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# *Guarding the Fiduciary's Conscience—A Justification of a Stringent Profit-stripping Rule*

IRIT SAMET*

**Abstract**—This article argues that considerations of moral psychology support the traditional stringency of the rule according to which fiduciaries who get involved in a potential conflict of interest shall be stripped of all their gains. The application of the rule, regardless of good faith on the part of the fiduciary, is being contested by courts and academia alike. The article is focused on the 'deterrence' justification for the rule, and argues that its unusual strictness should be read as a response to a substantial risk of conscious-silencing self-deception. Given the knowledge gap between them, the principal is very much dependent on the fiduciary's personal integrity but, in the grip of self-deception, the fiduciary's inner checks break down so that manipulative transactions are approved as harmless ones. Two distinctive features of the fiduciary relationship increase the chances that even a professional and virtuous fiduciary will be moved by self-deception to misapprehend the harm which a conflict of interest might cause to the principal: first, the wide discretion in the application of the fiduciary's duty to specific situations; and, second, the power gap between the fiduciary and the principal which enhances the temptation to exploit the fiduciary's position. This risk can only be averted by the more stringent version of the rule, as it is only by preventing the fiduciary from ever considering the legitimacy of a specific conflict of interest that we can hinder the process of reflection which is so prone to being subverted by self-deception.

## 1. *Introduction*

When a rule of equity does not distinguish between the honest and the fraudulent there has to be a good reason for it. For many years, it was an established rule that fiduciaries who got involved in a situation where their personal interest might conflict with their duty should be stripped of all that they gained from the situation. Actual harm to the principal, benevolent

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motivation or an independent contribution by the fiduciary to the enterprise were all deemed irrelevant; all that was needed for a complete disgorgement of profits was a potential conflict between duty and interest. Fiduciary duty is often analysed as 預防 prophylactic.[1] Rather than positing an independent higher moral standard, its purpose is to ensure that other primary duties which a fiduciary owes to his principal are complied with. The 'no conflict' rule accordingly prevents the principal from getting involved in situations in which the chances of committing a breach of duty are high.[2] Instead of fastening on the conscience of *wrongful* fiduciaries, the law orders that *all* fiduciaries that positioned themselves in an unauthorized conflict of interest must hand over all the profits they made from the situation, whatever may be their motivation.

In the recent case of *Murad v Al-Saraj*[3] the Court of Appeal questioned the justification for the harsh implementation of the disgorgement remedy. Special attention was given to the irrelevance of the fiduciary's motivation. The traditional rationale for the uncompromising application of the remedy to honest and dishonest fiduciaries alike is the need for deterrence combined with the evidential difficulties in proving that harm had been suffered by the principal as a result of the breach of fiduciary duty. Neither of those reasons, said the court, can justify the stringency of the rule any more. A sufficient defence can be achieved by shifting the burden of proof on to the fiduciary to prove her innocent intentions in a case of proved conflict.

This article argues that allowing the fiduciary to consider the performance of unauthorized transactions in circumstances of conflict will be very problematic from the point of view of the principal. This is because two factors that are inbuilt into the fiduciary relationship make a biased judgment on the part of the fiduciary more likely in conditions of conflict. The first is the unique temptation to exploit the fiduciary position where one person handles the affairs of another; the second is the way in which the application of the fiduciary's duty to specific situations leaves a wide scope for discretion on her part. Both factors work together to increase significantly the chances that self-deception on the part of the fiduciary will undermine his internal moral restraints and facilitate uncharacteristic dishonesty. Self-deception is a psychological process by which unwarranted beliefs are taken by the self to be correct

[1] P Birks, 'The Content of Fiduciary Obligation' (2000) 34 Israel L Rev 3–38, 8–10, and 17: '[T]he law ... requires conduct not virtue ... What the law requires when it requires altruism is at most action in the interest of others, outcomes, not motives'.

[2] M Conaglen, 'The Nature and Function of Fiduciary Loyalty' (2005) 121 LQR 452–80; Conaglen's analysis of the prophylactic nature of the fiduciary duty is very much in line with my argument in this article for he thinks that it 'operates to make a wrong less likely, by attempting to avoid situations where that wrong is more likely to occur' (468). L Smith, 'The Motive, Not the Deed' in J Getzler (ed) *Rationalizing Property, Equity and Trusts* (LexisNexis/Butterworths, London 2003) rejects this analysis as circular, and as 'so wide that it overshadows independent analysis of the harm against which it protects' (56), but for our purposes he accepts that the duty is indeed in place to protect the principal in *situations* where he is particularly vulnerable (75).

[3] *Murad v Al-Saraj* [2005] WTLR 1573 CA (CivDiv). The facts of the case are not particularly relevant for the present purpose, as it involved an entrepreneur who knowingly concealed relevant facts from other investors in order to increase his share of the profits.

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because they make life easier. In the context of moral theory, self-deception turns off the inner voice of conscience so that immorality can go through undetected by the conscious self. Following the analyses of Immanuel Kant and Joseph Butler, I am going to show how this most powerful psychological mechanism can jeopardize the indispensable social institution of fiduciary relationship. The only way to minimize the risk of self-deception is to eliminate the process of deliberation that is most prone to be infected by it; that is, to prevent fiduciaries from asking *themselves* whether a transaction that serves their own interest is also good for their principals. When the law makes it clear that *any* (unapproved) conflict is illegitimate, the process of reflection which is so prone to being subverted by self-deception is stopped before it can even start its destructive course.

## 2. *Rigidity*

### A. *The 'No Conflict' Rule*

The fiduciary-based duty to account does not run along the lines of the ordinary responsibility for loss. The basic principle which governs the relationship between a fiduciary and a principal is the 'no conflict' rule,[4] according to which fiduciaries are under an obligation to refrain from any conflict between their interests and the interests of their principal. Unlike other legal duties, this one is unusually absolute in that it also covers situations where there is a *potential* conflict of interest. The way it operates is by treating all suspicious cases as if guilt had been proved (that is to say, as if it has been proved that there is a conflict which put the performance of the fiduciary's duty to act loyally under risk). Thus, the shield which is offered by the fiduciary obligation is resistant to the question whether a situation was one of an *actual* breach of the positive duty to advance the interests of the beneficiaries: 'the remedy is designed ... to ensure that the imposed obligation [to avoid conflict] is *not* breached, not that the breach does no harm'.[5]

The unqualified nature of the 'no conflict' rule is expressed not only in its wide scope, including the case in which the potential harm seems very remote indeed, but also in the stringency of the remedy for the breach: the fiduciary is completely stripped of any gains which accrued from the illicit transaction. It is of course necessary to delineate the exact contours of the gainful

[4] Traditionally it is mentioned along with its twin the 'no profit' rule. Some treat them as separate rules, while others attempt to analyse the prohibition on making a profit as an automatic application of the 'no conflict' rule to a situation where such conflict is inherent. The idea is that where a fiduciary profits from her position this is bound to be a result of a conflict of interests and hence the former is a sub-class of the latter (cf. M Conaglen, (n 2), 467; and McClean, 'The Theoretical Basis of the Trustee's Duty of Loyalty' (1969) 7 Alberta L Rev 218–38). I will use the locution 'no conflict' to include both rules.

