Hilary Term
[2025] UKSC 10
On appeal from: [2023] EWCA Civ 305

JUDGMENT

Rukhadze and others (Appellants) *v* Recovery Partners GP Ltd and another (Respondents)

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Briggs
Lord Leggatt
Lord Burrows
Lady Rose
Lord Richards

JUDGMENT GIVEN ON
19 March 2025

Heard on 23 and 24 July 2024

Appellant
Lord Wolfson KC
Graham Virgo KC (Hon)
Watson Pringle
(Instructed by Signature Litigation LLP)

Respondent
Jonathan Crow KC
Tom Weisselberg KC
Tom Cleaver
(Instructed by Brown Rudnick LLP)

LORD BRIGGS (with whom Lord Reed, Lord Hodge and Lord Richards agree):

1. This appeal requires the Supreme Court to consider whether the time has come to make an important change to the equitable principles about the duties and liabilities of fiduciaries. The appellants acknowledge that such a change would involve departing from the ratio of two well-known and longstanding decisions of the House of Lords. They are *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 and *Boardman v Phipps* [1967] 2 AC 46. For that reason the court has assembled a panel of seven justices to hear the appeal.

2. The equitable principle in issue on this appeal, put at the highest level of generality, is that the undertaking characteristic of a fiduciary relationship that fiduciaries will act with single-minded loyalty toward their principals (or beneficiaries) means that the fiduciary must account to the principal for any profits which the fiduciary makes from that fiduciary relationship, unless the principal has given its fully informed consent to the fiduciary keeping them for himself. That duty to account for profits is usually called the profit rule: see eg *Lewin on Trusts,* 20th ed with 1st Supp (2023), paras 45-032 ff. Profits made from the fiduciary relationship are treated by equity as held upon constructive trust for the principal from the moment of their receipt by the fiduciary. In everyday language, the profits belong in equity to the principal and must be treated as such. Therefore the fiduciary must account for them, which means not merely revealing their existence, but paying them to the principal, or otherwise treating them as the principal's property. They are sometimes called secret profits but the fact that the principal knows that they are being made by the fiduciary is irrelevant to the duty to account, in the absence of the principal's fully informed consent that the fiduciary should keep them for his own account. In this judgment I will for convenience use the masculine to refer to the fiduciary because the individual fiduciaries in the present case were all men.

3. The profit rule originated as a duty owed by trustees to their beneficiaries, but it is equally applicable as between fiduciaries such as company directors and their companies. The directors are not trustees as such (because no trust property is vested in them) but they have powers and control over their principal's property and affairs which they must exercise as fiduciaries. The present case is about fiduciaries rather than trustees, but there is no difference in principle about the underlying profit rule, which is common to both.

4. Where profits are only made by the fiduciary after the fiduciary relationship has ended ("post-termination profits"), the fiduciary will still owe a duty to account if the profits have been derived from or made out of that former relationship. Typically the profits may be attributable to the development of an opportunity which the fiduciary learned about while performing his fiduciary role, or have been facilitated by the use of

information which he received while acting in the same capacity. Thus the duty to account for profits can outlast the termination of the fiduciary relationship, for example by the resignation of a director of a company. Disputes often arise as to whether post-termination profits fall within the duty to account, ie whether they have arisen out of that relationship, and (as will appear) the courts have used various formulae by which to describe the link between the fiduciary relationship and the relevant profits necessary to give rise to the duty to account for them. The outcome of such disputes is often very fact-sensitive.

5. But one thing has been clear: the former fiduciary is not allowed to defend his retention of the profit for himself by saying that he would have made it anyway, even if he had not committed a breach of fiduciary duty. Thus he may not say that, if asked, the principal or beneficiary would have consented, or that he could, for example by resigning earlier than he did, have made the same profit with no breach of duty. In this context, equity has invariably regarded these types of "what if" counterfactuals as illegitimate and irrelevant speculation, at least in the courts of England and Wales.

6. This appeal challenges the principle that counterfactuals of that kind are to be excluded. The appellants say that, wherever the issue arises as to whether a fiduciary is liable to account for profits, whether made before or after termination of the fiduciary relationship, the court must always answer it by reference to a common law "but-for" test of causation, ie by asking whether the fiduciary would have made the same profits if he had avoided any breach of fiduciary duty. This familiar common law test would, they say, bring much needed clarity, predictability, common sense and even justice to an area of equity which has been hitherto disfigured by imprecision, uncertainty, difficulty and occasionally excessive harshness in its effect. They point to what they call a similarly refreshing intrusion of firm common law principle into the field of equitable compensation, in *Target Holdings Ltd v Redferns* [1996] AC 421, and ask why the same improvement should not now be made to the equitable rules about accounting for profits. And they say that concerns about the difficulties of constructing the necessary counterfactual are much exaggerated in modern civil litigation, such counterfactuals being constructed on a daily basis wherever the court has to identify or quantify the loss flowing from a breach of contract, or the commission of a tort.

7. In order to decide whether it is appropriate to do so, it is necessary to look closely at the relevant equitable principles as displayed in the leading authorities, and then consider whether they either suffer from the alleged shortcomings or would be improved by the proposed change. The appellants very fairly have never suggested that their proposed formulation of a "but-for" test is actually to be found concealed in the current law. But there are some differences between the parties and even the members of this court as to what the law is, and it is fair comment that the applicable principles have not

always been stated with complete precision or accuracy in some of the leading cases. There is in particular a sharp difference between the parties as to whether some form of what may loosely be labelled "causation analysis" already forms part of the court's task in determining whether particular post-termination profits fall within the duty to account. There is also a difference among members of the court about whether the obligation to account for profits is best to be regarded as a distinct duty in itself or just a discretionary remedy for some other breach of fiduciary duty.

The facts

8. The decision for the court is not heavily dependent upon the detailed and complex facts of the present case. They can therefore be described in summary.

9. The lucrative business opportunity which lies at the heart of this case arose upon the death in February 2008 of an extremely wealthy Georgian businessman Arkadi Patarkatsishvili ("Badri"). It consisted of providing for a large reward asset recovery services for his family, both recovering his assets from their disorganised and often hidden locations around the world and resisting the claims of various governments and others to the same assets ("the Recovery Services").

10. Three key individuals came to be involved in seeking to design and provide the Recovery Services to Badri's family. The first was Eugene Jaffe, who owned and managed Salford Capital Partners Inc. ("SCPI"), a company incorporated in the British Virgin Islands. The second was the first appellant Irakli Rukhadze, who was a director of SCPI from 2004 until December 2009, but continued to work for or on behalf of SCPI until May 2011. The third was the second appellant Igor Alexeev who became a partner in the second respondent Revoker LLP ("Revoker") from April 2009, but who the judge found had come upon the business opportunity from SCPI. In addition the third appellant Ben Marson, an English solicitor, was employed by Revoker from 2009, and came upon the business opportunity from Revoker. Revoker was incorporated in this country under the Limited Liability Partnerships Act 2000.

11. The urgent need to meet the many hostile challenges to the family's continuing ownership and enjoyment of Badri's assets meant that the Recovery Services started to be provided by SCPI on an ad hoc basis, ahead of the conclusion of any agreement for them, soon after Badri's death, and continued on that basis through to 2009. It was a business opportunity which the judge found belonged to SCPI. Each of Jaffe, Rukhadze, Alexeev and Marson were active in the performance of the Recovery Services, thereby learning much of the very complex information about the location and nature of Badri's

assets in the process of working or acting for SCPI. Revoker was formed as part of the corporate structure under which the Recovery Services were to be provided, upon the agreement of terms with the family.

12. Negotiations for an agreement with Badri's family continued through 2010 and 2011. Meanwhile there was a falling out between Jaffe on the one hand and Rukhadze, Alexeev and Marson on the other, as a result of which they parted ways in May 2011. By then the individual appellants had resolved between them to seek a contract with the family for the provision of the Recovery Services in place of SCPI and Revoker. Prior to May 2011 they embarked upon preparatory steps to that end, including denigrating SCPI and Jaffe in the estimation of the family. Following their resignation from SCPI and Revoker, they continued to provide the Recovery Services on an ad hoc basis in place of those two entities, at the family's request, until an agreement with the family was finally reached in October 2012, via a newly formed corporate structure known as Hunnewell, of which the corporate appellants are all members. That agreement provided for annual management fees and a large capital sum once they passed a threshold of $500 million worth of net recoveries for the family, which they did in 2016. After a further dispute with the family about their entitlement the appellants were finally paid out by the family in 2018.

13. The respondents (successors to SCPI's original entitlement to the business opportunity to provide the Recovery Services) sued the appellants for an account of the profits represented by the payments made by the family just described. There was a split trial, of liability and quantum. At the liability trial the judge (Cockerill J) [2018] EWHC 2018 (Comm); [2019] Bus LR 1166 found that each of the individual appellants had committed breaches of fiduciary duty owed to SCPI and Revoker, in particular disloyalty in denigrating SCPI and Jaffe to the family, and that their resignation was undertaken in bad faith, ie with a view to taking for themselves SCPI's maturing business opportunity, in which they were successful. She did not decide whether the appellants had "diverted" the opportunity (in the sense that otherwise SCPI might have succeeded in obtaining it for itself). In the second trial she found [2022] EWHC 690 (Comm) that the appellants had made accountable net profits (after disbursements) of $179 million, but allowed 25% of that amount by way of equitable allowance for the appellants' work and skill in providing the Recovery Services and securing an agreement with the family, leading to a net award of $134 million plus interest.

14. The Court of Appeal (Popplewell, Phillips and Falk LJJ) [2023] EWCA Civ 305; [2023] Bus LR 646 dismissed their appeal. At all stages in the courts below the appellants reserved their right to contend for a departure from previous House of Lords authority so as to pursue their but-for causation argument in this court, but since the Court of Appeal

would have been bound to reject it they did not enlarge upon it there, and there is no treatment of it by either of the courts below.

The current law

15. The starting point is to bear in mind that the court is dealing with equitable principles. In *Boardman v Phipps* [1967] 2 AC 46, 123, Lord Upjohn said:

> "Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case."

It is therefore not surprising that the equitable rules or, I would respectfully call them, principles with which this appeal is concerned have been stated and re-stated in different factual contexts using different language no doubt particularly appropriate for the specific facts to which the principle was being applied. Although it will be necessary to cite some of the most well-known examples of the way in which the fiduciary's duty to account for unauthorised profits has been described, the task is not to arrive at some precise formulation as a sort of lowest common factor, but rather to elucidate the underlying concept which they seek to encapsulate. In that enquiry it is appropriate to bear constantly in mind the purpose for which the rule or principle exists, or the equitable objective which it serves.

16. The essential purpose of the rule that a fiduciary must not without his principal's consent keep for himself a profit from his position as such, and the related rule that a fiduciary must avoid placing himself in a position where his interest and his duty may conflict (usually called the conflict rule), is to protect or deter those who have undertaken an obligation of single-minded loyalty to someone else from being tempted by human frailty to fall short of that obligation. Authority for this may be traced all the way back to *Keech v Sandford* (1726) Sel Cas Ch 61; 25 ER 223. The trustee of the lease of the profits of a market for the benefit of an infant sought (during the term) a renewal for the infant's benefit from the landlord, who adamantly refused to renew for the infant's benefit. The trustee then took a new lease for himself. He was held liable to account to the infant. Lord King LC said, at p 62:

> "I must consider this as a trust for the infant; for I very well see, if a trustee, on the refusal to renew, might have a lease to

> himself, few trust estates would be renewed to cestui que use; though I do not say there is a fraud in this case, yet he should rather have let it run out, than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to cestui que use."

It matters not that the fiduciary in that case was a trustee in the strict sense rather than a non-custodial fiduciary such as a company director, as later cases show. In both cases the risks of relaxing the profit rule and conflict rule are the same, namely that human frailty will lead the fiduciary to prefer his own interest to that of the beneficiary or principal. The opportunity to renew the lease came to the trustee because of his status as such.

17. I have taken the phrase "single-minded loyalty" as the hallmark of a fiduciary undertaking from *Bristol and West Building Society v Mothew* [1998] Ch 1, 18 per Millett LJ. It was a case in which claims for breach of duty of care and fiduciary duty were bundled together, so that it was a suitable platform for an explanation of what is special about a duty or relationship being fiduciary. He said:

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary."

Millett LJ there describes the conflict and profit rules as duties which are facets of the core obligations of a fiduciary.

18. The essentially prophylactic role of the conflict and profit rules is perhaps most memorably explained by Lord Upjohn in *Boardman v Phipps* (supra) at p 123, just after his explanation about the high level of generality at which equitable principles have to be expressed. He continued:

> "The relevant rule for the decision of this case is the fundamental rule of equity that a person in a fiduciary capacity must not make a profit out of his trust which is part of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict. I believe the rule is best stated in *Bray v Ford* [1896] AC 44, 51-52] by Lord Herschell, who plainly recognised its limitations:
>
> > 'It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule....'"

That citation also illuminates the true relationship between the conflict and profit rules. The second is closely related to the first, but both serve the same prophylactic purpose.

19. References to the prophylactic or deterrent purpose of the conflict and profit rules continue into very recent times: see eg *Gray v Global Energy Horizons Corpn v Gray* [2020] EWCA Civ 1668; [2021] 1 WLR 2264, para 126 and *Murad v Al-Saraj* [2005] EWCA Civ 959, paras 74-75, per Arden LJ. There is some debate about whether the profit rule is just part of the conflict rule, or a separate (but related) rule in its own right. The editors of *Lewin* (op cit) at para 45-033(1) prefer the latter view, citing the following passage from the judgment of Oliver LJ in *Swain v Law Society* [1982] 1 WLR 17, 36:

> "That principle (*the profits rule*) is too well-known and well-established to need restating. It has been expressed in various cases in different ways – sometimes, as a branch of the rule that a trustee must not put himself in a position in which his own interests and those of his beneficiary conflict, and sometimes as merely an application of the principle that that which is the fruit of trust property or of the trusteeship is itself trust property. For myself I prefer the latter."

20. It is in my view of particular importance in the present context to note that the fiduciary duty to account for profits is a rule governing the conduct of fiduciaries which exists in its own right. It is a duty or obligation imposed by equity on all fiduciaries, as an inherent aspect of their undertaking of single-minded loyalty to their principals. It is not just a discretionary equitable remedy for the breach of some other duty, such as the conflict rule, nor is it necessarily triggered by some other breach, although it very often is. A fiduciary may come to generate a profit out of his role as such without committing any breach of trust. It may be an authorised use of the trust property, or of his fiduciary powers. But he must then account for that profit if it has been made from or out of his fiduciary position, not keep it for himself. The wrong which may lead to a court order for an account of profits is, in such a case, no more or less than the failure to account itself, by a fiduciary who wishes to keep the profit for himself. The duty to account for profits does not depend upon a demand for an account by the principal, or upon an order of the court. There is simply not the relationship between breach and damages for loss caused by the breach which has to be filled by rules as to causation and remoteness which are routinely applied by the common law, and which almost always involve the erection of a counterfactual.

21. The fiduciary duty to account for profits is not to be confused or conflated with the remedy of an account of profits which equity makes available to the owner of (usually) intellectual property which has been infringed, misused or misappropriated by a defendant. In such cases the account of profits is truly just a remedy. It does not depend at all upon the defendant being a fiduciary, and the defendant owes no prior duty to account to the owner of the intellectual property. It is imposed, as the result of an election by the owner, as one of the available remedies, by order of the court.

22. Numerous authorities show that the fiduciary duty to account is not just a remedy. The duty arises at the moment when the profit is received and, in terms of timing, marches hand in hand with the constructive trust which obliges the fiduciary to treat the profit as belonging to his principal. This was a central part of the Supreme Court's analysis of the consequences of the receipt of a bribe in *FHR European Ventures LLP v Cedar Capital*

Partners LLC [2014] UKSC 45, [2015] AC 250. At para 36 Lord Neuberger of Abbotsbury, giving the judgment of the court, said this, of the submission which the court eventually accepted:

> "A further advantage of the respondents' position is that it aligns the circumstances in which an agent is obliged to account for any benefit received in breach of his fiduciary duty and those in which his principal can claim the beneficial ownership of the benefit. [Sir George] Jessel MR in *Pearson's Case 5* Ch D 336, 341 referred in a passage cited above to the agent in such a case having 'to account either for the value … or … for the thing itself …' The expression equitable accounting can encompass both proprietary and non-proprietary claims. However, if equity considers that in all cases where an agent acquires a benefit in breach of his fiduciary duty to his principal, he must account for that benefit to his principal, it could be said to be somewhat inconsistent for equity also to hold that only in some such cases could the principal claim the benefit as his own property. The observation of Lord Russell in *Regal (Hastings)* [1967] 2 AC 134 quoted in para 6 above, and those of Jonathan Parker LJ in *Bhullar* [2003] 2 BCLC 241 quoted in para 14 above would seem to apply equally to the question of whether a principal should have a proprietary interest in a bribe or secret commission as to the question of whether he should be entitled to an account in respect thereof."

Later at para 47, Lord Neuberger firmly rejected the notion that the constructive trust could be regarded as remedial, imposed at some later date by the court in exercise of a remedial discretion.

23. As the editors of *Lewin on Trusts* (op cit) say at para 45-040, the constructive trust of profits is an "institutional" trust. They continue:

> "It is a 'true trust' in that the trustee holds the legal title to the asset constituting the profit as trustee for the beneficiary. Accordingly, the beneficiary takes the equitable interest in the profit and the trustee is accountable to the beneficiary because he holds the profit on trust and as a trustee."

Later they add that the recognition of a constructive trust of profits, and (I would add) the concurrent duty to account, involves no exercise of discretion by the court. Most recently the same analysis underlies the reasoning of Lord Hoffmann NPJ in *Hui Chun Ping v Hui Kau Mo* [2024] HKCFA 32 in relation to whether and if so when a claim against the fiduciary recipient of a secret profit could become statute barred.

24. Dicta in *Regal (Hastings) Ltd v Gulliver (Note)* [1967] 2 AC 134 are to the same effect. The main importance of the case lies in the application of the principle in *Keech v Sandford* to company directors (although that had happened before). It also contains a number of phrases which capture the essence of the necessary link between the fiduciary relationship and the relevant profit, to which I will have to return. On the present point however, Lord Russell of Killowen said this, at pp 144-145:

> "The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. *The liability arises from the mere fact of a profit having, in the stated circumstances, been made*. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account. The leading case of *Keech v Sandford* is an illustration of the strictness of this rule of equity in this regard, and of how far the rule is independent of these outside considerations." (my emphasis).

To the same effect is Lord Porter, at p 159:

> "Directors, no doubt, are not trustees, but they occupy a fiduciary position towards the company whose board they form. Their liability in this respect does not depend upon breach of duty but upon the proposition that a director must not make a profit out of property acquired by reason of his relationship to the company of which he is director. It matters not that he could not have acquired the property for the company itself—

> the profit which he makes is the company's, even though the property by means of which he made it was not and could not have been acquired on its behalf."

25. Important though it is to understand that a fiduciary's obligation to account for profits (other than those which he has been authorised to retain for his personal benefit) is a duty arising on the receipt of the profits, rather than just a remedy for breach of fiduciary duty, it does not of itself answer the sometimes difficult question whether a particular profit made, before or after termination of the fiduciary relationship, falls within the duty to account. Undertaking the role of a fiduciary does not, of itself, prohibit the fiduciary from carrying on other profitable activities which have nothing to do with the subject matter of the fiduciary relationship. The director of a company making cars may perfectly legitimately carry on an activity of betting on horse races out of working hours, and keep any profits he makes for himself. But the opposite would be true of an executive director of a company operating a horse racing stable, if his betting was informed by what he learned while at work, unless the company gives its consent. Similarly (subject of course to any contractual restraint) the director of a company may, after resignation, set up and make profit from carrying on a similar business to that of the company, provided that he does not use information, or pursue opportunities that came to him, from his fiduciary position in the company. The duty, which may well extend beyond the end of the fiduciary relationship, is to account for profits made from, out of, or otherwise sufficiently connected with, the fiduciary relationship.

26. Judges have over many years used a variety of different phrases to encapsulate that requirement for a link between the relationship and the profit. Sometimes they have done so when the existence of the requisite link is not in dispute. Sometimes they have used a phrase tailored to the facts of the case under review. Phrases have been used at different levels of generality. In the citations that follow I emphasise the key phrases used. In *Regal (Hastings) v Gulliver* (supra) at p 143 Lord Russell said:

> "…they may be liable to account for the profits which they have made, if, while standing in a fiduciary relationship to Regal, they have *by reason and in course of that fiduciary relationship* made a profit."

At p 144, in a passage already cited, he spoke of "those, who *by use of* a fiduciary position make a profit…".

At p 153 Lord Macmillan said that good faith:

> "does not absolve them from accountability for any profit which they made, if it was *by reason and in virtue of* their fiduciary office as directors that they entered into the transaction."

At p 154 Lord Wright spoke of profits:

> "acquired by him *by reason of* his fiduciary position, and *by reason of* the opportunity and the knowledge, or either, resulting from it ..."

Later, on the same page, he spoke of:

> "a secret profit *out of* the relationship".

And at p 156 he referred to liability to account for:

> "any benefit which he obtains *in the course of and owing to* his directorship".

27. In *Boardman v Phipps* (supra) at p 105 Lord Hodson opened his speech thus, following Lord Wright in *Regal*:

> "The proposition of law involved in this case is that no person standing in a fiduciary position, when a demand is made upon him by the person to whom he stands in the fiduciary relationship to account for profits acquired by him *by reason of* his fiduciary position *and by reason of the opportunity and the knowledge, or either, resulting from it*, is entitled to defeat the claim upon any ground save that he made profits with the knowledge and assent of the other person."

At p 117 Lord Guest said:

> "In the present case the knowledge and information obtained by Boardman was obtained *in the course of* the fiduciary position in which he had placed himself."

In the passage already cited, at p 123 Lord Upjohn spoke of:

> "the fundamental rule of equity that a person in a fiduciary capacity must not make a profit *out of* his trust".

28. More recent decisions have shown a tendency to describe the requisite link between the profit and the fiduciary relationship (or the breach of it) at an even higher level of generality. I have already mentioned Oliver LJ's description of the profit as the fruit of the trusteeship, in *Swain v Law Society* (supra). In *Murad v Al-Saraj* (supra) at para 112 Jonathan Parker LJ said that:

> "The judge's reference to the transaction 'which has involved his breach of duty' is important, for the fiduciary is liable to account only for profits which he has made '*within the scope and ambit of* the duty which conflicts or may conflict with his personal interest'" (a formulation which he derived from *Lewin on Trusts* 17th ed (2000), p 449).

29. In *Keystone Healthcare Ltd v Parr* [2019] EWCA Civ 1246; [2019] 4 WLR 99, para 18, in rejecting an argument that the profit had to be caused by the breach of fiduciary duty, Lewison LJ said:

> "I do not, therefore, accept Mr Mason's argument that the breach of fiduciary duty must be a cause of the profit. There must, of course, be *a sufficient degree of connection* between the breach of fiduciary duty and the receipt of the secret profit."

Similarly in *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704, para 97 Lawrence Collins J said that there must be "some *reasonable connection* between the breach of duty and the profits for which the fiduciary is accountable".

Most recently, in *Global Energy Horizons Corpn v Gray* (supra) at para 124 the Court of Appeal approved an earlier dictum of Lewison J in *Ultraframe (UK) Ltd v Fielding (No 2)* [2005] EWHC 1638 (Ch); [2006] FSR 17, para 1588, and stated at para 128 that:

> "There needs to be some *link or nexus* between the breach of duty proved and the profits for which an account is ordered, such that there is a *'reasonable relationship*' between them" (emphasis added).

30. The appellants criticised these recent expressions of the requirement for a requisite link between the fiduciary relationship (or the breach of it) and the profit as hopelessly vague, doing little more than state a general need without providing any real guidance as to how that need is to be satisfied. I consider that there would be force in that criticism, if those statements were taken out of context and used as if they expressed a comprehensive test. But it is first necessary to see what the recent cases say about what is not required, which have been interpreted by some as an adamant assertion that the establishment of the requisite link has nothing to do with causation.

31. In *United Pan-Europe Communications NV v Deutsche Bank AG* [2000] 2 BCLC 461, para 47, Morritt LJ said:

> "If there is a fiduciary duty of loyalty and if the conduct complained of falls within the scope of that fiduciary duty … then I see no justification for any further requirement that the profit shall have been obtained by the fiduciary 'by virtue of his position'. Such a condition suggests an element of causation which neither principle nor the authorities require."

To similar effect is the dictum of Jonathan Parker LJ in the *Keystone* case cited above.

32. The relevance or otherwise of causation in identifying profits falling within the duty to account came to a head in the *Gray* case. At first instance before Asplin J [2015] EWHC 2232 (Ch), para 132 it had been common ground that there had to be some causal link between the asset obtained and the breach of fiduciary duty. The judge naturally followed suit, and applied a causation test, but not a remoteness test, in her judgment. She said not that the full gamut of the common law but-for test was applicable, but that "some causal connection" had to be proved, between the asset (or profit) sought to be recovered and the breach of fiduciary duty.

33. That common ground continued into the Court of Appeal, but the court was having none of it. At para 128 in the judgment of the court (which contains the short passage already cited) it is said:

> "We now return to the question whether Asplin J was right to use the language of causation in this context. In our respectful opinion, she was wrong to do so, although we emphasise that we have not heard argument on the question, and it appears to have been common ground before her that the relevant test could appropriately be framed in terms of causation. The important point, in our judgment, is that the liability of a defaulting fiduciary to account for unauthorised profits is a strict one, which has always been jealously enforced by courts of equity. There needs to be some link or nexus between the breach of duty proved and the profits for which an account is ordered, such that there is a 'reasonable relationship' between them (as Lewison J said in the *Ultraframe* case). But the link or nexus does not need to be of a causal character. It will normally be sufficient if the profit arose within the scope of the defaulting fiduciary's conduct in breach of duty."

34. The extent to which a causal test of some kind is already built into the law about the identification of profits falling within the duty to account is the main issue about the current law which calls for close analysis. In the end it depends upon what is meant by causation and a causative test. If it is used as a label for the well-known causation tests which the common law routinely applies for the purpose of identifying the loss or damage flowing from a tort or a breach of contract, then it clearly has no place in this equitable context, as the further citations from authority will clearly show, and the parties agree. But if it is used in a wider sense, so as to refer to and then exclude any causative analysis of the question whether a person has made a profit out of his fiduciary position, then I would say that it goes too far. Causation, in the protean sense of asking whether event A played a causative part in the occurrence of event B is inherent in phrases such as "by reason of", "out of", "by virtue of", "owing to" or "resulting from" used in the well-known cases, as summarised above. But the analysis of causation in that "A led to B" sense differs from common law causation in this critical respect: it does not, whereas the common law test usually does, require the erection of a "but for" type of counterfactual.

