



Trusts & Equity (10th edn)

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p. 341 **10. The fiduciary duty**

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<https://doi.org/10.1093/he/9780192869630.003.0010>

**Published in print:** 01 April 2023

**Published online:** August 2023

### Abstract

The fiduciary duty is the defining duty of trusteeship and consists of several overlapping obligations intended to promote loyalty or faithfulness. As part of his fiduciary duty, the trustee should avoid conflict with the interests of the trust and not to make an unauthorized profit from the trust property, or from his position of trust. The fiduciary duty may also apply to a person who is not a trustee, in which case he is said to be a fiduciary. This chapter examines the principal obligations of trusteeship and the implications of breach of those obligations for trustees, beneficiaries, and third parties. It first discusses the strict rule of exemplary fiduciary propriety before turning to the duty of good faith. The chapter also looks at fiduciary relationships and fiduciary duties, the fiduciary duty to avoid conflicts of interest, the fiduciary duty to account for unauthorized profits, and trustee remuneration.

**Keywords:** fiduciary duty, trustees, beneficiaries, breach, third parties, exemplary fiduciary propriety, good faith, conflicts of interest, unauthorized profits, remuneration

### Context

The trustee's relationship to the trust is a fiduciary one. Does it surprise you to discover that an agent's relationship to their principal (e.g. solicitor to client), a director's relationship to their company, and even a doctor's relationship to their patient, are in some respects fiduciary? The first party in each of these relationships is in some sense in a position of trust and certain consequences flow from this. For example, a solicitor is not permitted to place their own money and clients' money in the same bank account. In this chapter we will consider the nature of the fiduciary duty and when, and by whom, it is owed.

## **10.1 Introduction**

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The fiduciary duty comprises a number of overlapping obligations concerned to promote loyalty or faithfulness. It is the defining duty of trusteeship. In *Bristol and West Building Society v. Mothew*, Millett LJ said that:

[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.<sup>1</sup>

The principal obligations that make up the fiduciary duty are the trustee's duty not to put himself in a position of potential conflict with the interests of the trust and his duty not to make an unauthorized profit from the trust property, or from his position of trust.<sup>2</sup> In certain circumstances, the fiduciary duty will also apply to a person who is ↗ not a trustee properly so called. In such a case, the person subject to the duty is said to be a fiduciary. The word 'fiduciary' simply means 'trust-like' or 'appertaining to trust', and, although its roots are Latin,<sup>3</sup> it has flowered in England and in Commonwealth jurisdictions derived from the English model. According to one French observer, the word '*plays in the spirit of English jurists*'.<sup>4</sup> If that is true, then in the common law of Canada it has become something of a national sport, for it is said that in Canada there are only three categories of people: 'those who are fiduciaries, those who are about to become fiduciaries, and judges'.<sup>5</sup> Canadian courts have even held that a parent is in a fiduciary relationship to their child.<sup>6</sup> The fiduciary duty was developed in Chancery, and it is equitable in the sense that it is, broadly speaking, concerned to restrain unconscionable abuse of legal power and position, but it is not equitable in the usual sense of being concerned to achieve justice between the parties in a particular case. It is not concerned to achieve fairness between the trustee and the beneficiaries of his trust, or between a fiduciary and his principal. On the contrary, it is a rule of public policy that is strictly applied against trustees in order to set an example and to encourage good behaviour in all who hold positions of trust.<sup>7</sup> One senior judge has efficiently characterized the rules governing the fiduciary duty to avoid conflicts of interest as being 'simple, strict and salutary'.<sup>8</sup>

This is the first of a series of chapters, which will take us to the end of the book, in which we will be examining the major obligations of trusteeship and considering the implications, for trustees, beneficiaries, and third parties, of breach of those obligations. One of the main tasks of Chapter 11 is to consider the trustee's duty of care and to distinguish it from the trustee's fiduciary duty; it should therefore be borne in mind, as we progress through the present chapter, that not every duty of a person in a fiduciary office is necessarily a fiduciary duty.<sup>9</sup>

p. 343 **10.2 The strict rule of exemplary fiduciary propriety**

Fiduciary obligations are rigorously enforced on grounds of public policy.<sup>10</sup> When it is established that a trustee has placed himself in a position of *potential* conflict, it is generally no defence for him to prove that *actual* conflict is unlikely to arise and, when a trustee makes an unauthorized profit, it is generally no defence to demonstrate that the trust has suffered no harm. Insistence upon exemplary fiduciary propriety encourages other persons in positions of trust to fulfil the requirements of their office.

