# SOCIAL MEDIA INFLUENCE: A NEW FRONTIER IN PROPRIETARY RIGHTS?

## INTRODUCTION

One of the first legal principles that study of the law of trusts impresses is the need for certainty with respect to the creation or distribution of proprietary rights via this ancient vehicle. Indeed, this insistence on certainty has severely limited the ease with which trusts, whether express or implied, may be created. Such requirements, however, are eminently justifiable and, without them, trusts would be neither administrable nor enforceable. The influence of equity, however, has always allowed the courts a degree of flexibility and judicial creativity when examining the presence of certainty and its subsequent impact upon the creation of a trust. As such, it is no surprise that the courts have continued this evolutionary process. The judiciary has consistently proved itself willing to entertain novel arguments and probe previously unknown areas presented to them before applying them to the legal principles relevant to the creation of a trust.

In 2019, the Commercial Court of the Queen's Bench Division was called upon to resolve a superficially mundane contractual dispute between New Balance Athletics and Liverpool Football Club[1]. While inherently interesting from a contract and sports law perspective, it is argued that the most significant *dicta* in the case went unnoticed. Having failed on their primary arguments, Liverpool Football Club was ultimately saved by a somewhat minor clause focusing upon the calibre of named individuals and their value to various marketing activities. This clause effectively used the metric of social media influence to quantify the value of individuals, something unheard of less than two decades ago.

Few could argue that the 21st Century has experienced a dynamic shift in how members of society interact, however. This has only accelerated because of Covid-19, where virtual networking has become normalised, and more people are placing greater emphasis on interactions through social media than via more traditional methods. Increasingly, the importance of this virtual environment has become recognised, accepted and standardised, both socially and commercially. Social media companies have become highly valued and prized as corporate assets, with a growing number of individuals choosing careers as 'influencers' to gain public recognition, subsequent sway over their followers, and personal

[1] *New Balance Athletics, Inc v The Liverpool Football Club and Athletic Grounds Limited* [2019] EWHC 2837 (Comm)

wealth. The interaction between social media companies and these influencers has become increasingly organised and complex, making use of numerous metrics and algorithms to calculate any given person's level of influence and revenues based upon published content. These levels of influence are also used by more traditional companies to determine an influencer's social media reach and attractiveness to target audiences, leading to lucrative contracts and incentives in exchange for promotion of their brand.

Given the escalating significance of social media influence and the increasingly sophisticated ways in which it is measured, foreseeing the possibility of it being used to ascertain certainty for the purposes of establishing proprietary rights under a trust is no longer fanciful. It is the argument of this paper that both certainty of subject and object are likely to be affected by this metric in the future, with influence taking the form of both property capable of being held under a trust and also as a method of ascertaining beneficiaries. While this is yet to be truly tested judicially in the context of trusts, authority does now exist where social media influence has been recognised as a legitimate, predictable, and reliable system of measurement. Furthermore, beyond the mere practicalities of social media influence being used to create proprietary rights under a trust, there is also a judicial imperative to do so. Given the origins of equity, it is argued that a normative case exists for the law of trusts to allow settlors to protect this valuable form of novel property or distribute other assets to those who possess it.

## I. *NEW BALANCE ATHLETICS V LIVERPOOL FOOTBALL CLUB:* THE HIGH COURT CASE

Starting with the 2015–2016 English Premier League (EPL) season, New Balance Athletics (NBA) had been given the contractual rights to supply Liverpool Football Club (LFC) with its on-field kit and were also licenced to produce and distribute athletic apparel, including replica football merchandise, globally for LFC through its retail outlets. Given the prestige of LFC[2], this

[2] LFC is the most successful football club in English history – see e.g., Adam Smith, 'Liverpool top all-time major honours in England - can they further extend their lead with Champions League final win?' (*Sky Sports News,* 1 June 2022) <https://www.skysports.com/football/news/11096/12604610/premier-league-champions-liverpool-top-all-time-major-honours-in-england>. In 2022, *Forbes* ranked LFC as the fourth most valuable football club in the world – Mike Ozanian and Justin Teitelbaum, 'The World's Most Valuable Soccer Teams 2022' (*Forbes,* 26 May 2022). <https://www.forbes.com/sites/mikeozanian/2022/05/26/the-worlds-most-valuable-soccer-teams-2022-real-madrid-worth-51-billion-back-on-top/?sh=3dcb9f69286b> accessed 23 June 2022. LFC had also won the UEFA Champions League in June 2019.

arrangement proved highly profitable for NBA, and it was their desire to continue the commercial relationship beyond the current contract's expiry at the end of the 2019–2020 EPL season. As part of the renewal process, LFC had the contractual right to explore offers from other sportswear manufacturers if an agreement could not be reached with NBA[3]. Should an acceptable offer be received, the contract obliged LFC to present the terms to NBA:

> [New Balance] shall then have thirty (30) business days from the date of receipt of such third-party offer to Notify [Liverpool Football] Club in writing if it will enter into a new agreement with the Club on terms no less favourable to the Club than (i) the terms of this Agreement and/or (ii) the material, measureable and matchable terms of such third-party offer.[4]

Should NBA match the third-party offer and notify LFC of their wish to do so[5], LFC would then be obliged to enter into a new contract with NBA under those matched terms.

The relevant competing offer in the case came from US-based sportswear giant Nike, the result of detailed and prolonged prior negotiations with LFC. Given their high levels of worldwide brand awareness, global distribution networks, and the ability to manufacture higher quantities of licenced merchandise, Nike was seen as the ideal successor to the rights currently being enjoyed by NBA[6]. To this end, Nike's offer contained clauses that both they and LFC believed could never be matched by NBA, thereby evading LFC's obligation to renew a contract with NBA on the terms offered by Nike. NBA subsequently triggered their contractual right to match Nike's offer, which they believed they had achieved, thereby binding LFC to a new contract with NBA. LFC refused to do so and the matter was referred to the Commercial Court of the Queen's Bench Division.

LFC's arguments focused primarily on the ability of NBA to match the number of 'doors' through which Nike would distribute their sportswear and whether NBA had breached their obligation of good faith in their attempts to match Nike's offer[7]. After much semantic debate

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[3] NBA decided to allow LFC to explore these offers during the exclusive negotiation or first dealing period.

[4] *NBA v LFC* [2019] EWHC 2837 (Comm) at [3].

[5] *NBA v LFC* [2019] EWHC 2837 (Comm) at [4].

[6] NBA's consistent inability to provide enough apparel to meet demand, particularly during the 2018–2019 season, was the main reason for LFC's desire to switch supply to Nike. It was felt that their global manufacturing and distribution network would help to increase LFC's revenues from sale of their licenced sportswear.

[7] For more detail, see Fraser J's *dicta* in *Alan Bates and others v Post Office* [2019] EWHC 606 (QB) at [706–711].

on the meaning of 'doors' and arguments over how the numbers offered by NBA had been reached, Teare J was satisfied that there was no breach of NBA's duty of good faith.

Having failed with this primary argument, Teare J's decision instead turned on a somewhat ambiguous clause in Nike's contract offer, which stated that they would:

> Market LFC and/or Licensed Products through marketing initiatives featuring not less than three (3) non-football global superstar athletes and influencers of the calibre of Lebron James, Serena Williams, Drake, etc[8]

When matching this clause, NBA stated that they would:

> Market LFC and/or Licensed Products through marketing initiatives featuring not less than three (3) non-football global superstar athletes and influencers[9]

Conspicuously absent were the names of the three non-football athletes and influencers referred to in the marketing clause of Nike's offer[10]. It would not have been possible, of course, for NBA to offer the three persons named in Nike's marketing offer as they were all exclusively contracted to Nike. The offer did not, however, oblige Nike to use those three named persons in their marketing activities for LFC, merely to provide a minimum of three global superstar athletes and influencers of their *calibre.* Therefore, there was no reason for NBA not to match Nike's offer with three names from their own stable of athletes and influencers unless NBA was aware that they would not be of the same calibre as Lebron James, Serena Williams and Drake. This fact was picked up early by Teare J, but he did not elaborate upon the importance of the omission until much later in his judgment[11].