35. Taking the common law test first: the question what loss has been caused by a breach of contract is usually answered (at least in part) by asking whether the alleged loss would have been suffered if the contract had been performed, rather than broken.

Likewise the object of an award of damages in tort is to put the claimant in the position which it would have enjoyed if the tort had not been committed. Put another way, the object of an award of damages in both cases is to put the claimants in the position which they would have enjoyed "but for" the breach of contract or the tort. Both processes of analysis necessarily involve the erection of a "but for" type of counterfactual, namely a hypothetical fact-situation where the contract had been performed without breach or the tort had not occurred. The measure of the loss and therefore the damages are set by measuring the difference in outcome between the actual and the counterfactual, subject to other important controls such as scope of duty, foreseeability and remoteness. This is not the occasion for any comprehensive summary of common law rules about causation, and the "but for" test may in many cases be only a preliminary stage in the causation analysis.

36. The cases in which the more protean causation analysis had been undertaken for the purpose of identifying accountable profits in the hands of a fiduciary have not involved or required the erection of any such "but for" type of counterfactual. The question is not, would the profit have been made even if there had been no antecedent breach of fiduciary duty, but did the profit owe its existence to a significant extent to the application by the fiduciary of property, information or some other advantage which he enjoyed as a result of his fiduciary position, or from some activity undertaken while he remained a fiduciary which the conflict duty required him to avoid altogether. For that purpose the court looks closely at the facts, ie what actually did happen, but does not concern itself with what might have happened in a hypothetical "but for" situation which did not in fact occur.

37. The determination of a court of equity to avoid a "but for" counterfactual in the identification of accountable profits is firmly established by clear and consistent authority. There may be said to be two potential aspects to the "but for the breach of duty" counterfactual. The first is what profit, gain or loss the claimant (principal or beneficiary) would have made but for the breach. The exclusion of that analysis as irrelevant is beyond question, and it is not sought to be introduced on this appeal. It is irrelevant mainly because an account does not operate as a means of equitable compensation for loss, but by way of requiring the fiduciary to disgorge that which he should have obtained, if at all, only for his principal. The authorities which state in the clearest terms that the question whether, but for the breach, the principal would have obtained the benefit is irrelevant include the *Regal case* (supra) and *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443.

38. The second, which is precisely that which the appellants do seek to introduce, is what profit the fiduciary would or might have made for himself if he had committed no

breach of duty. The clearest judicial expression of the impermissibility of such a "but for" analysis is to be found in the judgment given by Lord Radcliffe in *Gray v New Augarita Porcupine Mines Ltd* [1952] 3 DLR 1, a decision of the Privy Council on appeal from Canada. The appellant Gray had been a director of the respondent mining company, and had been held accountable for profits flowing from an agreement made with the company which was vitiated by a failure on his part to make the full disclosure of his interest required by his fiduciary position. He argued that the company would have made the same agreement even if he had made the requisite disclosure. At p 15 Lord Radcliffe said:

> "There may be an element of truth in all this, but in fact it constitutes an irrelevant speculation. If a trustee has placed himself in a position in which his interest conflicts with his duty and has not discharged himself from responsibility to account for the profits that his interest has secured for him, it is neither here nor there to speculate whether, if he had done his duty, he would not have been left in possession of the same amount of profit."

39. There is an equally trenchant rejection of any recourse to a "but-for" analysis in *Industrial Development Consultants Ltd v Cooley* (supra) per Roskill J at p 453:

> "When one looks at the way the cases have gone over the centuries it is plain that the question whether or not the benefit would have been obtained but for the breach of trust has always been treated as irrelevant."

Read in context it appears that Roskill J was there mainly concerned with the hypothetical question whether, but for the breach of duty, the principal would have reaped the benefit. Nonetheless his rejection of any "but-for" test is expressed in general terms.

40. In *Boardman v Phipps* it was found at trial that the defendants, one of whom acted as solicitor to the relevant trust, had not obtained the trustees' consent to the obtaining of the relevant profit for themselves. This finding was not appealed. Lord Guest said this, at p 117:

> "In the present case the knowledge and information obtained by Boardman was obtained in the course of the fiduciary position in which he had placed himself. *The only defence*

> *available to a person in such a fiduciary position is that he made the profits with the knowledge and assent of the trustees*. It is not contended that the trustees had such knowledge or gave such consent." (my emphasis).

It is not therefore a defence for someone who did not in fact obtain his principal's consent to assert that he would have been given it if he had asked. That would be to resort precisely to the second kind of "but for" counterfactual. It asks whether the fiduciary would have made the profit if he had done his duty and asked his principal for consent.

41. My acknowledgement that an element of factual causation often plays a part in the identification of profits for which a fiduciary owes a duty to account does not mean that causation, even of this non-"but for" kind, is a condition for the identification of such profits in every case. Sometimes fiduciaries receive or make profits for which they are plainly accountable, without the need for any causative analysis. For example, a company director who keeps for himself rents paid by a tenant of company-owned property is plainly liable to account to the company.

42. Nor does the assertion that the duty to account for profits is an obligation which does not always depend upon the identification of any prior breach of duty mean that proof of a prior breach of duty can play no part in answering the question whether particular profits fall within the duty to account. The making of post-termination profits from the use of information or opportunities that came to the former fiduciary while still in post will (absent consent) always be a breach of duty. The making of a profit will frequently follow on from a breach of the conflict duty. Where it can be shown that the activity which generated the profits had its origin in the fiduciary allowing his interest to come into conflict with his duty, such that the activity should not have been undertaken at all, then accountability for the resulting profit will usually follow. The facts of the present case, in which the appellants embarked upon a course of conscious disloyalty to their principals while still in office as directors, in furtherance of the obtaining of the principal's business opportunity for themselves, and then reaped the profits after leaving their fiduciary post, are a case in point.

Changing the law

43. The Supreme Court follows its predecessor the Appellate Committee of the House of Lords in deciding whether it should depart from earlier precedent, as set out in the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 issued by Lord Gardiner LC on 26 July 1966. It is worth setting it out in full:

> "Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
>
> Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.
>
> In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.
>
> This announcement is not intended to affect the use of precedent elsewhere than in this House."

44. To justify a departure in 2024 from the long- established principle that the duty to account for profits is not subject to a but for condition that the profit would not still have been made without any breach of fiduciary duty would require very serious justification, as the appellants accept.

45. The appellants' grounds for proposing such a change may be summarised as follows:

> (a) The present basis for the imposition of what the appellants call the remedy of an account of profits is draconian, works injustice to honest fiduciaries who have devoted time and skill and risked their own assets in a post-termination profitable business, and serves an objective which is no longer proportionate in modern society.

(b) While the courts of equity may in the past have been discouraged from constructing counterfactuals by the forensic difficulties and uncertainties of what used to be regarded as hypothetical speculation, modern procedural and forensic tools available to all the civil courts mean that this concern should be regarded as outdated.

(c) The supposed "release valve" from injustice constituted by an equitable allowance for the devotion of the fiduciary's time and skill is wrongly classified as exceptional, too uncertain in its availability, unpredictable in its outcome and unprincipled in its application to be fit for purpose, whereas a "but-for" condition applied across the board (save perhaps in cases of fraud or dishonesty) would replace the equitable allowance without any of those defects.

(d) Other equitable remedies (in particular equitable compensation) have been recently improved by the insertion of common law principles of causation, and it is time for the same modernisation to be extended to the remedy of an account of profits.

(e) English law is in this respect lagging behind the law of other common law jurisdictions and should now follow their lead.

(f) Academic criticism of the remedy of an account of profits ought to be given more weight than heretofore.

Each of those proposed justifications will be addressed in turn, while recognising that some of them overlap and that it is their combined effect which needs to be weighed in the balance.

(a) Injustice to honest fiduciaries

46. The appellants acknowledge that the no profit rule in its current form properly plays a deterrent role, *pour encourager les autres*, in maintaining the high standard of single-minded loyalty required of a fiduciary by buttressing the no conflict rule. But they say that this deterrent effect can be maintained by the court ameliorating the remedy while maintaining the same standard of liability. Fiduciaries will, they say, be sufficiently deterred from committing a breach of duty by the reputational consequences of being

found to be in breach in a public court, even if the claimant fails to obtain an account because of the effect of the newly imposed but-for test which they propose.

47. In my view this approach reveals a fundamental conceptual error in treating an order for an account of profits merely as a remedy for some other type of breach of fiduciary duty, such as the conflict duty. Although it may be regarded as having remedial effect in that common situation, it is not just a remedy, so that the introduction of the proposed but-for test would strike at the essence of the duty itself, as enshrined in the profit rule. An order for an account of profits is an order for the specific enforcement of a basic duty of trustees and fiduciaries, to treat any profit arising out of their fiduciary role as belonging to their beneficiaries. If such an order could be resisted by the trustee or fiduciary showing that he could have made the profit without committing a breach of fiduciary duty, then the underlying duty would be bound to be taken as attenuated by the routine constriction of the ambit of the court order for its enforcement. At present the inevitability of a duty to account for profits (subject only to a discretionary and uncertain equitable allowance, or an election by the claimant to take equitable compensation instead) is the principal disincentive apart from loyalty itself to fiduciaries from even entering into activities which involve a conflict between interest and duty. The proposed change would water down the simple duty not to go there at all without the principal's informed consent into a duty only to avoid making and keeping profits from a conflict situation which you cannot show that you would have been able to make anyway, eg by an earlier resignation, or by showing that the principal would have consented if asked. In the memorable, oft-cited, words of James LJ in *Parker v McKenna* (1874) LR 10 Ch App 96, 125:

> "the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that."

Although in *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443, 452 H, Roskill J said that, in the nuclear age, this dictum might seem something of an exaggeration, he added that:

> "it is eloquent of the strictness with which throughout the last century and indeed in the present century, courts of the highest authority have always applied this rule."

48. In his concurring judgment Lord Burrows prefers to accept the appellants' thesis that the order for an account of profits is best viewed as just a remedy for a wrong, and then to face it head on. He goes on to show that, even then, it should not admit the but-

for counterfactual for which the appellants contend. While I respectfully prefer the enforcement of duty analysis which I have sought to explain, I agree with his conclusion that, if the remedy for wrong approach were to be preferred, the appellants' submission fails nonetheless.

49. I am by no means persuaded that an apprehension of reputational damage by being found liable, but with no financial consequence, in a public court would have anything like the deterrent consequences of being held liable to account for profits. And which principal or beneficiary would risk engaging in very expensive civil proceedings against his fiduciary if the prospect of a financial recovery was (or risked being) watered down into a judicial slap on the wrists, by the application of a but-for test with all its uncertainties of outcome, dependent mainly upon hypothetical matters more likely to be within the fiduciary's knowledge than their own? Since many modern fiduciary relationships are governed by written contracts, the presence of an arbitration clause would mean that the claim of breach of fiduciary duty would have to be made and determined in private. And the now prevalent commercial mediation would have the same consequence, if successful.

50. The appellants submitted that the prophylactic role of the current law should be regarded as outdated because of the very large increase in fiduciary relationships in modern business. With respect I find this point, based simply upon increase in the number of fiduciary relationships, incomprehensible. Fiduciary duties have been an important part of what makes business distinguishable from an uncontrolled free for all for as long as there have been company directors, commercial agents, partnerships and legal services supplied by solicitors. The fact that such relationships have increased in line with the enormous expansion of business and financial services only serves to underline the importance of encouraging the making of business relationships involving single-minded loyalty, and the reinforcement of those relationships provided by long established law. Modern financial services regulation by no means makes that reinforcement provided by the law obsolete. On the contrary, much of the regulatory regime treats that fiduciary relationship as one of its foundations.

51. It may be that the underlying point which the appellants wish to emphasise is that modern business adopts *mores* more widely divergent from fiduciary loyalty than it used to do, so that the rigours of fiduciary liability are therefore out of place in the modern business world, and lead to results at variance with the ordinary expectations of modern business people. There was no evidence before the court to justify the assertion of such a change in *mores*, nor is there any basis for suggesting that this is something of which this court should or even could take judicial notice.

52. The appellants did not, and could not, submit that the fundamental reason for the strictness of the profit rule, namely human frailty in the face of temptation, has diminished, let alone gone away. The purpose of the rule is not that fiduciaries should routinely have to disgorge the profits of activities undertaken with their time and skill. Rather it is to deter them from undertaking that conflicting activity in the first place or, if determined to do so for their own benefit, first to obtain their principal's or beneficiaries' consent or, if it is withheld, to terminate the relationship and allow sufficient time to pass before starting their own profitable activity to be able to say that it, or its success, is not derivative of any advantage, information or knowledge of an opportunity which they gained while a fiduciary.

53. It was then submitted that many modern commercial fiduciaries either do not know that they are in a fiduciary relationship or, if they do, fail to understand the duties which that entails. That may be so, as it may be in relation to many areas of the law, although no evidence was put forward to that effect. But it is no reason to water down the long-standing principles which the law does apply where a duty of single-minded loyalty actually is undertaken. The answer to perceived ignorance of these basic and relatively simple principles is better public legal education, and better education and training for those embarking upon a fiduciary undertaking, not a retreat by the law itself. Nor should it be difficult for someone who has undertaken a duty of single-minded loyalty to another person to understand that such loyalty is likely to be undermined by conflict of interest, or by making and keeping profits on the side.

54. There is more force in the appellants' criticism of the current law on the basis of uncertainty if the test for deciding whether a fiduciary was accountable for particular profits was simply the requirement of a sufficient relationship or nexus between either the breach or the fiduciary relationship and the profits, shorn of any form of causation analysis. But as I have sought to demonstrate, the test is by no means as uninformative as might be suggested by the recent authorities if they are read as using those phrases as a descriptor rather than just a label. This appeal does not contain a factual platform upon which it would be safe or practicable for the court to lay down some more precise test, applicable across the board.

55. A full answer to the appellants' first ground is of course incomplete without reference to the discretion to grant equitable allowances, since they acknowledge that it acts as what they call a release-valve. It is sufficient to note, under this first heading, that the equitable allowance is a discretionary way of alleviating the potential injustice of transferring to a beneficiary the whole of the fruit of a fiduciary's hard work and skill.

(b) Outdated disinclination to construct counterfactuals

56. I would readily acknowledge that a supposed purely forensic difficulty in constructing necessary "but for" counterfactuals would not be a good reason for avoiding them, if they were otherwise a useful way of identifying accountable profits. But I would reject the submission that anything significant has changed in terms of the court's forensic ability to construct them, since the amalgamation of the courts of common law and equity 150 years ago. The leading authority for a but-for approach to the identification of the loss flowing from a tort is *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25. Lord Blackburn enunciated the general principle at p 39 that:

> "where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

The implementation of that common law principle has required the courts to construct counterfactuals for over 140 years (even assuming, contrary to the fact, that the principle was new in 1880). Those same courts have been administering equity alongside the common law for the whole of the same period. In my view the reason why equity has not done so in relation to an account of profits has nothing at all to do with forensic difficulty.

(c) Injustice better cured by a but for test than by equitable allowances

57. This is not the occasion for a detailed examination of the court's discretionary power to credit a fiduciary in an account of profits with an equitable allowance. This is mainly because the respondents were refused permission to appeal the equitable allowance of 25% which the judge granted the appellants on account of the work and skill which they devoted to gaining the profits for which they were found to be under a duty to account. Furthermore the appellants do not challenge the judge's application of the allowance if otherwise unsuccessful in their attempt largely to replace it with a but-for test. It is sufficient to summarise the discretion by saying that it compensates the fiduciary in an appropriate case for his devotion of work and skill, and perhaps the putting at risk of his own capital, in generating the relevant profits. The court applies a broad brush in determining the amount of the allowance, and it does indeed limit the potential for injustice in the traditionally strict enforcement of the duty to account. This ability to

temper the wind to the shorn lamb is a familiar equitable tool. Beyond that there is a fuller description of the equitable allowance in the judgment of the Court of Appeal in the present case at paras 112-123, with which neither of the parties before this court took exception.

58. In my view the equitable allowance better serves the objective of doing substantial justice than would the application across the board of a but-for test as a condition of the enforcement of the duty to account for profits. A fiduciary voluntarily undertakes the obligation of single-minded loyalty which the strict enforcement of a rule against the making of unauthorised profits is there to reinforce. Profits are no less unauthorised merely because, had the fiduciary asked for the principal's consent, it might have been granted. In many cases the principal or beneficiary receives from the account a benefit which could not have been obtained for them by the fiduciary, as in *Keech v Sandford, Regal v Gulliver* and *Boardman v Phipps*. Generally speaking that is the necessary price to pay for the strict enforcement of the profit rule. The cases in which it would be equitable to grant the accounting fiduciary an allowance for his work, skill and risk are of an infinite variety and occupy a range for which the remorseless application of a single bright-line common law rule incorporating a but-for test would be a very crude weapon indeed. Finally the deterrent effect of the profit rule is all the more effective if the fiduciary tempted to stray into a conflict situation knows, or is advised, that an account of all his profits is a virtual certainty, but the amelioration of an equitable allowance is only a judicial option, and subject to a high degree of uncertainty in amount.

(d) Equitable accounting should follow equitable compensation in admitting a but-for test of causation

59. It is undeniable that the twin cases of *Target Holdings Ltd v Redferns* (supra) and *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58; [2015] AC 1503 have transformed (or reformed) the law about equitable compensation by the erection of counterfactuals and the use of a but-for test. The process involved no departure from previous House of Lords or Supreme Court authority, of the type that is contended for by the appellants in this appeal.

60. But there is a more fundamental reason why the field of equitable compensation offers no example or template for reform in the present context. Equitable compensation is, as its label implies, about compensation for loss. But loss is irrelevant to an account of profits, as already explained. They are like chalk and cheese. Accordingly this ground fails in limine.

(e) The example set by other common law jurisdictions

61. The appellants sought to persuade the court that several other common law jurisdictions had introduced causation, and but-for causation in particular, to the identification of accountable profits, so that English law should be regarded as lagging behind. Two points were made. The first is that courts in Canada, Australia, Hong Kong and Singapore had recognised, contrary to the opposite as apparently expressed in *Murad v Al-Saraj* and *Global Energy Horizons Corpn v Gray,* that causation (including remoteness) does have a role to play in the identification of accountable profits. Secondly it is said that in some cases there has been an express adoption of a but-for test of causation, of the very type which the appellants propose should be introduced into English law.

62. As to the first point, I would acknowledge that there is an acceptance that some element of causation has a part to play. As explained above, I consider that this has long been implicitly recognised in English law as well, by the use of language descriptive of causation in the labels used to encapsulate the profit duty. The overseas cases which do so include *Strother v 3464920 Canada Inc* 2007 SCC 24; [2007] 2 SCR 177 (Canada), *Kao Lee & Yip v Koo Hoi Yan* [2003] 2 HKC 113; [2003] 3 HKLRD 296 (Hong Kong Court of First Instance) and *Warman International Ltd v Dwyer* (1995) 182 CLR 544 (High Court of Australia). They therefore represent no advance or departure from English law. The best explanation of what might appear to be dicta to the contrary in the *Murad* and *Gray* cases is that the courts were there thinking of, and ruling out, only but-for causation, rather than causation in any other form.

63. The second point rests on two cases, one from Singapore and the other from Australia. In *UVJ v UVH* [2020] SGCA 49, three brothers of a deceased testator became executors and trustees of his estate in 2000. They were already directors of three companies in which the estate had a very small minority shareholding. For many years thereafter they received directors' remuneration from the three companies, and periodically voted the estate's shares in favour of their re-appointment, as did the majority shareholders. Their two sisters, who were beneficiaries in the estate, sought an account from the brothers, and claimed that their directors' remuneration represented accountable profits. The brothers admitted that the conflict rule meant that they ought not to have voted the estate's shares in favour of their re-appointment without all the beneficiaries' consent but denied that their voting those shares caused them to continue to receive remuneration as directors.

64. The Court of Appeal of Singapore agreed. After a lengthy and scholarly review of authorities across the common law world, they concluded that they were not bound to treat but-for causation as irrelevant to the identification of accountable profits, notwithstanding dicta to that effect in what were (in Singapore) overseas jurisdictions including England. They concluded as follows, at para 98:

> "For the above reasons, it is our opinion that the profits sought to be disgorged via an account of profits must be caused by the breaches of fiduciary duty, whether this be that the trustee acted in conflict of interest or was guilty of some other breach. To find otherwise would be for equity to become an unruly horse where any breach by a fiduciary can be used to recover a profit however unconnected the two may be, and even if the profits would have been earned by the fiduciary in the absence of the breach."

65. On its face that looks like a clear endorsement of a rule or principle that liability to account depends upon there having been a prior breach of fiduciary duty, and that there must always be a but-for causative link between the breach and the profits, in the sense that the profit would not have been gained if there had been no breach. I would agree that if any breach of fiduciary duty could trigger an account of profits, however unconnected the two might be, then equity would indeed be an unruly horse.

66. But there are in my view two errors of approach in this dictum of the Court of Appeal of Singapore. The first is the assumption that a liability to account for unauthorised profits is always triggered by a prior breach of fiduciary duty. As already explained, a prior breach is neither necessary not sufficient to trigger an account of profits, although such a breach may well provide evidence of a sufficient link, and usually a causative link, between the fiduciary's office as such and the receipt of a profit. Nonetheless the duty to account for profits is an independent duty, not merely a remedy for some other breach.

67. The second is that, even if some form of causative link is material to the identification of accountable profits, it need not be (and in English law at least is not) a but-for type of causation requiring the erection of a counterfactual. This is borne out by the facts of the case. The brothers were re-appointed as remunerated directors of the three companies by the votes of the majority shareholders. The estate's tiny minority of shares played no significant part in that outcome. That is a conclusion which is plain from the actual facts, and required the erection of no counterfactual at all.

68. The second case is *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifespan Australia Friendly Society* [2018] HCA 43; (2018) 265 CLR 1, a decision of the High Court of Australia, a case about liability for what is there still called knowing assistance. At para 9 of the joint judgment of Kiefel CJ, Keane and Edelman JJ, they say that:

> "It is sufficient to show that the profit would not have been made but for dishonest wrongdoing."

69. Sufficient, of course, but not necessary. Furthermore there is in the same paragraph a ringing, fully quoted, endorsement of the dictum of Lord Radcliffe in *Gray v New Augarita Porcupine Mines* (supra) which I have earlier described as the clearest of all judicial statements of the inadmissibility of recourse to a but-for counterfactual about what profit, absent a breach of duty, the fiduciary would still have made. I do not therefore regard *Foresters* as at all supportive of the appellants' case.

70. Taking the overseas authorities as a whole, they largely confirm that causation (in the non-"but for" sense) has a part to play in the identification of accountable profits, but they do not begin to establish that a common law but-for causation test must be passed by a claimant, based upon the erection of a counterfactual. They are in my view clearly insufficient to command a "catch up" change in English law of the radical type which the appellants propose.

(f) Academic criticism

71. The court was referred to a significant part of the wealth of academic writing on the fiduciary duty to account for profits, some of which is indeed critical of the rigour of the principle and its capacity for causing injustice while pursuing a deterrent objective. Perhaps the most stringent is "Unjust Enrichment and the Fiduciary's Duty of Loyalty" by Gareth Jones, (1968) 84 LQR 472. He mainly attacks the bare majority in *Boardman v Phipps* for having reached the wrong conclusion about whether the defendants were in breach of the conflict rule, but he also propounds a restitutionary theory that an unauthorised profit should not give rise to a claim if it is not made at the beneficiary's expense. No-one in this appeal suggests that the duty to account for unauthorised profits has a basis in unjust enrichment.

72. Some of the academic material is supportive of the examination of the duty to account provided in this judgment, in particular "Identifying the Profits for which a

Fiduciary must Account" by Matthew Conaglen (2020) 79 CLJ 38. Irit Samet provides a wholehearted justification for the conflict and profits rules, rigidly applied, in her article "Guarding the Fiduciary's Conscience – A Justification of a Stringent Profit-stripping Rule" (2008) 28 OJLS 763.

73. There is much to learn from the concept of deemed performance which Lusina Ho identifies as being the essential justification for the profit rule in its current form, in her chapter "Deemed Performance in an Account of Profits" in *The Impact of Equity and Restitution in Commerce,* eds Devonshire and Havelock, (2019). With respect I do not share her view that some of the overseas cases, such as *Warman International Ltd v Dwyer,* really support a but-for approach to causation. Nor in her conclusion does she support such a rule.

74. Overall it cannot be said that the profit rule in its current form has given rise to anything approaching an academic consensus that change or reform is needed. There is justified criticism of dicta which appear to suggest that causation of any kind has no part to play in identifying accountable profits, to which I hope that the above analysis of those dicta is responsive. But that merely seeks to state more precisely what the law already is, rather than to change it.

Conclusion

75. For all those reasons I would not seek to reform, still less radically to change, the law about the fiduciary's duty to account for profits, or the means whereby equity identifies profits which are subject to that duty. None of the appellants' grounds for inviting this court to do so seems to me, on analysis, to carry significant weight, nor do they add up to anything significant in the aggregate. The rigour of the profit rule, together with the conflict rule to which it is closely related, continues to underpin adherence by fiduciaries to their undertaking of single-minded loyalty to their principals and beneficiaries, and the discretion to make allowance for their application of work, skill and risk in the taking of the account is a typically equitable answer to the occasional danger that the rigour of the rule will cause disproportionate injustice.

76. I would therefore dismiss this appeal.

LORD LEGGATT (CONCURRING)

77. I agree with Lord Briggs that the appellants' invitation to this court to change the law governing a fiduciary's liability to account for profits should be declined. But my analysis of the liability is different from his. This difference does not affect the outcome of the appeal. But in the belief that the common law develops best through the competition of ideas, I will set out my reasons for concluding that the appeal should be dismissed.

What the judge decided

78. The following brief summary of what the judge decided is sufficient to frame the legal issues raised on the appeal but belies the size and difficulty of her task. To find the relevant facts, Cockerell J had to dissect a large body of conflicting evidence presented by parties who raised a huge number of issues – factual, expert and legal – in pursuing their respective cases with "utter commitment, verging on venom" and with no legal expense spared: see [2022] EWHC 690 (Comm), paras 9-10. The trial was split into two parts. The judgments given after each phase of the trial are clear-sighted in their evaluation of the facts and a model of judicial craft.

79. The claimants (and respondents to the appeal) are a company incorporated in the British Virgin Islands, to which the claims of another such company have also been assigned, and an English limited liability partnership. On this appeal nothing turns on the differences between the interests of these three entities and I can refer to them for short as "the claimants". Equally, nothing turns on any difference in the positions of the three individual defendants (and appellants). The result of the trial was that these defendants were held liable to account for (ie pay) to the claimants profits made from exploiting a business opportunity and information obtained through working for the claimants in fiduciary roles. The business opportunity was an opportunity to assist the family of a deceased Georgian billionaire to locate and recover his assets which, at the time of his death, were held through complex and secretive arrangements in many jurisdictions. The defendants became involved in this project while the claimants were providing such "recovery services" to the family on an ad hoc basis and were negotiating the terms of a contract to do so. After resigning from their positions with the claimants, the defendants provided the recovery services themselves and, following protracted negotiations, concluded a contract with the family under which they ultimately earned substantial profits.