[5] S Worthington, 'Reconsidering Disgorgement for Wrongs' (1999) 62 MLR 218–40, 237.

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transaction but, once the illicit transaction is established, the equitable 'duty to account' encompasses the entire profit, regardless of the hypothetical question 'what would the situation have been without the breach?' In this way, a fiduciary who could have legitimately gained (X) from a certain deal but calculated that misrepresenting it to the principal will gain him (X+*n*), will lose (X+*n*) and not only the surplus (*n*) that is a direct result of his breach of duty.[6] This simple example may lead one to think that the disgorgement remedy has a punitive purpose. But that would be a mistake—as the law stands at the moment, honest fiduciaries who breach their duties as a result of a sincere error are treated just as harshly.[7]

The extraordinary nature of the way in which the 'no conflict' rule operates to protect the interests of the principal is indeed most conspicuous in those cases where the harsh remedy is applied to a *bona fide* fiduciary. In the case of the rogue fiduciary who knowingly exploits his privileged access to other people's money with the intention to elicit profits for himself, the remedy of complete disgorgement does not raise too many queries. Principles of restitution or at least some vague considerations of desert may blur the real rationale behind the strictness of the remedy, for in such cases a harsh response seems, on the face of it, to be fair.[8] It is a well-established principle, however, that '[t]he 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.'[9] When the fiduciary is innocent, the disconnection between the duty and the results of its breach on the one hand, and any considerations of desert, on the other hand, is clear and distinct. This principle was already fully at work in the case of Mr Keech, the 18th-century trustee who acquired a lease for himself after all his efforts to renew it for his infant beneficiary failed.[10] Even a fiduciary (here, a trustee) who has done everything to comply with his primary duty is not discharged; the remedy for the breach of fiduciary duty is applied in his case with equal force. Lord King, in explaining the surprising result that 'the trustee is the only person of all mankind who might not have the lease' points to the risk which leaving any room for a trustee to profit from his position poses to the beneficiary: 'it is very obvious what would be the consequences of letting trustees have the lease, on refusal to renew to the cestui que trust'. This article

[6] Unless he can show that he has put so much effort into the deal that it becomes his 'own', but that is a question of the right test for causation, which is beyond the scope of the present article.

[7] See (n 15).

[8] See Worthington (n 5), 218–9

[9] Lord Russell of Killowen in *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (HL), 144G–145A.

[10] *Keech v Sandford* (1726) Sel Cas Ch (HL) 62. And see J Getzler, 'Rumford Market and the Genesis of Fiduciary Obligations' in A Burrows and Lord Rodger of Earlsferry (eds) *Mapping the Law: Essays in Honour of Peter Birks* (OUP, Oxford 2006), 586: 'Historically the *Romford Market* case has been received as embodying a prophylaxis, or preventive sanction through profit-stripping that takes away all incentive for a fiduciary to consider how he might gain from his position'. This remains so in spite of the poor report, its questionable status at the time, and the existence of other more eloquent, well-argued cases which generalized the rule to other kinds of fiduciary relationship (589).

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aims to explain these 'obvious consequences', and to examine whether they still justify a rigid 'no conflict' rule.

The leading modern case which exemplifies the independence of the order to account from any wrongdoing is *Boardman v Phipps*.[11] Here, again, a fiduciary who had acted with immaculate conscience was stripped of all his profit (though he was allowed a generous remuneration for his efforts).[12] This case is an exceptionally good illustration of the irrelevance of harm or a reprehensible motivation to the operation of the remedy. For here, the beneficiaries actually benefited from the transaction (the takeover increased the value of their shares), an offer to buy the shares for the trust was rejected, and the honesty of the fiduciary was never questioned. Lord Guest was very clear about the circumstances which give rise to disgorgement: '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 trustee.'[13] Arguments as to the absence of harm to the principal or the flawless motivations of the fiduciary have no place in this context: 'The profiteer, however honest and well intentioned, cannot escape the risk of being called upon to account.'[14]

傷害無關緊要或與補救措施運作的應受譴責動機

From this undiscriminating application of the profit-stripping remedy we learn that the 'no conflict' rule is not punitive. As Heydon JA stated in *Harris v Digital Pulse Pty Ltd*,[15] 'No doubt the strictness of the rules, in tending to prevent fiduciary temptation arising and thus tending to protect the principal from fiduciary misconduct, tends to deter fiduciaries from misconduct themselves. But it does not follow that the rules are punitive.'

[11] *Boardman and others v Phipps* [1967] 2 AC 46 (HL).

[12] It could be argued that allowance for effort and skill is the way to mitigate the harshness of the disgorgement remedy in the case of a *bona fide* fiduciary. But subsequent decisions regarding the question of remuneration sought to distinguish *Boardman* on this point. Thus in *O'Ssullivan v Management Agency and Music Ltd.* [1985] QB 428 (CA) the fiduciaries won an allowance for their skill and labour despite the undue influence with which they secured the agreement with their client. The court was not willing to limit the possibility of remuneration to 'cases where the personal conduct of the fiduciary cannot be criticised' (468, *per* Fox LJ). The allowance represents that slice of the profit which is a direct result of the fiduciary's labour and skill and is therefore too remote to be attributed to the conflict of interests. The questions of causality and the fiduciary's conscience are not always independent (cf. J Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart, Oxford 2002) who suggests that the law ought to adopt a special causality test for dishonest fiduciaries, in which the foreseeability of the consequences is not taken into account (108–11)). But the question whether allowance for skill and labour to *bona fide* fiduciaries is as harmful to the principal as a sweeping relaxation of the 'no profit' rule is beyond the scope of the present article. For an argument against the awarding of an allowance on this basis see J Palmer, The Availability of Allowance in Equity: Rewarding the Bad Guy', (2004) 21 New Zealand Univ Law Rev 146–72.