Ultimately, the fact that NBA had failed to match Nike's marketing offer proved persuasive and so LFC was not obliged to enter into a new contract with NBA and were free to do so with Nike instead. Unfortunately, given the time pressures involved, the decision was not appealed and so the opinions of the Court of Appeal and/or Supreme Court were never offered. Nevertheless, recognition that the calibre of a named individual was, indeed, quantifiable was important; focusing on social media influence as the key metric for ascertaining it, however, took the High Court even further down this pioneer's trail.

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[8] *NBA v LFC* [2019] EWHC 2837 (Comm) at [7].

[9] *NBA v LFC* [2019] EWHC 2837 (Comm) at [9].

[10] 'Stable' is the accepted term for a company's collection of sponsored athletes.

[11] *NBA v LFC* [2019] EWHC 2837 (Comm) at [100] and [74 – 83].

## II. THE QUANTIFIABLE METRIC OF INFLUENCE

The compelling aspect of the judgment when comparing the marketing offers of NBA and Nike was the suggestion that the 'calibre' of an individual could be measured with sufficient accuracy to determine whether that of Nike had been matched. The transcript of the trial makes for compelling reading on this subject, with dialogue between various parties demonstrating the detail that Teare J was provided with[12]. During cross examination of Chief Marketing Officer for NBA, Christopher Davis, by lead counsel for the defendant, Guy Morpuss QC, one such exchange occurred. Early in their analysis of the relevant word 'calibre', argument became focused on the influence of the superstars named by Nike:

> **GM**: It is right, isn't it, that New Balance does not sponsor any football athletes of the same calibre of Lebron James and Serena Williams?
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> **CD**: What is meant by "calibre"? That is what I was confused about.
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> **GM**: If one takes, for example, the ESPN list of the top 100 most famous athletes…this is the ESPN list of the world famed 100, what they classify as the topmost famous 100 athletes, it is an annual survey they do and I presume you are familiar with it?
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> **CD**: I am.
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> **GM**: We see there Lebron James, a very famous basketball player, in number 2, a Nike athlete? … His social media is the last column. It is not very well written, but he has 45.3 million followers…If we go down to number 17, Serena Williams is the number 1 female athlete on the list? …and obviously the number 1 in terms of tennis players, the most famous there, with followers of some 10.8 million, I think it is. The point I was making to you a moment ago is you don't have anyone that you sponsor, a non-football athlete, who is on the top 100 list, do you?
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> **CD**: That's correct.

[12] Special thanks must be given to Geoff Steward at Stobbs IP (https://www.iamstobbs.com/) for his opinions on my initial thoughts for this paper and for providing the official transcripts of the trial, which has proved invaluable.

**GM**: It is quite possible -- in fact, it is not just possible, it is what is done, and you are very familiar with this, to put a value on these sort of influencers of what they can add to a brand; that is right, isn't it?

**CD**: Yes, however, there are many different types of values for many different commercial purposes. So, there are so many different ways to measure reach, effectiveness, engagement, what business issue you are trying to solve. There is just a lot of subjectivity to the matter in terms of commercial effectiveness and credibility...

**GM**: What is happening here is you are valuing the different athletes by reference to their social media exposure and coming up with…a value for them by reference to their social media exposure?[13]

Lebron James, Serena Williams and Drake, of whose calibre Nike would provide not less than three 'non-football global superstar athletes and influencers' to market LFC products, were not the only persons named by both sides with respect to their influence. The exchange above, between Morpuss and Davis, went on to discuss then-Liverpool players such as Georginio Wijnaldum[14].

Following the cross-examination of Davis, lead counsel for the claimant, Daniel Oudkerk, then re-examined him. Davis continued his discussion of influence and provided a list of NBA's premier influencers to rival those proposed by Nike's marketing offer:

**DO**: Can you help his Lordship -- I mean, we looked -- I think we were looking at Twitter followings there, is Twitter the only social media out there? What else is there?

**CD**: I think there is Instagram followings, so there's a wide variety of social media platforms, Twitter, Instagram, Facebook, Snapchat. There's also many different ways to judge marketing effectiveness. We utilise Google search index, share of voice, earned media value, earned media share voice -- I know I'm getting into semantics here, but there is a wide range of calculations you can use to judge the effectiveness of an athlete to your brand…

[13] *NBA v LFC* [2019] EWHC 2837 (Comm) Transcript <18 October, 2019> at 153 – 156.

[14] *NBA v LFC* [2019] EWHC 2837 (Comm) Transcript <18 October, 2019> at 157.

**DO**: …in terms of athletes you have, can you give any examples of these thousand athletes if we are looking at the top end?

**CD**: Yes, so on the influencer side, we have Chen Yao who is arguably the most prominent influencer in China. He has 16 million Weibo followers and 4 million Instagram. We also have Jaden Smith, who is a significant influencer, and, on the athlete side, Kawhi Leonard, arguably the best player in the NBA, who was NBA Finals MVP this last year, chose not to have social media, so we judge his effectiveness by earned media value and we actually like the fact that he doesn't have social media because so many reporters are eager to report on him.[15]

These examinations by counsel for both claimant and defendant, therefore, provide intriguing detail with which Teare J could determine whether NBA had matched Nike's specific marketing clause. From reading of the trial transcripts and law reports it is also apparent that the focus of all parties was on the influence of the individuals in question and how it related to their 'calibre' or effectiveness. The transcripts of the trial use language loosely and, reading through them, terms such as 'value', 'influence' and 'calibre' are often used interchangeably. Indeed, it may be inferred that the influence of those being discussed in the case was synonymous with their value or 'calibre', making the semantics of the terminology redundant.

The cross-examination and re-examination of Davis also uncovered something that superficially seemed trivial: that Morpuss, Oudkerk and Teare J had no awareness of the celebrities being discussed[16]. As such, despite the humorous and socially revealing nature of these exchanges, it did effectively demonstrate that the decision was unaffected by the trial judge's underlying familiarity with the persons being referred to. Teare J did not, therefore, draw any conclusions on the influence of the three persons named by Nike because he was subjectively aware of their superstar nature and presumed others were too. Solely through the quantitatively measured influence of the persons discussed was Teare J able to determine that Nike's marketing offer had not been matched by NBA. His statement on this was clear:

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[15] *NBA v LFC* [2019] EWHC 2837 (Comm) Transcript <18 October, 2019> at 158 – 159.

[16] During these exchanges, Morpuss admitted that he had to look up who Lebron James was at 154; Teare J needed to ask Christopher Davis about what sport Giorginio Wijnaldum played at 157 of the 18 October transcript. At 46 of the 22 October October transcript, there is a humorous exchange between Oudkerk and Teare J about Drake, where Oudkerk needed to explain to the judge who Drake was and the nature of his profession.

> In my judgment the calibre of the named athletes or influencers can be measured. Mr. Davis said the exercise of measurement was "very subjective". I am not sure what he meant by that because a calculation based upon social media exposure is based on appearances which can be counted. It may be that different people have different views as to the most relevant way in which such appearances can be valued but some of those methods used (for example "max add value" or "share of voice value") will have a repeatable methodology. I accept that the calibre of the named athletes can be valued in a number of ways, but it would be unrealistic (and contrary to the evidence in this case) to say that their calibre cannot be measured.[17]

While he did admit that the 'calibre' of an individual could be *valued* in different ways, its measurement was empirically quantifiable and, despite not mentioning influence specifically in this paragraph, it would seem logical that it was, nevertheless, his focus. There can, therefore, be little doubt about Teare J's belief that influence was indeed measurable. Were the athlete's physical or technical prowess in their given sport being referred to instead, with respect to their value, it would not make sense to specifically reference social media and use marketing terminology such as share of voice (SV). The fact that Nike's offer had included not just athletes but also influencers reinforces this idea; the marketing offer was not simply about providing the best athletes to promote LFC's products, but instead those celebrities sponsored by them with the greatest influence.