80. The claimants brought this action alleging that the defendants had wrongly diverted, for their own benefit, the opportunity to provide the recovery services. In her "Phase 1 judgment" the judge upheld the claim, finding that the defendants had breached fiduciary duties owed to the claimants by "appropriating a developing business opportunity which was to be regarded as an opportunity of the claimants": see [2022] EWHC 690 (Comm), para 1. More particularly, she found that the defendants had worked for the claimants in roles which gave rise to fiduciary duties of loyalty; that they had resigned from those roles with the intention of competing with the claimants to provide the recovery services; and that, before resigning, they had planned and taken preparatory steps to pursue the opportunity and had also acted disloyally by (among other things) disparaging in communications with the family the individual who ultimately controlled the claimants. The judge made no finding that the defendants had diverted the business opportunity from the claimants in the sense that their disloyal conduct was causative of the family's decision to engage them to provide the recovery services, but she considered it unnecessary to reach a conclusion on that issue.

81. As well as finding that the defendants had breached fiduciary duties, the judge found that they breached duties of confidentiality owed to the claimants by using information about the family's assets, the strategies devised by the claimants for recovering the assets and the progress made in negotiating terms of remuneration.

82. After the Phase 1 judgment was given, the claimants opted to seek the remedy of an account of profits. In her judgment following Phase 2 of the trial, Cockerell J found that substantially all the fees and other benefits which the defendants had received from the family in return for providing the recovery services, less the expenses incurred in providing the services, fell within the scope of the account; but that its scope did not extend to the value of certain investments which the defendants had made using (in part) such receipts or separate loans from the family. The judge rejected an allegation that, before the defendants resigned, a binding agreement had been reached that they should receive 50% of the profits earned from providing the recovery services. But she made a finding that, if all had gone forward absent a breach, it is most likely that the parties would have concluded such a profit-sharing agreement – although she did not regard this as legally relevant. The judge assessed the net profits for which the defendants were liable to account and held that an equitable allowance should be made of 25% of those profits to reflect the "exceptional deployment of time, effort and skill", and risks taken, by the defendants in providing the recovery services. This resulted in a total sum payable to the claimants of some US$134m plus interest.

83. Each side was given permission to appeal to the Court of Appeal against certain of the judge's findings, but those challenges all failed. In the Court of Appeal the defendants

reserved the right to advance on any further appeal to the Supreme Court the legal arguments which they now make.

The defendants' case

84. Those arguments are that the defendants should only be held liable to account for profits which were caused by their breaches of fiduciary duty; and that to determine whether there is such a causal connection a "but for" test should be applied. In other words, their liability should be limited to profits which, but for their breaches of duty, they would not have earned.

85. The defendants' primary position is that, applying this test, they should not have to account for any profits at all. It is, they say, clear from the judge's findings that, had they resigned before any preparatory and other disloyal steps were taken, they would still have provided the recovery services and successfully negotiated a contract with the family to do so, just as in fact happened. Thus, all or almost all the profits which the defendants in fact earned would have been made even if there had been no breach of fiduciary duty. Alternatively, they contend that, at a minimum, their liability should be cut in half. This contention is based on the judge's finding that, if all had gone forward absent a breach, it is most likely that the parties would have concluded a profit-sharing agreement under which the defendants would have received 50% of the profits earned.

86. In advancing these arguments, counsel for the defendants have expressly invited the Supreme Court to reconsider, and if necessary to depart from, two decisions of the House of Lords: *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378; [1967] 2 AC 134 (Note) and *Boardman v Phipps* [1967] 2 AC 46. We were also asked to consider whether a historic case on which those later decisions built, *Keech v Sandford* (1726) Sel Cas Ch 61; 25 ER 223, was correctly decided. Because of this potentially radical invitation to depart from precedent, a panel of seven Justices was convened to hear the appeal. In the way the defendants' case was argued, ably, by Lord Wolfson KC, I do not think that its acceptance would in fact require the court to hold that any of what I will call "the three leading cases" should have been decided differently. But to see whether this is so or not, it is first necessary to identify what was decided in those cases.

The three leading cases

Keech v Sandford

87. In *Keech v Sandford* a lease of the profits of a market was held on trust for a child. Before the lease expired, the trustee asked the landlord to renew it for the benefit of the child, which the landlord refused to do. The trustee then acquired the lease for himself. Lord King LC ordered him to assign the lease to the beneficiary of the trust and to account for any profits made since it was concluded. The Lord Chancellor said, at p 62, that:

> "though I do not say there is a fraud in this case, yet [the trustee] should rather have let it run out, than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to [the beneficiary]."

Although the "very obvious" consequence was not spelt out, the implication is that if, on a refusal to renew a lease for the benefit of the trust, trustees were permitted to take the lease for themselves, they might be tempted by self-interest to engineer such a refusal or at any rate not to try as hard as they otherwise might to get the lease renewed.

Regal (Hastings)

88. In *Regal (Hastings) Ltd v Gulliver* the defendants were directors of a company which owned a cinema and was seeking to expand its business by acquiring the leases of two more cinemas. The company formed a subsidiary to enter into the leases. The owner of the cinemas was unwilling to proceed unless either the directors personally guaranteed payment of the rent or the paid-up capital of the subsidiary was at least £5,000. The directors were not prepared to give personal guarantees and concluded that the parent company was only able to find £2,000. To make up the balance of the required capital, the directors bought shares in the subsidiary themselves. The venture was successful and the shares of the company and the subsidiary were later sold at a profit. The company (under its new ownership) then sued its former directors claiming an account of the profits made from the sale of their shares in the subsidiary. The claim failed before the judge and the Court of Appeal but succeeded on a further appeal to the House of Lords.

89. The Court of Appeal had considered it a good answer to the claim that the directors were not under a duty to acquire the relevant shares for the company and that, in buying the shares themselves, they were acting in good faith and for the benefit of the company which would not otherwise have been able to make a profitable investment. The House

of Lords disagreed. In a passage which has often been quoted, Lord Russell of Killowen said, at pp 144-145:

> "The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account."

Lord Russell then cited *Keech v Sandford* as an illustration of the strictness of the rule.

Boardman v Phipps

90. *Regal (Hastings)* was followed in *Boardman v Phipps* [1967] 2 AC 46. Boardman acted as solicitor for a family trust which owned a minority shareholding in a textile company. In acting as agent for the trustees, Boardman obtained information about the company and its assets from which he saw that the company was being mismanaged but that its shares had hidden value which could be realised if a controlling stake in the company was acquired. The trust did not have power under its investment clause or the financial means to buy further shares. But Boardman and one of the beneficiaries of the trust managed to buy almost all the remaining shares in the company themselves at prices well below their asset value. Once in control, they sold off parts of the business and generated a substantial return on capital for all the shareholders, ie themselves and the trust.

91. On a claim by one of the other beneficiaries of the trust, Wilberforce J [1964] 1 WLR 993 decided that Boardman and his co-defendant held the shares which they had purchased as constructive trustees for the trust and were liable to account to the claimant for a proportion of the profits made on the shares corresponding to his beneficial interest in the trust. The judge held that, in calculating the amount payable, credit should be given for the expenditure incurred by the defendants together with a "liberal" allowance to

reflect their skill and work in producing the profits. That decision was affirmed by the Court of Appeal [1965] Ch 992 and by the House of Lords [1967] 2 AC 46, although the House of Lords was divided three to two.

92. The ground on which the three law lords in the majority found the defendants liable, was that, in purchasing their shares, they had made use of information and exploited an opportunity which they had obtained through acting in a fiduciary capacity as agents of the trust. The only defence available would have been to show that the profits were made with the informed consent of the trustees, but that had not been shown: see Lord Cohen at pp 102F-103B; Lord Hodson at p 105B; and Lord Guest at pp 117D-118C.

The "profit rule"

93. It has become commonplace to describe the rule illustrated by these three leading cases as the "profit rule" and to express this rule as being that a trustee or other fiduciary "must not make a profit out of his trust": see eg *Boardman v Phipps* at p 123 (Lord Upjohn) and *Bristol and West Building Society v Mothew* [1998] Ch 1, 18 (Millett LJ), quoted by Lord Briggs at paras [17] and [18] above; also *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45; [2015] AC 250, para 5. Thus, according to *Snell's Equity*, 35th ed (2024), para 7-047:

> "The essence of the profit rule is that a fiduciary acts in breach of fiduciary duty where he or she makes a profit by reason or in virtue of the fiduciary office or otherwise within the scope of that fiduciary office."

This is the characterisation adopted by counsel for the defendants on this appeal. In their written case they identify the relevant duty as "the duty not to receive a profit from one's [fiduciary] position" such that "the receipt of profit constitutes the breach".

94. Far from capturing the essence of the rule, this formulation seems to me to misrepresent it. Indeed, the very label "profit rule" is something of a misnomer. It treats a consequence (in some cases) of a breach of a fiduciary duty as if it were itself a breach. There is nothing wrong in making a profit. To do so is not in itself a wrongful act; indeed, it may not involve any act by the fiduciary at all in so far as it simply consists in receiving money. If, however, the profit results from conduct which is a breach of fiduciary duty, the fiduciary may be required to pay over the profit to the principal as an alternative to being required to compensate the principal for loss caused by the breach. To say that a

fiduciary must not make a profit out of his trust or other fiduciary position fails to identify, and diverts attention from, the nature of the underlying fiduciary duty which, if a profit is derived from its breach, gives rise to a liability to account for the profit.

Misuse of trust property

95. The fiduciary duty which references to the "profit rule" obscure is the duty of a trustee or other fiduciary not to use property – or any information or opportunity which is to be treated as if it were property – of the principal for the fiduciary's own benefit, or indeed for any purpose outside the scope of the fiduciary's authority, unless the principal has given its informed consent. If, in breach of this duty, the fiduciary enters into a transaction which generates a profit, the fiduciary will be liable to account for the profit to the principal. As well as this personal liability, assets acquired by such a transaction are themselves treated as property of the principal through the imposition of a constructive trust.

96. The duty, and the liability to account for profits flowing from its breach, have long been recognised. In 1834 the principle was explained in clear terms by Lord Brougham LC in *Docker v Somes* (1834) 2 My & K 655, 664-665; 39 ER 1095, 1098:

> "Wherever a trustee, or one standing in the relation of a trustee, violates his duty, and deals with the trust estate for his own behoof, the rule is that he shall account to the cestui que trust for all the gain which he has made. Thus, if trust money is laid out in buying and selling land, and a profit made by the transaction, that shall go not to the trustee who has so applied the money, but to the cestui que trust whose money has been thus applied. In like manner (and cases of this kind are more numerous), where a trustee or executor has used the fund committed to his care in stock speculations, though the loss, if any, must fall upon himself, yet for every farthing of profit he may make he shall be accountable to the trust estate. So, if he lay out the trust money in a commercial adventure, as in buying or fitting out a vessel for a voyage, or put it in the trade of another person, from which he is to derive a certain stipulated profit, although I will not say that this has been decided, I hold it to be quite clear that he must account for the profits received by the adventure or from the concern. In all these cases … whatever [the trustee] gets he must account for and pay over. *It*

> *is so much fruit, so much increase on the estate or chattel of another, and must follow the ownership of the property and go to the proprietor*." (emphasis added)

The last sentence, which I have highlighted, uses an analogy which has often been used to elucidate the principle: the analogy of a fruit tree, whose fruit is naturally regarded as the property of the person who owns the tree.

97. The three leading cases to which I have referred show the extension of this principle to a situation where a fiduciary exploits for his or her own benefit information or access to a business opportunity which, as between the fiduciary and the principal, is regarded as the property of the latter. In *Keech v Sandford* the trustee exploited such an opportunity in taking the renewal of the lease for himself. In *Regal (Hastings)* the directors exploited such an opportunity which the company was actively pursuing when they bought shares in the subsidiary for themselves. Likewise, in *Boardman v Phipps* when the defendants bought shares in the textile company for themselves, they exploited information and an opportunity which was, in the words of Wilberforce J, "essentially the property of the trust" (p 1012). In each case the defendants were held liable to account for the profits which were the fruits of exploiting the information or opportunity of the principal.

Information and opportunities as property

98. In *Boardman v Phipps* [1964] 1 WLR 993, 1011-1012, Wilberforce J explained that it is not "the mere use in any circumstances of any knowledge or any opportunity which came to the trustee or agent in the course of his trusteeship or agency" which makes him liable to account. It is necessary that "the knowledge of which profitable use was made can be described as the property of the trust or of the business". Wilberforce J found that on the facts this requirement was satisfied as the knowledge ("of a most extensive and valuable character") which Boardman exploited in buying shares in the textile company was "obtained exclusively by Boardman acting as agent for the trustees as holders of 8,000 shares". There was thus a sufficiently close connection between the minority shareholding which was an asset of the trust and the knowledge and opportunity which the defendants turned to profitable use to treat the shares purchased by the defendants as themselves trust property.

99. The Court of the Appeal endorsed this analysis. Lord Denning MR identified the fundamental principle as being that if a person in a fiduciary position "uses property, with which he has been entrusted by his principal, so as to make a profit for himself out of it,

without his principal's consent, then he is accountable for it to his principal": *Boardman v Phipps* [1965] Ch 992, 1018. He gave as an example *Shallcross v Oldham* (1862) 2 J & H 609. In that case the master of a ship who was authorised to carry cargo at the best freight he could get, when he could not find a shipper willing to pay a suitable rate, bought a cargo of coal himself and paid freight for its carriage. On a claim by the owner of the vessel, the master was ordered to account for the profits he had made from the sale of the coal at its destination. The Vice Chancellor, Sir William Page Wood, held that the master had no right to employ the property entrusted to his charge (ie the ship) for his own benefit and applied the principle that "where a chattel is entrusted to an agent to be used for the owner's benefit, all the profits which the agent may make by using that chattel belong to the owner" (p 616).

100. Lord Denning explained the wider application of this principle, at pp 1018-1019:

> "Likewise with *information or knowledge* which [the agent] has been employed by his principal to collect or discover, *or which he has otherwise acquired*, for the use of his principal, then again if he turns it to his own use, so as to make a profit by means of it for himself, he is accountable … for such information or knowledge is the property of his principal, just as much as an invention is." (citations omitted; emphasis in original).

After referring to the finding of Wilberforce J that, on the facts, the knowledge acquired by Boardman was "essentially the property of the trust", Lord Denning said: "This finding is decisive of the case. The [defendants] used this property of the trust so as to make a profit for themselves without the consent of the trustees" (p 1020). Also instructive is the explanation of Russell LJ, at p 1031:

> "The substantial trust shareholding was an asset of which one aspect was its potential use as a means of acquiring knowledge of the company's affairs, or of negotiating allocations of the company's assets, or of inducing other shareholders to part with their shares. That aspect was part of the trust assets. … The defendants exploited that aspect - that potential use - and as a result were able to profit by acquiring other shares: for that profit they must on general principle be accountable."

101. On the appeal to the House of Lords different views were expressed about whether knowledge or information can properly be described as property. Of the majority, Lord Cohen accepted that information is not property "in the strict sense of the word": *Boardman v Phipps* [1967] 2 AC 46, 102G. By contrast, Lord Hodson "dissent[ed] from the view that information is of its nature something which is not properly to be described as property", observing that it "may be very valuable as an asset" and that the information acquired by Boardman "was capable of being and was turned to account" (p 107B-C). Similarly, Lord Guest saw "no reason why information and knowledge cannot be trust property" and considered that all the information which Boardman obtained in acting on behalf of the trust "became trust property" (p 115E). Of the minority, Viscount Dilhorne was willing to accept that "some information and knowledge can properly be regarded as property" but did not think that the information obtained by Boardman about the affairs of the company was "to be regarded as property of the trust in the same way as shares held by the trust were its property" (pp 89G-90A). Lord Upjohn acknowledged that information which it would be a breach of confidence to disclose "is often and for many years has been described as the property" of the person to whom the duty of confidentiality is owed and that "the books of authority are full of such references". But he insisted that "in the end the real truth is that it is not property in any normal sense but equity will restrain its transmission to another if in breach of some confidential relationship" (pp 127G-128A).

102. In expressing these apparently discordant views, the law lords were, I would suggest, mostly talking past one another. There is no single or universal concept of property. The term "property" can have different meanings depending on the context and the rights in view. Thus, to ask, for example, whether so called "intellectual property" is "really" property is to ask a meaningless question. What matters is not the label but the nature of the rights.

103. When rights are described as property rights, this is sometimes intended to signify that they are rights against the whole world and that they automatically attach to whoever is the owner of the object or item in question. If the term "property" is used in this sense, then plainly information cannot be property. I take this to be what Lord Cohen and Lord Upjohn meant when they said that information is not property "in the strict sense of the word" or "in any normal sense". But a central, and for some purposes defining, feature of property is the right of the owner to determine how an object is used as between that person and one or more others. Information can be the object of such a right. In that sense information can properly be regarded as property or – if we wish to confine the term to a narrower meaning – treated as analogous to property in deciding how the law should protect this right.

104. Thus, where, as between a principal (P) and fiduciary agent (A), P has the exclusive right to use and control the use of information, and A without the consent of P uses the information for A's own benefit, the law provides similar protection to that afforded when tangible property is used without the owner's consent. This protection includes imposing a liability on A to surrender to P any benefit derived from using the information. The liability may be enforced by ordering an account of profits. This remedy may be awarded when confidential information is misused: see eg *Peter Pan Manufacturing Corpn v Corsets Silhouette Ltd* [1964] 1 WLR 96 and *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109. The same principle applies to the misuse of protected "intellectual property". A patent, trademark or copyright confers an exclusive right to exploit the patented invention, trademark or copyrighted work. If another person does so without the consent of the owner of the right and makes a profit from doing so, that person may be ordered to account for the profit by paying it over to the owner of the right.

105. In the context of a fiduciary relationship, information about a relevant business opportunity is treated as property in the same sense. As between the parties to the relationship, the principal has the exclusive right to use the information so that the fiduciary may use it only for purposes authorised by the principal; and if the fiduciary makes use of it for other purposes, so as to make a profit, he or she may be ordered to account for the profit.

106. The rationale for making an account of profits available in all these cases is linked to the nature of right which the law is seeking to protect. If P has an exclusive right as against A to exploit the use of the object in question (whether it be a physical object or an intangible asset), and A without P's consent uses the object for A's own purposes, the law cannot undo A's wrongful use. But it can do the next best thing of requiring A to surrender to P the benefits obtained by A from A's use and in that way making it as if the wrong had not occurred. Such a remedy is justified even if A's use did not prevent P from using the object or if P would have made no use of it anyway. The reason is that P's right is not just a right that A must not interfere with P's use of the object; it is a right that A will use the object only for P's benefit. A violation of the right that A must not interfere with P's use of the object can be remedied by requiring A to compensate P for any loss which A's wrongful interference has caused to P. But this does not by itself provide an adequate remedy for a violation of the right that A will use the object only for the benefit of P. To put P in an equivalent position to that which P would have been in if the wrong had not occurred, the law treats benefits obtained from A's use as if they had been obtained on behalf of P.

107. Reasoning based on treating information about a business opportunity acquired by a fiduciary as a form of property in this sense seems first to have been employed in cases involving partnerships. In *Dean v MacDowell* (1878) 8 Ch D 345 the defendant while in partnership with the claimants set up another business of his own. When the claimants found out, they brought a claim for an account of the profits made by the defendant from this separate business. Although on the facts the claim failed, in stating the principles to be applied Cotton LJ said, at p 354, that:

> "if [the partner] makes any profit by the use of any property of the partnership, including, I may say, information which the partnership is entitled to, there the profit is made out of the partnership property, and therefore, of course, it must be brought into the partnership account. So, again, if from his position as partner he gets a business which is profitable ..."

108. In *Aas v Benham* [1891] 2 Ch 244, 257-258, Bowen LJ gave the following explanation of these dicta:

> "I think that when Lord Justice Cotton said that a partnership was entitled to the profits which arose out of information obtained by one of the partners as partner, he was speaking of information to which the partnership was entitled in the sense in which they are entitled to property … that is to say, information the use of which is valuable to them as a partnership, and to the use of which they have a vested interest."

Lindley LJ, at p 256, said that "information which the partnership is entitled to" meant "information which can be used for the purposes of the partnership". On the facts of *Aas v Benham* the test was held not to be satisfied, as although the defendant had made use of information obtained as a partner when setting up a company, the nature of that company's business and hence the purposes for which the information was used were wholly outside the scope of the partnership business.

109. When company directors came to be seen as owing duties in managing the property and affairs of the company equivalent to those of trustees or agents, a similar approach was adopted in relation to the use of information and business opportunities obtained in the course of and by reason of their role as directors. In the UK the duties of directors are now codified in the Companies Act 2006 ("the 2006 Act"). Section 175(1) of the 2006

Act puts in statutory form the duty of a director to "avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company". Section 175(2) provides:

> "This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity)."

The duty in this case

110. The statutory duties of directors set out in the 2006 Act do not apply here, as only one of the defendants (Mr Rukhadze) was ever a director of a claimant company and that company was not a UK company: it was incorporated in the British Virgin Islands. There is no equivalent provision in the BVI Business Companies Act 2004 to section 175 of the 2006 Act. But, as section 170(3) of the 2006 Act explains, the general duties of directors specified in sections 171 to 177 are based on certain common law rules and equitable principles as they apply in relation to directors; and the fiduciary duty recorded in section 175(2) not to exploit any relevant property or information or opportunity reflects the common law.

111. The claims made in these proceedings have - correctly in my view - been advanced as claims for breach of this duty. As pleaded in the particulars of claim, the fiduciary duties of which the defendants were said to be in breach comprised duties "not to appropriate assets belonging to [the company] (including business opportunities)" and "not to use assets belonging to [the company] for [the defendant's] own personal gain or for purposes inconsistent with [the company's] interests".

Relationship with the "conflict rule"

112. The statutory formulation of the duty in section 175 of the 2006 Act characterises the duty not to exploit any property, information or opportunity as a particular application of the duty to avoid conflicts of interest. Whether this characterisation is apt is a contested question.

113. In *Boardman v Phipps*, at p 123, Lord Upjohn described "the fundamental rule of equity that a person in a fiduciary capacity must not make a profit out of his trust" as "part

of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict." Several other distinguished jurists have expressed similar views: see eg *Furs Ltd v Tomkies* (1936) 54 CLR 583, 592 (Rich, Dixon and Evatt JJ in the High Court of Australia); Peter Millett, "Bribes and Secret Commissions" [1993] RLR 7, 10. Others have treated the duties as distinct: see eg *Chan v Zacharia* (1984) 154 CLR 178, 198-199 (Deane J in the High Court of Australia); *Swain v The Law Society* [1982] 1 WLR 17, 36 (Oliver LJ); and *Lewin on Trusts*, 20th ed with 1st Supp (2023), para 45-033 (stating that "there are two distinct, though allied rules, the profit rule being based upon the principle that an unauthorised profit which is the fruit of the trust property, or of the trusteeship, is itself trust property").

114. In his stimulating recent book *The Law of Loyalty* (2023), chapter 4 and pp 200-207, Lionel Smith has examined this question in depth and given what I consider compelling reasons for regarding the rules as separate. As he explains, although both rules are rooted in the same underlying idea of loyalty, they operate differently and, when infringed, lead to different remedies.

115. A conflict of interest exists when a person in a fiduciary position has an interest which compromises her ability to act in the best interests of the principal when exercising her fiduciary powers. The duty to avoid such a situation is "based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect": *Bray v Ford* [1896] AC 44, 51 (Lord Herschell). The mischief is that the fiduciary is in "such a position that he has a temptation not faithfully to perform his duty to his employer": *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch D 339, 357 (Cotton LJ). An example of such a situation is a sale of trust property to a partnership of which the trustee is a member: see *In Re Thompson's Settlement* [1986] Ch 99. The interest which gives rise to a conflict is typically (though not it need not be) a financial interest. For as AL Smith LJ said in *In re Lamb, Ex parte The Board of Trade* [1894] 2 QB 805, 820:

> "It is obvious - everybody knows it who has any knowledge of life - that when a man has a pecuniary interest, his mind is naturally warped in favour of his own interest. It is human nature, and no one can doubt it."

116. If the principal enters into a transaction which a fiduciary helped bring about in circumstances where the fiduciary had a conflict of interest of which the other party to the transaction was aware, the principal is entitled to have the transaction set aside. There

is no need to show – and it would often be impossible to determine – that the conflicting interest affected the fiduciary's conduct or judgment. The inherent danger that the fiduciary may have acted disloyally is reason enough to allow the principal to require the transaction to be undone.

117. The duty not to exploit information and opportunities which are treated as property of the principal (in the sense discussed earlier) serves a similar prophylactic purpose. It recognises that, human nature being what it is, there is a danger that a fiduciary may strive less hard to obtain a desirable business opportunity for the principal if, in case of failure to obtain it for the principal, the fiduciary is free to acquire it for himself. This is the risk to which Lord King LC referred in *Keech v Sandford* (see para 87 above). The prohibition on a fiduciary entering into such a subsequent transaction is thus designed to remove or neutralise what would otherwise be a potentially conflicting interest when the fiduciary is exercising her fiduciary powers. Knowing that any relevant property, information or opportunity may be exploited only for the benefit of the principal is calculated to ensure single-minded pursuit of the principal's interests. It thus shares the same aim as the rule which requires the fiduciary to avoid, and disqualifies the fiduciary from acting in, a situation of conflict of interest. In this way the two rules are related. The two duties, however, are not the same nor is the latter duty an instance of the former. This must be so, as transactions in which a fiduciary exploits relevant information or a business opportunity for personal gain do not necessarily involve a conflict of interest.

118. In *Keech v Sandford*, for example, the trustee was not exercising any power on behalf of the trust when he entered into a new lease in his personal capacity after the landlord had refused to renew the lease for the benefit of the child. His duty to act loyally in the best interests of the trust was therefore not engaged and he was not in a position of conflict of interest. Similarly, in *Regal (Hastings)*, when the directors purchased shares in the subsidiary, they were not exercising powers which they held as directors. As Lionel Smith points out, far from involving any conflict of interest, their purchases of shares *aligned* their self-interest with the interests of the company, as both then had a common interest in the financial success of the subsidiary: see *The Law of Loyalty*, pp 190-191 and 205. The same point can be made about *Boardman v Phipps*. Far from involving any conflict of interest, Boardman's purchase of shares in the textile company in which the trust held shares aligned his own financial interest with the interest of the trust in realising the value of the company's assets.