[13] *Boardman and others v Phipps* (n 11) 117

[14] *Regal (Hastings) Ltd v Gulliver* (n 9) 145.

[15] *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 10 (CA), 414. On the general reluctance of the court of equity to punish faulty trustees, see for example *Westdeutsche Landesbank Girozentrale v Islington* [1996] AC 669 (HL), 692–3. On the impropriety of using the disgorgement remedy as a sanction against faulty fiduciaries see Smith (n 2) 60–1 and n 37. But see also, Cooter and Freedman, The Fiduciary Relationship: its Economic Character and Legal Consequences', (1991) 66 NYUL Rev 1045–75, who think that the employment of moral discourse in relation to fiduciary duties, the 'stench of dishonesty' that sticks to a breach of such duty and the moral condemnation that follow it are intended to 'wound' the defendant fiduciary, and are therefore a 'disguised element of punishment' (1071–4).

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What the many cases on the subject of fraudulent fiduciaries conceal, the few cases concerning honest fiduciaries disclose: the remedy is not meant as an incentive to sincere and honest action *in conditions* of conflict of interest. Rather, it is a warning against getting involved in such situations in the first place.

## B. *Traditional Reason, Modern Criticism*

Two main considerations are traditionally cited in support of the inflexible 'no conflict' rule: deterrence and evidential complexity. Both have recently come under attack, as both judges and academics have begun to wonder whether they still maintain their force in a modern legal system. This article focuses on the argument from deterrence. But before we delve into a detailed analysis of its meaning and viability, let me first give a quick overview of the two justifications and their traditional interpretation.

### (i) *Evidential complexity*

If the principal had to ascribe the duty to account to an actual harm, the court would have to ascertain what would (most likely) have happened without the breach of the fiduciary duty. Could the principal have accrued any of the profit without the fiduciary's intervention? Would the fiduciary's profits have been the same without the breach? If not, how much is attributable to the breach? Given the myriad possible eventualities in a dynamic commercial setting, the value of such speculations was thought to be quite small indeed, and the courts of equity traditionally declined to launch this kind of enquiry. When the speculative nature of the investigation is coupled with the cumbersome laws of evidence that applied at the court of equity at the time, the requirement to prove that the conflict caused them harm would have put principals under a burden which was totally unfair. In the words of Sir WM James LJ in *Parker v McKenna*:

> [T]his Court, is not entitled, in my judgment, to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that.[16]

The concern of Sir WM James LJ came under direct attack from the Court of Appeal in *Murad*. Arden LJ finds it obsolete, because the contemporary Civil Procedure Rules endow the courts with new powerful tools with which to decide such hypothetical questions: 'It would not be in the least impossible for a court in a future case, to determine as a question of fact, whether the beneficiary ... would have wanted the trustee to have acted other than in

[16] *Parker v. McKenna* [1874] LR 10 Ch App 96.

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the way that the trustee in fact did act.'[17] Shifting the burden of proof on to the fiduciary to prove that the most reasonable hypothetical scenario is in her favour is therefore, in her view, a sufficient means to protect the legitimate interests of the principal.[18] The new rules of evidence may well alleviate the fear lest rigid procedures prevent the principal from proving the harm when he can easily do so. However, the highly speculative nature of the investigation into the question of what would have happened without the presence of a conflict of interests has not changed. Today, as in the 19th century, 'determining whether the agent's acts were other-regarding or self-regarding often proves to be a guessing game'.[19] The reference to the new Civil Procedure Rules therefore does not answer the more principled question of whether it is a good policy to put the principal in a position where he has to counter the fiduciary's arguments. From the point of view of the law of evidence, the question is exacerbated by the gap that naturally obtains between the parties, in terms of knowledge and access to relevant information. Either way, I believe that considerations of deterrence are sufficient to determine the issue at hand, and I will therefore move on to discuss them.

(ii) *Deterrence*

Fiduciaries are in a position of great temptation to take advantage of their position. The risk of complete disgorgement, even of profits she could have made had she resisted the temptation, should deter the fiduciary from succumbing to it. The second part of this article offers an analysis of each element of the argument: the temptation, its embeddedness in fiduciary relationship, and the fit between the danger and the deterrence. We can then ask whether they indeed join up to form a powerful argument in favour of the old rule that orders disgorgement of profits with reference to the presence of conflict rather than bad faith.

The rigidity of the 'no conflict' rule is also the focus of criticism by academics, such as Lionel Smith and JH Langbein. According to Smith, the current response to the risk posed to principals by conflict of interest is doubly flawed: it is not enough to deter a rogue fiduciary, while it unjustly harms honest fiduciaries. For even with the complete disgorgement sanction in place, the deceptive fiduciary has nothing to lose—if she is caught she will be ordered

[17] *Murad v Al-Saraj* (n 3), [82]. See also, JH Langbein, 'Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?', (2005) 114 Yale Law J 931–90, 945–7 for a review of the old procedural rules in the Court of Equity and the way these hindered any effective fact-finding. Langbein's own solution, which is based on encouraging advance judicial ruling (958), is specifically tailored for trustees, and cannot be generalized to cover other kinds of fiduciary relationships.

[18] Flannigan and others argue that the control which trustees enjoy over the trust account makes it very easy for them to 'seed' evidence that would misdirect even the most sophisticated fact-finding mechanisms that courts can now employ. Reliance on modern extensive disclosure duties would fly in the face of a reality where corruption of record-keeping is a daily matter (R Flannigan, 'The Strict Character of Fiduciary Liability' (2006) New Zealand Law Rev 209–41).

[19] Cooter and Freedman (n 15) 1049.

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to hand over a gain she would not have come by without the deception; if her actions go undiscovered, she is able to retain her profit.[20] And as far as the honest fiduciary is concerned, she can be caught in its net even if she entered a situation with a potential for conflict of interest in perfect good faith. If Smith is right, the 'no conflict' rule in its present form is too inefficient to justify the injustice of its application to innocent fiduciaries. Yet, there are number of reasons why, in contrast to Smith's suggestion, this is no win-win game for the 'rational self-serving' fiduciary. First, profits hardly ever fall like manna from the skies. The fiduciary who wishes to make profit out of her position has to invest time, effort, skill and many times even money, in the deal. If she is caught, remuneration for these costs is far from guaranteed. It could also be the case that, by disclosing the deal to the principal and obtaining her permission, she could have secured an honest gain for herself, albeit a smaller one.[21] An additional disincentive to deception is the possible blow to her reputation as a trustworthy fiduciary—a consideration which is relevant especially to recurrent players, such as professionals and institutional bodies. When the betrayed principal is granted the opportunity to recover from the fiduciary all her gains, he is encouraged to sue, and expose the wrongdoing to the public eye. In this way, the remedy of complete disgorgement ensures that most fiduciaries have much to lose from entering any situation in which there is a conflict of interest.