Although the judgment in question centred on a dispute in the law of contract, its conclusions are fascinating and, it is submitted, may be used to extrapolate how influence may come to be used for the purpose of the creation and vesting of proprietary rights under a trust. Given the conclusion, therefore, that influence is quantifiable and how its importance has risen throughout the 21st Century, its use as a new objective determinant for the purpose of creating and vesting proprietary interests through a trust deserves examination.

## III. CERTAINTY: FLEXIBILITY MEETS PRAGMATISM IN THE 21ST CENTURY LAW OF TRUSTS

The requirement that an express trust must satisfy all three certainties, following *Knight v Knight*[18], is so well-established and understood that it has become trite. While there may be

[17] *NBA v LFC* [2019] EWHC 2837 (Comm) at [80].

[18] (1840) 3 Beav 148, 9 LJ Ch 354

some discretion inherent in aspects of equity, the finding of a trust is always governed by these requirements, despite some notable and often lamentable exceptions[19]. It therefore remains a vitally important legal principle and one that the courts have consistently enforced, however generous their interpretation and application of the certainties may be. The purported settlor must demonstrate sufficient intention to create a trust obligation rather than a gift or power or other disposition method; once this has been established, the trust property, beneficial entitlements and the objects of the trust must also be ascertainable.

Despite the need for certainty before a trust may be found, the courts have shown an historic and admirable willingness to adapt to changing socio-economic conditions in their judgments. Accepting that language may change between generations when declaring intention, that new property types may appear while antiquated ones disappear, and that terminology with respect to the classification of beneficiaries might mutate are all hallmarks of judicial evolution in this area.

It is not unreasonable, therefore, to believe that similar developments may not be made with respect to social media and its associated applications in property law. Whatever one's beliefs about the merits of social media and the impact that it has on the wellbeing of those who use it, there can be no debate about the importance that it plays in the lives of many people, crossing domestic and international borders[20]. From casual and infrequent interactions to more intense regular usage, social media and its implications have become increasingly familiar and part of our everyday lexicon.

Far removed from the pioneering days of social media sites such as Facebook and MySpace, which focused largely on virtual communities where people could connect and share

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[19] The finding of express trusts in *Paul v Constance* [1977] 1 All ER 195 and *Hunter v Moss* [1994] 3 All ER 215 are perhaps the nadir of certainty in English trusts law over the past 50 years. Development of the common intention constructive trust in the context of land also raises issues of certainty and legal principles applicable to institutional constructive trusts, e.g., *Stack v Dowden* [2007] 2 A.C. 432*; Graham-York v York* [2015] EWCA Civ 72. Also, the nature of a constructive trust imposed on those accepting secret commissions and bribes, *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, cf. the institutional approach of Millett LJ in *Paragon Finance plc v Thakerar & Co* [1999] 1 All ER 400, following the now-overruled treatment in *Lister & Co v Stubbs* (1890) 45 Ch. D. 1, confirmed in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (In Administration)* [2011] EWCA Civ 347.

[20] The United Kingdom was home to approximately 57.6 million active social media users as of February 2022. That translated to a social media penetration rate of 84.3 percent of the population of the UK. See S Dixon, 'Active social media users in the United Kingdom (UK) 2022' (Statista, 22 July 2022) < https://www.statista.com/statistics/507405/uk-active-social-media-and-mobile-social-media-users/#:~:text=The%20United%20Kingdom%20(UK)%20was,the%20population%20of%20the%20UK.> accessed 05 September 2022.

somewhat basic content, today's platforms have expanded beyond this function and have become versatile vehicles of commerce. Far from being the exclusive realm of younger users, social media companies are clever enough to realise the value of retaining social engagement aspects as these are more attractive to older users, are the focus of marketing to attract them, and provide a method for higher indoctrination that would be otherwise unavailable to this demographic. One can simply look at the finances of social media companies to understand their actual and potential commercial value[21].

This shift from largely social spaces to valuable platforms for advertising and marketing has also seen the rise of terminology that was largely unknown amongst the public even 10 years ago. Words such as 'influencer', 'selfie', and 'vlogger' have become commonplace and have now permeated the vocabulary of a large percentage of the UK populace[22]. Simple interaction with traditional media such as newspapers, radio and television will introduce even the most reluctant consumer to the existence, terminology and impact of social media.

As we become increasingly familiar with this 21st Century phenomenon and desensitised to the often-detached nature of virtual life, it is understandable that so many value their social media presence so highly. To some, their lives lived through the universe of social media are just as, if not more, important than their physical social interactions. This may be a result of social anxieties, comfort with a medium less reliant on traditional social skills and characteristics, or the commercial rewards that come from a successful social media presence. Wishing to receive validation through social media has always been an integral part of the medium, beginning with feedback such as 'likes' on Facebook posts and numbers of friends to star ratings/thumbs up and positive comments on YouTube videos. Today this sphere is dominated by much more complicated metrics such as Instagram followers, post views, YouTube subscriptions, re-tweets and Google Search Index, helping to explain why so many dedicate increasingly greater proportions of their time to management of their social media profiles.

Garnering recognition and notoriety amongst fellow social media afficionados are just a few methods of gaining the intangible quality generally referred to as 'influence'[23]. To truly increase

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[21] See, e.g., Meta at position 34 on Forbes' Global 2000 list with a market value of $499.86 billion < https://www.forbes.com/lists/global2000/?sh=690357eb5ac0.> accessed 05 September 2022.

[22] *A Dictionary of Social Media* is just one example of reference books published on this subject, further normalising this terminology for both lay people and academics: Daniel Chandler and Rod Munday, *A Dictionary of Social Media* (1st Edition, OUP 2016).

[23] Chandler and Munday, 'A Dictionary of Social Media': the impact of an individual's actions online on those of others, and the strength of this.

one's influence, however, one must be acknowledged by those outside the sphere of social media, including by those in the general public and/or specific commercial sectors including *inter alia* entertainment, business and sport. Those who use their influence for gain, usually commercial but also for the intrinsic value that such recognition provides to their external locus of identity, are commonly referred to as 'influencers'[24]. Because of their ability to affect the habits of others, whether buying, viewing or influencing sub-groups of individuals, influencers are highly sought after by a variety of organisations who wish to engage in influencer marketing[25]. Relevant PeerIndexes (PI)[26] are often used to measure influencers in specific spheres against one another, with those ranking highest often the most desirable and, therefore, able to demand greater rewards for their services.

Given the potentially high value of social media influence to those who wield it, whether for commercial or personal gain, it would seem anathema to the ethical and philosophical underpinnings of equity as a system of law to not allow it to be protected via trust. It cannot be denied that equity has come a long way since the unpredictable dictates of conscience in mediaeval courts. The norms underpinning equity, however, still have more than a little in common with those cited by Lord Ellesmere in his often-quoted judgment for the Earl of Oxford[27]. Indeed, the trend in the current century is very much a shift back towards the more flexible origins of conscience and away from the previous march towards a greater degree of certainty and predictability that had progressed for 150 years[28]. One need look no further than the recent judgment of Marcus Smith J in *Khan v Mahmood*[29] to discern attitudes present in the judiciary with respect to equity's flexibility and the use of conscience:

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[24] Chandler and Munday, 'A Dictionary of Social Media': A social influencer is a key individual with an extensive network of contacts, who plays an active role in shaping the opinions of others within some topic area, typically through their expertise, popularity, or reputation. A brand influencer in marketing is anyone in a position to have a direct impact on those who purchase products or services.

