (2018) 32 Trust L Intl 92 at 96: "a power holder must make a sincere and serious commitment to the purposes for which her powers have been given … compliance is tested objectively and not subjectively: what matters is not whether a party believes her own conduct to be appropriate and well justified, but what the court thinks of it".

67 Smith, "Aspects of Loyalty", *supra* note 61 at 5. See also Peter Birks, "The Content of Fiduciary Obligation" (2002) 16 Trust L Intl 34: "An independent obligation to abstain from pursuing interests of one's own is unintelligible, certainly unworkable."

68 Charles Mitchell, "Equitable Compensation for Breach of Fiduciary Duty" (2013) 66 Current Leg Probs 307 at 314.

regarded as part of the "irreducible core" of a trustee's duties, and is likely therefore to be impossible to exclude.[69]

It is submitted that a different reading of *Ivanishvili* is possible, which reaches less drastic conclusions. On this reading (the "Narrow Reading"), the Court of Appeal established two propositions. First, the Court rejects the notion that a trustee can escape liability by a technical or taxonomical classification of breaches as proscriptive or prescriptive. The "academic taxonomic exercise should not obscure the substantive content of the duties".[70] Second, the Court of Appeal holds that the duty of good faith requires a trustee to "act in circumstances where he knows that the interests of the beneficiaries are at risk of harm".[71] This essentially crystallises the duty of good faith into a positive duty triggered by actual knowledge of a risk of harm: "[t]he decision to act or not act must be made honestly and in good faith for the benefit of, and in the interest of, the beneficiaries".[72] In other words, the duty of good faith proscribes "knowing inaction".

If the decision can be understood in this way, *Ivanishvili* provides welcome clarification of the scope and nature of the duty of good faith. In the first place, commentators have sometimes observed that a duty to act in good faith on the one hand, and a duty *not* to act in *bad* faith on the other, may often be seen as two sides of the same coin.[73] The Court of Appeal is entirely correct, then, to reject a fiduciary's defence based on a taxonomical technicality. But on this understanding, the rejection of the proscriptive thesis is just that – a taxonomical point – and does not entail a corresponding substantive embrace of an open-ended prescriptive duty. The real substantive question is what the duty of good faith requires of a fiduciary, regardless of whether it is phrased in prescriptive or proscriptive terms. Here, the second aspect of the Narrow Reading comes into play. The Court holds that where a fiduciary knows of circumstances creating a risk of harm to the beneficiaries' interests, the fiduciary is obliged to take action (which is to say that the fiduciary is proscribed from knowing inaction).[74] It is submitted that this is not, in fact, at odds with the orthodox understanding of the duty of good faith. Lionel Smith, for example, has suggested that it is not very controversial to say that a fiduciary who "takes an action, or deliberately does not act, in a way that is dishonest or that consciously

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69 *Tan Yok Koon*, *supra* note 63 at [205]; *cf*, David Fox, "Non-excludable trustee duties" (2011) 17(1) Trusts and Trustees 17.

70 *Ivanishvili*, *supra* note 1 at [43].

71 *Ibid* at [47].

72 *Ibid* at [48].

73 Weiming Tan, "Negotiating New Curves Along Chancery Lane: Four More Questions on Fiduciaries" (2022) 35 Trust L Intl 197 at 207.

74 It may be worth noting that knowledge itself is a potentially slippery concept, as demonstrated by the history of the *Baden* categories of knowledge in relation to knowing or dishonest assistance: *Baden v Société Générale* [1993] 1 WLR 509 (HC, Eng) at [250]. Given *Ivanishvili*'s clear distinction between negligence and bad faith, it seems that some subjective knowledge of a risk of harm is likely to be required, which will include some types of Nelsonian blindness. That is consistent with the position in knowing assistance: see *Royal Brunei Airlines v Tan* [1995] 2 AC 378 (PC); *George Raymond Zage III v Ho Chi Kwong* [2010] 2 SLR 589 (CA). For further helpful discussion, see *eg*, Paul S Davies, "The Mental Element of Accessory Liability in Equity" (2022) 138 Law Q Rev 32.

disregards the interests of the beneficiary, is in breach of the duty of good faith."[75] More particularly:

> The fiduciary who, perfectly aware of his charge, does nothing at all, must be said to consciously disregard the interests of the beneficiary ... it seems quite possible that such extreme conduct (total inaction, or subjective recklessness) is both a breach of the duty of care, skill and diligence, and at the same time a breach of the duty of good faith…[76]