Langbein believes that the rigidity of the 'no conflict' rule has by and large caused more harm than good both to principals and to fiduciaries. He goes a step further than Smith in criticizing the rule not only as unfair to honest fiduciaries, but as detrimental to the interests of the principal. Langbein expounds how many interactions that are based on confidence are replete with conflict; however, in no other case, except that of a fiduciary relationship, does the law sees fit to introduce a 'categorical prohibition' on conflicts of interest.[22] In his view, this prohibition is just as misplaced in the context of fiduciaries as it would be in other types of confidence-based interaction. His basic argument is that the rule overdeters.[23] There are too many cases in which the fiduciary refrains from entering a transaction that would benefit the principal, just because it would serve her interests as well. Rather than being taken to court, lose and become famous among law students and infamous among their professional colleagues, they prefer to sit back and take no action.

[20] Smith (n 2) 60.
[21] *Murad* (n 3) is a case in point. According to the High Court judge the investors–principals would have agreed to go along with the hotel venture even if they knew that the entrepreneur–fiduciary's contribution to the purchase consisted of a commission set-off, albeit, in that case, they would have insisted on a larger share of the profit. Given the huge profit of £2 million, the fiduciary would surely have been much better off had he been honest with the investors who trusted him.
[22] Langbein (n 17) 934–43.
[23] 'What the sole interest rule does ... is to identify some conceivable but conjectural evil, and then conclusively presume that this farfetched plot actually transpired, by refusing to let the putative evildoer prove that such thing never happened', Langbein ibid 25.

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In the following sections, I show that the 'no conflict' rule in its present form offers just the kind of deterrence that is required in the circumstances. But first we must be clear about the kind of situations to which Langbein's criticism is relevant. One major problem with his analysis is that he fails fully to take into account the possibility of obtaining the principal's prior consent to transactions that involve conflicts of interest. When such consent is secured the transaction is legitimate in spite of the conflict.[24] The number of situations to which Langbein's criticism is applicable is consequently very limited. For it is only in circumstances where it is impossible or too costly to secure the principal's consent that a fiduciary would decline a transaction that is best for everyone. Langbein himself points to a public auction as one such case;[25] but it seems obvious that situations in which the need to obtain authorization would make the whole transaction worthless are hard to come by.[26] And if, as I am arguing, the risk in relaxing the 'no conflict' rule is very high indeed, the principal is surely better off without the potential to profit from such exceptional situations.

### C. *Suggestions for Amendment*

Arden LJ in *Murad* takes the opportunity to challenge the idea that the rigid application of the disgorgement remedy is necessary to protect the fiduciary relationship. In her view, robbing the fiduciary of any opportunity to demonstrate what his share would have been without the breach of duty is too extreme. Sufficient deterrence can be achieved by shifting the burden on to the fiduciary to prove that no harm was caused to the principal by the breach; in the words of Parker LJ: 'it may be said that commercial conduct which in 1874 [the year when *Parker v. McKenna* was decided] was thought to imperil the safety of mankind may not necessarily be regarded nowadays with the same depth of concern'.[27] Thus Arden LJ is in effect calling upon the House of Lords to introduce more flexibility into the 'no conflict' rule so as to allow the fiduciary to argue that no harm was caused, or intended, by the conflict of interests.[28]

If Arden LJ's suggestion in *Murad* is accepted, the message which the law is communicating to fiduciaries will change in a dramatic way: instead of

[24] See for example, *Regal (Hastings) Ltd v Gulliver* (n 9) 150.

[25] Langbein (n 17) 952.

[26] M Leslie, 'Defence of the Further Inquiry Rule' (2005) 47 William and Mary Law Rev 541–86, 550–54. On the importance of the fiduciary's consent as mitigating the inflexibility of the rule, see further Flannigan (n 18) 214: 'Once established . . . consent is a complete answer to a claim of breach. That is how judges have incorporated a full measure of flexibility . . . into the operation of fiduciary accountability. That fact is . . . largely ignored by those who challenge the strict ethic'.

[27] *Murad v Al-Saraj* (n 3) [121].

[28] However, Arden LJ did not see the *Murad* case itself as the appropriate place to apply the suggested new policy because of the deceptive nature of the entrepreneur's breach of duty. In contrast with people like Mr Boardman or the directors in *Regal* who worked in good faith under the impression that they were not breaching their duties, the entrepreneur's misrepresentation was motivated by bad faith. Even in her view, when a breach is designed to deceive the principal and make an illicit profit on her account, the rule of complete disgorgement should be applied in its traditional strictness.

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'avoid all situations which are potentially conflictual', it will now say 'you may get involved in potentially conflictual situations, as long as you act in perfect good faith and without any deception or concealment, and in the belief that [you are] acting in the best interests of the beneficiary'.[29] The reform is based on the idea that a more flexible message is nowadays sufficient to achieve a satisfactory level of deterrence. With a burden of proof that lies on the defendant fiduciary, and the court's increased ability to answer the hypothetical question 'what would have happened without the fiduciary's action?', the new rule will adequately protect the principal, and strike the right balance between the interests of the parties. In the rest of the article I argue that the law should not allow fiduciaries to enter into a situation of potential conflict even when they sincerely believe that the transaction is in their principal's best interests. Permission to enter such a transaction will undermine an indispensable apparatus of deterrence which is based on deep psychological insight regarding the risk of self-deception on the part of the fiduciary. In other words, rather than merely reducing the deterrent effect of the remedy (and perhaps compensating for that by resorting to modern rules of evidence to obtain the answer to speculative questions) the mitigation will render ineffective a means of deterrence that operates only in conditions of *absolute* prohibition on any (unauthorized) conflictual transaction. As we shall see, only by disallowing any discretion on the part of the fiduciary regarding the outcome of a conflict of interest, can we successfully reduce the risk posed by fiduciaries who seek to promote their own interests at the expense of their principals; and only the rule in its unmitigated form does just that.