[25] Chandler and Munday, 'A Dictionary of Social Media': The strategy of promoting brands, products, or services with selected individuals who are judged most likely to exercise a significant influence on purchase decisions within a particular target market. Such influencers amplify brand exposure online and include, for instance, popular bloggers. This is similar to word-of-mouth marketing, but it does not necessarily involve explicit recommendations.

[26] Chandler and Munday, 'A Dictionary of Social Media': A metric designed to identify opinion leaders in a particular niche.

[27] *Earl of Oxford's Case* (1615) Chan. Rep. 1, analysed by D. Ibbetson, '*The Earl of Oxford's Case (1615)*' in *Landmark Cases in Equity,* C. Mitchell and P. Mitchell (eds) (Hart Publishing, 2012).

[28] See *Stack v Dowden* [2007] 2 A.C. 432*; Graham-York v York* [2015] EWCA Civ 72; *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, and *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, for more detail.

[29] [2021] EWHC 597 (Ch)

> *'Pennington v. Waine* makes clear that the test is not whether everything has been done which, according to the nature of the property, is necessary to be done to effect the transfer, but whether it is unconscionable to allow the donor to resile from his or her gift…It seems to me that this belief (that the Respondent and Appellant co-owned the contested property in law), albeit unaccompanied by concrete detrimental reliance, and combined with the Respondent's conduct that I have described, renders the Respondent's attempt to resile from his "gift" unconscionable.'[30]

*Pennington*[31] was a case subject to a large degree of academic and judicial criticism, based around the Court of Appeal's contention that a proprietary interest under a constructive trust could be created through a largely undefined finding of unconscionable conduct by the donor. While *Pennington*[32] could have been justified as a dubious example of proprietary estoppel, no such reasoning may be found in *Khan*[33]. Marcus Smith J reiterated the conclusions of Arden LJ, yet went even further than her own generous judgment, finding the Respondent's behaviour unconscionable in the absence of appropriate detrimental reliance[34]. Whatever one's opinions may be with respect to the specific cases cited here, equity has consistently shown itself willing to protect individuals from the unconscionable actions of others, even to the point of potentially abandoning the institutional model of the constructive trust in favour of its remedial counterpart.

It is not in doubt that there are serious problems associated with recognising social media influence as property that may be then capable of supporting proprietary rights. It is definitively not a *chose in possession* and, at present, does not exist as a *chose in action* either. Such problems are not insurmountable, however. The boundaries of property law have proved unsurprisingly fluid given its philosophical and normative roots[35], allowing trusts to be established over previously unrecognised subject matter and in favour of formerly untested beneficiary groups. The Law Commission is in the process of consulting on the legal recognition and protection of digital assets such as cryptocurrency and non-fungible tokens[36].

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[30] *Ibid.* at [44].
[31] [2002] 1 W.L.R. 2075
[32] *Ibid.*
[33] [2021] EWHC 597 (Ch).
[34] In *Pennington,* the Respondent had relied upon the assurance of the donor's agent by accepting the onerous administrative and fiduciary duties of a company director.
[35] See, e.g., James Penner and Henry Smith (eds.), *Philosophical Foundations of Property Law* (Oxford University Press 2013).
[36] Law Commission, *'Digital Assets Call for Evidence'* (2021), *'Digital Assets Interim Update'* (2021), and *'Digital Assets Consultation Paper'* (2022), all available at https://www.lawcom.gov.uk/project/digital-assets/ (last accessed 12 September 2022).

Such a move demonstrates that there is both a normative and moral[37] imperative to safeguard resources that are of such value and importance to so many. Historically, equity has often been at the forefront of such changes, with the trust proving itself to be an endlessly flexible vehicle for the purpose of achieving desired results. Equity can not only recognise influence as both the subject matter and determinant for ascertaining *cestui que trusts,* it is also morally and normatively bound to do so.

Because of its prominence in 21st Century society, it is only a matter of time before social media is subjected to judicial scrutiny with respect to trusts litigation. Just as litigants such as unmarried parties, illegitimate children, and co-habitees of shared land took advantage of changing socio-economic and political circumstances to assert their own proprietary rights, so too will those dealing in this new online environment. Indeed, this already occurs in social media marketing[38] where valuable social media influencer assets are gifted, sold, and purchased in the same manner as other intangible assets. Treating social media marketables such as influence in a similar manner would immediately raise the possibility of it becoming property subject to a trust. Certainty of objects is also likely to be affected since an intangible characteristic like social media influence may be used as an objective determinant for categorising beneficiaries. How influence is quantified remains fluid and complex, but methods such as Klout score[39] have been used regularly as a method of identifying the influence of individuals for the purpose of social media marketing. As these constantly adapt and change, the trend towards quantifiable metrics will only increase. Given the powerful nature of beneficiary rights under a trust and the consequences that may arise through their creation, the precision with which influence may be calculated is vital.

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[37] For more detail, see Joseph Raz, *Practical Reason and Norms* (Oxford University Press 1990).

[38] Chandler and Munday, 'A Dictionary of Social Media': A social network of producers and consumers of online content (as well as of offline commodities and services), in which likes, shares, mentions, and recommendations are a significant currency. It is a mixed economy in which likes can be bought, which features gift-giving as well as buying and selling, in which the roles of producers and consumers can blur and blend, and in which the role of influencers is crucial.

[39] Chandler and Munday, 'A Dictionary of Social Media': A scale of 1 to 100 for social media influence using a scoring algorithm based on the aggregation of social network data such as follower count, likes, mentions, retweets, and shares. Klout closed down on 25 May 2018, its parent company Lithium Technologies citing the social media influence scoring application was no longer aligned with its long-term strategy: Rachel Permutter, 'Klout Is Shutting Down, but Here Are 5 Social Media Tools You Can Use to Replace It' (*The Entrepreneur,* 25 May 2018) < https://www.entrepreneur.com/article/313320> accessed 01 July 2022.

## IV. BENEFICIARY RIGHTS UNDER A TRUST: THE POWER OF *IN REM*

The trust has been a potent and versatile method for the creation, vesting, and management of rights in a beneficiary, or *cestui que trust* since it evolved from the mediaeval use in the 16th Century[40]. In English law, beneficiary rights are recognised in the *numerus clausus*[41] but, unhelpfully, this does not tell us anything about their actual nature. The oft-presumed proprietary nature of these rights is perhaps the single greatest restraining force on the judiciary, given their superiority to personal rights and the consequences that can flow from their creation under a trust. Whether this is accurate, however, is debateable. Should beneficiary rights be personal in nature then the need for certainty is likely to be reduced and the historical strictness of numerous judgments departed from.

Personal rights, or rights *in personam,* typically consist of a duty owed by one party to another; there is no proprietary interest in the property itself and the beneficiary would not be able to assert such rights directly against those interfering with them. Should beneficiary rights be proprietary, or *in rem,* however, then they will bind all others and the beneficiary may directly defend any interference of their property by them. The *cestui que trust* is not simply provided with compensation as in the case of breach of *in personam* rights; they are treated as the true owner of the property in equity, despite their trustee(s) owning the property in law. This would result in important consequences, including the ability to trace or follow property misapplied through breach and recover ring-fenced property outside creditors of the trustee should they become insolvent.

The most notable advocate of the personal obligation argument was the renowned legal historian Frederic Maitland[42]. Robert Chambers has also posited on a beneficiary not possessing a directly enforceable proprietary right in trust property but, instead, merely a right against the trustee's own enforceable right in the property[43]. This idea of a right in a right was subsequently developed by Lionel Smith in 2008[44] and Ben McFarlane and Robert Stevens in

[40] The Statute of Uses 1535 effectively brought an end to the old enfeoffment to use. The trust gradually replaced it in name by the beginning of the 18th Century through various novel routes.