119. It was argued in *Boardman v Phipps* that, by buying shares in the textile company, Boardman put himself in a position of potential conflict of interest. Such a potential conflict was said to arise because Boardman was "the solicitor whom the trustees were in the habit of consulting if they wanted legal advice" (Lord Cohen, at p 103E-F) and he

might have been asked to advise the trustees, had they wished more shares in the company for the trust, whether an application to the court to allow them to do so was likely to succeed. The sanction of the court would have been needed for such a purchase as it was not a type of investment authorised by the trust instrument.

120. Of the three law lords in the majority, Lord Cohen accepted this argument, while making it clear that this point was not necessary to his decision: pp 103C-104A. So did Lord Hodson, although he acknowledged that it was "but a remote possibility" that Boardman would ever be asked by the trustees to advise on the desirability of an application to the court: pp 111B-112C. The third member of the majority, Lord Guest, did not mention the possibility of a conflict of interest. The sole ground of his decision was that, in purchasing shares, Boardman had used information acquired in a fiduciary capacity for his own benefit.

121. Viscount Dilhorne and Lord Upjohn, who dissented, rejected the argument based on a possible conflict of interest for reasons which are to my mind unanswerable. Subsequent authorities have endorsed Lord Upjohn's test that there must be "a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict" (p 124C). The possibility of Boardman being asked to advise the trustees about an application to the court fell into the latter category. As Viscount Dilhorne noted, at p 92F-G:

> "That there was such a conflict of interest and duty was not alleged in the pleadings. It was not an issue at the trial. No evidence was directed to it. If Mr Fox [a professional trustee and accountant who was one of the two active trustees] had been asked about it, he might well have said: 'I would not consider the trust buying the shares and so I would not consider an application to the court to allow it to do so.'"

This was against the backdrop that the trust anyway had no money available for investment (p 76E) and that Mr Fox had said that "he would not consider the trust purchasing the shares under any circumstances" (p 92C). To these points I would add another. Even if the fanciful possibility of the trustees seeking advice on an application to the court to allow the trust to buy shares had arisen, the fact that the trustees were "in the habit" of consulting Boardman would not in any case have prevented him from avoiding a conflict of interest by declining to advise on this question (without the trustees' informed consent).

122. None of this goes to show that *Boardman v Phipps* was wrongly decided. But that is because the ratio of the decision did not depend on identifying a possible conflict of interest. As discussed above, it rested on the principle that a person must not use for their own purposes information or an opportunity which, as between them, the principal has the exclusive right to exploit.

Duration of the duty

123. Once it is recognised that the duty not to exploit property, information or opportunities is distinct from the duty to avoid conflicts of interest, there is no difficulty in explaining why the former duty continues after the fiduciary has stopped acting as such. That it does continue has been decided in a line of cases concerning company directors who, after leaving office, exploited information and opportunities of which they became aware while they were directors of the company. This case law has been codified in section 170(2)(a) of the 2006 Act, which states that a person who ceases to be a director continues to be subject to the duty in section 175 (quoted at para 109 above) "as regards the exploitation of any property, information or opportunity of which he became aware at a time when he was a director".

124. If the duty not to exploit any property, information or opportunity really were (as section 175 of the Companies Act assumes) an application of the duty to avoid conflicts of interest, the survival of the duty after the person has left office would be indefensible because the duty to avoid conflicts of interest only exists while a person is acting in a fiduciary role. Once the person has ceased to hold such a role, she no longer has any powers to control or manage the principal's property or affairs. So there cannot be a situation in which she is at risk of being swayed by self-interest in exercising any such power. The person no longer has a duty to act in the best interests of the principal in making any decision because she is no longer in a fiduciary relationship with the principal or in a position to make any relevant decision in a fiduciary capacity. All such decisions now lie in the past. So no conflict of interest can arise.

125. It does not follow, however, that, after leaving office, a former fiduciary is free to use for her own purposes property belonging to the principal. Plainly she is not. The same applies to information and opportunities which are treated for these purposes as, or as akin to, property of the principal. The duty not to exploit such information and opportunities does not depend on whether the individual continues to act for the principal.

126. The continuation of the duty is essential to its operation. Like other fiduciary duties, it is directed to ensuring loyalty while the fiduciary is acting in that capacity. But

unlike other fiduciary duties, such as the duty to avoid a situation in which the fiduciary has a conflict of interest, it does so by imposing a prohibition which projects indefinitely into the future. Looked at from an instrumental point of view, the duty would provide only limited incentive to pursue the best interests of the principal single-mindedly if an opportunity not exploited for the principal's benefit while the fiduciary was in office could be exploited by the fiduciary for her own benefit once she had resigned.

127. In some cases judges have struggled to explain the survival of the duty because they have supposed, erroneously, that it is an instance of, or is based on, the duty to avoid conflicts of interest. As the duty to avoid conflicts of interest does not survive the termination of the fiduciary relationship and, with it, the duty to act in the principal's best interests, this has led them to look for disloyal conduct which occurred before the fiduciary left office.

128. In *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443 a managing director resigned from his position with the claimant company, falsely claiming to be ill. He then got for himself a business contract for which he had negotiated unsuccessfully on behalf of the claimant. Roskill J held that he was liable to account to the claimant for all the remuneration that he received under the contract. The judgment places considerable emphasis on findings that the defendant obtained and made preparations to use information for his own purposes at a time when he was still in office and thus owed duties to pass the information on to the claimant (which he did not do) and not to put himself in a position in which his duty to the claimant and his own private interests conflicted: see pp 452H-453B. As Lawrence Collins J subsequently observed, a more principled basis for the decision would have been that what the defendant did was to divert to himself the very type of contract it was his job to secure for the company: see *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704, para 90. This would still have been a breach of fiduciary duty if the defendant had done nothing disloyal while he was a director.

129. The true principle emerges more clearly from the decision of the Supreme Court of Canada in *Canadian Aero Service Ltd v O'Malley* [1974] SCR 592; (1973) 40 DLR (3d) 371. There two senior officers of a company, after resigning, pursued and obtained a contract which they had previously been involved in trying to win for the company. The court held that these defendants owed fiduciary duties not to obtain for themselves any property or business advantage belonging to the company or for which they had been negotiating; and that these fiduciary duties continued after their resignations. Laskin J (who gave the judgment of the court) said, at para 25, that the applicable principle:

> "disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing; he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, *or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired*." (emphasis added)

130. In *Island Export Finance Ltd v Umunna* [1986] BCLC 460, 481-482, Hutchison J accepted that the principles stated in *Canadian Aero Service* also represent English law, subject to the qualification that the last words of the passage quoted above (which I have emphasised) should not be read as precluding directors who resign from office from using their general fund of knowledge and expertise acquired in the course of their work in a new position.

131. In *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704, para 95, Lawrence Collins J endorsed that view. He also pointed out that a director is not under any fiduciary obligation in deciding whether to resign and "is entitled to resign even if his resignation might have a disastrous effect on the business or reputation of the company". He went on to say, at para 96:

> "In my judgment the underlying basis of the liability of a director who exploits after his resignation a maturing business opportunity of the company is that the opportunity is to be treated as if it were property of the company in relation to which the director had fiduciary duties. By seeking to exploit the opportunity after resignation he is appropriating for himself that property."

See also *Shepherds Investments Ltd v Walters* [2006] EWHC 836 (Ch); [2007] FSR 15, para 133 (Etherton J).

132. In *Foster Bryant Surveying Ltd v Bryant* [2007] EWCA Civ 200; [2007] Bus LR 1565 this statement of the underlying principle was agreed by the parties to be an accurate statement of the law: see para 8 (principle 9). Yet Rix LJ put a gloss on it when he said, at para 69:

> "In my judgment, Lawrence Collins J was not saying that the fiduciary duty survived the end of the relationship as director, but that the lack of good faith with which the future exploitation was planned while still a director, and the resignation which was part of that dishonest plan, meant that there was already then a breach of fiduciary duty, which resulted in the liability to account for the profits which, albeit subsequently, but causally connected with that earlier fiduciary breach, were obtained from the diversion of the company's business property to the defendant's new enterprise."

133. I disagree with Rix LJ that this is what Lawrence Collins J was saying in *CMS Dolphin*. In my view, Lawrence Collins J clearly *was* saying that the fiduciary duty survived the end of the relationship as director. I infer that Rix LJ put forward a different explanation because he supposed that, once a relationship which gives rise to fiduciary duties has ended, all the duties arising from that relationship must also cease. That led him to suggest that, to give rise to liability, an act done after the director's resignation must result from a breach of fiduciary duty which had already been committed.

134. This alternative explanation, however, is not a good one. The common pattern in this line of cases is that a director, after leaving office, wins for himself a contract which he had previously been involved in trying to win for the company, making use for that purpose of his knowledge of the business opportunity acquired through the work that he did when he was a director. In such a case the question whether the director made plans or took any preparatory steps before leaving office seems to me of peripheral significance. If he did, they are not the real object of complaint. The essence of the wrong is exploiting the information and opportunity by getting the contract for himself. Whether or not he began preparations before he resigned is hardly to the point. Even if some plans or preparations were made before the director left office, it would generally be unrealistic to regard the profits made from the contract as the result of those preliminary steps. The profits are a consequence of getting the contract, which might well have been won and would have been just as objectionable without those steps.

135. Given that a director has a right to resign irrespective of the consequences to the company, I also cannot see how the motive for the resignation can be regarded as material. If it is lawful to resign, any plans which prompted the resignation cannot turn that lawful act into an unlawful one or impose a duty on the director to carry on working for the company. Again, what matters is that the individual, after he has ceased to be a director, has exploited knowledge that he acquired through work done for the company in pursuing a business opportunity while in office to appropriate that opportunity for himself. Whether

he resigned with the intention of doing this or decided on this course of action after leaving for some other reason is not to the point.

136. In this case Cockerill J, influenced by the dicta of Rix LJ in *Foster Bryant* which I have quoted at para 132 above, thought it necessary to determine whether the defendants had taken preparatory steps before they resigned. She found that they did. But that finding was not essential to her decision. Although in general fiduciary duties cease when the relationship which gave rise to those duties terminates (eg through resignation), that is not true of the duty not to exploit any property, information or opportunity of the principal. Just like the duty not to disclose or exploit information acquired in confidence, that duty continues after the relationship which gave rise to it has ended. Exploiting such information for the benefit of the individual's new enterprise is thus a breach of fiduciary duty, irrespective of whether there was some earlier breach before the individual left office with which it is causally connected. In the present case the subsequent conduct of the defendants was the crux of their wrongdoing and a sufficient basis on which to hold them liable.

What counts as an opportunity of the principal?

137. There are important questions which this court may at some stage need to address about what counts as an opportunity of the principal which the fiduciary has a duty not to exploit for her own purposes. Undoubtedly the opportunity must be one which came to the knowledge of the fiduciary in the course of and by reason of her role. It would be consistent with *Regal (Hastings)* (see eg Lord Macmillan at p 153F) and *Boardman v Phipps* (see eg Lord Hodson at p 109G) to require also that knowledge used to exploit the opportunity was special information not publicly available; and that the opportunity was procured through the principal's efforts (as in *Regal (Hastings)*) or assets (as in *Boardman v Phipps*: see paras 98-100 above). There is an illuminating exploration of these questions, including comparison with how the concept of a "corporate opportunity" has been more fully developed in the United States, in a book by David Kershaw, *The Foundations of Anglo-American Corporate Fiduciary Law* (2018), chs 12-14.

138. The circumstances that I have mentioned were all present here. The opportunity to negotiate a contract to provide the recovery services came to the knowledge of the defendants in the course of and by reason of their roles. Knowledge so acquired and which they used to exploit the opportunity included special information, confidential to the claimants (see para 81 above). The opportunity was not merely one in which the claimants had an interest: it was an opportunity which the claimants had procured and were actively

pursuing, and which the defendants had been involved in pursuing on their behalf, until the defendants appropriated it for themselves.

139. An argument can be made that in *Boardman v Phipps* and *Regal (Hastings)* the House of Lords cast the net of liability too wide. As counsel for the defendants pointed out, those decisions have been the subject of extensive academic criticism. Two prominent critiques are articles by Gareth Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968) 84 LQR 472 and John Langbein, "Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest" (2005) 114 Yale LJ 929. It is, however, important to note the object of this criticism. What those distinguished scholars criticised is the finding of liability in these cases despite the following features:

(i) The defendants had acted honestly and in the best interests of their principals;

(ii) The defendants' conduct had positively benefited their principals by generating profits for them (from the principals' own shareholdings) which they would and could not otherwise have made; and

(iii) The only way of obtaining that benefit for the principal was by the defendants investing their own money alongside that of the principal.

140. Although Lord Russell in *Regal (Hastings)* in the passage quoted at para 89 above asserted that these matters were irrelevant, I have struggled to find either in his speech or in any of the other speeches in that case or in *Boardman v Phipps* any justification in terms of legal principle or policy for that assertion. In *Boardman v Phipps* the majority rested their conclusion on the authority of *Regal (Hastings)*, which they regarded, with good reason, as indistinguishable on its facts. Given that the appeal to the House of Lords in *Boardman v Phipps* was argued before the Practice Statement (quoted by Lord Briggs at para 43 of his judgment) was made which allowed the possibility that the House might depart from its own previous decisions, that at the time was justification enough. In *Regal (Hastings)*, at p 145A, Lord Russell justified his statement of the law by citing *Keech v Sandford* as "an illustration of the strictness of this rule of equity in this regard". The facts of *Keech v Sandford*, however, did not include the features that the conduct of the fiduciary had positively benefited the beneficiary by producing a profit for him which he could not otherwise have made and that the investment by the fiduciary of his own money was necessary to produce that profit.

141. Those features might today reasonably be regarded as material. As Jones and Langbein pointed out, it is hard to see what policy is served by discouraging fiduciaries from making profits for their principals in such circumstances. As John Langbein put it, at p 955:

> "The House of Lords' message to trustees is: Thou shalt not create value for thy trust beneficiary in circumstances in which there may be actual or potential benefit to thyself."

It may be said with force that in such cases the rule adopted by the House of Lords contradicts the purpose of the rule, which is to benefit the beneficiary.

142. Had the features listed at para 139 above all been present here, and had it been argued that on such facts the Supreme Court should now depart from *Regal (Hastings)* and *Boardman v Phipps*, that argument would in my opinion have deserved serious consideration. It is not, however, an argument made, or which could be made, on this appeal. That is because this case has none of those features.

143. Taking them in turn, it cannot be said here, as it was in *Boardman v Phipps*, that the defendants "acted with complete honesty throughout" (Lord Cohen at p 104E) or that "it has never been suggested that the appellants acted in any other than an open and honourable manner" (Lord Hodson at p 105G). The defendants were found by the judge to have acted disloyally in various respects. Nor could it be claimed that they acted in the best interests of the claimants. The opportunity to provide the recovery services, far from being one which the claimants could never have exploited themselves, was an opportunity which the claimants were actively pursuing (without competition) until it was appropriated by the defendants. The defendants' conduct certainly did not benefit the claimants. And while the defendants deployed their own skill and effort in providing the recovery services, they did so purely for their own benefit and not for the benefit of the claimants.

144. Accordingly, the factors which might justify a request to revisit, and potentially to depart from, the decisions of the House of Lords in *Regal (Hastings)* and *Boardman v Phipps* are all missing. The defendants' invitation to consider on this appeal whether those cases were correctly decided should therefore be declined. Any such reconsideration should await a case where the potential criticism is relevant on the facts.

Making the law fit for modern business

145. Another theme of the defendants' submissions is that fiduciary law needs to be updated to make it fit for modern business. It is said that the contexts in which fiduciary duties may arise today are often very different from the contexts in which those duties were developed, which were "traditional relationships" such as that between the trustee and the beneficiary of a trust or between a family solicitor and a lay client. Now such duties regularly arise in purely commercial settings among sophisticated businesspeople who rely on less formality, and far less on trust. The point is also made that in pursuing business opportunities such actors often create and use corporate structures for reasons such as tax efficiency which may have little, if anything, to do with the duties which they want to assume or impose; and that it may therefore be mere happenstance whether the duties owed include fiduciary duties or are purely contractual.

146. This theme of the defendants' submissions is discussed by Lady Rose in her judgment. I agree with her that, in developing and applying the common law, courts need to be sensitive to changes in the way business is conducted and in the expectations of the business community, as well as changes in social attitudes more broadly. I also think it right that the variety of different contexts in which fiduciary duties can arise is something to which the law should have regard. The defendants have, however, emphasised that they do not propose that there should be any change to the law as regards either the extent or the scope of fiduciary duties or in the strict nature of fiduciary liability. They have also not sought to challenge the judge's findings, based on a factual examination of the role which each defendant actually performed, that they owed fiduciary duties to the claimants. Whether it is appropriate to apply to people who have created corporate entities for tax reasons (or other purely commercial considerations) the obligations of loyalty expected of fiduciaries is therefore not an issue in this appeal.

147. The thrust of the defendants' argument is that the current law operates too harshly and unpredictably when it comes to *remedies* and, specifically, in defining the scope of the remedy of an account of profits. Their complaint is that, in a business context where it may be happenstance whether the duties owed by an individual to a business entity are fiduciary or only contractual, it is unfair and unprincipled that the nature of the duty should make a radical difference to how remedies for a breach of duty operate. In particular, there is no principled justification for applying different rules and tests of causation when the breach is of a fiduciary duty to those which apply elsewhere in the law of obligations - for example, when the breach is of a duty owed in contract or tort.

148. I am not prepared to give any credence to this line of argument in so far as it relies on the supposed "happenstance" of whether an individual owes fiduciary duties. If that complaint had merit, it would indicate that the incidence of fiduciary duties or the extent of those duties, at least in some contexts, is too wide. Yet the defendants have made it clear that they are not making such a suggestion. Nor, as I understand their case, do they seek to criticise the availability in principle of the remedy of an account of profits in claims against fiduciaries, even though such a remedy is not available (aside from the anomalous case of *Attorney General v Blake* [2001] 1 AC 268) for breaches of contractual obligations.

149. Where the defendants' argument has force, in my opinion, is in expecting the law to be consistent in how the remedy of an account of profits is applied. There are two aspects to this. First, as mentioned earlier, an account of profits is available as a remedy in various contexts where property – or information treated for this purpose as a form of property – is misused. I can see no reason why, in determining what profits have been made as a result of such misuse, different principles should be adopted when the misuse is a breach of fiduciary duty from those adopted when it is a breach of a duty of confidentiality or an infringement of intellectual property rights. The object of reassigning the profits made from the breach to the claimant is the same in each case. Second, where an account of profits is an available remedy, it is an alternative to a claim for compensation for loss caused by the breach. I can see no reason why different principles should be adopted to identify and quantify profits from those adopted to identify and quantify losses.

150. Historically, the remedy of an account has its origins in the practice of the old Court of Chancery, in cases where a trust relationship was shown, to order an "account" to be taken by a master. This involved investigating disbursements made by the trustee. Where the account revealed an unauthorised disbursement, the beneficiary was entitled to "falsify" the disbursement by requiring the statement of account to be drawn up as if the payment had not been made. By this means the trustee was required to make good the deficit. Alternatively, the beneficiary could adopt the transaction and treat it as if it had been made on behalf of the beneficiary (for example, where the payment had been used to make an investment), thereby obtaining the benefit of any profit which had accrued. In neither case was a causal analysis required to link the loss or profit with the trustee's wrongful act.

151. This simple mechanism worked well enough in the context of traditional trusts. But in adapting it to provide appropriate redress in the multifarious situations in which fiduciary obligations may nowadays arise, the courts have recognised the need to introduce more refined techniques to identify and quantify the actual consequences of the

breach of duty. They have also recognised that equitable remedies should focus on the nature of the relevant obligation and the function of the remedy rather than being fixed by their historical origin. The pathbreaking cases, whose ramifications are still being worked out, are the decisions of the House of Lords in *Target Holdings Ltd v Redferns* [1996] AC 421 and of the Supreme Court in *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58; [2015] AC 1503. I will return shortly to the significance of these decisions for the issue of causation raised in the appeal.

The causation issue

152. That issue, in the form agreed between the parties, is whether the court should have regard, when determining the scope of an account of profits, to the hypothetical question of whether a given profit would have been earned if the breach had not occurred and/or the fiduciary had acted loyally in performance of its duties. If that question is answered in the affirmative, the court is also asked to decide: (a) whether the court should apply a causation test and, if so, what that test should be; and (b) what effect the application of the proper test would have had on the scope of the account in this case, and on the order made.

153. Although it is not the sequence in which the issues are framed, it is logical to consider first whether the court should apply any causation test. If it should, it becomes necessary to consider whether – as the defendants contend – the proper test of causation is a "but for" test which involves asking the hypothetical question whether a given profit would have been earned if the breach of fiduciary duty had not occurred.

Is a causation test required at all?

154. In any claim founded on a civil wrong a test of causation is essential to connect what the defendant has done to a remedy to which the claimant is entitled. A claim for an account of profits is no exception. A person who has made unauthorised use of the property (or information or an opportunity) of another could not, on the basis of that finding, properly be held liable to account for any profit made from some causally unrelated activity. If a given profit was made from, for example, an investment made by the defendant relying entirely on his own resources and knowledge, there could be no justification for requiring the defendant to surrender the profit to the claimant. Imposing such a liability is only justifiable when the profit *resulted* from the defendant's use of the property, information or opportunity – in other words, when there is a causal connection between the conduct on which the claim is based and the profit which the defendant is ordered to pay over to the claimant.

155. This seems so obvious that it would go without saying were it not for some recent dicta of the Court of Appeal. In *Keystone Healthcare Ltd v Parr* [2019] EWCA Civ 1246; [2019] 4 WLR 99, para 18, Lewison LJ said that he did not accept the proposition that "the breach of fiduciary duty must be a cause of the profit". Yet he immediately added: "There must, of course, be *a sufficient degree of connection* between the breach of fiduciary duty and the receipt of the secret profit" (emphasis added). He also referred to his own earlier statement in *Ultraframe (UK) Ltd v Fielding (No 2)* [2005] EWHC 1638 (Ch); [2006] FSR 17, para 1588, that there must be a "reasonable relationship" between the breach of duty and the profit for which an account is ordered. He did not explain what kind of connection or relationship is required if not a causal one. Nor can I conceive of any other kind of connection or relationship which might be thought legally relevant.

156. Similar comments may be made about *Global Energy Horizons Corpn v Gray* [2020] EWCA Civ 1668; [2021] 1 WLR 2264, where it was common ground at a hearing to assess the profits for which a defaulting fiduciary was liable to account that there needs to be, in the judge's words, "some causal link between the asset obtained and the breach of fiduciary duty": see para 123. While emphasising that they had heard no argument on the question, the Court of Appeal suggested that the judge was wrong to use the language of causation. They said, at para 128:

> "There needs to be some link or nexus between the breach of duty proved and the profits for which an account is ordered, such that there is a 'reasonable relationship' between them ... But the link or nexus does not need to be of a causal character. It will normally be sufficient if the profit arose within the scope of the defaulting fiduciary's conduct in breach of duty."

Again, I do not understand what "link or nexus … not … of a causal character" could, and supposedly should, be used to determine whether the profit is one for which the defendant is liable to account.

157. The source of the suggestion that a causal connection is not necessary appears to be some remarks (obiter) of Morritt LJ in *United Pan-Europe Communications NV v Deutsche Bank AG* [2000] 2 BCLC 461, para 47, which were quoted in both *Keystone* (para 17) and *Gray* (para 128):

> "If there is a fiduciary duty of loyalty and if the conduct complained of falls within the scope of that fiduciary duty … then I see no justification for any further requirement that the

> profit shall have been obtained by the fiduciary 'by virtue of his position'. Such a condition suggests an element of causation which neither principle nor the authorities require."

158. The suggestion that there is no requirement that the profit was obtained by the fiduciary "by virtue of his position" cannot be supported. The existence of that requirement is confirmed by authority at the highest level, including the passages in the speeches in *Regal (Hastings)* and *Boardman v Phipps* quoted by Lord Briggs at paras [26] and [27] of his judgment. The requirement reflects the fundamental principle that a wrongdoer should be held responsible only for consequences of the wrong and not for profits or losses which are not causally connected with what the person has done wrong. The judges who in *Keystone* and *Gray* cited the dicta of Morritt LJ in *United Pan-Europe* implicitly recognised this because, having disclaimed the need for a causal connection, they brought it back in again by requiring a "link or nexus" or "sufficient degree of connection" between the breach of duty and the profit. These are just different ways of saying that the breach of duty must be a cause of the profit.

159. In short, both principle and authority require a test of causation to be applied to identify any profits for which a defaulting fiduciary is liable to account. As Mummery LJ put it in *Swindle v Harrison* [1997] 4 All ER 705, 733: "There is no equitable by-pass of the need to establish causation."

Causation and counterfactuals

160. The next question is what the relevant test of causation is. In particular, does it require the court to engage in so called "counterfactual" reasoning by asking whether a given profit would have been earned if (contrary to fact) the breach of fiduciary duty had not occurred?

161. Some philosophers believe that all causal explanation necessarily involves counterfactual reasoning. As David Lewis put it in his influential article "Causation" (1973) 70 Journal of Philosophy 556, 557:

> "We think of a cause as something that makes a difference, and the difference it makes must be a difference from what would have happened without it. Had it been absent, its effects - some of them, at least, and usually all - would have been absent as well."

The relationship between causation and counterfactual statements is the subject of extensive philosophical debate: see eg the essays collected in John Collins, Ned Hall and LA Paul (eds), *Causation and Counterfactuals* (2004). But whatever view is taken of the relationship as a matter of general philosophical analysis of the concept of causation, counterfactual reasoning undoubtedly plays a key role in how causal connections are identified in the law of obligations: see eg Jane Stapleton, "Choosing what we Mean by 'Causation' in the Law" (2008) 73 Missouri L Rev 433; Jonathan Schaffer, "Contrastive Causation in the Law" (2010) 16 Legal Theory 259; and Jane Stapleton, "An 'Extended But-For' Test for the Causal Relation in the Law of Obligations" (2015) 35 OJLS 697.

162. When a claimant's right to claim compensation depends on proving a causal connection between a breach of a duty owed by the defendant and harm suffered by the claimant, the law uses counterfactual reasoning to determine whether the necessary causal connection has been shown. A comparison is made between what actually happened and what would have happened if the breach had not occurred. The purpose of the comparison is to identify with precision those consequences, if any, of the defendant's conduct for which the defendant should (subject to any further limiting factors) be held responsible.

163. It is worth spelling out in a little more detail what the exercise involves. The first step is to identify the specific duty of which the defendant was in breach and the particular conduct which constituted the breach. The next step is to construct a hypothetical scenario in which the defendant's conduct is changed to the minimum extent necessary to achieve compliance with the duty. The court then considers what harm, if any, the claimant would have suffered in that scenario.