## 3. *Justification*

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### A. *The Danger of Self-deception*

The absolute nature of the disgorgement remedy sends the fiduciary a very clear message: 'any unauthorised profit that you gain as a result of your position as fiduciary is illegitimate; any conflict of interest amounts to a breach of your duty'. The law has made a clear choice to nip in the bud any potential for an (unauthorized) conflict, so that the fiduciary is discouraged from considering whether a certain transaction may be profitable both for herself and for the principal. But how can we explain this lack of trust in the fiduciaries' judgment, given that the latter are often experts whose professional skill was the very reason for their appointment in the first place? Why are we suspicious of their capability to foresee a possibly harmful conflict of interest while at the

[29] *Murad v Al-Saraj* (n 3) [82]. Notice that Arden LJ does not require that no *actual* harm was caused to the principal. The fiduciary may have made a sincere mistake as a result of which the conflict of interests did cause harm, but that damage will presumably be compensated for via ordinary compensation mechanisms.

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same time entrusting them with assessing what is good for the principal in all other cases? I suggest that two characteristic features of the fiduciary position justify the lack of trust in the exercise of *any* discretion regarding the potential harm of conflictual situations: the first is the nature of the temptation to exploit the position of a fiduciary, and the second is an indispensable leeway in the exercise of the fiduciary obligation. If the analysis is right, then the traditional rigid application of the disgorgement remedy is necessary to protect principals from fiduciaries who would otherwise put their own interest in the front. The sad fact that some fiduciaries who act in perfectly good faith lose out because they are not given a chance to prove their honest intentions can then be justified on the grounds that the rule in its unmitigated form does a much better job in protecting the principals.

A fiduciary who has to deliberate about the merits of a transaction which involves a possible conflict of interest is especially prone to self-deception and the biased judgment it yields.[30] 'Self-deception' is a psychological mechanism that drives people to adopt the belief that is more comfortable for them to hold even when it is totally unwarranted.[31] Thus, the person who is self-deceived is led by unconscious considerations of self-interest to endorse an irrational belief in the face of conflicting evidence.[32] It works like this: a powerful craving triggers psychological mechanisms that distort the ordinary process

[30] One might wonder about the possibility of applying reasoning which is based on moral psychology to modern institutional fiduciaries, such as fund management firms and stockbroker companies. However, such concerns are part of a more general problem in company law of how to use conceptual schemes that are based on the actions and mental states of flesh and blood humans. So, for example, we can ask whether a corporation ever forgets, or whether it can have *mens rea* or drive a car. (cf. The Law Commission *Fiduciary Duties and Regulatory Rules: A Consultation Paper* Law Com. no. 124 (1992), para 2.3). This is, of course, not the place to discuss this intricate issue. But, unlike the problem of knowledge where modern technologies of data storing and the structure of the conglomerate complicate matters, in the context of fiduciaries who take decisions, the human factor is still the most crucial one. At the end of the day, the decision on how to invest the principal's money, or deal with her affairs in any other way, is taken by people, even when they function within a group. Group dynamic is indeed different from the inner deliberation of individuals, and perhaps the chances are a bit better that a dishonest plan will be exposed as such before it is executed. But as we know well, in each group, especially in a hierarchical body, such as a corporation, there is a dominant voice and eagerness on the part of the lower ranks to profess loyalty to the interests of the corporation. As Hudson reminds us: 'No risk-weighting model, no automatic trading system, no system of financial regulation, can fully replace the activities of individual human beings, brim full of their own opinions, frailties and personal mythologies . . . it is the fiduciary (the officer, director, trustee or other functionary) who will continue to make day-to-day decisions in relation to the vast panoply of corporate entities and noncorporate investment vehicles which exist under English law' (A Hudson, 'The Future of Company Law: New Fiduciaries, New Britain' (2000) 21 Company Law 95–7, 95). The fact that it is the interest of their employer that they may wrongly prefer, rather than their own personal interest, should not matter much. For employees often tend to identify with the interests of the company, perhaps especially when the profits they bring to the company are translated into lucrative bonuses and quick promotion. The temptation to utilize the fiduciary position in order to make unlawful gains therefore poses a substantial risk even when the fiduciary is a body of people.

[31] It is not necessary here to discuss the exact nature of self-deception; for example, the question whether it is a dynamic state as its definition in terms of 'mechanism' implies, or a more passive state of mind. For a conceptual analysis of this and other elements of the definition see R Audi, *Action, Intention, and Reason* (Cornell University Press, Ithaca; London 1993) 210.

[32] There are two possibilities in regard to the contrasting warranted belief: either that it is still unconsciously held by self-deceived (and is the cause for the doubts that characterize self-deception), or that it disappeared as a result of self-deception: see D Davidson, 'Deception and Division' in J Elster (ed), *The Multiple Self* (CUP Cambridge, 1986), 79 and AR Mele, *Self-deception Unmasked* (Princeton University Press, Princeton; NJ, 2001).

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of evidence-gathering.[33] The distortion produces a false belief that is more accommodating to the satisfaction of the desire than the warranted belief. A number of psychological means can serve this purpose: positive misinterpretation of data against [p] (taking her refusal to be his as 'playing hard to get'); selective focusing on data which supports [p] while disregarding data which undermines it (focusing on surveyor A's assessment that the asset is worth X and disregarding surveyor B's assessment of its value as X+1, simply on the ground that A's assessment was received first); or selective data gathering, as where undue efforts are put into finding data which supports [p], when readily accessible data which refutes it is not collected (ignoring a widely published review which indicates a rise in the price of property of this kind on flimsy grounds), etc.[34]

Unfortunately, holding an unwarranted belief as a result of self-deception is a very common phenomenon.[35] The kind of self-deception that is most relevant to fiduciaries concerns beliefs about the propriety of one's actions. These are cases where, as a result of self-deception, the agent is convinced that (in the circumstances) she has taken the right course of action. A 'right course of action' for a fiduciary is one that promotes the interests of the principal in the best possible way. But, for reasons that will be discussed below, in cases of potential conflict of interest, there is an especially high risk that self-deception will lead the fiduciary to believe that he acted consistently with his duty, even when he actually prefers his own private interest to that of his principal.