[41] B Rudden, *Economic Theory v Property Law: The Numerus Clausus Problem* in J Bell and J Eekelaar (Eds), Oxford Essays in Jurisprudence, Third Series (Oxford University Press, 1987).

[42] F.W. Maitland, *Equity, Also the Forms of Action at Common Law: Two Courses of Lectures* (Cambridge University Press 1929).

[43] Robert Chambers, *An Introduction to Property Law in Australia* (Thomson Law Book 2001) at [115]; see now the 3rd edition (2013) at [13.90].

[44] Lionel D Smith, 'Trust and Patrimony' (2008) 38 RGD 379.

2010[45]. In short, these arguments would enforce the idea of a beneficiary's right being *in personam* and obligatory in nature rather than proprietary, severely reducing its potency. This author, however, finds the arguments put forward by James Penner on this issue in several works more compelling[46]. Given the wealth of case law and academic and judicial commentary on the issue of a beneficiary's rights, it would seem rather specious to deny its proprietary nature based upon several rather anomalous examples. It will be the contention of this paper, therefore, that the rights of a beneficiary under a trust are *in rem* rather than *in personam.*

Such a situation, where the legal title holder of property is not treated as its true owner, is anathema to many legal systems based upon patrimony, including the majority of those found in Europe, but similar mechanisms are now being used around the world[47]. Whether or not these interpretations are true trusts in the traditional English sense is highly debateable, but those employed by many Commonwealth nations are much more familiar in their legal principles and operation. Countries such as Canada, New Zealand and Australia recognise trusts in a comparable form to those established in England, but key differences have developed over time. The evolution of trusts law in the Commonwealth illustrates our conservative approach in certain areas, with stringent restrictions remaining in place before a trust may be found with the subsequent vesting of proprietary rights in a beneficiary. Despite recent developments, the nature of constructive trusts remains institutional in England and Wales, with the more flexible and, arguably, more equitable remedial model adapted by Commonwealth jurisdictions explicitly rejected[48]. This restrictive approach might seem unfair at times, but the courts have often needed to tread a tightrope between legal certainty, the intention of the settlor, and perceived justice to the parties. While common law often favours certainty and, by extension, predictability, equity is often misconceived as being more focused

[45] Ben McFarlane & Robert Stevens, 'The Nature of Equitable Property' (2010) 4 Journal of Equity 1.

[46] See, e.g., Ben McFarlane, *The Structure of Property Law* (Oxford: Hart, 2008) at 22-26; J. E. Penner, 'The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust' (2014) 27 Can J L & Jurisprudence 473. It is beyond the scope of this paper to argue this matter properly, but the latter work is highly recommended for anyone wishing to investigate this issue further.

[47] This was the subject of a lecture given by this author at King's College London in 2015. See, e.g., the *fiducie* in France, the *trust interno* of Italy, the Anstalt in Liechtenstein, and the concepts of Benami and Waqf in Southern Asian and Islamic Law

[48] The remedial constructive trust effectively creates and vests proprietary rights through a trust imposed by the courts, the process similar to other equitable remedies such as specific performance. While each jurisdiction has different bases for the imposition of this remedial model, the institutional requirements required in England & Wales have been moved away from. Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 did accept *obiter* that the remedial constructive trust was possible in the future, however it was specifically rejected in *Re Polly Peck International plc (No 2)* [1998] EWCA Civ 789. See also the *dicta* of Lord Sumption in *Angove Pty Ltd v Bailey* [2016] UKSC 47.

on fairness and justice, with uncertainty and unpredictability flowing from this perceived flexibility.

Given the power of proprietary rights under a trust, including the trust property being ring-fenced from creditors of the trustee, the ability of the beneficiary to follow or trace their assets and recover them (or a correlative proportion) from wrongdoers and innocent volunteers under certain circumstances, and to claim increases in value in the property following breach, it is unsurprising that the courts have been cautious when adjudicating upon their existence. In the recent past, economic conditions where insolvency and creditor hardship have been prevalent have perhaps persuaded the courts to favour distribution of property *pari passu* to all creditors rather than find it held under a trust for the benefit of just one or several[49]. This ability to recover property to the exclusion of others is, perhaps, the single most important advantage to rights *in rem* over those *in personam* and the reason behind much of our litigation concerning the law of trusts. With the current cost of living crisis, it would be reasonable to expect this trend to reappear, placing further curbs on the finding of trusts and beneficiary proprietary rights. Only when the courts are satisfied that there is sufficient certainty for the creation of a trust, either express or implied, is one likely to be found.

## V. THE METRICS OF INFLUENCE

While the *dicta* of Teare J in *NBA v LFC*[50] provided judicial recognition of influence as a quantifiable metric, more analysis of its viability is needed before meaningful conclusions may be reached. While it is not within the scope of this paper to analyse the minutiae of social media marketing or how influence is valued by different companies and individuals, it is nevertheless possible to examine several key concepts referred to in the *NBA v LFC*[51] case.

### *Google Search Index (GSI)*

Often referred to now simply as ‘indexing’, GSI was one of the metrics specifically cited by Christopher Davis, with respect to how value may be assigned to an individual, during his examination in chief by Daniel Oudkerk.

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[49] This may be a factor in the decline in traditional implied *Quistclose*-type trusts: *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] A.C. 567; *Cooper v PRG Powerhouse* [2008] EWHC 498 (Ch); *Re EVTR* [1987] 6 WLUK 221

[50] *NBA v LFC* [2019] EWHC 2837 (Comm)

[51] *NBA v LFC* [2019] EWHC 2837 (Comm)

When someone searches the web for something using Google Search, the order in which results appear is determined by GSI. This ranking of websites is a result of indexing, the method for compiling and organising results after Google Search has used web crawler software to automatically search the web for relevant pages to add.

For influencers, having their names or companies appear higher on a relevant GSI is invaluable as there is a direct correlation between one's position and the number of visitors to their website or social media profile[52]. Unsurprisingly, many searchers are more likely to engage with the first results provided to them by Google Search rather than scrolling through numerous results on many pages[53]. There are many ways to improve one's indexing on a GSI but the process itself because it is automated and controlled by predictable algorithms, can be manipulated by influencers to improve their rankings and conversion rates. This process, known as search engine optimisation (SEO) is a marketable service and numerous individuals have themselves become influencers because of their proven success in improving the SEO of others[54].

GSI is, therefore, a readily available metric that may be used to calculate an individual's influence in any given sector and, by extension, their objective value to a particular brand.

***Promotional Quality Score (PQS)***

PQS is another metric used by Google to calculate the relative performance of a user's advertisement in comparison with others. Measured on a scale of 1-10, higher quality scores are sought by companies as they are a definitive method of determining how well an advertisement is performing. PQS is calculated by analysing an ad's performance with respect to three metrics: expected click-through rate, ad relevance, and landing page experience[55]. Google itself provides a diagnostic tool, which allows an advertiser to determine its own PQS so that it may be compared with those of its competitors.

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[52] 'Organic Click Through Rates by Position and Percent (2022)' (*SEO Inc,* 27 May 2022) <https://www.seoinc.com/seo-blog/much-traffic-comes-organic-search/> accessed 08 July 2022.

[53] The link between a search term and subsequent page click is referred to as a conversion rate.

[54] See, e.g., Neil Patel the co-founder of NP Digital, recognised as a top influencer and entrepreneur for his SEO services by the Wall Street Journal, Forbes, and *Entrepreneur* magazine (*NP Digital,* July 2022) <https://neilpatel.com/> accessed 08 July 2022.

[55] Click-through rate refers to the likelihood that your ad will be clicked when shown. Ad relevance is how closely an advertisement matches the intent behind a user's specific Google search, while landing page experience refers to how relevant and useful an individual's landing page is to those who click on their add.