164. Suppose (to adapt an example discussed by Jane Stapleton and Jonathan Schaffer in the articles cited above) that a motorist is driving at 40 mph in an area where the speed limit is 30 mph. On seeing a pedestrian ahead starting to cross the road, the motorist brakes but is unable to stop in time and runs down the pedestrian. On a claim by the pedestrian for compensation for his injuries, it is necessary to determine whether the injuries were caused by the defendant's negligent driving. For that purpose a "but for" test is applied.

165. In considering what would have happened if the defendant had not driven negligently, an infinite number of different possible worlds could be imagined. These would include, for example, scenarios in which the defendant decided not to leave home, or took a different route, or stopped off on the journey and so never encountered the pedestrian. Those possibilities, however, are not of interest. For the purpose of determining whether the claimant's injuries were caused by the defendant's breach of

duty, we must first identify the specific duty of which the defendant was in breach and then adjust the facts just enough to achieve compliance with the duty. Thus, if the duty relied on is the duty to drive within the speed limit, the relevant comparison is with what would have happened if the defendant had been driving at a speed of 30 mph. As well as having a duty not to exceed the speed limit, however, a motorist has a duty to drive at a speed which is reasonably safe having regard to the conditions. Maybe in the particular circumstances compliance with that duty would have required the defendant to drive at a speed of no more than 25 mph. If so, that provides the relevant hypothetical scenario with which to compare what actually happened when asking whether, but for the defendant's breach of duty, the injuries would have occurred.

166. There are a few recognised situations in which this method of counterfactual reasoning does not work: see eg *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1; [2021] AC 649, paras 181-185. But they are not relevant for present purposes. What is important is that the model I have described is used throughout the civil law to determine whether wrongdoing by the defendant caused harm to the claimant including, as is now established, in claims for compensation for loss caused by a breach of fiduciary duty.

167. In *Target Holdings Ltd v Redferns* the defendant solicitors held funds on trust for the claimant mortgage lender which were to be transferred to the borrower when the borrower completed the purchase of a commercial property and the loan was secured by a charge over the property. In breach of trust, the solicitors paid over the money without any charge in place. A charge was later executed. But the borrower (a shell company with no other assets) defaulted on the loan and, although the claimant realised its security by selling the property, the sum recovered was much less than the amount lent. The solicitors contended that their breach of trust had not caused loss because the claimant would have suffered the same loss even if the funds had been paid over at the agreed time.

168. The House of Lords held that this contention was good in law and, if proved as a matter of fact at the trial, would defeat the claim. Although unwilling to assimilate equitable and common law rules as to causation and quantification of loss completely, Lord Browne-Wilkinson (who gave the leading speech) insisted, at p 432G, that "the principles underlying both systems are the same". In particular:

> "there does have to be some causal connection between the breach of trust and the loss to the trust estate for which compensation is recoverable, viz the fact that the loss would not have occurred but for the breach …" (p 434F)

169. The point was put beyond doubt by the Supreme Court's decision in *AIB Group (UK) plc v Mark Redler & Co Solicitors*. As explained by Lord Reed, at para 93:

> "compensation for the breach of an obligation generally seeks to place the claimant in the position he would have been in if the obligation had been performed. Equitable compensation for breach of trust is no different in principle …"

Thus "the model of equitable compensation, where trust property has been misapplied, is to require the trustee to restore the trust fund to the position it would have been in if the trustee had performed his obligation": para 134. Similarly, Lord Toulson (with whose judgment as well as that of Lord Reed the other Justices agreed) said that "it would not … be right to impose or maintain a rule that gives redress to a beneficiary for loss which would have been suffered if the trustee had properly performed its duties": para 62.

170. The defendants on this appeal argue that there is no reason to apply a different causation test when the relevant consequence of a breach of fiduciary duty is a gain made by the defendant rather than a loss suffered by the claimant. I agree. I can see no good reason why a different test should apply. The two situations are symmetrical. It is equally necessary in each case to identify with precision the consequences of the breach of duty. Counterfactual reasoning is the technique which the law employs to achieve this and is just as apt whether the consequence of the breach is a loss to the claimant or a profit to the defendant. There is no more justification for ordering the defendant to surrender to the claimant a profit which the defendant would have made in any case irrespective of the breach than there is for ordering the defendant to compensate the claimant for a loss which the claimant would have suffered in any case irrespective of the breach. Neither is a result of what the defendant did wrong.

171. The Supreme Court recognised this basic symmetry in *AIB Group*. Lord Toulson said, at para 64:

> "Where there has been a breach of [fiduciary] duty, the basic purpose of any remedy will be either to put the beneficiary in the same position as if the breach had not occurred or to vest in the beneficiary any profit which the trustee may have made by reason of the breach (and which ought therefore properly to be held on behalf of the beneficiary). Placing the beneficiary in the same position as he would have been in but for the breach may involve restoring the value of something lost by the breach or

> making good financial damage caused by the breach. But a monetary award which reflected neither loss caused nor profit gained by the wrongdoer would be penal."

As explained in this passage, the purpose of any gain-based remedy for a breach of fiduciary duty is to vest in the principal any profit which the fiduciary has made by reason of the breach. To determine what, if any, profit has been made by reason of the breach, it is necessary to consider whether a given profit would have been earned if the breach had not occurred.

Authorities applying a "but for" test

172. Where I disagree with the defendants is with their suggestion that to apply a "but for" test of causation to profits as well as losses would represent a change to the law. In my view, a "but for" test is already inherent in the requirement to show a relevant causal connection between profits for which the defendant is liable to account and the defendant's breach of fiduciary duty. No change to the law is needed. The problem the defendants face is not that the "but for" test is inconsistent with the current law; it is that the test does not produce the outcome they would like. As I will explain when I address its application to the facts, the "but for" test of causation is satisfied in this case. In seeking to argue otherwise, the defendants misapply the test. This leads them to suggest that some very well-known and often cited cases would have been decided differently if a "but for" test of causation had been applied. I disagree with that suggestion. In my view, with one exception, all the cases cited on this appeal are consistent with the operation of the "but for" test.

173. It is rare on the facts of the reported cases that comparison with what would have happened "but for" the breach leads to the conclusion that no profit at all was made for which the fiduciary is liable to account. But the decision of the Singapore Court of Appeal in *UVJ v UVH* [2020] SGCA 49 is an example of such a case. Three brothers who were executors of an estate were appointed as directors of companies in which the estate held shares. In breach of fiduciary duties owed to their sisters who were also beneficiaries of the estate, they voted the estate's shares in favour of resolutions approving directors' remuneration without their sisters' knowledge or consent. Even so, the estate held only very small minority shareholdings in the three companies and the resolutions would still have passed even if the brothers had not voted or even if they had used the estate's shares to vote against the resolutions. The improper use of the estate's shares therefore made no difference to the outcome. The brothers would have received the same remuneration as directors of the companies even if the breach had not occurred. The Singapore Court of

Appeal held that, for that reason, the sisters' claim for an order requiring the brothers to account for the remuneration received failed. The court's reasoning and conclusion on this point are, in my view, unimpeachable.

174. As some commentators have noted, the High Court of Australia adopted "but for" causal reasoning in *Warman International Ltd v Dwyer* (1995) 182 CLR 544. Dwyer exploited his fiduciary position as a senior employee of Warman to establish a competing business and divert to it an agency to distribute in Australia gearboxes manufactured by an Italian company called Bonfiglioli. The High Court held that Dwyer was liable to account for the net profits gained from this breach of fiduciary duty. To ascertain precisely what benefit Dwyer had acquired in consequence of the breach, the court considered "what would have happened in the absence of Dwyer's breach of fiduciary obligations" (p 566). The trial judge had found that Warman's distributorship would not have endured for much longer in any event and, in all likelihood, would have remained on foot for a further year but no more. The advantage gained by Dwyer from the breach thus consisted, most clearly, in the profits made from distributing the Bonfiglioli products during this year when Warman would otherwise have done so. The breaches of duty had also enabled Dwyer to acquire the services of former Warman employees and "to derive benefits from the experience, contacts and know-how of those employees" which "would, at least to some extent, have endured beyond the initial one year period" (p 567). While recognising that it was extremely difficult to value those benefits, the court decided that a fair estimate which would "clearly cover" the whole of the benefits acquired was to award the profits made in an additional year, making the period for which an account was ordered two years in total (pp 567-568).

175. In this way the High Court assessed the amount of the profits caused by Dwyer's breaches of fiduciary duty by considering what difference to his financial position the breaches made. That involved identifying (where necessary by making a broad judicial estimation) those profits of his business which would not have been made but for the breaches of fiduciary duty.

176. In most of the cases cited on this appeal no such detailed exercise was required because it was obvious that, on the "but for" test, all the profits claimed were caused by the breach of duty. For example, in *Regal (Hastings)*, as discussed above the directors' breaches of duty consisted in purchasing shares in the subsidiary for themselves. Had they not done so, they would plainly not have made the profits from the sale of those shares for which they were held liable to account. The same is true of *Boardman v Phipps*. But for the defendants' breaches of fiduciary duty in buying shares themselves in the textile company, they would not have made any of the profits which they in fact made from that investment. In each case, therefore, the "but for" test was satisfied.

Hypothetical consent

177. The defendants propose a different analysis of these two leading cases. They contend that the relevant counterfactual scenario is one where the defendants sought to obtain the fully informed consent of their principals to their purchases of shares. They submit that it is clear on the facts that, had such consent been sought, it would in all likelihood have been given. Thus, in *Regal (Hastings)*, as Lord Russell observed at p 150A, the directors "could, had they wished, have protected themselves" by obtaining the approval of the company in general meeting. As it appears that they held a majority of the company's shares, this would have been a formality: see Gower, *The Principles of Modern Company Law*, 11th ed (2021), para 10-085. In *Boardman v Phipps* the two active trustees did consent to the defendants' purchases of shares in the textile company, which were clearly beneficial to the trust, and it must be highly likely that the third trustee would have given her informed consent if it had been sought.

178. If it were correct that a fiduciary is not liable to account for a profit made from a transaction to which the principal would have consented if asked, such hypothetical consent would be as good as actual consent in such a situation. Put another way, this approach would effectively dispense with the need to obtain the informed consent of the principal where such consent is likely to be given. That is an unattractive conclusion. But it does not follow from the need to satisfy a "but for" test. The fallacy in the defendants' argument is that it treats the fiduciary duty of which in *Regal (Hastings)* and *Boardman v Phipps* the defendants were in breach as if it were a duty to obtain the informed consent of the principal to the defendants' share purchases. There is, however, no such duty. A fiduciary has no duty to seek or obtain the informed consent of the principal to any private transaction that he wishes to undertake. The hypothetical non-breach scenario with which what actually happened is compared is therefore not one in which such consent was sought. It is a scenario in which the only variation from the actual facts is that the defendants' purchases of shares in their own right were not made (and any necessary further consequences of that hypothesis). Whether the principal would have consented to the transaction, if asked, is not a relevant consideration.

179. The irrelevance of such hypothetical consent is confirmed by *Gray v New Augarita Porcupine Mines Ltd* [1952] 3 DLR 1, a decision of the Privy Council on an appeal from Ontario. Gray was a director of a mining company who over several years misused his powers by arranging transactions with the company from which he accrued substantial profits. These transactions included issuing to himself large blocks of the company's shares as fully paid up, at a discount of 80%, and then selling them at much higher prices. After new directors were appointed, he entered into a settlement agreement with the company under which he agreed to transfer to it certain assets in return for a waiver of all

claims against him. The company later brought proceedings claiming an account of the profits made by Gray from misusing his position as a director.

180. The Privy Council upheld the decision of the lower courts that the settlement agreement could not be rescinded as it was impossible to restore the parties to their previous positions. But it also held that the settlement agreement did not relieve Gray from liability to account for the profits he had made. The reason was that, when the settlement was made, the company had not been fully informed of the facts. Gray therefore could not show that he had obtained the company's informed consent to the relevant transactions.

181. Gray argued that it would have made no difference if he had disclosed the full extent of his use of the company's property for his own gain. He maintained that the other directors were desperate to recover some cash, had decided what sum they wanted from Gray and did not think that they could get any more out of him. The response of Lord Radcliffe, at p 15, was:

> "There may be an element of truth in all this, but in fact it constitutes an irrelevant speculation. If a trustee has placed himself in a position in which his interest conflicts with his duty and has not discharged himself from responsibility to account for the profits that his interest has secured for him, it is neither here nor there to speculate whether, if he had done his duty, he would not have been left in possession of the same amount of profit."

In other words, if a fiduciary has not relieved himself of liability to account for profits by obtaining the informed consent of the principal to the relevant transaction, it is irrelevant to consider whether or on what terms the principal would have consented if provided with full information.

Absence of contrary authority

182. Once the notion that a hypothetical consent can assist a defaulting fiduciary is cleared aside, I do not think that – apart from the case I will discuss shortly – there is any authority which supports the suggestion that a "but for" test is inapt to determine whether the defendant's breach of duty has caused the defendant to make any, and if so what,

profit. There are not even any dicta, let alone the ratio of any decision, cited on this appeal which support that proposition.

183. Other than cases confirming that a hypothetical consent does not provide a defence, Lord Briggs rests his rejection of a "but for" test on a single dictum. At para 39 of his judgment he quotes a remark of Roskill J in *Industrial Development Consultants Ltd v Cooley*, at p 453F: "When one looks at the way the cases have gone over the centuries it is plain that the question whether or not the benefit would have been obtained but for the breach of trust has always been treated as irrelevant." It is clear from the context, however, that what Roskill J was saying has "always been treated as irrelevant" was whether or not, but for the defendant's breach of trust, the *claimant* would have obtained the benefit in question. In other words, he was making the point that the liability of the defendant to account for a profit made from a breach of trust does not depend on the claimant having to show that he has suffered a corresponding loss because the profit is one that he would otherwise have made. That is uncontroversial. But this point amounts to no more than that the measure of the sum payable on an account of profits is the defendant's gain and not the claimant's loss. Roskill J's dictum cannot reasonably be read as a general rejection of any "but for" analysis. In particular, he was not suggesting that it is or ever has been treated as irrelevant to consider whether the defendant's gain would have been obtained but for his breach of trust.

Murad v Al-Saraj

184. I have mentioned that there is one case discussed in argument which rejected the application of the "but for" test to determine the scope of an account of profits. This is the majority decision of the Court of Appeal in *Murad v Al-Saraj* [2005] EWCA Civ 959. I must describe this case in some detail to explain why, in my opinion, it was wrongly decided.

185. Mr Al-Saraj and the two Murad sisters agreed to buy a hotel (of which Mr Al-Saraj was the manager) as an investment: £1 million to be contributed by the Murads and £500,000 by Mr Al-Saraj in cash, with the balance financed by borrowing. It was further agreed that on any resale of the hotel the profit would be divided equally. The hotel was later re-sold for a substantial profit. It turned out, however, that the apparent contribution of Mr Al-Saraj was largely illusory and included a secret commission from the vendor of £369,000.

186. The trial judge found Mr Al-Saraj liable in deceit for fraudulently misrepresenting that he was contributing £500,000 in cash to the purchase price and also for breach of

fiduciary duty in failing to disclose to the Murads his arrangements with the vendor. Rescission was not an available remedy as it was impossible fully to unravel the transaction. The judge found that, if Mr Al-Saraj had told the Murads the truth, they would still have agreed to invest, and the purchase of the hotel would still have gone ahead, but the parties would have agreed on a lower profit share for Mr Al-Saraj: see [2004] EWHC 1235 (Ch), paras 287-288. The Murads' loss was therefore the difference between the share of profits which they actually received on the sale of the hotel and the larger share which they would have received but for the deceit and non-disclosure of Mr Al-Saraj. They elected, however, to claim an account of profits and Mr Al-Saraj was held liable to surrender to them his entire profit on the sale of the hotel.

187. On appeal Mr Al-Saraj argued that the sum for which he was liable to account should not include the share which would have been agreed if he had disclosed the true facts to the Murads. The Court of Appeal by a majority (Arden and Jonathan Parker LJJ, with Clarke LJ dissenting) rejected that argument. The majority thought that they were driven to that result by what they saw as the "rigid and inflexible" rule of equity for which *Regal (Hastings)* is authority. At the same time they regarded this rule as capable of operating harshly and suggested that it may be appropriate for a higher court to revisit it: see paras 81-83 and 121.

188. I confess to finding the reasoning of the majority judgments hard to follow, including why they thought that *Regal (Hastings)* was a decisive, or even relevant, authority against the argument made on behalf of Mr Al-Saraj. Arden LJ took the passage from the speech of Lord Russell which I have quoted at para 89 above to show - as I agree that it does - that "liability to account for profit in equity does not depend on whether the beneficiary actually suffered any loss": para 80. But she was in my view mistaken in understanding that this was "the essence" of what Mr Al-Saraj was arguing. He was not disputing that a fiduciary may in principle be liable to account for a profit even though the beneficiary has not suffered any loss. His argument was that the sum which he would have received even if he had not committed a breach of fiduciary duty was not a profit made from the breach and therefore not a profit for which he was liable to account. Elsewhere in the judgment, Arden LJ asserted that it also follows from *Regal (Hastings)* that an argument of this kind affords no defence: see para 67. But she did not explain why this follows from *Regal (Hastings)* and it was in my view a mistake to suppose that it does.

189. Arden LJ said that it would be wrong to understand the judge as having taken "the novel step of awarding the equitable remedy of account for the common law tort of deceit". Rather, "[t]he judge gave a remedy of account because there was a fiduciary relationship. For wrongs in the context of such a relationship, an order for an account of

profits is a conventional remedy": para 46. That, however, was too broad a statement. Not every wrong committed in the context of a fiduciary relationship attracts the remedy of an account of profits. As discussed earlier, whether the remedy is available depends on the nature of the wrong.

190. It appears simply to have been assumed that an account of profits is available as a remedy for breach by a fiduciary of a duty to disclose material facts. In my view, that assumption was incorrect. The duty of disclosure is an aspect of the fiduciary's duty to act in good faith. The right of the claimant to be informed of facts material to her decision is not a right to the exclusive use and enjoyment of an asset such as could entitle the claimant to an account of profits made by the defendant from its unauthorised use. The appropriate remedies in principle for breach of a duty not to misrepresent, or positively to disclose, such facts are either rescission of a transaction which the claimant was thereby induced to enter into or compensation for loss suffered by the claimant which would not have occurred if the duty had been complied with. It was essentially for this reason that the Court of Appeal held in *Halifax Building Society v Thomas* [1996] Ch 217 that an account of profits is not an available remedy for a claim in deceit. The fact that in a fiduciary relationship deliberate non-disclosure is also actionable does not justify awarding as a remedy for such non-disclosure a remedy which is not available for a positive fraudulent misrepresentation.

191. In *Murad v Al-Saraj* the position was complicated because the facts which Mr Al-Saraj wrongly failed to disclose included the fact that he had received a secret commission in relation to the purchase of the hotel. In obtaining that commission he was exploiting an opportunity acquired through his role as a fiduciary for personal gain. This was therefore a profit for which he was liable to account. In circumstances where he had not obtained the informed consent of the Murads to the receipt of the commission, it was irrelevant whether they would have given such consent if the full facts had been disclosed to them (see paras 177-181 above).

192. The question which should have been asked was whether the profit share that Mr Al-Saraj received on the sale was sufficiently connected with the secret commission that he obtained in relation to the purchase of the hotel to be regarded as its proceeds - as were, for example, properties which bribes received by the defendant were used to purchase in *Attorney General for Hong Kong v Reid* [1994] 1 AC 324. On the judge's findings there was no direct relationship between the sum of £500,000 which Mr Al-Saraj notionally contributed to the purchase of the hotel (and which included the secret commission of £369,000) and his agreed profit share. Other factors that influenced the agreed share were that Mr Al-Saraj would be managing the hotel and that he had arranged the deal: see the High Court judgment, paras 282-283. This explains why, as the judge found, the Murads

would still have agreed to Mr Al-Saraj receiving a share (even though lower) of the profits on any resale if they had known the true nature of his financial contribution.

193. Had the correct question been asked, I therefore think that the correct answer would probably have been that the only sum for which Mr Al-Saraj was liable to account to the Murads was the amount of the secret commission. The share of the profits that he received on the sale of the hotel was too remote (in terms of causation) from the commission that he received in relation to its purchase to fall within the scope of the account. There is an analogy with the profits made by the defendants in this case from derivative investments which were held by Cockerill J not to be recoverable.

194. But in any event, even if profits from the sale fell within the scope of the account, it was illogical to hold that the share of those profits which resulted from Mr Al-Saraj's breach of fiduciary duty (however that breach is characterised) was greater if the question asked was "what did Mr Al-Saraj gain?" than it was when the question asked was "what did the Murads lose?". That is because on the facts of the case the claimants' loss was necessarily equal to the defendant's gain. Of course that is not always so. In many cases the defendant may make a profit from a breach of duty without the claimant suffering a corresponding loss. But in *Murad v Al-Saraj* the question was how a single cake (the total profit on resale of the hotel) should have been divided between the parties. In such a situation a larger share for one party entails a correspondingly smaller share for the other, and vice-versa. It was not coherent to hold that the wrongdoing of Mr Al-Saraj led to him gaining at the Murads' expense a part of the total profit which they did not lose. That, however, is what the court held in concluding that the entire profit share that he received was a result of his wrongdoing although the Murads had lost only such part as they would have been entitled to receive if no breach of fiduciary duty had occurred.

195. For these reasons, the reasoning in *Murad v Al-Saraj* was, in my view, flawed and the result reached in that case irrational.

An unprincipled distinction

196. The irrational conclusion reached in *Murad v Al-Saraj* is one that could be reached in any case if a different test of causation is used to determine what gain, if any, the defendant has made from a breach of fiduciary duty from the test used determine what loss, if any, the claimant has suffered from the same breach. This goes back to the point I made earlier that, if the law is to be coherent, the test applied must be symmetrical. There is no basis in principle, justice, common sense, rhyme or reason for holding that a "but

for" test must be applied when assessing a loss resulting from a breach of fiduciary duty but not when assessing a gain resulting from such a breach.

197. The recognition that ordinary principles of causation that apply elsewhere in the law of obligations should apply to fiduciaries as they do to others has perhaps been slow in coming. But in *Target Holdings* and *AIB Group* this court held that it would not be right to impose or maintain a rule that gives redress to a principal for loss which would have been suffered if the fiduciary had properly performed his duties. The same is true of any rule that gives redress to a principal by requiring the fiduciary to surrender to the principal a gain which would have been made if the fiduciary had properly performed his duties. There is no material distinction between those two rules.

198. Attempts made to justify depriving a fiduciary of a profit which the fiduciary would have made anyway, absent the breach, have tended to fall back on the explanation given in Voltaire's *Candide* for executing Admiral Byng: that it was necessary "pour encourager les autres": see eg *Murad v Al-Saraj* [2005] EWCA Civ 959, para 74; and Peter Millett, "Bribes and Secret Commissions" (1993) 1 RLR 7, 17. The thrust of this explanation is that it is wise to penalise a blameless person from time to time in order to discourage others from engaging in conduct which would be undesirable. The difference is that, while Voltaire was engaged in satirical humour, these arguments appear to be seriously put forward. One answer to them, along the lines just discussed, is that, if they had any merit, they should apply to losses just as much as gains. If deterrence of this kind were a proper aim, it would be equally justifiable – or, as I would say, unjustifiable – to require the fiduciary to compensate the principal for losses vaguely connected with a breach of the fiduciary's duty even if the losses would have been suffered if the duty had been performed.

199. A more fundamental answer is that such deterrence is not a proper aim of the law of equity. If it were, then why not require the fiduciary to pay over, say, three times the amount of the profit that he received? What equity requires is the defendant to surrender to the claimant all those profits, but only those profits, made from the breach of duty and in that way seek to make it as if the wrong had not occurred.

200. I conclude that to determine whether a given profit resulted from a relevant breach of fiduciary duty, it is necessary to ask whether the profit would have been made if the duty had been performed and no breach had occurred. In other words, the law applies the ordinary "but for" test of causation.

How the test applies here

201. As foreshadowed earlier, however, this conclusion does not avail the defendants because applying the "but for" test to the facts of this case does not produce the answer they want. The defendants breached fiduciary duties owed to the claimants by exploiting for themselves the business opportunity of providing the recovery services and negotiating a contract with the family to supply those services from which they made substantial profits. They also breached duties of confidentiality owed to the claimants by using for that purpose information which was confidential to the claimants. But for these breaches of duty, the defendants would have made none of the profits which they in fact made and which the judge assessed. On their own case as to the applicable test of causation, therefore, the necessary causal connection is present.

202. The defendants' arguments on the issue of causation have focused on the judge's findings that, in breach of their fiduciary duties, they took various preparatory and other disloyal steps before they resigned from their roles with the claimants. They invite the court to consider what would have happened if those steps had not been taken and to conclude that, in that event, they would still have provided the recovery services and successfully negotiated a contract with the family, just as in fact happened. This amounts to saying that, if the defendants had not begun acting in breach of their duties to the claimants when they did, they would have done so anyway. No doubt that is true, but it does not afford them any defence to the claim.

203. As discussed earlier, the crux of the defendants' wrongdoing is not that they jumped the gun by preparing to compete with the claimants for the contract to provide the recovery services before they had resigned or that they resigned with an ulterior motive. It is that they breached fiduciary duties owed to the claimants by, in the judge's words, at para 1, "appropriating a developing business opportunity which was to be regarded as an opportunity of the claimants". The question of exactly when they set out to do this is essentially a sideshow.

204. The alternative way in which the defendants put their case relies on the judge's finding, at para 434, that "if all had gone forward absent a breach", it is most likely that the parties would have concluded a profit-sharing agreement under which the defendants would have received 50% of the profits earned from providing the recovery services.

205. It is important to note that this scenario is one where the profits would be earned by the *claimants*. As the Court of Appeal emphasised, the defendants have not alleged that there was any expectation or possibility that, absent a breach, any part of the business

of providing the recovery services would be owned by them: see [2023] EWCA Civ 305; [2023] Bus LR 646, para 17. What the judge was contemplating was a scenario in which an agreement with the family (of the kind under negotiation when the defendants resigned) was achieved by the claimants under which the claimants would have been paid for the recovery services; the defendants would have continued to carry out the bulk of the work, as they had been doing before they resigned; but, in exchange for their loyal service to the claimants in assisting them to make the profits, the defendants would have been entitled to be paid 50% of profits made and owned by the claimants.