Self-deception is so dangerous because it enables virtuous people to justify their dishonest actions to themselves by collapsing their first and foremost inhibition against insincerity—conscience. Even a disincentive like the risk of complete disgorgement in the case of any harm to the principal cannot be the chief weapon in the battle against corruption in the context of fiduciary obligations. This is because, as Leslie and others show, the fiduciary context typically lacks some features that would otherwise hold back an abuse of imbalanced power relations.[36] Thus, fiduciary relationships do not exemplify the same deep commitment to norms of loyalty and devotion that characterize family relationships. Neither is the social pressure to abide by one's duty (even in the absence of a commitment of the heart) as strong as it is in the family setting. Even relationships in the standard commercial context

[33] We need not get in to the question what desire exactly triggers the process. There are again two possibilities: either to satisfy a specific wish ('to be beautiful'), pursue a specific interest ('to be loved by her') or just to feel better about one's actions ('it was O.K for me to go out for a pub crawl a night before my exam'), see A Lazar, 'Self-deception and Paradoxes of Rationality' in J Dupuy (ed), *Self-deception and Paradoxes of Rationality* (CSLI Publications, Stanford; CA 1998), 32.

[34] See Mele (n 32), 25–7.

[35] See for example, R Trivers, 'The Elements of a Scientific Theory of Self-Deception', (2000) 907 Ann NY Acad Sci 114–31 'we know that processes of self-deception—active misrepresentation of reality to the conscious mind—are an everyday human occurrence, that struggling with one's own tendencies towards self-deception is usually a life-long enterprise, and that at the level of societies (as well as individuals) such tendencies can help produce major disasters' (114 and the references there).

[36] See Leslie, (n 26) 554–8. Though her discussion is focused on trust relationships, many of her arguments apply *mutatis mutandis* to other fiduciary relationships.

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of service-providers, where information gaps facilitate exploitation of power (such as between garage owners and their customer)[37], usually have some inherent checks and balances that fiduciary relationships lack. These include the potential loss of repeat business, easy exit opportunities and the risk to the business's reputation among other potential customers who learn about the abuse of faith. Such disincentives are not necessarily built into fiduciary relations and, actually, the more vulnerable the principal, the less likely he is to enjoy the protection of such disincentives. A long-lasting relationship of dependency and personal trust tends to be a one-off situation from which the vulnerable party finds it very hard to exit. Leslie concludes that self-serving interests that motivate the powerful party to be honest in other contexts cannot be as safely relied on when it comes to a fiduciary relationship. But in that case the fiduciary's honesty and sense of integrity will have to do the job.

Self-deception is a serious threat to fiduciary relationships, for it strikes them exactly in their most vulnerable spot—the reliance on the fiduciary's conscience. It facilitates wrongdoing by subverting the process of evidence gathering and weighing, thus blurring one's conscience and (mis)leading one to view illegitimate actions as permitted (or even as prescribed). When illicit actions are seen by the self in a positive light, one of the most efficient means of blocking them—the sense of right and wrong—is neutralized. A self-deceived fiduciary who asks himself whether a certain self-serving action is in line with his duties will come up with a positive answer even when this is not the case.[38] The only way to lower the risk of self-deception to a minimum is to leave *no room* to consider the matter in the first place. That is, if the fiduciary knows that *any* self-serving action is unlawful, the question that triggers the mechanism of self-deception is avoided and in that way it never gets the chance to kick off. And, as we saw, in most cases where what is best for the principal happens to coincide with the interests of the fiduciary, permission from the principal can clear the way for the transaction to go ahead.[39]

## B. *Professional and Honest People*

Bishop Joseph Butler, a philosopher with a profound psychological insight, considered self-deception as the greatest danger to honesty. In the context

[37] See Langbein (n 17) 937.

[38] Edelman's suggestion to apply the strict remedy to intentional dishonesty is exposed to the same criticism. The deterring effect of the unique causality test is vulnerable to the mischief of self-deception, for under its influence the fiduciary is not aware of the fact that her actions are dishonest: Edelman (n 12).

[39] Self-deception can of course strike at an earlier stage, ie at the time when one considers whether in a certain situation the question of a conflict between duty and profit is arising at all. However, adopting an unwarranted belief at that preliminary stage will usually demand a deeper kind of deception, as the possibility of making a personal profit from the transaction would usually be quite clear. As I explain later, a successful self-deception demands a serious degree of ambiguity or an interpretative flexibility, and that can more readily be found in the question whether the interests of the principal may be damaged as a result of the conflict of interest. Nevertheless, in the more complicated cases, this danger indeed remains in place even if the stringency of the disgorgement remedy is left intact.

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of ethics, self-deception is a result of a desire to think well of our (moral) character. One sure way of achieving the peace of mind of the righteous (other than actually being an honest person!) is to silence any self-doubts and scruples. Drawing on his personal experience as an educator, he observes that people will hardly ever listen to those admonitions that are really relevant to their shortcomings; for most people, the opposite of what is said of Brutus, 'that he never read, but in order to make himself a better man', actually applies.[40] The fear of tainting the good view they have of themselves makes people notice 'the most minute thing which can possibly be argued in favour of themselves', while entirely overlooking 'the plainest and most obvious things on the other side'.

Butler's analysis of the workings of self-deception is especially relevant to fiduciaries because of the way it underscores the discrepancy between the *capability* of the self-deceived to exercise discretion in a certain area of expertise and the *actual* malformed judgment they come up with on the specific question they are deceiving themselves about. The self-deceived are so illusive because they can demonstrate deep knowledge and notable understanding in a certain area, and yet completely fail to take the right considerations into account when it comes to a specific point which involves their personal interest. One of the criticisms levelled against the refusal to allow the fiduciary to consider the merit of any potentially conflictual situation is the following: why not give the fiduciary, often a professional in the relevant field, the credit that she is able to weigh up what is best for her principal even when her own personal interests are at stake? After all, reliance on her advice and judgment about the running of the principal's affairs, and confidence in her ability to do so in a conscientious and successful way are usually the reasons why she was hired in the first place.

But, being an expert, says Butler, is no guarantee against biased judgments. Even an intellectual ability, combined with a psychological sensitivity that enables one to calculate outcomes and realize what an honest person should do in the circumstances, does not inoculate against egoistic self-persuasion. When personal good is involved and a weak spot is hit (and who doesn't have one?), self-deception is likely to strike. When self-deception is at work the expert's attention is diverted from relevant factors and other less important or even erroneous considerations are brought to the fore. The resulting judgment could then fall well below what can reasonably be expected, given the capability and expertise of the self-deceived. Butler employs the concept of self-deception to explain the perplexing case of those otherwise virtuous people who manage to come up with an outrageous judgment in regard to one particular point. Thus, a miser, for example, may hold a set of objectionable beliefs in regard to the duty to give alms— to whom it is due, how much, how often, etc.—while

[40] J Butler and WR Matthews, Fifteen Sermons Preached at the Rolls Chapel; and, A Dissertation upon the Nature of Virtue (Bohn's Standard Library, Bell London 1914), 153.