PQS is, therefore, another method through which the value of an individual may be accurately measured and, therefore, their relevant level of influence. Influencers featuring in ads that generate a higher PQS will, naturally, be of greater value to companies and will also improve their overall influence over a particular demographic.

### *Share of Voice (SV)*

Another of the metrics specifically mentioned in *NBA v LFC*[56], share of voice is a well-established marketing term used to determine the total percentage of a particular audience targeted by a company that is possessed by that company[57]. In other words, it is a measure of a company's relative share of money when compared to its competitors, which is spent on advertising to reach a specific target audience[58]. The higher the SV, the more money is spent by a company on its advertising in relation to the total spent by all companies combined; they will also contribute a larger percentage of the overall advertising budget for a particular audience.

This may be calculated as[59]:

$$SV = \frac{\mathrm{A}}{\Sigma\,\mathrm{At}}$$

*Figure 1*

While it would seem logical that a higher SV would be desirable, the opposite is often true. Having a lower SV while being able to retain a high share of a particular market means that a company can spend less on advertising; larger and more successful brands will often have a lower SV in comparison with smaller or newer brands seeking to break into a particular market[60].

This traditional metric has now been adapted by social media to monitor an influencer and/or their brand's online visibility in comparison to others. Where traditional SV measures a brand

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[56] *NBA v LFC* [2019] EWHC 2837 (Comm).

[57] Knight, Christopher M. (n.d.), '*Understanding SOV (Share of Voice)*,' <http://www.ezine-tips.com/listtips/list-business/20000302.shtml> accessed 7 July 2022.

[58] Thomas Whipple and Lou Walcer, '*How Estimates of Share Of Voice (SOV) Affect Advertising Budget Decisions*' (2011) Volume 3, Number 7 International Business & Economics Research Journal 47.

[59] Where A = advertising spend by a particular brand and $A_t$ is the total ad spend by all brands to reach a target audience.

[60] See, e.g., Lidl's manipulation of SV, which allowed it to enter the competitive UK supermarket sphere in 1994 and increase its share of the market – Mark Ritson, '*The effectiveness factor that helped Lidl double its market share,*' <https://www.marketingweek.com/ritson-lidl-share-of-voice-market-share/> accessed 11 July 2022.

talking about itself with reference to its competitors, social SV looks at how much *others* are talking about an influencer and their brand. By analogy, therefore, the higher an influencer's SV, the more visible they are and, therefore, the greater their influence over a target audience.

Social SV may be calculated in a similar manner to traditional SV[61]:

$$SV = \frac{\mathrm{V}}{\Sigma\,\mathrm{Vt}}$$

*Figure 2*

One of the complications, however, is how the total number of mentions may be calculated; by comparison, determining the total ad spend of brands is relatively easy. Nevertheless, numerous applications do exist to calculate these. The most popular and respected use a Data Library compiled by Brandwatch[62], a company which uses custom web crawlers in a similar manner to Google when compiling GSIs to search application programme interfaces, data streams from third-party data providers, and receives data directly via relationships with specific sites to compile and analyse mentions of individual brands and the total number of mentions with respect to user search terms. This data is dredged from a variety of social media platforms including, *inter alia,* Facebook, Twitter, YouTube, Instagram, Tumblr, Reddit, Snapchat, and Rumble. The total mentions in relation to, e.g., a specific product or individual can then be compared to those from a specific brand or influencer.

Despite the complexity and variables involved, established applications using data collected and moderated by Brandwatch can, therefore, be reliably used to determine an influencer's SV. This data is routinely used by companies to determine the value of an influencer, as referenced by Christopher Davis during his examination in chief, and there is no reason why an individual's influence, therefore, could not be calculated as effectively by the courts.

### ***Earned Media Value (EMV)***

A modern metric, EMV is a measurement of engagement with social media content of a third-party brand[63]. Christopher Davis spoke of EMV as a metric that could be used by NBA to determine the level of social media engagement with their products as a result of established relationships with specific influencers. The higher the value, the more exposure and engagement their products were receiving on social media and, therefore, the greater the

[61] Substituting ad spend (A) for mentions (M).

[62] See https://www.brandwatch.com/

[63] See, *e.g.,* Christina Vasiliou, '*Earned Media Value: What it is and How to use it,'.* <https://www.creatoriq.com/blog/earned-media-value> accessed 23 August 2022.

likelihood of commercial revenue. As such, companies such as NBA and LFC will always want to accrue higher EMV scores, as this indicates that their products are being engaged with on social media, helping to spread product knowledge and awareness. When Davis spoke of the value of an individual to NBA, however, EMV takes on a slightly different appearance.

While EMV is an inherently valuable commodity to companies, it is also something that can be assigned to individuals to quantify their influence. As such, it is a metric actively sought in influencers before they are paid to endorse brands. Both NBA and LFC recognised this over the course of their litigation, referencing how EMV was a metric to be taken into account when determining the value of an influencer and, by extension, their 'calibre'. EMV is recognised as a more accurate indication of social relevance, with highest scores generated by those with established communities of followers and high retention levels. Influencers with higher EMV across a variety of brands are eminently more valuable to companies as a result of the social media 'buzz' that they can create around products that they endorse. It works in a similar manner to word of mouth, with products promoted by trusted influencers more likely to be purchased than those simply promoted via traditional advertising campaigns. As such, influencers such as Lebron James and Drake have inherently high expected EMV because of the influence that they have acquired, making them of high value or 'calibre' to brands.

EMV, like SV, is calculated by numerous companies and, as such, is another metric that may be reliably quantified. Indeed, quantification of all metrics discussed are often holistically gathered by the most respected and successful companies specialising in this area. While there are some subjective differences in quantification, consistent metrics are considered such as established platforms, engagement and posts[64].

EMV also links into SV, resulting in earned media share of voice, the proportion of total EMV enjoyed by a particular brand when compared to others.

## VI. SUFFICIENTLY CERTAIN? INFLUENCE AS AN OBJECTIVE DETERMINANT

Having examined some of the most important metrics used to quantify influence, it is now necessary to examine the feasibility of its use in ascertaining the certainties of subject and object with respect to establishing a trust. When examining the possibility of this somewhat

[64] Platforms include the standards of Facebook, Twitter, YouTube and Instagram but increasingly also TikTok, Pinterest and independent online blogs. Engagement includes comments across platforms, Likes, Favourites, Retweets, Pins, Shares and Views. Posts by brands, influencers, retailers and other publications are also crawled.

radical new metric's employment as a method for satisfying semantic certainty, it must be remembered how flexible the courts have historically been in this area. While the creation of proprietary interests should not be discretionary[65], there can be little doubt that the courts have been liberal at times with their decisions.

With respect to certainty of subject matter, developments involving the embrace of previously untested and often unusual property types are not difficult to find. Trusts have been upheld for personal property that at one time was novel: shares in companies of various types[66], bonds[67], and bank accounts[68]. Trusts have also been upheld over unusual property unlikely to be commonly encountered, such as interests in litigation[69] and even milk quotas[70]. The judgment of Ungoed-Thomas J in *Re Golay's Will Trusts*[71], where he was willing to accept 'reasonable' as a sufficiently certain objective determinant for the quantification of a specific sum of money from a wider whole amount of income generated by land is another that demonstrates the generosity of the courts. More recently, the invention and acceptance of cryptocurrency has challenged the judiciary again with respect to the subject matter of a trust[72]; if one may leave this property, unknown before the 21st Century, on trust for another, then it is not fanciful to extend the courtesy to other novel types of intangible property such as social media influence. Should an individual, who has acquired influence through their social media and commercial activities, wish to leave this potential property on trust for another then it is unclear why this should not be allowed. It is arguably more quantifiable than other property that has been upheld historically and its novel, intangible nature is also unlikely to be any impediment. Provided the settlor defines the influence to be left on trust with sufficient precision, there is every possibility that it could now form the subject matter of a valid and enforceable trust.