As Professor Jones once put it: '*there are cases where the innocent fiduciary must suffer, like Admiral Byng. Policy may demand a public sacrifice of the fiduciary's profit.*'<sup>11</sup> John Byng was an English Admiral sent, in 1756, to relieve Minorca from the French. He failed and was unfairly court-martialled for dereliction of duty. Having been found guilty, he was executed on the quarterdeck of his own ship, leading the French satirist and philosopher Voltaire to suggest that, in England, it is deemed good to kill an Admiral from time to time '*pour encourager les autres*'.<sup>12</sup> The fiduciary duty has the same prophylactic, or preventative, aim of encouraging good behaviour in persons other than the parties in the instant case. This has been called the policy of 'prophylaxis',<sup>13</sup> but we will refer to it as the policy of exemplary fiduciary propriety.

In *Parker v. McKenna*,<sup>14</sup> James LJ went so far as to say that the strict enforcement of exemplary fiduciary propriety is required for '*the safety of mankind*'.<sup>15</sup> In one case, the court insisted that '*in order to set an example to the world*', a trustee in bankruptcy should repay money that he had been paid under a mistake of law.<sup>16</sup> This all sounds very dramatic, but it must be borne in mind that not only private persons, but public bodies also, assume trust-like obligations. The strict enforcement of fiduciary duties is therefore exemplary ('sets a positive example') to all who hold positions of trust—whether the trust is a political trust '*in the higher sense*'<sup>17</sup> or a fiduciary office that is justiciable in the courts in the usual way at the behest of a private beneficiary or principal.

Of course, it should not be thought that all fiduciaries owe the same fiduciary duties. The fiduciary duties owed by an express trustee will not be precisely the same as those owed by a fiduciary agent.<sup>18</sup> Some form of the basic rules against conflicts and unauthorized profits will apply to all fiduciaries, but the nature and extent of the fiduciary duties owed in any particular case are qualified by reference to the particular relationship, including any underlying contractual relationship, between the parties.<sup>19</sup> An agent will not owe a fiduciary duty at all if the contract between agent and principal excludes such a duty.<sup>20</sup> Neither should it be thought that a contract which binds the parties to work together for a common purpose (such as a joint venture) necessarily imposes fiduciary duties between the parties.<sup>21</sup> As we saw in Chapter 2, a fiduciary duty '*cannot be prayed in aid to enlarge the scope of contractual duties*'.<sup>22</sup>

p. 344 **10.3 The duty of good faith**

Good faith has been described as '*an apocryphally indefinite term*'.<sup>23</sup> At its most basic, it merely describes the absence of dishonesty. It is used in this sense to describe the bona fide or 'good faith' purchaser.<sup>24</sup> The duty of good faith is more substantial, but equally hard to define. Some consider the duty of good faith to be the positive aspect of the fiduciary duty. They contrast it with negative aspects of the fiduciary duty, such as the duty *not* to put oneself in a position of potential conflict and the duty *not* to make an unauthorized

gain. However, this distinction is not convincing. Even the so-called ‘negative’ fiduciary rules have their positive counterparts. Hence a fiduciary has a positive duty, unless he is authorized to the contrary, to extricate himself from any position of actual conflict and to disgorge any gain made from his position of trust.