206. This scenario is not the relevant counterfactual to consider in applying the "but for" test. I pointed earlier that, to isolate what difference the defendant's wrongful conduct has made, it is necessary first to identify the conduct which constituted the breach of duty and then to construct a hypothetical scenario in which the defendant's conduct is changed to the minimum extent necessary to achieve compliance with the duty. Here that scenario is one in which the defendants resigned from their positions with the claimants but did not take any steps to exploit the opportunity to provide the recovery services themselves. That scenario is not one in which any profit-sharing agreement would have been concluded or in which the defendants would have become entitled to any part of the profits made by the claimants from providing the recovery services.

207. Speculating about what would have happened if the defendants had not resigned and had instead continued to work for the claimants would only be relevant if it were a breach of duty for the defendants to resign and to stop working for the claimants. Manifestly it was not. The defendants were entitled to resign and stop working for the claimants whenever they chose. What they were not entitled to do was to then appropriate for themselves the business opportunity which they had previously been pursuing on behalf of the claimants.

208. The defendants are therefore wrong to suggest that, but for their breaches of duty, they would have earned 50% (or any part) of the profits which they in fact earned from providing the recovery services to the family on their own account. On the facts found, but for their breaches of duty, they would not have made any of the profits which they in fact made. So the judge was right to order them to account for the entirety of those profits, subject to the equitable allowance made to reflect the value of the work done to produce the profits. The defendants' appeal from that decision should accordingly be dismissed.

Is there an independent duty to account for profits?

209. I have given my reasons for agreeing that the defendants' case on causation fails. But before concluding I must explain why I do not share a theory of fiduciary accounting for profits put forward by Lord Briggs.

210. Lord Briggs suggests that an account of profits is, as he puts it, "not just" a remedy. He conceives it as a duty which exists "in its own right" and does not depend upon a demand for an account of profits by the principal or upon an order from the court. This theory does not, as I read Lord Briggs' judgment, make any difference to his reasons for deciding that an order for an account of profits was rightly made in this case. But he attaches "particular importance" to it (see para 20) and describes the contrary view as "a fundamental conceptual error" (see para 47). As I am guilty of this alleged error and have been unable to understand why an account of profits should be regarded as anything other than an equitable remedy, I find it necessary to explain why I consider this "duty theory" to be a misconception.

211. On one thing we agree. Regardless of whether an account of profits is "just" a remedy, it undoubtedly *is* a remedy: that is to say, a type of order that a court may make in response to a claim in legal proceedings. Traditionally, an order for "an account" refers to a procedure by which the court conducts an inquiry to discover whether a fiduciary has made a profit and, if so, to determine the amount of the profit. This may be followed by an order requiring the fiduciary to pay either the whole or part of this amount to the claimant. The reason why the amount which the fiduciary is ordered to pay may be less than the gross profit is that the court may make deductions for (i) any expenses reasonably incurred by the fiduciary in obtaining the gross profit and (ii) an equitable allowance to reflect skill and labour deployed, and perhaps risks taken, by the fiduciary in generating the gross profit.

212. Like Lord Briggs, when I refer to an order for an account of profits, I am referring to an order of the latter kind for payment of a sum of money. As Lord Briggs also points out at para 22 of his judgment, such an order is not the only remedy that may be granted when a fiduciary is found to have made a profit resulting from a relevant breach of fiduciary duty. Another available remedy is a declaration that the defendant holds a particular asset on a constructive trust for the claimant. (Such a declaration was made, for example, in *Boardman v Phipps*: see para 91 above.) The claimant can elect between the two remedies: see *FHR European Ventures*, para 7. Alternatively, if the breach of fiduciary duty has also caused loss to the claimant, the claimant instead of seeking either of these two gain-based remedies can elect to recover equitable compensation for the loss:

see *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] AC 514, 521.

213. A further point not in doubt is that, when the court makes an order for an account of profits, the order creates a duty to pay the amount specified – just as any remedial order granted by a court imposes a duty on the party to whom it is directed, enforceable by the party in whose favour the order is made, to carry out the order.

214. So much is common ground and, in my view, nothing more is needed. But Lord Briggs posits a further duty to account for profits. According to this theory, at the moment when the fiduciary receives a profit as a result of a relevant breach of fiduciary duty (here the duty not to exploit for his own use property, information or an opportunity of the principal), the fiduciary comes under a new, positive duty to account for (ie pay) that profit to the principal. This duty is said not to depend upon the making of any claim by the principal, or any process of inquiry into what has happened, or any remedial order granted by a court. On this theory, when the court makes an order for an account of profits, the court is enforcing an already existing duty, in the same way as when a court makes an order requiring payment of a debt or for specific performance of some other pre-existing obligation. Applied to the facts of this case, this would mean that, when Cockerill J ordered the defendants to pay certain sums to the claimants following Phase 2 of the trial, she was not just awarding a remedy for the breaches of fiduciary duty found in Phase 1, but was also ordering the defendants to perform a further duty of which they had also been in breach from the moment when they received fees for providing the recovery services.

215. At best, positing such an additional duty overcomplicates the law. It is redolent of Lord Diplock's unhelpful theory that breach of a "primary" contractual obligation gives rise by implication of law to a "secondary obligation" on the part of the contract breaker to pay damages to the other party (see eg *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 847) – a theory which Lord Denning MR in his last judgment rightly described as "too esoteric altogether" (*George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284, 300-301). The law operates perfectly well without such an additional duty to account. It does so by imposing substantive duties on fiduciaries, such as the duty not to misuse property of the principal, and making a range of remedies available to the principal in the event of breach including, where appropriate and at the election of the claimant, an order to account for profits. No useful purpose would be served by imposing another duty on the fiduciary to pay over to the principal profits received from the initial breach of duty. Applying a legal version of Occam's Razor, the law should not multiply duties beyond necessity.

216. The objections to the duty theory, however, go further than this. Imposing such an additional duty is not only unnecessary; it would also be unjust and inconsistent with how an account of profits operates as a remedy. Imposing such a duty would be unjust because often the fiduciary cannot know without a judicial determination what sum of money, if any, is payable. In these proceedings a complex inquiry – Phase 2 of the trial – was required to quantify the profits which the defendants had obtained from appropriating the business opportunity held in Phase 1 to be an opportunity of the claimants. That inquiry involved, among other issues, resolving disputes about the value of assets. In cases of this kind it would be unreasonable to recognise a duty – over and above the duty whose breach generated profits – to pay to the claimant all profits which the court ultimately decides are within the scope of the account before the court has decided what those profits are. It would be impossible for defendants to satisfy such a duty – or at least impossible to know that they had satisfied it – because the content of the duty could not be ascertained prior to a judicial decision. The position is quite unlike the case of a debt which the debtor has promised to pay and which the creditor is entitled to be paid without an order from the court. In the case of a debt, the instrument which creates the debt also specifies either the precise amount payable or how that amount is to be calculated. Likewise, when specific performance of a contractual obligation is ordered, the contract specifies the obligation which is enforced by an order of the court. There is no such precision in many cases where an account of profits is claimed. The appropriate analogy is with a claim for unliquidated damages. There is no duty to pay damages (or equitable compensation) before a court order is made – as reflected in the law that there is no liability for loss caused by failing to pay damages until ordered to do so by a court (see eg *President of India v Lips Maritime Corpn* [1988] AC 395, 425) and that paying before the court has awarded damages cannot extinguish the claimant's cause of action (see eg *Edmunds v Lloyds Italico & l'Ancora Compagnia di Assicurazione e Riassicurazione SpA* [1986] 1 WLR 492, 495-496). The same logic applies to accounting for profits.

217. These are sufficient reasons to reject the duty theory even before one comes to the question whether an equitable allowance should be made to reflect time and skill deployed, and risks taken, by the fiduciary in carrying out the work which generated the relevant profits. It is common ground that whether to make such an allowance at all and, if so, in what amount is a matter of judicial discretion. Lord Briggs observes at para 57 that, in exercising the discretion, the court "applies a broad brush". It is no criticism of the judge in this case to note that she adopted such a broad brush in deciding that an appropriate equitable allowance to make was 25% of the sum which would otherwise be recoverable from the defendants – a figure not based on any calculation, but which the Court of Appeal felt "quite unable to say" was "outside the ambit of the discretion reasonably available to the judge" (see para 150 of its judgment).

218. The existence of a fiduciary duty to account that does not depend upon any demand by the principal or order of the court cannot sit coherently with the existence of this discretionary power. It cannot be right that the fiduciary has a duty to pay the entire gross profit to the principal which arises at the moment of receipt and then, if the court makes an equitable allowance, claim that sum back from the principal. No one to my knowledge has ever suggested that this is how the process should operate. It would be equally unjustifiable to suggest that the fiduciary owes a duty to pay to the principal the profit net of any equitable allowance before the court has exercised its discretionary power to decide whether any (and, if so, what) allowance to make. The defaulting fiduciary may of course seek to avoid a court order by making an offer of payment to the principal. But such an offer is not a matter of obligation. The notion that a person has a legal duty to make a payment the amount of which depends upon a future exercise of judicial discretion before that discretion is exercised is not one that I can endorse.

No authority

219. The theory that such a duty exists is not based on any authority. Although Lord Briggs suggests at para 22 of his judgment that "numerous authorities" show that there is a fiduciary duty to account which is "not just a remedy", he does not identify any authority which shows this. He quotes at para 24 dicta of Lord Russell and Lord Porter in *Regal (Hastings)*. Yet far from supporting the claim that a fiduciary has a duty to pay over profits, those dicta are in fact inconsistent with it. Both Lord Russell and Lord Porter say that a person who makes a profit by reason of his fiduciary position is "liable" to account for it. A liability is not a duty: see eg WN Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale LJ 16, 44-54; and Stephen Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (2019), p 192. A duty requires you to do something. If you are under a legal duty to pay me a sum of money, then you must pay me that sum and I have a corresponding right to be paid that sum by you. A liability, by contrast, does not require you to do something but gives someone else (in this context a court) a power to do something to you. If you are under a legal liability to pay me a sum of money, then you may be ordered by a court to pay me that sum and my entitlement is limited to my "right of action", ie my right to obtain such an order from the court.

220. Not only do Lord Russell and Lord Porter speak - entirely accurately in my view - of a liability rather than a duty to account but the distinction is further apparent from Lord Russell's statement that: "The profiteer, however honest and well intentioned, cannot escape the risk of being called upon to account". It is implicit in this statement that a fiduciary does not have a duty to pay over profits irrespective of a demand by the principal or an order of the court. To the contrary, the fiduciary is subject to the risk of being

ordered by a court, upon a demand by the principal, to surrender such profits. In short, an account of profits is a remedial order that a court may make, and not an extra fiduciary duty.

221. The (only) other authority said by Lord Briggs to support the duty theory is the decision of this court in *FHR European Ventures*. But that decision did not address this question at all. What was in issue there was whether, when an agent receives a bribe or secret commission, the principal has a proprietary remedy against the agent in addition to the personal remedy of an account of profits. The Supreme Court decided that a proprietary remedy is available by way of a declaration that the bribe is held on a constructive trust for the principal.

222. Lord Briggs, at para 22, quotes para 36 of the judgment in *FHR European Ventures* given by Lord Neuberger. In that passage Lord Neuberger was not concerned with whether the fiduciary has a duty to account which arises independently of any claim by the principal. He was discussing whether consistency requires that in all cases where an agent is obliged to account for the value of a bribe or secret commission received in breach of fiduciary duty, the principal should also have a proprietary claim to the payment or other benefit received. Lord Briggs also emphasises that the mechanism by which such a proprietary remedy is made available is the imposition of a constructive trust. This constructive trust is described as "institutional", meaning that it is deemed to arise automatically as a matter of law in specified circumstances, in contrast to what has been called a "remedial" constructive trust, which depends upon a discretionary decision by a court that justice would be done by imposing a trust in favour of the claimant. The concept of a "remedial" constructive trust has been said not to be part of English law: see *FHR European Ventures*, para 47.

223. All this is well and good, but it provides no support at all for the notion that a fiduciary has a duty to pay over profits (whether gross or net of expenses and any equitable allowance) resulting from a breach of fiduciary duty that does not depend upon a demand by the principal or an order of the court.

Deemed performance

224. Given what seem to me to be its manifest defects, I have struggled to understand why the duty theory should be thought to have any appeal. I think the answer lies in its resonance with a technique which has deep historical roots and remains potent today among equity lawyers. The technique is to approach the grant of remedies for wrongdoing on the part of trustees and other fiduciaries by treating them as if they had acted in

accordance with their fiduciary duties. This is sometimes expressed by invoking the maxim that "equity regards as done that which ought to be done".

225. As a method of counterfactual reasoning, this is a principled approach. I have invoked such reasoning in this judgment: see paras 107 and 170-171 above. It is the counterpart in equity to the common law principle that "where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, *as if the contract had been performed* (see *Robinson v Harman* (1848) 1 Exch 850, 855; 154 ER 363, 365, per Baron Parke, emphasis added). In the same way, where a fiduciary misuses her position to make a profit for herself, say by accepting a bribe, it is a just response to put the principal in the same situation as if the fiduciary had obtained the profit for the principal. In each case the remedy is appropriate because it reverses the consequences of the wrong by making it as if the wrong had not been committed. Using this method of reasoning does not presuppose that the fiduciary *actually did* accept the payment which was a bribe on behalf of the principal any more than it supposes that the party in breach actually did perform the contract. As the point is neatly put by Arthur Ripstein, *Private Wrongs* (2016) at p 258: "These imagined alternative transactions serve, not as analyses of the wrong, but as measures of what is already established as a wrong". They can serve this purpose even if it is clear that as a matter of fact the principal did not and never would have authorised the act done by the fiduciary. It is no more necessary or sensible to pretend that the transaction really was authorised than it would be to pretend that the contract really was performed by the party in breach.

226. Sometimes, however, in discussing an account of profits this point is lost sight of and the principle of deemed performance is taken literally. This may be a historical legacy of the rules for the taking of accounts applied in the Court of Chancery (see para 150 above), which still seem to cast a spell over some equity lawyers. An extreme example of this tendency is an article by Lord Millett, expounding what he called the "good man" theory of equity: see Peter Millett, "Bribes and Secret Commissions" [1993] RLR 7, 20. According to this: "Equity insists on treating [the fiduciary] as a good man, despite all the evidence to the contrary; it will not allow him to say that he is a bad one". Thus, if the fiduciary obtains a profit out of his fiduciary position – for example, by taking a bribe – "equity insists on treating him as having obtained it for his principal; he will not be allowed to say that he obtained it for himself". This deemed performance of the fiduciary's duty is then followed through by requiring the fiduciary to pay over the money to the principal rather than keeping it for himself, just as would be the consequence if the fiduciary really had received the money on behalf of the principal. Taking this theory to its logical conclusion, Lord Millett even went so far as to deny that the law governing the receipt of bribes is part of the law of wrongs at all: see Peter Millett, "Proprietary

Restitution" in S Degeling and J Edelman (eds), *Equity in Commercial Law* (2005) 309, 324.

227. In *AIB Group*, para 69, Lord Toulson's summary response to this approach was to say: "There is something wrong with a state of the law which makes it necessary to create fairy tales". I would prefer to say: there is nothing wrong with creating fairy tales provided this does not lead you to believe in fairies.

228. Lord Briggs does not go so far as to adopt the "good man" theory of equity. But his duty theory is based on a similar approach of treating wrongdoers as if they had acted loyally in accordance with their fiduciary duty. He notes, at para 20 of his judgment, that a fiduciary may generate a profit out of his role without committing any breach of trust. This will be so when the profit results from an *authorised* use of the trust property, or of fiduciary powers. But the fiduciary must not keep such a profit for himself: he has a duty to pay the profit to the principal. The wrong which may lead to a court order for an account of profits is, in such a case, no more or less than the failure to pay itself. So far so good. But it then appears to be assumed that, if such a duty is owed by the dutiful trustee who has received a profit in the performance of his role, a similar duty must also be owed by a defaulting trustee who has generated a profit from an *unauthorised* use of the trust property, or of fiduciary powers.

229. Non sequitur. It is a mistake to equate a fiduciary who dutifully holds or receives money for the principal with a wrongdoer. Different rules apply when a breach of fiduciary duty is committed. At that point liabilities arise and there is no need or reason to posit the creation of any new fiduciary duty. The example of the fiduciary who receives money from an authorised use of the trust property in fact illustrates this point. It is true that a fiduciary who holds or receives money for the principal is bound to pay over or account for that money - but only at the principal's request: see eg *Bowstead & Reynolds on Agency*, 23rd ed (2023), art 52. For as long as the fiduciary simply holds the money, no breach of trust occurs. If, however, the fiduciary fails or refuses to pay over the money in response to a request by the principal, or appropriates it for his own use, a breach of duty is committed for which the principal is entitled to claim a remedy. It makes no sense to introduce a further duty to pay over the money to the principal which comes into existence upon the breach of the first duty to pay over the money to the principal. What the principal needs, and acquires, at this point is a right to a remedy – not another duty.

230. The analysis is no different where the breach of duty precedes the receipt of money and consists in unauthorised use by the fiduciary of property (or information or an opportunity treated as property) of the principal. In each case, once a breach is committed,

the law applicable is the law governing liabilities and remedies. To suppose that a new substantive duty arises at this point (whether it is described as a "primary" or "secondary" obligation) merely causes confusion.

The constructive trust device

231. I infer, although it is not spelt out, that similar thinking underlies the reliance placed by Lord Briggs on the notion of a constructive trust. When a declaration is made that a benefit received from a breach of fiduciary duty is held on a constructive trust for the principal, this trust is treated as having come into existence at the moment when the benefit was received. One of the duties of a trustee is to account for profits which are regarded in equity as belonging to the beneficiary. Therefore, it seems to be suggested, a fiduciary who makes a profit as a result of a breach of fiduciary duty has a duty to pay the profit to the principal which arises at the moment when the profit is received.

232. There are, in my view, two flaws in such reasoning. The first is that, even if the constructive trust imposed on the defaulting fiduciary is viewed as a "true trust", it does not justify the recognition of a duty to pay a profit to the principal when it is received. As just discussed, the duty of a trustee or other fiduciary who, acting within the scope of their authority, receives money on behalf of the principal is to pay over the money to the principal in response to a request. There is no duty to pay that arises automatically and without any demand. The second flaw is that there is no reason anyway to read across all the duties of an express trustee to the situation where a person who owes fiduciary duties commits a breach of such a duty.

233. It is essential not to lose sight of the fact that the kind of "constructive trust" in play when a benefit is received from a breach of fiduciary duty is not a trust created by an act of a settlor, which exists before any court order is made recognising that fact. It is what Millett LJ in *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400, 409, called "merely a remedial mechanism by which equity [gives] relief". For example, no one is suggesting that the defendants here ever agreed to act as trustees or to hold benefits derived from providing the recovery services on a trust for the claimants. Nothing could be more contrary to their intentions. But equity adopts the fiction of treating them as if they had agreed to do so. It does so as a device for making proprietary remedies available to a claimant.

234. In the recent case cited by Lord Briggs of *Hui Chun Ping v Hui Kau Mo* [2024] HKCFA 32, para 16, Lord Hoffmann NPJ helpfully explains this point in more detail:

> "The constructive trust was an altogether different animal from a trust created by an agreement to hold or exercise control over property in a fiduciary capacity. It was another fiction by which equity provided a remedy against someone who had obtained property by or with knowledge of fraud or breach of fiduciary duty. If a court of equity decided that someone had obtained property in this way, it would declare that he held it on a constructive trust for the plaintiff 'as if' he had agreed to be a bare trustee of that property. The court could then order the defendant or anyone claiming under him (other than a purchaser for value in good faith and without notice of the plaintiff's claim) to transfer to him the legal title. It was in essence a proprietary claim, analogous to a common law action to recover property."

235. The purpose of giving a principal a proprietary claim against an agent or other person in a fiduciary relationship who takes a bribe, or who appropriates information or an opportunity of the principal as the defendants did here, is to enable the principal rather than the defaulting fiduciary to benefit from any increase in the value of assets acquired from the breach of the fiduciary's duty or their product and to make the principal effectively a secured creditor if the fiduciary becomes insolvent. As Lord Hoffmann NPJ observed in *Hui Chun Ping*, para 28, that could be done without the device of deeming the assets acquired to be held on trust for the principal. It is unnecessary to adopt the fiction that the defendant agreed to hold the assets on trust. He added that, nonetheless, "the fiction does no harm." That is true provided the fiction is recognised for what it is. It does cause harm, however, if the fictitious nature of the trust and the limited purpose of the device are overlooked and a fallacious inference is drawn that a defaulting fiduciary must owe all the same duties as a consensual trustee: see William Swadling, "The Fiction of the Constructive Trust" (2011) 64 CLP 399, 425-432.

236. The terminology of "institutional" and "remedial" constructive trusts is also misleading. It obscures the fact that both kinds of constructive trust are a legal fiction devised to provide proprietary remedies. The difference between the two concepts lies only in whether the availability of such remedies is seen as a matter of entitlement arising automatically by operation of a rule of law or as contingent on an exercise of judicial discretion to grant such a remedy if, in all the circumstances, the court considers it just and equitable to do so.

237. The equation of the defendants in this case with persons appointed as trustees who make authorised use of trust property seems to me a symptom of the difficulty of escaping

from old ways of thought and restating the law applicable to wrongdoing by fiduciaries in terms of principles of causation and remedy which assimilate it with the general law of wrongs and bring it up to date. The "pathbreaking" decisions of *Target Holdings* and *AIB Group* have made such a breakthrough in relation to compensation for loss: see Alex Chan, "In Defence of *AIB v Redler*" (2021) 27 Trusts & Trustees 725, 742. A similar breakthrough in relation to surrender of profits is taking longer to achieve. I hope that this case will not delay it for long.

Conclusions

238. I will summarise my main conclusions:

(i) A fiduciary owes a duty to the principal not to use any property (or any information or opportunity which, as between the parties to the fiduciary relationship, the principal has the exclusive right to exploit) for the fiduciary's own benefit, or for any purpose outside the scope of the fiduciary's authority.

(ii) This duty is distinct from the duty to avoid a conflict of interest and, unlike the latter duty, continues after the termination of the relationship which gave rise to it.

(iii) If the fiduciary breaches this duty, the fiduciary will be liable to compensate the principal for any loss suffered by the principal as a result of the breach or to account to the principal for any profit made by the fiduciary as a result of the breach (or to claim a proprietary remedy). The principal can choose between these remedies.

(iv) In determining what loss or profit, if any, resulted from the breach, a "but for" test of causation is applied: the fiduciary is liable to compensate the principal for any loss which the principal would not have suffered or to account to the principal for any profit which the fiduciary would not have made but for the breach of duty.

(v) It is not relevant to consider whether, if the fiduciary had sought to obtain the informed consent of the principal to the use made by the fiduciary of the principal's property (or information or opportunity), such consent would have been given. The breach of duty does not consist in failure to obtain the principal's

consent but in the wrongful use of the property. Such use is made lawful only by actual and not by hypothetical consent of the principal.

(vi) Applying the "but for" test of causation in this case, the defendants breached fiduciary duties (and duties not to make unauthorised use of confidential information) owed to the claimants by appropriating for themselves the business opportunity of providing the recovery services. But for these breaches of duty, the defendants would not have made any of the profits which they in fact made from providing those services.

(vii) The judge was therefore right to order the defendants to account for those profits, subject to an equitable allowance for the work done to generate the profits.

(viii) It is unnecessary and unsound to postulate a duty owed by a fiduciary who makes unauthorised use of any property, information or opportunity of the principal to disclose and pay to the principal any profits made from such misuse without the need for a demand by the principal or an order of the court.

(ix) The proper analysis is simply that such misuse is a breach of fiduciary duty which renders the fiduciary liable to be ordered by a court to remedy the wrong done (by paying compensation for loss caused or paying over the profits gained to the principal or treating an asset as if it were held on trust for the principal).

LORD BURROWS (CONCURRING)

Introduction

239. The central issue on this appeal concerns the correct approach to an account of profits for breach of fiduciary duty. The appellants, who are the defendants, submit that the law laid down by the House of Lords in the leading cases of *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378, [1967] 2 AC 134n ("*Regal Hastings*") and *Boardman v Phipps* [1967] 2 AC 46 is unduly harsh to fiduciaries in the way that the remedy of an account of profits operates; and that those cases should be overruled, using the 1966 Practice Statement [1966] 1 WLR 1234 or, at the very least, should be reinterpreted.

240. The essential facts can be outlined very briefly. The individual defendants (there are also corporate defendants who, for ease of exposition, I put to one side) had senior

positions of responsibility at Salford Capital Partners Inc ("SCPI") and/or Revoker LLP ("Revoker"). By virtue of those positions, the defendants owed fiduciary duties to SCPI/Revoker. At a time when they were still in those positions, they obtained and set up for subsequent exploitation by themselves, a business opportunity. That opportunity was to provide services recovering assets for the family of a deceased Georgian billionaire. They then resigned their positions with SCPI/Revoker and carried out those recovery services making profits for themselves. The respondents, and the claimants, are Recovery Partners GP Ltd, to whom SCPI assigned its claims, and Revoker.

241. Cockerill J held at the Phase 1 trial, concerned with liability, that the defendants were in breach of fiduciary duty to SCPI/Revoker by what was in essence their disloyal resignation: [2018] EWHC 2918 (Comm); [2019] Bus LR 1166. The claimants then elected for an account of profits rather than equitable compensation. At the Phase 2 trial, concerned with the account of profits, Cockerill J held as follows (see [2022] EWHC 690 (Comm)):

> (i) The defendants were bound to account for all the profits which they had subsequently made from providing the recovery services (but not for profits on a further venture comprising the funding of litigation involving Royal Bank of Scotland ("RBS")).
>
> (ii) It was irrelevant to consider a 50% profit-sharing agreement that the parties had been negotiating but had not concluded.
>
> (iii) However, an equitable allowance of 25% of the profits should be granted to the defendants for their time and skill in making the profits.

On an appeal by the defendants against the decision on the account of profits (and a cross-appeal by the claimants on the equitable allowance) Cockerill J's decisions were upheld by the Court of Appeal: [2023] EWCA Civ 305; [2023] Bus LR 646 (Popplewell, Phillips and Falk LJJ).

242. The defendants have now appealed to this court in relation to the account of profits. I agree with Lord Briggs that the appeal should be dismissed because the two leading House of Lords cases should not be overruled or reinterpreted. However, as will become apparent, I do not agree with some of his reasoning and, in particular, I prefer to adopt a "remedy for a wrong" analysis which views the account of profits in this case (and those we are asked to overrule or reinterpret and in many other situations) as a remedy for the

wrong of breach of fiduciary duty. This judgment explains my reasoning in my own words.

243. I should make clear at the outset that, in my view, nothing in this case turns on whether one analyses the breach of fiduciary duty as being the disloyal resignation, which was focused on by Cockerill J and was not in dispute in the Court of Appeal, or, more generally, that the defendants allowed their self-interest and duty to conflict by making an unauthorised profit out of their position as fiduciaries. The latter general description of the breach of fiduciary duty encompasses the defendants' disloyal resignations in the sense that the resignations were disloyal because they were carried out so as to exploit the business opportunity for personal gain in a situation where that opportunity, and hence the subsequent unauthorised profit, was obtained out of their position as fiduciaries.