The courts have also been willing to adapt legal principles and judicial opinion on certainty of objects on numerous occasions, with history implying that it would not be unreasonable to

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[65] See, *e.g.,* the *dicta* of Lord Millett in *Foskett v McKeown* [2001] 1 A.C. 102 at 127.

[66] *e.g., Hunter v Moss* [1994] 1 W.L.R. 452; *North v Wilkinson* EWCA Civ 161; [2018] 4 W.L.R. 41; *Walbrook Trustees (Jersey) Ltd v Fattal* [2010] EWCA Civ 408; [2011] 1 All E.R. (Comm) 647.

[67] *Re Vinogradoff* [1935] WN 68.

[68] *Paul v Constance* [1977] 1 All ER 195.

[69] *Harrison v Tew*, The Times, November 30, 1988, CA.

[70] *Swift v Dairywise Farms Ltd* [2000] 1 All E.R. 320.

[71] [1965] 1 W.L.R. 969

[72] See Sagar, The Digital Estate (2018), §§ 4–85 to 4–95. Also, *Vorotyntseva v Money-4 Ltd* [2018] EWHC 2598 (Ch) *AA v Persons Unknown* [2020] 4 WLR 35 at [55–61]; *Ion Science Ltd v Persons Unknown* (unreported) 21 December 2020; *Wang v Darby* [2022] Bus LR at [55].

expect them to do so again in the future[73]. The competing *dicta* of Stamp, Sachs and Megaw LJJ in *Re Baden's DT (No. 2)*[74] is often cited with respect to application of the test for certainty of objects under a discretionary trust, but it must not be forgotten that the Court of Appeal ultimately accepted the vague and undefined term 'relative' as sufficiently certain. While this term has subsequently been defined in the Family Law Act 1996[75], no such precise legal definition of 'relative' existed at the time. Stamp LJ admirably dictated that the beneficiary group was only certain when 'relative' was changed to 'next of kin', yet his opinion was the only one of the three to truly give effect to the any given postulant test[76]. Both Megaw and Sachs LJJ were willing to allow the much broader and undefined term 'relative' to stand unaltered, despite the group clearly not satisfying the any given postulant test. Sachs LJ conceded that it would not have been possible for the trustee to say with certainty whether any given postulant was or was not a beneficiary of Mr Baden, effectively admitting that the test had not been satisfied. By allowing the beneficiary group to pass, therefore, the importance of evidential certainty was sacrificed in favour of the settlor's intention, a decision that was unlikely to have been taken lightly. That a Lord Justice of the Court of Appeal was willing to undermine an essential legal principle demonstrates the lengths to which the courts might go to extend previous boundaries and evolve well-established aspects of trusts law.

Looking at other dispositions of property, Browne-Wilkinson J (as he was then) upheld a testamentary gift subject to conditions precedent for the deceased's 'friends' in *Re Barlow's WT*[77], despite the multitude of legal and practical problems that this phrase raises. While admitting that the term would have been insufficiently certain for a trust, this distinction is

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[73] Adoption of the any given postulant test for discretionary trusts despite opposition from more conservative members of the judiciary is just one example - *McPhail v Doulton* [1971] AC 424.

[74] [1973] Ch. 9

[75] Under the Family Law Act 1996, s 62, 'relative' is defined in relation to a person as:
*'(a) the father, mother, stepfather, stepmother, son, daughter, stepson, stepdaughter, grandmother, grandfather grandson or granddaughter of that person or of that person's [spouse, former spouse, civil partner or former civil partner], or (b) the brother, sister, uncle, aunt, niece [, nephew or first cousin] (whether of the full blood or of the half blood or [by marriage or civil partnership)] of that person or of that person's [spouse, former spouse, civil partner or former civil partner]' and includes, in relation to a person who [is cohabiting or has cohabited with another person], any person who would fall within paragraph (a) or (b) if the parties were married to each other [or were civil partners of each other];*

[76] This more generous test dictated that the trustee was no longer required to compile a complete list of all beneficiaries for certainty of object to be present; instead, it was only necessary for the trustee to be able to state with certainty that any given postulant was or was not a beneficiary of the given trust. The shift from the 'complete list' test to the 'any given postulant' or 'is/is not' test was given effect by the House of Lords via a majority judgment in *McPhail v Doulton* [1971] AC 424.

[77] [1979] 1 All ER 296

extremely specious and indefensible. There is no justifiable reason why the certainty required for a gift should be any less than that for a discretionary trust, since both involve the transfer of proprietary rights, with the any given postulant test the most appropriate standard for both[78]. Nevertheless, despite the unfair fiduciary liabilities imposed upon the executors of Miss Barlow's estate with respect to administering the gift, Browne-Wilkinson J was satisfied that it should be upheld and the realities of employing his 'reasonable test of friendship'[79] were insufficient to dissuade him.

Such examples are unfortunate but not isolated; they do, however, illustrate how flexible and liberal the courts can be when determining whether the certainties of subject and object have been satisfied for a trust should there be compelling reasons to uphold one[80]. Even beyond this reality, however, is another argument, which suggests that influence may be even more acceptable to the courts with respect to certainty than many of the descriptors already approved of. As discussed above, ascertaining certainty has historically been achieved through the consideration and acceptance of numerous highly questionable metrics. It has also been demonstrated, however, that contrary to highly subjective terms already upheld, influence is capable of increasingly precise and technical measurement. As a result, the metrics of influence result in far greater levels of certainty and ascertainability than many of those previously upheld by the courts. Indeed, the measurement of influence is likely to only become more accurate and predictable in the future. It would seem clear, therefore, that a trust employing influence with respect to either its subject or objects would not require any courtesy similar to that extended by Sachs LJ in *Re Baden's DT (No. 2)*[81] with respect to evidential certainty.

Looking at practicalities, it would be entirely plausible for a trustee to consult with a third party, experienced in calculating influence and brand value, to ascertain the credentials of a prospective beneficiary and to survey the group of objects more generally. To this end, the

[78] Frustratingly, this has still not been upheld by the courts, with the problematic test from *Re Allen* [1905] 2 Ch 400 preferred instead. The problems associated with this test may clearly be seen in the judgment in *Re Barlow's WT.*

[79] It is not possible to have an objective test of a purely subjective relationship norm such as friendship..

[80] The most traditional justification being to give effect to the intentions of the settlor, particularly if the trust in question is testamentary in nature. See, e.g., the judgment of Lord Wilberforce in *McPhail v Doulton* [1971] AC 424 at 457.

[81] [1973] Ch. 9

desperately outdated provisions of the Trustee Act 1925, s.27[82] could be updated, allowing trustees to take advantage of this new and effective method of distributing property subject to such a trust. Unlike the *dicta* of Sachs LJ, this would give effect to the any given postulant test in the same manner as that envisaged by Stamp LJ, leaving the trustee without any 'don't knows'. Such a process would inevitably provide the trustee with much greater certainty and protection from liability than many of the often loosely defined beneficiary groups already accepted. The scrutiny allowed by the now-commercialised metrics of influence would also likely satisfy the much more stringent list test required by a fixed trust[83], something that certainly cannot be said of many beneficiary groups upheld for discretionary trusts.

## VII. ADMINISTRATIVE UNWORKABILITY: SPECTRE ON THE SHOULDER

This level of precision would also help to prevent another potential issue likely to arise when a trust is declared in favour of large numbers of beneficiaries: that of administrative unworkability. While this issue has often been a concern rather than a true barrier to trusts containing large numbers of objects, it has certainly never been tested in the context of a beneficiary group likely to consist of such a diverse and geographically fractured collection of individuals.