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holding humane and sensitive views in regard to other moral duties, such as visiting the sick. An observer of the miser's cold-hearted judgments in regard to alms-giving might come to view the rest of her morally sound views as mere hypocrisy. But this hasty verdict, says Butler, is a superficial observation that misses the essence of her situation as self-deceived, and the ensuing 'amazing incongruity, and seeming inconsistency of character'.[41]

For a fiduciary, it is not only her sensitivity as an honest person that can succumb to self-deception—her gift for analysing the financial aspects of a specific deal can also fall prey to this destructive mental mechanism. Self-deception has the power to blur one's vision in regard to a single well-defined case, or kind of cases, while her skill and aptitude are otherwise left intact. In his 'sermons' Butler highlights the unique danger that self-deception poses for the honest person, and for those who rely on her honesty, as falsehood hides behind a façade of righteousness that even the self cannot penetrate. More generally, he points to the way in which virtues of probity and skill can succumb to self-deception and fail to block the resultant biased judgment. Fiduciary relationships are often founded on this combination of merits—the fiduciary's expertise in managing the principal's affairs, and her honesty in doing so; but both can crumble in the face of self-deception, for it drives the fiduciary to reach decisions that are neither up to her professional standards nor suitable for an honest person. Let us see how two inherent features of their position render fiduciaries exceptionally prone to the risk of self-deception.

## C. *Temptation*

The great difficulty in obeying the demand of disinterestedness and the urgent need to deter fiduciaries from succumbing to the allure of easy gain were clear to the courts right from the start. As early as *Whichcote v Lawrence*,[42] the Court of Equity put the issue in terms of enhanced temptation: 'where a trustee has a prospect of advantage to himself, it is a great temptation to him to be negligent'. A century later in *De Bussche v Alt*,[43] the Court of Appeal re-emphasized the point in stating that with 'this strictness the temptation to embark on what must always be a doubtful transaction is removed'. In Australia, Heydon JA has observed in *Harris* that: 'the height and strictness of the standards protect the principals of fiduciaries by nullifying temptation. In that sense they deter fiduciaries from drifting into a position of conflict, or worse'.[44] He continued:

> '[fiduciary rules] are prophylactic in the sense that they tend to prevent the disease of temptation in the fiduciary–they preserve or protect the fiduciary from that disease.

[41] Ibid.
[42] *Whichcote v Lawrence* (1798) 3 Ves 740, 752.
[43] *De Bussche v Alt* (1878) 8 LR 286 (Ch D) 316.
[44] *Harris v Digital Pulse Pty Ltd* (n 15), [406].

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> *The temptation might be assisted if the fiduciary had in contemplation the possibility of escaping liability by arguing that the principal was caused no loss*, or that the profit made was never available to the principal. The prevention of or protection from the relevant disease is assisted by the strictness of the standard imposed and the absence of defences justifying departures from it'.[45]

Notice the repeated use of the menacing expression 'disease' in reference to the abuse of fiduciary position. The immediate association is not only of a wide-spread phenomenon, but also of a condition that affects the *fiduciary* and from which she needs protection, perhaps no less than her principal.

In his critical review of the 'no conflict' rule, Lionel Smith questions the view that ascribes special needs to the principal in comparison with other potential victims of breach of duty: 'Why not have a prophylactic rule for breaches of contract or for the tort of negligence?' he asks. Smith rules out a broad explanation that is based on the seemingly exceptional vulnerability of principals: 'A multinational corporation with a board of 15 directors is not particularly vulnerable.'[46] I agree with Smith that a satisfactory answer to these questions cannot focus on the typical principal. The difference between fiduciary and other legal relationships is largely determined by the *fiduciary's* unique state of mind, and the way it affects his professional performance. Nevertheless, as many writers show, there is a point at which principals are particularly disadvantaged: their very limited ability to monitor and detect exploitation.[47] This will be true, *mutatis mutandis*, even to a board of 15 directors. This special vulnerability, of which the fiduciary would normally be well-aware, makes it more difficult for him to resist the urge to take advantage of his position. The relative ease with which a cunning fiduciary can escape exposure, together with the potential for substantial profits, combine to create a powerful temptation to exploit the fiduciary's position for one's own benefit. And, as the temptation grows, so does the risk of self-deception that breaks through the inner obstacles to wrongdoing and facilitates uncharacteristic dishonesty. But there is another factor, besides the lure of the easy gain, which explains the ease with which self-deception can take root in the fiduciary context: the indispensible exercise of discretion on the part of the fiduciary. Let us see how.

## D. *Rules and Applications*

In their paper on the economic character of breaching one's fiduciary duty, Cooter and Freedman refer to the inherently flexible framework within which

[45] Ibid [413]–[414] (emphasis added). See also, Conaglen (n 2): 'The function of fiduciary duties is, therefore, to strike at situations where there is a temptation for the fiduciary to act in breach of non-fiduciary duty' (462).

[46] See Smith (n 2) 61.

[47] On the poor monitoring capacities of principals, see Flannigan (n 18) 236; Leslie (n 26) 558–60; Getzler (n 10) 10 and Cooter and Freedman (n 15) 1049 and the sources in n 10.

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"由於資產管理必然涉及風險和不確定性，受託人的具體行為不能提前決定"

fiduciary relationships take place. They conclude that 'because asset management necessarily involves risk and uncertainty, the specific behaviour of the fiduciary cannot be dictated in advance'.[48] A precise, detailed, explication of their duties will make it difficult for the fiduciaries to respond to the dynamics of the commercial environment. In order to allow them to maximize the benefits of their principals, the obligations of the fiduciaries must therefore be put down using open-ended language. And, indeed, when Millett LJ seeks to define the essence of fiduciary duty he famously resorts to the broad term 'loyalty'.[49] But terms like 'loyalty', 'good faith', 'prudence' and 'best efforts' require a great amount of interpretative work if they are to become practical guidance. But only such broad expressions leave enough room for the discretion and flexibility that are so crucial to the efficient running of another's affairs:

> In fiduciary relationship ... chance event and unanticipated contingencies require continual recalculation to determine which course of action will be most productive ... Thus in the constantly changing environment of a fiduciary relationship, the agent's obligations must be articulated in general and open-ended terms.[50]