The two House of Lords cases that we are asked to overrule or reinterpret

244. In *Regal Hastings*, the claimant company, Regal, owned a cinema and wanted to acquire two other cinemas. The directors found that Regal could not itself afford to buy the cinemas. They therefore put up much of the money by creating a subsidiary company in which they took 2,000 £1 shares, the company's solicitor took 500 £1 shares, outside purchasers took 500 £1 shares and Regal took 2,000 £1 shares. The two cinemas were bought and subsequently the shares in the subsidiary company were sold at a considerable profit (£2 16s 1d profit per share). Regal, now under new directors, sought to recover the profits made by the former directors from the sale of the shares in the subsidiary company.

245. The House of Lords held that the former directors were liable to account to Regal for the profits made. Although they had been acting honestly and in good faith, the fact remained that they had personally made unauthorised profits out of their fiduciary position as directors.

246. In the leading speech, Lord Russell said the following at pp 143-145:

> "[The former directors] may be liable to account for the profits which they have made, if, while standing in a fiduciary relationship to Regal, they have by reason and in course of that fiduciary relationship made a profit. … The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such

> questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account."

See very similarly Viscount Sankey at p 137 and Lord Macmillan at p 153.

247. In *Boardman v Phipps*, the claimant was a beneficiary with a 5/18ths beneficial interest in the Phipps trust. The trust property, inter alia, comprised shares in a company. The defendants, who were another beneficiary and the solicitor to the trustees, sought to improve the value of the shares. Using information acquired while acting as agents for the trustees, the defendants embarked on a skilful operation whereby they acquired for themselves the majority of the shares in the company. The value of the shares in the company rose sharply so that the defendants' operations were profitable for themselves personally and for the trust holding. The claimant beneficiary nevertheless brought an action claiming that they should account to him for 5/18ths of the profit they had personally made.

248. The House of Lords by a three–two majority (Lords Cohen, Hodson and Guest; Viscount Dilhorne and Lord Upjohn dissenting) held the defendants liable to account for the profit they had made. *Regal Hastings* was followed. Although the defendants had been acting bona fide, this did not alter the fact that they had made their gains out of their position as agents for the trustees and hence while acting as fiduciaries to the beneficiaries and the beneficiaries had not authorised their scheme. However, it was stressed that the defendants should be entitled to a liberal allowance for their work and skill.

249. The minority's reasoning was that to order a disgorging of profits was too harsh. The normal strict rule against unauthorised profits acquired by a fiduciary ought not to apply here where the fiduciaries had acted in good faith and the trustees, on behalf of the beneficiaries, had made it clear that they were not interested in any scheme to obtain majority shares in the company.

250. It is of central importance to what we have to decide in this case that the defendants in both those leading cases were required to give up the profits made without consideration of whether, had they informed the beneficiaries, some or all of those profits would have been made by the defendants in any event (ie without any breach of duty) because the beneficiaries would have consented. In other words, in working out the account of profits, a "but for" test of causation between the breach of fiduciary duty and the profits made by the defendants was not being fully applied because the counterfactual of what would have happened if a possible lawful alternative had been pursued (in those cases by seeking the principal's authority for some or all of the profits) was treated as irrelevant. I shall refer to that as the "lawful alternative counterfactual". It is the primary submission of the appellants that *Regal Hastings* and *Boardman v Phipps* were incorrectly decided because they did not apply a "but for" causation test which included the lawful alternative counterfactual.

251. I should interject that the strict approach taken in *Regal Hastings* and *Boardman v Phipps* can be traced back as far as *Keech v Sandford* (1726) Sel Cas Ch 61, although the appellants were not suggesting that that case was incorrectly decided. A trustee of a lease for an infant beneficiary had taken the renewal of the lease for his own benefit in a situation where the lessor had refused to renew the lease for the benefit of the beneficiary. The trustee was held bound to assign the renewed lease to the beneficiary and to account for the profits made from the renewal of the lease. Lord King LC said at p 62:

> "This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to [the beneficiary]."

252. It is significant that the appellants' call for the lawful alternative counterfactual to be applied also runs directly counter to a very clear statement of Lord Radcliffe, giving the advice of the Privy Council, in *Gray v New Augarita Porcupine Mines Ltd* [1952] 3 DLR 1. On an appeal from Canada, the Board decided that the correct remedy for breach of fiduciary duty by a director of a company was for a director to account to the company for all the unauthorised profits that he had made from his position as director. It was suggested that it might be relevant to consider what profits the company might have allowed the director had he disclosed his dealings and not allowed his interest and duty to conflict. But Lord Radcliffe forthrightly rejected that suggestion, at p 15, because:

> "it constitutes an irrelevant speculation. If a trustee has placed himself in a position in which his interest conflicts with his duty and has not discharged himself from responsibility to account for the profits that his interest has secured for him, it is neither here nor there to speculate whether, if he had done his duty, he would not have been left in possession of the same amount of profit."

Murad v Al-Saraj

253. It is helpful to look at one further English authority at this stage. This is because it appears that the primary judicial inspiration for the central submissions made by the appellants before us were comments made by the Court of Appeal in *Murad v Al-Saraj* [2005] EWCA Civ 959.

254. Mr Al-Saraj and the Murad sisters entered into a joint venture to purchase a hotel. They agreed how they would split the profits (from running or selling the hotel). The hotel was purchased but then the Murads discovered that Al-Saraj had deceived them because he had come to a deal with the vendor of the hotel whereby his supposed contribution of £500,000 cash to the purchase was largely illusory. It was clear that there had been a breach of fiduciary duty constituted by Al-Saraj's non-disclosure to the Murads of the true nature of his contribution.

255. In the Murads' claim for an account of profits for that breach of fiduciary duty, the trial judge found that, even if there had been full disclosure, the Murads would have continued with the transaction albeit with an altered profit-sharing ratio. This was the basis for an argument by Al-Saraj (drawing on the High Court of Australia decision in *Warman International Ltd v Dwyer* (1995) 182 CLR 544, a dishonest assistance case) that he should not be stripped of all his profits in the venture.

256. The majority (Arden and Jonathan Parker LJJ) rejected that argument on the facts where the fiduciary was acting in bad faith. But it accepted that a traditional strict inflexible approach to accountability might have to be reassessed in a future case. It also pointed out that the inflexibility was tempered to a degree by the discretion of the court to make an allowance for the skill and effort of the defaulting fiduciary. Clarke LJ, dissenting, thought that even in this case it was open to the court to be more flexible given that, had there been no breach of fiduciary duty, there would have been a profit-sharing agreement between the parties.

An account of profits as a remedy for the wrong of breach of fiduciary duty

257. One distraction can be disposed of at the outset. When a claimant seeks an account of profits, it is normally not merely seeking to have an account drawn up by the defendant. That is, it is not confining itself simply to an enquiry as to what the state of the account should be as between, for example, the fiduciary and the beneficiary. Rather the claimant is also seeking a court order for payment of the profits that should have been shown in the account. An account of profits is therefore shorthand for both the drawing up of the account and the order to pay over the profits owed to the claimant. See generally, Mitchell McInnes, "An Account of Profits for Common Law Wrongs" in *Equity in Commercial Law* (2005) eds Simone Degeling and James Edelman, p 407 who refers to the drawing up of the account itself as a "preliminary exercise" which is typically sought "in order to establish an evidentiary basis for the imposition of some form of liability upon the defendant".

258. But even accepting that an account of profits is, in that sense, a monetary remedy ordered by a court, one analysis, which I shall call the "primary duty" analysis, is that the account of profits is not operating as a remedy for the wrong of breach of fiduciary duty but is rather a form of direct enforcement of a primary duty of the fiduciary. This analysis is supported by, for example, Lionel Smith, "Fiduciary Relationships: ensuring the loyal exercise of judgement on behalf of another" (2014) 130 LQR 608, 625-633; *The Law of Loyalty* (2023), chapter 5; and Robert Stevens, *The Laws of Restitution* (2023), pp 313-317. The latter succinctly summarises the argument as follows at p 313 (footnote omitted):

> "Although it has become common today to speak of a duty to account for profits arising because of a breach of fiduciary duty, and such a duty to account does often coincide with the fiduciary being in breach of his duty of loyalty, the duty to account is independent of any wrongdoing. Such a duty to account is a primary one, not a secondary duty arising because of a wrong."

259. Similarly, as I understand him (see, for example, at paras 20 and 25), Lord Briggs takes the view that, while a court order for an account of profits can often be viewed as a remedy for breach of fiduciary duty, it is not just a remedy because it can always be viewed as the specific enforcement of a fiduciary duty in its own right (ie what I am calling a primary duty). It is the failure to pay across the unauthorised profits to the beneficiary that is always objectionable. The fiduciary may or may not be committing a breach of fiduciary duty by making the profit out of its position as a fiduciary but what

the fiduciary must always do is to comply with its (primary) duty to pay across that profit once made. And once viewed in that way, there can be no rational reason for cutting back from the scope of the court's enforcement of the (primary) duty – by the application of causation rules – any of the profits made by the fiduciary out of its fiduciary position.

260. At this stage, it may perhaps be helpful to draw an analogy with remedies in the law of contract. Damages is a remedy awarded for the wrong of breach of contract. But, in contrast, a promisee who brings an action against a promisor for a debt or specific performance of a contractual obligation needs merely to allege that the sum is due or that the contractual performance is owing. An action for a debt or specific performance enforces a primary contractual duty. And unless required by the particular primary duty, there need be no causal enquiry when one is enforcing a primary duty. Hence, there is no causal enquiry required in respect of a debt action or where the claimant is seeking specific performance. Similarly, if one were to accept the "primary duty" analysis of an account of profits, one would be simply concerned to work out whether the profits fall within the fiduciary's primary duty to account to the beneficiary; and it would appear that the appellants' submissions, calling for the application of a "but for" test of causation, would never get off the ground.

261. However, in my view, there is an alternative analysis of the account of profits, which I refer to as the "remedy for a wrong" analysis. This focuses on the point that in many situations – including the facts of this case and those which we are asked to overrule – one can readily identify the account of profits as a remedy for a breach of fiduciary duty. Although a breach of fiduciary duty may be committed in various ways, it is commonplace for that breach to be constituted by the very making of an unauthorised profit for personal benefit out of one's position as a fiduciary. The making of the profits for the fiduciary's benefit rather than for the benefit of the beneficiary is commonly a breach of fiduciary duty because the fiduciary, by the very making of the profit, has allowed its self-interest and duty to conflict. Put another way still, the fiduciary commits a breach of fiduciary duty where, without authority, it exploits for its own benefit an opportunity that has arisen from its fiduciary position. An account of profits is then most naturally viewed as a remedy responding to that wrong. That analysis of the account of profits finds widespread support in the language and reasoning of the courts and in the pleading of claims. In my view, it is important to follow through the "remedy for a wrong" analysis of an account of profits – which was the analysis upon which the appellants' submissions were based – so as to examine, in depth, whether it leads to the application of a "but for" causation test including the lawful alternative counterfactual.

262. On the "remedy for a wrong" analysis, one can regard a breach of fiduciary duty as engendering two different equitable remedies. The first is equitable compensation

(sometimes labelled "accounting for loss") which is concerned with compensating the beneficiary for loss. The second is an account of profits which is concerned with disgorgement to the beneficiary of the fiduciary's profits. On this analysis, breach of fiduciary duty belongs alongside many other civil wrongs, whether at common law or in equity, in giving the victim of the wrong a remedial choice which, expressed at a high level of remedial generality, is between compensation and disgorgement. The claimant must make a choice or election between a compensatory or disgorgement remedy but that election need not be made until judgment (and can be deferred until after an inquiry as to the amount of profits) and an election may be changed if the judgment is unsatisfied: see generally *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1; *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] AC 514; *Island Records Ltd v Tring International plc* [1996] 1 WLR 1256. And in relation to compensation and disgorgement, there is a causal enquiry in order to determine the necessary link between the wrong and either the claimant's loss or the defendant's gains. That is, on both sides of the remedial divide there is a causal enquiry required to link the loss or the profits to the wrong.

263. In respect of equitable compensation, the leading cases of *Target Holdings Ltd v Redferns* [1996] AC 421 and *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58, [2015] AC 1503, have adopted an analysis which treats equitable compensation (or accounting for loss) as a remedy for the wrong of breach of trust. In each case it was held that there could be no equitable compensation for breach of trust by solicitors where the loss would have been suffered even if there had been no breach of duty. Any argument that the equitable compensation sought was to enforce a primary duty of the trustee, so that causation of loss was irrelevant, was implicitly rejected.

264. Although the wrong of breach of fiduciary duty may take different forms, the core duty is one of loyalty owed by the fiduciary to the beneficiary. The fiduciary must operate in the interests of the beneficiary and not in self-interest. The wrong is committed where the fiduciary allows self-interest and duty to conflict. This is sometimes referred to as the "no conflict" rule and is contrasted with the "no profit" rule. But from what has already been said, it follows that the no profit rule can commonly be seen as merely a more specific application of the no conflict rule: see Lord Upjohn in *Boardman v Phipps* at p 123 talking of the former being "part of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict." (See also, in respect of the duties of company directors, the statutory codification of the law in the Companies Act 2006 section 175(1) and (2), headed "Duty to avoid conflicts of interest", and section 178, headed "Civil consequences of breach of general duties".)

265. Therefore, rather than saying that the account of profits rests on a primary duty such that the premise of the appellants' submissions is flawed, I consider that it is important to address those submissions head-on by accepting the "remedy for a wrong" analysis so that we are dealing with a disgorgement remedy (the account of profits remedy constituting an award of money to the successful claimant) for the equitable wrong of breach of fiduciary duty. As Cockerill J's judgments make clear ([2018] EWHC 2918 (Comm); [2019] Bus LR 1166, at para 467 and [2022] EWHC 690 (Comm), at para 6), the claimants could have chosen the remedy of equitable compensation for the wrong but have instead opted for an account of profits. That is, the claimants have chosen disgorgement not compensation.

The causal link between the breach of fiduciary duty and the defendant's profits

266. The central thrust of the appellants' submissions is that, as a starting point for disgorgement, there must, in principle, be a causal link between the breach of fiduciary duty and the defendant's profits; that that causal link is provided by the "but for" test; and that the "but for" test includes the consideration of the profits which the defendant, counterfactually, might otherwise have lawfully obtained (ie the lawful alternative counterfactual). That starting point identifies the pool of profits and there may then be a further cut-back because some of those profits may be too indirectly connected with (ie too remote from) the breach of fiduciary duty.

267. It can be seen that this model is avowedly a mirror image of the approach to compensation, whether at common law through common law damages (for a tort or breach of contract) or in equity, through equitable compensation (for, for example, breach of fiduciary duty or dishonest assistance).

268. Mr Crow KC, for the respondents, accepted that, if we were starting with a blank sheet of paper, that might be a possible approach for the law to take on disgorgement for breach of fiduciary duty. However, that is not the position and for this court now to take that approach would involve unwarranted judicial legislation that is far removed from incremental development of the common law. In any event, so he submitted, the present law is both principled and is justified as a matter of policy. I agree with the thrust of Mr Crow's submissions.

269. As a matter of authority, the English case law, with the leading cases being *Regal Hastings* and *Boardman v Phipps* (but there have been many other cases following those leading cases), has consistently taken the view that, subject to an equitable allowance for skill and effort and the application of a cut-back for profits that are too indirectly

connected to the breach (an example of the latter being the profits on the RBS funding litigation in this case, those profits being from a further venture that was separate from the recovery services) the disgorgement required is of all the (net) profits that the defendant has made in breach of fiduciary duty. That is, the defendant must disgorge all the unauthorised profits obtained by reason of, or out of the position of, being a fiduciary.

270. As is implicit in those formulations, there has to be a causal link between the profits and the fiduciary's breach of duty. It is not any profit that the fiduciary has made that must be disgorged. Rather profits that are unconnected to the fiduciary's position (eg profits from writing a book or gambling in the fiduciary's spare time and without using any information obtained as a fiduciary) are not within the relevant pool of profits for disgorgement. However, even though one can say that, in general, the profits must be ones that would not have been made "but for" the breach of fiduciary duty, it is clear that there is to be no consideration of the profits which the defendant, counterfactually, might otherwise have lawfully obtained (ie the lawful alternative counterfactual is irrelevant). In that sense, the "but for" test is not being applied.

271. Why is it that, in respect of disgorgement for breach of fiduciary duty, one does not consider the counterfactual of the profits which the defendant might otherwise have lawfully obtained (for example, on these facts, under a profit-sharing agreement with the principal)?

272. An initial point to be made is that the rejection of that counterfactual may extend beyond disgorgement for breach of fiduciary duty. For example, in *Celanese International Corpn v BP Chemicals Ltd* [1999] RPC 203*,* a patent infringement case, Laddie J made clear, in a learned examination of several relevant authorities on accounting for profits for tortious infringement of intellectual property rights, that, while causation was important because a defendant has to account only for profits made by the infringement of the patent (and this led him to approve an approach of apportioning the profits to the relevant infringement), it was irrelevant to consider what profits the defendant would have made had it adopted the most likely non-infringing method of production. He said at para 39:

> "[I]t should be no answer to an account that the defendant could have made the same profits by following an alternative, non-infringing course. The question to be answered is 'what profits were in fact made by the defendant by the wrongful activity?'. It should not matter that similar profits could have been made in another, non-infringing way."

273. Similarly, in *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* [2018] HCA 43, (2018) 265 CLR 1, the High Court of Australia ordered an account of profits, comprising the value of the whole of a funeral products business, for the equitable wrong of dishonest assistance. It was reasoned (see para 9 of the leading judgment including the citation – see para 252 above – of Lord Radcliffe in *Gray v New Augarita Porcupine Mines Ltd*) that it was not open to the defendants to establish that some part of the profit would have been made had they acted honestly without committing a wrong.

274. However, there are other cases indicating the converse. For example, in *Siddell v Vickers* (1892) 9 RPC 152, another patent infringement case, it was suggested that one should compare the profits actually made with those that would have been made if the next most likely means of non-infringing manufacture had been adopted. Similarly in this court recently in *Lifestyle Equities CV v Ahmed* [2024] UKSC 17; [2025] AC 1, an infringement of trademark case, in a passage that was admittedly obiter dicta, Lord Leggatt, with whom the other Justices agreed, said the following at para 176:

> "In estimating the profits for which [the trader] was liable to account, the question should therefore have been asked whether it is likely that any, and if so what proportion, of the sales of goods bearing the offending signs which were in fact made would have been made if the signs had not been used. The appropriate inference might have been that no sales would have been made but the question was not considered."

275. It follows from this that, in my view, one cannot say across the whole law of disgorgement for civil wrongs that it will always be irrelevant to consider, in assessing the relevant profits, what the profits would have been had the next most likely lawful conduct been taken by the defendant. Rather one has to consider the particular reason why an account of profits is being awarded.

276. I therefore now turn to consider that question in respect of breach of fiduciary duty.

Why does the law allow a claimant to elect for disgorgement for breach of fiduciary duty?

277. There is relatively little difficulty explaining why a defendant is required to compensate a claimant for a wrong committed against a claimant. A defendant is not

entitled to make someone worse off than they would otherwise have been by committing a wrong against them. Compensation for loss caused by wrongdoing (whether by equitable compensation or common law damages) may be said to be a straightforward application of corrective justice.

278. On the face of it, it may be thought more difficult to explain why a claimant should be entitled to the profits that the defendant has made by committing a wrong against the claimant. After all, the consequence of doing so is that the claimant, assuming disgorgement gives a higher sum than compensation (and that the claimant has therefore made a rational choice in electing for disgorgement), will end up better off (ie with a "windfall") than the position the claimant would have been in had the wrong not been committed. Much academic ink has been spilt in trying to answer this question and the linked question as to why some civil wrongs (eg breach of fiduciary duty, breach of confidence, and intellectual property torts) routinely give rise to disgorgement whereas others do not (eg breach of contract – although see the exceptional case of *Attorney General v Blake* [2001] 1 AC 268 – and some torts).

279. In this single case, it would be over-ambitious to attempt to achieve complete coherence on disgorgement across the whole of the common law (including equity). It is also relevant to bear in mind that the appellants are not challenging the proposition that liability for breach of fiduciary duty does not require proof of fault and imposes strict liability. They are challenging the conventional law on the remedy of an account of profits for breach of fiduciary duty not on what constitutes liability for breach of fiduciary duty.

280. Nevertheless, it is helpful to recognise that, drawing on general justifications given for disgorgement, disgorgement as a remedy for breach of fiduciary duty might be explained by two underlying ideas.

281. The first is that a dishonest, deliberate or cynical wrongdoer should not be allowed to profit from the wrong. A person who perceives that committing a wrong to the claimant is worthwhile, because the profits to be gained exceed the losses to be compensated, should have that incentive removed. One way of removing that incentive, and the minimum necessary to achieve that goal, is to remove the profit by an award of an account of profits to the claimant. In general terms, applicable to torts and equitable wrongs alike, this type of explanation has the support of the Law Commission in its report, *Aggravated, Exemplary and Restitutionary Damages* (1997) (Law Com 247), paras 1.48-1.53.

282. But that cannot be the explanation, or at least cannot be the sole explanation, in the context of breach of fiduciary duty, because an account of profits is not confined to where there is a dishonest, deliberate or cynical breach of fiduciary duty.

283. The second, and more complete explanation in this context, is that it would undermine or contradict the purpose of the fiduciary duty if the fiduciary were allowed to keep unauthorised profit. As I have indicated above, at its core, a fiduciary duty imposes a duty of loyalty (or, if one wishes to emphasise the point, a duty of undivided loyalty or single-minded loyalty). It requires a sacrifice of self-interest. It would directly undermine that duty of loyalty for the fiduciary to be allowed to keep profit made from a breach of that duty. In this respect, the duty naturally carries through to the remedy of an account of profits.

284. Both those underlying explanations may be linked to a policy of deterrence: see James Edelman, *Gain-Based Damages* (2002) pp 83-86. Although deterrence would normally only make sense in the context of deliberate or cynical wrongdoing, in the context of a fiduciary duty, deterrence can be seen to operate, even on a strict liability basis. By imposing a strict rule, the fiduciary is not tempted to put himself or herself in a position where self-interest and duty conflict and where, as Mr Crow forcefully submitted, human nature being what it is, the fiduciary may deceive himself or herself as to whether he or she is acting honestly. He drew our attention to the following passage from the speech of Lord Herschell in *Bray v Ford* [1896] AC 44, 51:

> "It is an inflexible rule of a Court of Equity that a person in a fiduciary position … is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect."

285. Similarly, as James Edelman expresses it, in *Gain-Based Damages* (2002) at p 85 (footnotes omitted):

> "There is [a situation] in which the law recognises a need for deterrence even though the defendant's breach has not been

> deliberate or reckless and calculated for gain. This is where there are institutions which require such a degree of protection that the prospect of gain for even inadvertent wrongdoing should be removed and potential defendants should be put on their guard. One institution which has been recognised as deserving this protection is the relationship of extreme trust and confidence or 'fiduciary relationship'. Fiduciaries are liable to disgorge any profits made in breach of their duties, however innocently, because of this need for protection or prophylaxis to 'express the policy of the law in holding fiduciaries to their duty' [citing the High Court of Australia in *Maguire v Makaronis* (1996) 188 CLR 449, 468]."

286. One can add that the flip side to deterrence in this context is that the present law may be said to incentivise a fiduciary to make full disclosure to a principal thereby seeking to obtain authorisation for the profits.

287. The important point that follows from those possible explanations is that it would to some extent cut against them if a fiduciary were able to argue that he or she might otherwise have made some, or all, of the profits by not committing the breach of fiduciary duty. The fact is that the fiduciary has committed the breach of fiduciary duty and has made profits by so doing. It maintains the disincentive to a cynical wrong and fully upholds the duty of loyalty for the fiduciary to be denied the possibility of arguing that the same profit could have been lawfully made. Put another way, it would undermine the purpose of the duty of loyalty to allow the fiduciary to dictate a counterfactual investigation of the profits that might lawfully have been made.

288. Indeed in at least some circumstances it would be absurd to allow the fiduciary to mount an argument based on the lawful alternative counterfactual. Say the fiduciary has taken a bribe. The fiduciary must account for that bribe to the principal and it would plainly be absurd to speculate as to whether the principal might have allowed the fiduciary to keep part of the bribe had the fiduciary disclosed what was happening. The fact is that the fiduciary did not seek that authority in advance. Much the same can be said about unauthorised profits. The fiduciary has obtained those profits without authority. It would be verging on the absurd for the fiduciary to be able to argue that, had he or she sought the principal's consent, the principal would have authorised those profits. The fact is that the fiduciary did not obtain prior authority and therefore committed the wrong.

289. Matthew Conaglen, "Identifying the Profits for Which a Fiduciary Must Account" (2020) 79 CLJ 38, 58, has forcefully expressed the point as follows (footnotes omitted):

> "the mere fact of the profit having been made is sufficient to justify its disgorgement even if the defendant can show that it could potentially have been earned without a breach of fiduciary duty … because the fiduciary has chosen not to take that route. … The strictness of the approach is designed to provide fiduciaries with an incentive to resist the temptation to misconduct themselves. … Fiduciary doctrine is clear in requiring that the fiduciary should not have taken the profit unless he made full disclosure and obtained consent; having failed to avail himself of that potential escape route, and chosen instead to take the profit, there is nothing incoherent in stripping the fiduciary of that profit even if the fiduciary could potentially have obtained consent from his or her principal. The profit was made, it was made without authorisation, and remains so unless and until authorisation is obtained. In other words, it simply does not follow that profit can, or should, *only* legitimately be stripped from a fiduciary in circumstances where the breach of fiduciary duty is a 'but for' cause of that profit."

290. This is not to deny that in respect of other wrongs the reason why an account of profits is a remedy for the wrong in question may mean that a different approach should be taken to the lawful alternative counterfactual.

291. The conclusion to be reached is that there are good reasons (which one may describe as reasons of principle and policy) why, in respect of an account of profits for breach of fiduciary duty, a "but for" test which incorporates a lawful alternative counterfactual should not be applied.