It is submitted that the Narrow Reading is the better interpretation of *Ivanishvili*. First, the Narrow Reading is all that was required to reach the Court's decision. As alluded to above, the Court identified two possible dimensions in which the positive duty of good faith might manifest itself: an "adjectival" dimension that "attaches to or regulates the performance of non-fiduciary duties or exercise of powers",[77] and an "actuating" dimension that will "positively require a trustee *to act* in circumstances where he knows that the interests of the beneficiaries are at risk of harm".[78] In fact, the "adjectival" dimension seems entirely consistent with the conventional understanding of the duty of good faith. In *Tan Yok Koon v Tan Choo Suan*,[79] the Court of Appeal linked the adjectival nature of fiduciary duties to their proscriptive character, observing that "it is often said that fiduciary duties are proscriptive and prophylactic, and seek to avert breaches of non-fiduciary duties … in this sense, fiduciary duties are adjectival in nature."[80] As for the "actuating" dimension, the emphasis is on the fiduciary's decision whether or not to act, given knowledge of particular circumstances putting the beneficiaries' interests at risk. The "focus is on whether the trustee should have *acted* in the circumstances, not on whether the trustee achieved a particular outcome."[81] On the facts, it was clear that CS Trust had failed to take any action to secure the beneficiaries' position.[82] Accordingly, the reasoning encapsulated in the Narrow Reading was sufficient to dispose of the appeal.

Second, the Court of Appeal did not seem to be regarding itself as establishing a radically new proposition of law. Consider, for example, *Winsta Holding*. In that case the Court was cognisant of the fact, which it made fully explicit, that it was breaking new ground in laying down the burden-shifting test. In reaching its decision, the Court extensively surveyed the comparative position in different jurisdictions,[83] provided a representative sample of relevant academic positions,[84] and (most importantly) explained fully the rationale for its decision in both principle

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75 Smith, "Aspects of Loyalty", *supra* note 61 at 21–22.

76 *Ibid* at 22. See also Lionel Smith, "Parenthood is a Fiduciary Relationship" (2020) 70 UTLJ 395 at 433 ("A fiduciary who deliberately disregards the interests of the beneficiary acts with subjective dishonesty and therefore in bad faith.")

77 *Ivanishvili*, *supra* note 1 at [47].

78 *Ibid* at [48] (emphasis in original).

79 *Tan Yok Koon*, *supra* note 63.

80 *Ibid* at [192].

81 *Ivanishvili*, *supra* note 1 at [48] (emphasis in original).

82 Notice also the emphasis on CS Trust's knowledge in *Ivanishvili*, *ibid* at [57].

83 *Winsta Holding*, *supra* note 6 at [129]–[228].

84 *Ibid* at [229]–[237].

and policy.[85] In *Ivanishvili*, in contrast, the Court elaborated the positive content of the duty of good faith with relatively little reference to existing discourse on the prescriptive-proscriptive dichotomy. If the Court had the Broad Reading in mind, one would have expected the Court to consider, for example, the concern of indeterminate ambit raised *inter alia* by Birks and Smith.[86]

An objection might be that the Narrow Reading is simply too narrow: after all, the Court of Appeal stated that the positive dimension of the duty of good faith manifests in "at least" the "adjectival" and "actuating" sense,[87] which means that good faith cannot be confined to the sense of "proscribing knowing inaction" entailed by the Narrow Reading. The response is that nothing in the Narrow Reading is inconsistent with the possibility, in future, of judicially recognising new situations in which the duty of good faith may be breached. After all, bad faith is probably, like fraud, "infinite in variety".[88]

Beyond its interpretive merits, it is submitted that the Narrow Reading is the better approach to the fiduciary duty of good faith as a matter of principle. This is because care should be taken that the duty of good faith does not accidentally subsume other established doctrines, such as the duty to act impartially as between beneficiaries,[89] the duty to act for proper purposes,[90] and the duty to take into account relevant considerations.[91] Consider the duty of impartiality, which applies where there are different beneficiaries, or classes of beneficiary, with potentially conflicting interests.[92] In such a case, the trustees are obliged to administer the trust fund impartially, with regard to the different interests of the beneficiaries, and preserve an "equitable balance".[93] It is sometimes suggested that this duty itself does no more than reflect, in particular circumstances, the duty to act for proper purposes and the duty to take into account relevant considerations.[94] However, *Ivanishvili* appears to regard the duty of impartiality as a facet, not of those duties, but of the duty of good faith in its adjectival form.[95] Perhaps there is nothing wrong with recognising that good faith, in some general sense, is the taxonomical basis for other duties. But this should not be allowed to detract from the precise sense in which the duty of good faith contains its own specific content. Thus, the duty of good faith may in some situations overlap with the duty to act for proper purposes, but they remain importantly distinguishable. As Nolan explains:

> Clearly, a power can be used in good faith but for an improper purpose. The tests of good faith and proper purposes are conceptually distinct … trustees cannot make an appointment to a beneficiary in order to benefit someone who is not a

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85 *Ibid* at [238]–[248].