Whether or not it is a fiduciary duty properly so-called, the duty of good faith is certainly a duty that is owed by fiduciaries in relation to the exercise of their powers and discretions.<sup>25</sup> So, if a fiduciary has been authorized to act for two principals with potentially conflicting interests:

[h]e must act in good faith in the interests of each and must not act with the intention of furthering the interests of one principal to the prejudice of those of the other.<sup>26</sup>

In *Hilton v. Barker Booth & Eastwood*,<sup>27</sup> the House of Lords considered a case in which Barker Booth & Eastwood, a firm of solicitors, acted as agent on both sides of the sale of a property development. Not only was the firm in breach of the Solicitors Practice Rules by acting for the property developer (the vendor) and the purchaser in the same transaction, it also knew that the purchaser was a convicted fraudster and it failed to reveal this fact to the developer-vendor. The firm even loaned the purchaser the purchase deposit to give the impression that the purchaser was of good credit. The firm sought to defend itself against a claim by the developer by saying that it was bound by its fiduciary duty of confidentiality to the purchaser not to disclose the purchaser’s history to the vendor. The House of Lords disagreed and held that in a case of actual conflict between two principals, it was no defence for the fiduciary to say that it only breached its fiduciary duty to one principal because it was discharging its fiduciary duty to the other. The duty of good faith requires a fiduciary to act fully in the best interests of both principals and certainly prohibits the use of one fiduciary duty as an excuse for breach of another.

A trustee of a traditional settlement trust is in an analogous position. He is obliged to exercise his powers and discretion in good faith for the purposes of the trust, which means that he is not permitted to prefer the interests of one class of beneficiary to the exclusion of the interests of any other competing class of beneficiary. He cannot be exclusively loyal to either class of beneficiary. This duty is considered further in Chapter 11 in the context of investment.

### 10.4 Fiduciary relationships and fiduciary duties

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A question of some theoretical and practical importance is whether fiduciary duties can only ever be owed by persons who occupy a recognized form of fiduciary office—such as agent, banker, company director,<sup>28</sup> partner<sup>29</sup>—or whether fiduciary duties may be free-standing—that is, owed by persons who are not parties to any established form of ‘fiduciary relationship’. The answer to the question was settled by the Court of Appeal in *Bristol and West BS v. Mothew*.<sup>30</sup> The fact that a person is not a party to a recognized category of fiduciary relationship does not mean that he does not owe a fiduciary duty—if a person owes a fiduciary duty, he is a fiduciary: ‘he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.’<sup>31</sup> Sir George Jessel made a similar observation more than a hundred years earlier:

What is a fiduciary relationship? It is one in respect of which, if a wrong arise, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the cestui que trust.<sup>32</sup>

p. 346 ↵ So a fiduciary duty may arise independently of any established category of ‘fiduciary relationship’, but in what circumstances will the duty arise? Again, an answer was provided in *Mothew*:<sup>33</sup>

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.<sup>34</sup>

#### **10.4.1 Fiduciary duty characterized by lack of self-interest**

A fiduciary duty will not arise in every case in which one party reposes trust in another.<sup>35</sup> There must also be an obligation on the fiduciary to prefer the interests of his principal to the exclusion of his own interests, at least to the extent of the fiduciary’s undertaking and the extent of the trust reposed by his principal. In short, a fiduciary relationship is defined as much by the absence of self-interest as by the presence of trust, or, as a leading Canadian judge put it: ‘*The fiduciary relationship has trust, not self-interest, at its core.*’<sup>36</sup> This explains why, when a banker or other agent is permitted to make use of his client’s money for his own business purposes, profit, or otherwise for his own benefit, the banker or agent is ‘*not in any fiduciary relation whatever*’ with the client.<sup>37</sup>

#### **10.4.2 The trust ‘has always been the paradigm for all fiduciary relationships’**

In the trust relationship,<sup>38</sup> the fiduciary duties are ‘peculiarly intense’<sup>39</sup> and all fiduciary relationships are, to a greater or lesser extent, trust-like. Having said that, it was accepted as long ago as 1866, in the case of *Tate v. Williamson*,<sup>40</sup> that the courts do not place limits on the varieties of fiduciary relationship.<sup>41</sup> Tate was an indebted student who had turned to his uncle for help. His uncle’s son (Williamson), having undertaken to act as his father’s deputy, arranged to purchase a share of freehold land from Tate for the price of £7,000. Williamson knew that the land was actually worth £20,000, but he did not reveal the true valuation to Tate. Tate died of drink at the tender age of 24 and his next of kin filed a bill to impeach the sale to Williamson. The bill was successful, and the sale was set aside on grounds of breach of fiduciary duty.<sup>42</sup>