292. There is one further point. Although the focus in this case was on an account of profits alone, the law is clear that, in addition to that personal remedy, a constructive trust may be imposed on unauthorised profits made in breach of fiduciary duty. In *Boardman v Phipps* itself, the declaration made by Wilberforce J, which was upheld by the House of Lords, was that, in addition to being required to account for 5/18ths of the profits, the defendants held 5/18ths of the relevant shares on constructive trust for the claimant beneficiary. More recently, it was held by this court in *FHR European Ventures LLP v*

Cedar Capital Partners LLC [2014] UKSC 45, [2015] AC 250, that the imposition of a constructive trust was not confined to where unauthorised profits have been made in breach of fiduciary duty but should also be imposed on bribes taken in breach of fiduciary duty. If the appellants' submissions were to be accepted, and a "but for" causation test were required to be applied including a lawful alternative counterfactual, it is not entirely clear how this would impact on the imposition of a constructive trust for breach of fiduciary duty. Perhaps the answer would be that the subject-matter of the constructive trust could only be determined after the application of the "but for" test including the lawful alternative counterfactual. But I shall say nothing further about this conceivable additional problem with the appellants' case because we heard no submissions on it.

The equitable allowance for work and skill

293. Part of the appellants' submissions focused on the idea that, if a full-blown "but for" test were to be applied, this would tend to obviate the need for an equitable allowance for work and skill; and that would improve the present law because when and why that allowance is granted, and its quantification, are unclear.

294. Certainly I accept that it is unsatisfactory for the law to say that this is all a matter for the discretion of the court depending on the particular facts of the case. Equity, no more and no less than the common law, comprises rules and principles that can be, and should be, made as clear as possible.

295. My own inclination is to think that, even in the context of breach of fiduciary duty, an equitable allowance should be readily allowed because, like disbursements, making that allowance goes to the correct calculation of the net profit made by the defendant. But there should normally be no equitable allowance for a deliberate or cynical breach of fiduciary duty. If disallowance of that equitable allowance for that reason depends on a punitive rationale, so be it.

296. However, we heard no detailed submissions on the equitable allowance generally and permission to cross-appeal on the equitable allowance of 25% allowed in this case was refused. It would therefore be imprudent to say any more about the equitable allowance.

Why the two House of Lords cases should not be overruled

297. The 1966 Practice Statement allows the Supreme Court to overrule past decisions of the highest court where it considers it "right to do so". On the face of it, that recognises a very wide unfettered discretion. In practice, the Supreme Court, and the House of Lords before it, has exercised considerable restraint in using that power: see, eg, Lord Reed's examination of the 1966 Practice Statement in *In re Dalton* [2023] UKSC 36, [2023] 3 WLR 671, at paras 45-50. Leaving aside where there have been changes in society or societal attitudes that render the law out of date, two major constraints are how clear it is, with the benefit of hindsight, that the past decision was legally incorrect; and how disruptive the overruling will be, given that the common law operates by retrospective overruling.

298. In my view, it cannot be said that, in respect of the account of profits in *Regal Hastings* and *Boardman v Phipps*, it was plainly wrong not to apply a "but for" test which would have included the lawful alternative counterfactual. On the contrary, as has been explained above, the approach taken can be readily justified. Moreover, to overrule those cases would involve considerable disruption (for example, shareholders may have invested in companies on the basis of the law governing directors being as traditionally understood) and, in general terms, that is because the law has been well-settled since those cases were decided over 50 years ago (and indeed, as we have seen in para 251 above, a strict approach to fiduciaries making unauthorised profits out of their position can be traced back to *Keech v Sandford* (1726) Sel Cas Ch 61).

299. Although there has been some eminent academic criticism of those two cases, or the present law more generally, for being too harsh (see, eg, Gareth Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968) 84 LQR 472; John Langbein, "Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest" (2005) 114 Yale LJ 929; Mitchell McInnes, "Account of profits for breach of fiduciary duty" (2006) 122 LQR 11) other distinguished commentators have defended the present law (see, eg, James Edelman, *Gain-based Damages* p 212; Irit Samet, "Guarding the Fiduciary's Conscience – A Justification of a Stringent Profit-stripping rule" (2008) 28 OJLS 763; Matthew Conaglen, "Identifying the Profits for Which a Fiduciary Must Account" (2020) 79 CLJ 38). One must also bear in mind that the appellants are focusing only on the remedy of an account of profits and are not seeking to challenge the strict liability imposed. And while there have been occasional judicial comments indicating that a re-examination of the leading cases might be appropriate (see in particular *Murad v Al-Saraj*), there has been no groundswell of judicial opinion, either here or in Commonwealth jurisdictions, that those cases were wrongly decided. I also note that there has been no Law Commission Report recommending reform. Furthermore, it is hard to

see that there have been changes in society that render those decisions outdated. Given that human nature has not changed, there is nothing to suggest that the need to uphold the fiduciary duty of loyalty is less powerful today than in the past. Indeed, one might argue that, to be consistent with today's wider legislative regulation of many of those who owe fiduciary duties to their clients (eg banks and financial advisers), the stringent application of the account of profits remedy for breach of fiduciary duty is more appropriate today than it ever was. Nor can it be said that, leaving aside the equitable allowance, the law is unclear or uncertain.

300. I therefore reject the appellants' submissions calling for an overruling, or a reinterpretation, of the approach to an account of profits laid down in *Regal Hastings* and *Boardman v Phipps*.

Conclusion

301. For all these reasons, I would dismiss the appeal.

LADY ROSE (CONCURRING)

302. I agree that the appeal should be dismissed but I have arrived at that conclusion for different reasons from those set out in the judgments of Lord Briggs, Lord Burrows and Lord Leggatt.

303. I do not wish to add anything to the discussion of whether in this case a court order requiring a fiduciary to account for profits constitutes the enforcement of a rule which exists in its own right or is the grant of a discretionary equitable remedy triggered by the breach of some other duty. I will address instead whether this court should accept the appellants' submissions that the time has come to depart in some important respects from the strict application of the rules or principles that have so far been applied when fiduciaries fall short of the exacting standards of conduct that have in the past been required of them. The appellants argue that this court should fashion a different test for determining when fiduciaries should have to disgorge profits they have made after the fiduciary relationship has terminated – at least when those profits were earned in circumstances similar to the circumstances of the present case.

304. I recognise that the appellants assert in their written case that the change they are inviting this court to make is a change in relation to the remedy for breach of fiduciary

duty. That remedy is, they say in their written case, intended "to require a fiduciary to disgorge to the principal the profits made *from the breach*" (emphasis in the original). It is at that stage that they contend for a more flexible approach to the ordering of an account, so that the court can consider arguments as to whether the fiduciary would have been able to make the profit even without the breach. They argue that this would be a better and more just way of responding to the merits of the case than the current unsatisfactory rules about discretionary equitable allowances.

305. Lord Briggs' judgment casts doubt on this underlying premise; namely whether the account really is a remedy for breach or whether it is of itself a duty of the fiduciary. What is clear, however, are the following points. The first is that when the court is considering whether to order an account of post-termination profits, the court must first investigate whether there is a connection between the post-termination profits earned by the fiduciary and his former role, for example, as a director of the company which is a sufficient connection to warrant bringing the profits earned within the pool of profits for which he is liable to account. As Lord Briggs states at para 26, there are many different phrases used in the case law to encapsulate that link and he lists some of them in paras 26 to 34. That link is not, Lord Briggs says, generally regarded as a "causal link" because it is not necessary for the company to establish that the director only found out about that opportunity because of his role with the company now bringing the claim against him. Knowledge of the opportunity may have been publicly available but, as Lord King LC said in *Keech v Sandford* (1726) Sel Cas Ch 61, the trustee may still be "the only person of all mankind" who cannot take advantage of it for himself: see the passage cited by Lord Briggs at para 16 of his judgment.

306. This first point about the sufficient connection was relevant on the facts of the present case. There were several sums claimed initially by the respondents which they did not pursue at trial because they accepted that the connection between the post-resignation investments and the appellants' breaches whilst they were directors was "less direct". Cockerill J confirmed the correctness of that stance saying that she would not have found that the claim in respect of those items succeeded: see paras 199 and 200 of Cockerill J's judgment on the account ([2022] EWHC 690 (Comm) (the "Phase 2 judgment"). The respondents did, however, pursue their claim to the RBS Litigation Funding investment worth US$54.4 million. The judge held that there was an insufficient connection saying that whilst derivative profits are conceptually capable of falling within the ambit of the account, by no means will they always do so: paras 408-418 of the Phase 2 judgment. The connections established were not sufficient to provide the nexus required as a matter of law between the appellants' work on the Recovery Services and their decision later to invest in the RBS Litigation Funding.

307. The second point on which we are agreed is that the effect of the current law is that a former fiduciary is not allowed to defend his retention of post-termination profits by saying that:

> (i) he would have made those profits anyway even if he had not done the things which have been held to amount to a breach by him of his fiduciary duty (see para 38 of Lord Briggs' judgment); or that
>
> (ii) if he had asked in advance for the consent of the claimant to do those things, the claimant would have given its consent and so would have authorised or ratified what would otherwise be a breach of his fiduciary duty (see para 40 of Lord Briggs' judgment); or that
>
> (iii) the claimant would not anyway have been able or willing to take advantage of the opportunity later exploited by the fiduciary (see para 37 of Lord Briggs' judgment).

308. The appellants did not shy away from the fact that they are asking us to depart from previous decisions of the House of Lords. The test for whether this court will take such a step is the test set out in *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 (26 July 1966). This has been carried forward to the Supreme Court without the need for a further statement: see *Austin v Southwark London Borough Council* [2010] UKSC 28; [2011] 1 AC 355, para 25 per Lord Hope of Craighead. The Practice Statement refers to the use of precedent as an indispensable foundation upon which to decide what is the law and how to apply it to individual cases, but went on:

> "Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so."

309. In the *Austin* case, Lord Hope reviewed the authorities as to when the test should be applied. He referred to the speech of Lord Reid in In *R v Knuller (Publishing, Printing and Promotions) Ltd* [1973] AC 435, 455 where Lord Reid said:

> "I have said more than once in recent cases that our change of practice in no longer regarding previous decisions of this House as absolutely binding does not mean that whenever we think that a previous decision was wrong we should reverse it. In the general interest of certainty in the law we must be sure that there is some very good reason before we so act. … I think that however wrong or anomalous the decision may be it must stand and apply to cases reasonably analogous unless or until it is altered by Parliament."

310. Lord Reid, however, said earlier in *R v National Insurance Comr, Ex p Hudson* [1972] AC 944, 966 that it might be appropriate to depart if to adhere to the previous decision would produce serious anomalies or other results which were plainly unsatisfactory. Similarly, in *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309, para 31 Lord Steyn said that a fundamental change in circumstances or experience showing that a decision of the House results in unforeseen serious injustice, might permit such a departure.

311. The appellants' argument runs by analogy with the speech of Lord Pearson in the well-known case of *Herrington v British Railways Board* [1972] AC 877. In that case, the House overruled the earlier rule in *Robert Addie & Sons (Collieries) Ltd v Dumbreck* [1929] AC 358 that an occupier of land owed no duty of care to trespassers. Lord Pearson said, at p 929, that that rule "has been rendered obsolete by changes in physical and social conditions and has become an incumbrance impeding the proper development of the law". He described how a larger proportion of the population now live in cities and towns with an absence of playing space for children. This meant that there was more need for occupiers to take reasonable steps to deter people from trespassing in places that were dangerous for them. The old rule was, Lord Pearson said at p 930, "plainly inadequate for modern conditions … It has become an anomaly and should be discarded".

312. The appellants' case is that the strict rule which precludes the fiduciary from resisting an order to disgorge profit by showing that he would have made the profit without any breach of his duty or that the claimant would have consented to him making it if he had asked has similarly been rendered obsolete by changes in the way in which people do business. The nub of their argument is encapsulated in para 42 of their written case before this court. They submit that the incidence of fiduciary duties has "morphed and expanded significantly" since the early case-law in which the principles were formulated. Such duties now arise in many contexts and further:

> "42. 2(a) Much of the early case-law was concerned with traditional relationships, such as that between a family solicitor and his client, where the fiduciary status was both well-known, and justified due to the asymmetry of knowledge, information and control, and the degree of trust and dependency that was being placed by one party in another with regard to their finances and estate.
>
> 42. 2(b) Now, fiduciary duties regularly arise in purely commercial contexts, such as in the present case, where the fiduciary and the principal are both sophisticated operators, having access to the same information, who may also rely on less formality, and far less on trust, than in the traditional relationships.
>
> 42. (3) Further, where fiduciary duties arise outside of the traditional contexts of, for example, solicitor, trustee or agent, it may be mere happenstance whether the duty owed is a contractual duty of loyalty, for example under a consultancy agreement, or a fiduciary one. People can agree with each other to pursue a business opportunity using a number of different structures, and that decision may have little to do with what sort of duties they want to assume or impose; they are at least as likely to be concerned with considerations such as, for example, domicile, tax and secrecy. While some such structures give rise to fiduciary duties under the law, some do not. Accordingly, a fiduciary may well not even know that he is a fiduciary - it can often be a complex legal question (as it was in this case) whether the combination of his role and responsibilities involve sufficient assumption of responsibility to cross the line to become a relationship of trust and confidence. If so, he may not knowingly or willingly have signed up to the increased burdens that the law places on fiduciaries."

313. What the appellants say in that submission is undoubtedly true. Any judge who has presided over cases in the Business and Property Courts in recent years will recognise that the account of what happened when these parties got together to provide the Recovery Services to the family was not unusual.

314. This also comes across clearly from the meticulous and engaging narrative of the facts provided by Cockerill J in her judgment in the liability phase of the proceedings ([2018] EWHC 2918 (Comm); [2019] Bus LR 1166 ("the Phase 1 judgment")). At the start of that judgment, she observed that "the approach to analysing commitments which is reflected in English law and which is second nature to English lawyers was not something which gelled easily with any of the main witnesses": (para 18). The first appellant ("Mr Rukhadze") was, she said, "supremely uninterested in the detail of the structures through which the Recovery Services were to be provided". She refers to Mr Rukhadze's attitude to company structures which he expressed in his comment: "structures are there to serve us… and not the other way round": (para 25). She recognised later that the formal relationships between the parties were not the same as what the parties understood to be their actual relationships. In the section of the Phase I judgment where she describes the breakdown of the relationship between the parties from March 2011 onwards, she quotes from an angry email sent by Mr Rukhadze in response to someone pointing out that Revoker LLP (that is the limited liability partnership formed in late 2009 of which Mr Rukhadze was a member) was against taking a particular proposed step with the Russian investigatory authorities:

> "277. Mr Rukhadze replied: 'I thought Igor and I had at least 50% […] What is Revoker anyway? Don't we have another company called Recovery something? [...] I confuse these structures as they are meaningless. There are people who do work and then there are meaningless structures that exist today and may be gone tomorrow.'"

315. In a later email exchange, Mr Rukhadze responded to the suggestion that he, as the senior officer of Revoker, should set up a system of bi-weekly reporting to Revoker and seek approval for all major decisions. Mr Rukhadze roundly rejected any such duty (quoted in para 278 of the Phase 1 judgment):

> "What is Revoker anyway, a partnership? What other companies do we have (I believe Recovery something rather). Can you please make sure I am briefed about the current status of these entities by Jamal as somehow these structures are now presented as meaningful?"

316. The description in the Phase 1 judgment of the structuring of the entities which would provide the Recovery Services to the family shows that the choice of entities, who owned what, who was appointed a director of which company, who was employed by

which company and so forth depended on a variety of factors. These ranged from ensuring that the fees were exempt from VAT to managing the application of the Financial Services and Markets Act 2000: see para 188 of the Phase 1 judgment. They were also influenced inevitably by which mechanism was most advantageous as the way a particular party would receive his share of the reward for providing the Recovery Services. The participants could receive their allotted portion, for example, by way of the appropriate percentage of share capital of the company which received the assets; by way of director's remuneration or director's loans paid by the company; or partnership drawings from a limited liability partnership; or by way of a carried interest in a particular asset; by way of an employee's salary or of a consultancy fee under a consultancy arrangement or a series of these at different times or a combination of these.

317. For example, Mr Rukhadze entered into a consultancy agreement with Recovery Partners. One of the many issues at the liability phase was whether that agreement gave rise to any genuine obligations. Cockerill J describes how Mr Rukhadze initially said that he entered into the consultancy agreement for tax reasons or because he was not resident in the United Kingdom and so could not legally be employed here: see para 204. His pleaded case as to why he owed no actual duties to Recovery Partners under the consultancy agreement was because the "sole intended purpose" of that agreement was not to regulate legal relations but to provide a means for Mr Rukhadze to receive fees for such period as he was not resident in the UK for tax purposes. It was, Mr Rukhadze said, an innovation that the solicitors Macfarlanes devised as a temporary solution until Mr Rukhadze became a UK resident and could be paid as a member in Revoker: see para 318 of the Phase 1 judgment. Cockerill J rightly rejected these attempts to brush aside the agreement, holding that the consultancy agreement must be taken at face value: either it correctly reflected the legal relations between Mr Rukhadze and Recovery Partners and was effective in accordance with its terms or it was a fraud on one or more tax authorities: para 316.

318. This background provides the context for the appellants' call for a change in the law. The happenstance of whether, unbeknown to the parties, one or more fiduciary duties sprang into being from the arrangements that were put in place to ensure the tax efficient division of the spoils amongst them now threatens to allow one of their group opportunistically to assert that he is entitled to everything.

319. Bearing all that in mind, I have considered carefully whether in a "purely commercial context" as the appellants describe it, we should mitigate the effect of the existing rules to reflect the fact that the business world has changed. Are the appellants right to say that the honourable and gentlemanly world of 19th century business ethics evoked in the case law – if indeed it ever really existed – no longer has a place here?

320. It is useful first to recall why directors of companies have, from an early stage in the development of company law, been treated as being in an analogous position vis a vis the company and its members as trustees are vis a vis the beneficiaries of the trust fund in their care. In *Al Nehayan v Kent* [2018] EWHC 333 (Comm); [2018] 1 CLC 21, Leggatt LJ said that "fiduciary duties typically arise where one person undertakes and is entrusted with authority to manage the property or affairs of another and to make discretionary decisions on behalf of that person": para 159. The history of the relationship between the director, the company and the shareholders of the company was described by Lord Reed PSC in his judgment in *BTI 2014 LLC v Sequana SA* [2022] UKSC 25; [2024] AC 211. He examined the underpinning of the traditional equation of the company's interests with those of its members:

> "20. As a matter of legal history, that approach appears to have been influenced by the continuity of the joint stock company with its precursor, the unincorporated deed of settlement company, in which the members were the company, and the directors were trustees. There appears also to have been a view at one time that the substance of the relationship between the directors and the shareholders as a whole was that the shareholders, as the corporators, entrusted their property to the directors and conferred on them their powers of management. In the eyes of equity, that relationship was analogous to the fiduciary relationship between the directors and the company. That view is illustrated, for example, by the statement in the 6th edition of Lindley on Companies (1902) that "[d]irectors are not only agents, but to a certain extent trustees for the company and its shareholders" (vol 1, pp 509-510; emphasis added). It is also illustrated by many judicial dicta. In *In re Wincham Shipbuilding, Boiler, and Salt Co; Poole, Jackson and Whyte's Case* (1878) 9 Ch D 322, 328, for example, Sir George Jessel MR stated:
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> > 'It has always been held that the directors are trustees for the shareholders, that is, for the company.'"

321. When the company was financially stable, therefore, it was justifiable to treat the company's interests as equivalent to the shareholders' interests "since it results in the directors being under a duty to manage the company in the interests of those who primarily bear the commercial risks which the directors undertake": (para 59).

322. Certainly the 19th century cases proceed on that basis. In *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461, 471, Lord Cranworth LC referred to the directors as "a body to whom is delegated the duty of managing the general affairs of the company". *In re Lands Allotment Co* [1894] 1 Ch 616 the issue was whether the directors should be treated as akin to trustees not only as regards when they were in breach of their fiduciary duties but also as regards when they could benefit from the Statute of Limitations that was passed for the benefits of trustees. Lindlay LJ said at p 631:

> "Although directors are not properly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control; and ever since joint stock companies were invented directors have been held liable to make good moneys which they have misapplied upon the same footing as if they were trustees ..."

323. The appellants argue that the relationship between the parties in the present case was very far from a relationship when any of them was entrusting any of their assets to the management of the others. They were not relying on the competence and integrity of that other person to maintain the value of their financial investment. They were all, as Mr Rukhadze put it, "people who do work" and they all played an active role in ensuring the success of the venture in which they all hoped to share. There was not the same asymmetry of control and information as there is between the directors of a more conventional company and the shareholders whose financial investment is at risk if the value of the company's shares suffers as a result of the mismanagement or dishonesty of the directors. Their alliances last as long as they are mutually convenient and no longer. I bear in mind that the need for the family to engage the parties to provide Recovery Services in the first place arose because Badri had given many millions of dollars of his assets to individuals whom he clearly trusted to act as his informal "treasurers": see para 105 of the Phase 1 judgment. These former trusted associates do not appear to have regarded their obligations of friendship or loyalty to Badri as outliving Badri himself.

324. Although the appellants' indignation at the result of these proceedings is clearly strong and genuinely felt, there are in my judgment insuperable obstacles in the way of a judicial development of the law along the lines suggested by the appellants.

325. First, although many of the cases cited by Lord Briggs espousing the high standards of conduct expected of company directors date back many decades, the law regarding directors' duties was recently codified in the Companies Act 2006 ("the 2006

Act"). It is true, as Lord Leggatt points out in para 110 of this judgment, that the statutory duties set out in the 2006 Act do not apply here since the company of which Mr Rukhadze was a director, SCPI, was incorporated in the British Virgin Islands. But as he also notes, section 170(3) provides that the general duties specified in sections 171 to 177 "are based on certain common law rules and equitable principles" as they apply to directors. Those sections "have effect in place of those rules and principles" but at the same time, by section 170(4), "shall be interpreted and applied in the same way as common law rules or equitable principles." The fiduciary duty recorded in section 175(2) not to exploit any relevant property or information or opportunity reflects the common law. Further, the business and commercial environment in which the parties were operating these companies was the UK and it is that environment which the appellants argue has changed in a way which should prompt this court to change the law.

326. There is nothing in the provisions of the 2006 Act that suggests that, so far as companies incorporated in this jurisdiction are concerned, the UK legislature regarded developments in the business world as at 2006 as calling for a substantial relaxation of the rules applied to company directors by analogy with trustees either whilst the appointment as director lasts or after it has been terminated. The appellants have not pointed the court to anything in the statutory or regulatory context surrounding that codification that suggests that Parliament or the professional regulators regarded the law as producing the kind of serious anomalies or unforeseen serious injustice which, applying the authorities on the 1966 Practice Statement, would justify this court in changing the law.

327. Secondly, the 2006 Act provided an opportunity for the legislature to draw distinctions between the directors of some companies to whom the full rigour of the principles continued to apply and directors of other companies in respect of whom that rigour was mitigated in some respects in the manner proposed by the appellants. That opportunity was not taken. The provisions do recognise in some respects that not all companies are the same. Section 173 tempers the obligation on the director to exercise independent judgment where he acts in a way authorised by the company's constitution. The provisions which refer to the potential authorisation of conduct which would otherwise be a breach of duty accommodate the fact that authorisation may be given by directors rather than by the members in certain circumstances: see section 175(5) and section 180.

328. In practice, therefore, the terms of the company's constitution, the nature of the company, the number of members and their relationship with the directors may have a significant effect on how the directors' duties operate. But there is nothing there which attempts to draw a distinction between the relationships in a large, listed company

between the director, the company and its members, and those same relationships in the context of a special purpose vehicle company like that set up in this case.

329. Thirdly, and following on from the second point, if this court were to accept the appellants' suggestion to change the law, we would have to decide whether to change the law in respect of all company directors – or all fiduciaries – so that they can all from now on raise (with greater or lesser likelihood of success) these arguments when faced with a claim for an account or only some directors who are involved in companies in similar circumstances to the present. To change the law for every company would certainly be a very serious step. But to attempt to define the situations in which a counterfactual analysis is required or permissible would be a difficult task and one which it is not appropriate for this court to undertake.

330. The repercussions of any development of the common law relating to company directors would also extend beyond the scope of the common law duties and equitable principles. In a case involving a company to which the 2006 Act applies, section 178 of that Act provides that the consequences of a breach of sections 171 to 177 "are the same as would apply if the corresponding common law rule or equitable principle applied". The duty in section 175(2) is, section 178(2) states, "accordingly, enforceable in the same way as any other fiduciary duty owed to a company by its directors". It would be very unclear what effect a change in the law made by this court would have on the application of those provisions.

331. Further, the second appellant, Revoker, was not a company but a limited liability partnership. Cockerill J described the default provisions that apply according to the Limited Liability Partnership Regulations 2001 (SI 2001/1090) governing the mutual rights and duties of the members of such a partnership: see paras 92 to 98 of her Phase 1 judgment. Under Regulations 7(9) and 7(10), a member of an LLP owes the following duties:

> "(9) If a member, without the consent of the limited liability partnership, carries on any business of the same nature as and competing with the limited liability partnership, he must account for and pay over to the limited liability partnership all profits made by him in that business.
>
> (10) Every member must account to the limited liability partnership for any benefit derived by him without the consent of the limited liability partnership from any transaction

> concerning the limited liability partnership, or from any use by him of the property of the limited liability partnership, name or business connection."

332. Cockerill J said at para 94 of the Phase 1 judgment:

> "The nature of the duties to account in regulations 7(9) and 7(10) appear to be closely analogous to the equitable duties. That being so, Whittaker & Machell in *The Law of Limited Liability Partnerships,* 4th ed (2016), pp187-188 express the view that the 'no profit' rule applies in the same way, ie encompassing post-termination use of a pre-termination opportunity."

333. If this court were to hold for example that the actual consent of the company is no longer needed in order for a corporate director like Mr Rukhadze to escape liability as long as the court is satisfied that the company would have consented if asked, it would inevitably cause confusion about whether that also changed the nature or incidents of the duties owed by the members of a limited liability partnership.

334. Generally, where people use corporate structures for their own convenience they are regarded by the law as having taken on the burdens of that choice as well as the benefits. In *Swynson Ltd v Lowick Rose llp (formerly Hurst Morrison Thomson llp)* [2017] UKSC 32, [2018] AC 313, a wealthy businessman Mr Hunt was held to have accidentally extinguished the loss suffered by one of his companies which had been negligently advised by its accountants to make a loan to a risky company because he personally lent the borrower the money to repay the loan to his company for tax reasons when the borrower defaulted. In the opening paragraph of his judgment, Lord Sumption JSC said "The distinct legal personality of companies has been a fundamental feature of English commercial law for a century and a half, but that has never stopped businessmen from treating their companies as indistinguishable from themselves. Mr Michael Hunt is not the first businessman to make that mistake, and doubtless he will not be the last."

335. Mr Rukhadze has made the same mistake of not appreciating the nature of the responsibilities he took on when, for whatever reason, he accepted appointment as a director of one of the claimant companies. Whether the development and the continued prosperity of the business community in this jurisdiction is helped or hindered by the application of the rules discussed in this case is a broader question which must be tackled by the legislature, if any updating of the rules is needed.