A doctrine first mentioned by Lord Wilberforce in *McPhail v Doulton*[84], the leading judgment remains that of Lloyd LJ in the Divisional Court in *R. v District Auditor Ex p. West Yorkshire Metropolitan CC*[85]. Despite Lord Wilberforce's contention that a trust in favour of 'all the residents of Greater London' should fail for being too wide to be administered, it is unclear why such a discretionary trust *must* fail if all beneficiaries could be ascertained with sufficient precision[86]. Trusts with large numbers of beneficiaries spread across the globe, such as unit trusts, are used frequently within investment portfolios to increase diversity and spread risk and yet do not run afoul of this potential check on their administrability[87]. Such trusts are often

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[82] The existing legislation provides that a trustee *'…may give notice by advertisement in the Gazette, and [in a newspaper circulating in the district in which the land is situated] and such other like notices…'* to aid them in distribution of the trust property.

[83] See, e.g., *Inland Revenue Commissioners v Broadway Cottages Trust* [1955] Ch. 20

[84] [1971] AC 424

[85] [1985] 7 WLUK 106

[86] See, *e.g.*, IM Hardcastle, 'Administrative Unworkability: A Reassessment of an Abiding Problem' [1990] Conv 24, at [25]. Lloyd LJ admitted in *Ex p. West Yorks MCC* that there was no uncertainty in the definition of the beneficiary group, merely that the size of the group made the trust unworkable.

[87] For further detail see, e.g., the Society of Estate Planners < https://www.step.org/>

run by trust corporations, with access to greater resources than a small number of trustees, so it is possible that this potentially makes them less unworkable from a practical perspective. Yet trust corporations could equally be a single legal person, who may be no more capable of administering a trust than a collection, however small, of non-corporate trustees. From a property law perspective, it seems odd that the courts would impose limits like this on a settlor's liberty to alienate their property as they wish.

Closely linked with the doctrine of administrative unworkability is the consideration of capriciousness, with the latter more understandable as a court-imposed barrier to a settlor's distribution of their assets[88]. Even so, judicial interference with an individual's freedom to spend their own property on any legal and valid purpose or to distribute it to ascertainable individuals feels uncomfortable. Only in cases where property will be applied for valid yet distasteful purposes or for the benefit of individuals who are themselves offensive to public policy should capriciousness really be seen as a legitimate interference with a settlor's wishes[89].

Rather than a fetter on the settlor's ability to dispose of their property, the most likely rationale for the doctrine is the court's protection of the trustee from possible liability for breach of trust. This feels a more justifiable reason for the doctrine's existence since it cannot be denied that a trustee's ability to survey the beneficiary group and make appropriate dispositions within it would be adversely affected if the trust's objects ran into many thousands or even millions. For a discretionary trust, the trustee's role is slightly less onerous in that they do not need to compile a complete list of the beneficiaries, as in a fixed trust[90], but it nevertheless becomes difficult to assess a group of objects effectively when their numbers rise. James Brown and Mark Pawlowski have offered an alternative viewpoint on administrative unworkability: that of economic viability[91]. Should a trust prove to be prohibitively expensive to administer then it should be considered unworkable as it is not economically viable to do so, similar to possible

[88] Templeman J in *Re Manisty's Settlement* [1974] Ch. 17 suggested that capriciousness could be found where no rational reason existed for a donor to benefit a specific class in the context of a special power of appointment. cf. the *dicta* of Megarry V-C in *Re Hay's ST* [1982] 1 W.L.R. 202 with respect to the same class of '*residents of Greater London*'.

[89] For an interesting potential purpose, see *McCaig v Glasgow University Court (No.1)* (1904) 12 S.L.T. 145 and *M'Caig v University of Glasgow* (1907) S.C. 231. While Scottish cases, the *dicta* of Lord Kyllachy at [242] is relevant and rational. *cf*., however, the *dicta* of Lord Low in the same judgment at 247.

[90] See *Re Baden's DT (No. 2)* [1973] Ch. 9 for further detail.

[91] James Brown and Mark Pawlowski, 'Re-thinking administrative unworkability in discretionary trusts' Trusts & Trustees (2021) 27(5): 363

considerations applied to the application of the Trustee Act 2000, s.5 with respect to a trustee's duty to take advice prior to investing trust property[92].

While an attractive angle on the approach discussed by Lord Wilberforce and Lloyd LJ, there are many questions that would still need to be answered before it could be applied by the courts, and it is unclear whether they would be willing or, indeed, able to determine the point at which a trust was considered to be economically unviable. If a settlor, for example, set up a trust that incurred a disproportionately high administration cost, then invalidating it for economic unviability and defeating the wishes of the settlor, particularly if the trust was testamentary in nature, would seem exceptionally harsh.

A trust for the benefit of those possessing a particular level of social media influence or perhaps subject to the influence exerted by the settlor is likely to provide proprietary rights to individuals across the globe rather than to a traditionally limited region or nexus of identity. Trusts set up for the benefit of one's followers across social media platforms is unlikely to cause any issue, since data on the identity of these individuals should be readily available, satisfying either the list or any given postulant tests. Given the accuracy with which influence may be measured, it is argued that these trusts are easier to administer than many dealing with numerous beneficiaries defined by more traditional metrics such as familial ties or organisation membership. The provisions of the Trustee Act 1925, s.27, as mentioned above, could also be updated and used in this context to combat any suggestion of this type of trust failing for administrative unworkability. As such, it is highly unlikely that such a trust, despite its diverse and numerous beneficiaries defined via previously untested qualifications, would fail for this reason.

## CONCLUSION

The case of *LFC v NBA*[93] had nothing to do with either proprietary rights or their distribution under a trust, yet its impact in these areas may be extrapolated through a detailed examination of Teare J's judgment and the trial transcripts. Discussion of marketing clauses focused on the 'calibre' of named individuals quickly identified the key issue of social media influence and engaged a litany of issues as yet untested in the field of proprietary rights.

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[92] Trustee Act 2000, s.5(3) provides an exception to this duty should it be unreasonable for the trustee to seek advice. Should the trust fund be small, for example, and the cost of acquiring advice was disproportionate then it would be possible for the courts to find seeking such advice unreasonable.

[93] *NBA v LFC* [2019] EWHC 2837 (Comm)

As a result, the decision has provided judicial precedent for their potential creation in favour of those identifiable through novel and often misunderstood metrics. Far from being obtuse qualifications without definition, determining the influence of individuals is possible via increasingly accurate formulas, with the results being so precise that they are now the foundation of highly lucrative commercial agreements by a growing number of the largest and most recognisable businesses.

Indeed, the metrics of influence discussed in *LFC v NBA*[94] have moved beyond those traditionally upheld by the courts. Unlike their predecessors, the quantification of influence has become an increasingly accurate and technical matter of mathematical calculation. This is only likely to improve in the future, adding a level of certainty previously only possible for traditional property types. As such, there is no reason why this novel type of intangible property could not form the subject matter of a trust, nor be used to identify the objects of such a vehicle.

The courts have proven themselves flexible with respect to new property types and methods for ascertaining beneficiaries. Influence, therefore, despite only emerging in the current century, has the very real possibility of being accepted judicially in the near future. Despite the geographic and numerical issues likely to arise in trusts of this nature, the methods for calculating influence are sufficient to avoid any issues relating to either certainty or administrative unworkability.

While it is unclear whether trusts employing influence as either a new form of intangible property or an objective determinant for ascertaining beneficiaries, it does appear that the creation of such a trust would not be unreasonable. The growing prominence of social media in both private and public life, together with its use in a wide variety of commercial transactions, however, cannot be denied. Its emergence into the realm of trusts law and proprietary rights, therefore, feels inevitable rather than unlikely.

[94] *NBA v LFC* [2019] EWHC 2837 (Comm)