86 See *supra* note 67.

87 *Ivanishvili*, *supra* note 1 at [46].

88 To borrow a phrase from Lord Macnaghten: *Reddaway v Banham* [1896] AC 199 (HL, Eng) at 221.

89 *Eg*, *Nestlé v National Westminster Bank Plc* [1994] 1 All ER 118 (CA, Eng) [*Nestle*].

90 *Eg*, *Grand View Private Trust Co Ltd v Wong* [2022] UKPC 47 [*Grand View*].

91 *Pitt v Holt* [2013] 2 AC 108 (SC, Eng).

92 Such a conflict often arises between income and capital beneficiaries, where the former prefer wasting assets with high income, and the latter prefer stable investments with low income but higher capital returns.

93 *Nestle*, *supra* note 89 at 136–137.

94 *Edge v Pensions Ombudsman* [2000] Ch 602 (CA, Eng) at 627E.

95 *Ivanishvili*, *supra* note 1 at [47].

> beneficiary, however desirable they believe in good faith that may be for the family which includes both the beneficiary and the non-beneficiary.[96]

The law already contains a rich array of doctrines designed to address different aspects of fiduciary wrongdoing. The danger of adopting a broad, open-ended juridical concept, like that entailed by the duty of good faith under the Broad Reading, is that doctrinal texture may be papered over by contextual considerations. Yet, that body of doctrine reflects carefully considered decisions which respond to specific reasons, which in turn provide practical guidance in accordance with law's public function.

VI. Practical Implications

The topic of fiduciary remedies is of perennial commercial significance given the prevalence of fiduciary relationships, and the practical importance of its intricacies is illustrated by the quantum of the claim in *Ivanishvili* itself. Yet, as illustrated above, the exact principles applicable to custodial breaches of fiduciary duty remain a matter of uncertainty. This is an inevitable consequence of the development of an autochthonous law of fiduciary remedies. Developments like *Ivanishvili* shed some light on the matter, but one can only hope that further clarification will soon be forthcoming.

The more significant aspect of the decision is the Court's headline-grabbing rejection of the proscriptive thesis. As already noted above, the fiduciary's duty of good faith is non-excludable. Claimants alleging breach of fiduciary duty will naturally advocate adopting the Broad Reading and will likely incorporate claims based on breaches of the duty of good faith where available. Whether the Broad Reading or the Narrow Reading is ultimately correct, this means that defending fiduciaries are likely, at least in the immediate aftermath of *Ivanishvili*, to face a widening scope of factual allegations, which will potentially increase overall litigation costs. Further, whichever reading of *Ivanishvili* is taken, the decision makes clear that the nature of the good faith inquiry puts the focus squarely on the fiduciary's decision-making process. In this connection, the importance for fiduciaries of keeping good records is elevated. This is particularly so given the informational duties of fiduciaries: the general rule that trustees are under no general duty to give reasons for their decisions[97] does not extend to reasons for the exercise of administrative powers,[98] and in any event disclosure may well be compellable if litigation eventuates.[99] What seems inevitable is that, if the Broad Reading is adopted, fiduciaries will find themselves vulnerable to wide-ranging allegations which may potentially shift the balance of power in relationships. One suspects that if the door is thrown open too wide, subsequent courts may find themselves searching for ways to rein in the good faith doctrine, particularly in a case involving a more sympathetic fiduciary.

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[96] Richard Nolan, "Controlling Fiduciary Power" (2009) 68(2) Cambridge LJ 293 at 298. A different mental state is relevant to the doctrine of fraud on a power: the actual purpose for which the fiduciary acted. *Cf*, *Grand View*, *supra* note 90.

[97] See *Re Londonderry's Settlement* [1965] Ch 918 (CA, Eng).

[98] *Lewis v Tamplin* [2018] EWHC 777 (Ch) at [47], [52].

[99] *Eg*, *Breakspear v Ackland* [2009] Ch 32 (HC, Eng); *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 (CA, Eng) at 719.