As we say, according to its critics, the 'no conflict' rule in its present form unnecessarily restricts the fiduciary's discretion. The suggestion is therefore that the rule should be mitigated so as to allow fiduciaries to ask themselves whether the general requirement of loyalty is satisfied even in transactions that are profitable also for them. Admittedly, allowing such discretion would contribute to the flexibility which is so vital to the efficient functioning of the fiduciary (albeit, only in cases where it is too costly to ask for the principal's permission). But the additional measure of discretion also increases the threat of self-deception on the part of the fiduciary. This is because the perfect setting for this destructive mechanism to kick in is the transition from a rule or a principle to concrete applications of it. When a basic rule is clear to us, but its application to the situation at hand is more doubtful, self-deception can readily 'help' us reach the answer that best serves our own interest. This point is powerfully argued by Kant in his various discussions of self-deception. Like Butler, Kant allocates self-deception a major role in his analysis of wrongdoing. And for him too its disastrous potential lies in its capacity to silence the inner defences against dishonesty, ie the conscience.

Here is Kant's explanation of why self-deception thrives at the point where the value of a *concrete* action has to be inferred from a *general* rule:

> [I]f we attend to ourselves in any transgression of a duty, we find that we do not really will that our maxim [i.e. the principle that informs a specific action] should become

[48] Cooter and Freedman (n 15) 1046.

[49] 'The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary' (*Bristol and West Building Society v Mothew* [1996] 4 All ER 698, 710), see also Birks (n 1).

[50] Cooter and Freedman (n 15) 1048–9.

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> a universal law ... only we take the liberty of making an *exception* to ourselves (or just for this once) to the advantage of our inclination .... Now, even though it cannot be justified in our own impartially rendered judgement, it still shows that we really acknowledge the validity of the categorical imperative [i.e. the basic moral law] and permit ourselves (with all respect for it) only a few exceptions that, as it seems to us, are inconsiderable and wrung from us.[51]

Self-deception, he says, hardly ever induces an unwarranted belief about the basic rule itself; rather it works by way of self-persuasion that the specific action in which we are interested does not violate any obligation we have, as it falls under an exception to the general rule. For self-deception, unlike total delusion, cannot result in an unwarranted belief which is too absurd to be taken seriously. The self-deceived, especially if he is a generally honest and capable person (as a fiduciary will often be), will find it too hard to see his action as permissible when it stands in striking contradiction to his basic duties and convictions. Thus, for example, a decent trustee will find it very difficult to justify to himself a direct transfer of trust monies to cover his overdraft, as that would be too obvious a case of theft. In a similar way, he will probably not be able to purchase trust property at a reduced price and escape the inevitable scruples; this too would be a direct breach of his duty, and the belief that this is not the case would be very hard to sustain indeed.

However, in a slightly more complicated case, and most cases are far more complicated, the application of the general duty of loyalty will not be as straightforward as that. What if the market for the specific trust property is not so good at the moment and the expenses of sale to a stranger, rather than to himself, may eat up all the profit? What if different assessors suggested different valuations? Here, at the point where the rule must be clarified and the exceptions to it interpreted, self-deception thrives. Even the conscientious trustee may find it quite easy to entertain an unwarranted belief regarding his calculation of the price and the effect the transaction had on the beneficiary. A mitigated 'no conflict' rule will encourage the fiduciary to engage in precisely this kind of tricky manipulation of the rules.[52]

The point of the open-ended locutions which are used in the formulation of fiduciary duties is to leave room for discretion in conditions of uncertainty, and to relieve the fiduciary from commitment to concrete results in such circumstances. But discretion is a double-edged sword: it allows the fiduciaries to do their job properly, indeed, to take it on in the first place, but it also creates space for the manipulations of self-deception and the faulty decisions that ensue. The solution is to curb the discretion where the process of

[51] I Kant and others, *Groundwork of TheMetaphysics of Morals* (CUP Cambridge, 1998), 4:424, 75–6.

[52] The courts are alert to this danger, so that even when they award remuneration to a fiduciary who has been stripped of his profits, they try to ensure that it will not communicate to other fiduciaries that transactions in situations of conflict may be rewarding for them, see Lord Goff in *Guiness plc v Saunders* [1990] 2 AC 663 (HL): 'the exercise of the jurisdiction is restricted to those cases where it cannot have the effect of encouraging trustees in any way to put themselves in a position where their interests conflict with their duties as trustees' (701).

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deliberation is exceptionally prone to manipulative self-serving interpretation 'by which we throw dust in our own eyes'.[53] A perfectly strict and clear rule like 'you can *never* profit from your position as a fiduciary' will do just that. The point of the strictness is exactly to discourage fiduciaries from ever asking *themselves* whether a transaction that is profitable for them is about to cause such harm. The loss of opportunities to the principal, and the injustice caused to some innocent fiduciaries are a price well worth paying for the protection of those who can legitimately expect another person to run their affairs with utmost honesty.

## 4. *Conclusion*

The all too human tendency to give charitable interpretation to our own actions and motivations endangers any social institution that is based on trust and integrity. The fiduciary relationship is a paramount example of such an institution. Ambiguity in the terms of the fiduciary obligations and general rules that must be applied in conditions of uncertainty leave a wide space in which it is up to the fiduciary to decide which course of action is best for the principal. The relative ease with which she can illegitimately benefit from her position and escape punishment is bound to tempt the fiduciary to utilize this space for her own benefit. Therefore, the process of deliberation about the qualities of a conflict-ridden transaction may well go astray as a result of self-deception. Self-deception generates a biased judgment, wherein a breach of duty is not recognized by the fiduciary as such. In that way, an inappropriate decision can bypass any sense of dignity, integrity and conscientiousness on which the fiduciary (justly) prides herself. One very good way to protect the principal from such a destructive process is to exclude such sensitive deliberation; that is, to answer the question 'can I legitimately enter a transaction from which I will profit as a fiduciary?' with a firm universal 'no'. This is exactly what the absolute 'no conflict' rule does. Allowing the fiduciary to argue that she acted as an honest person would therefore be more than a mere decrease in its overall deterrent effect. Opening this possibility would undermine the whole point of a very specific preventative device that can work only by altogether eliminating a reflection that can so easily be manipulated.

[53] I Kant, Religion within the Boundaries of Mere Reason (CUP Cambridge, 1996), 6:38, 84.

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