#### **10.4.3 Move from subjective trust to objective vulnerability?**

p. 347 It is probably accurate to say that the recognition of a fiduciary duty now depends less upon the nature of the parties’ relationship to each other than upon the assumption by one of an obligation to the other. There is, in short, a discernible trend from status to consensus as a basis for the imposition of a fiduciary duty. Establishing an undertaking to act in the interest of another may be more important than proof of actual or subjective trust and confidence between the parties.<sup>43</sup> In this vein, L. S. Sealy has observed that the emphasis has gradually shifted from the defendant to the claimant and from ‘*the notion of selflessness*’

to ‘features such as the “vulnerability” of the beneficiary’. The decision of the Court of Appeal in *Medsted Associates Ltd v. Canaccord Genuity (International) Ltd*<sup>44</sup> provides a striking illustration of this trend. The Court of Appeal decided that the fiduciary duty owed by an investment broker to investors was limited because the investors knew that the broker would be receiving commission from the party selling the investments and because the investors ‘were wealthy Greek citizens and it is likely that they were experienced investors’. This decision marks a surprising inroad into the traditional rigour of the fiduciary duty.<sup>45</sup> Professor Sealy suggested that the trend towards focusing on the vulnerability (or invulnerability) of the principal might eventually cause the fiduciary principle to lose ‘vital links with its roots’.<sup>46</sup> Austin argues that, as the basis of the fiduciary duty changes, there may be implications for its content: ‘If we move comprehensively from fiduciary relationship to fiduciary duties, a momentum will have been generated to reduce fiduciary law into the general law of obligations.’<sup>47</sup> One possible incident of such a shift towards obligations would be, for example, to reduce a fiduciary’s liability in response to the contributory fault of the principal. Such a development becomes increasingly irresistible as the focus shifts from the fiduciary’s breach to the principal’s behaviour.<sup>48</sup>

Despite this, Austin is confident that ‘the movement from relationship to obligation need not cause the fiduciary standard to be diluted from a prescriptive, prophylactic rule to a prescriptive but less demanding one’.<sup>49</sup> This is surely correct. The fact that the source of the fiduciary duty may be the voluntary assumption of a personal responsibility rather than the status of the parties should not, of itself, detract from the strict enforcement of the fiduciary duty on grounds of public policy.

### p. 348 10.5 The fiduciary duty to avoid conflicts of interest

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The fiduciary duty to avoid conflicts of interest is basically fourfold: first, not to place oneself in a position of potential conflict of interest; second, not to carry out a transaction in conflict of interest; third, to remove oneself from a position in which one is inhibited from acting due to potential conflict of interest; fourth, to remove oneself from a position in which one is bound to transact in conflict of interests. Breaches of the first two ‘prohibitive’ aspects of the duty might be referred to as ‘positional’ and ‘transactional’ breaches, respectively. Breach of the third and fourth ‘mandatory’ aspects are breaches of what Millett LJ has referred to, respectively, as the ‘no inhibition principle’ and the ‘Actual Conflict Rule’.<sup>50</sup> The usual response to a conflict of interest is to resign from the trust, but this will not always be in the best interests of the trust. The court has been known to authorize a trustee to stay in post if it is satisfied that the trustee can discharge his duties to the trust without ever having to choose between the trust and his private interests.<sup>51</sup> This safeguard of the court’s authorization is notably missing in the case of directors where there is a potential conflict between their interests and those of the company.<sup>52</sup>

Before we go any further, we should, of course, address a preliminary question: ‘What is a conflict of interest?’ The short answer is that there are two types of conflict of interest: the first is conflict between the interests of the principal and the personal interests of the fiduciary; the second is conflict between the interests of the principal and the fiduciary’s duty to advance the interests of another principal or third party. A conflict of the second type is a breach of the ‘double employment’ rule or, to put it another way, a breach of the obligation of ‘undivided loyalty’.<sup>53</sup> The informed consent of both of the fiduciary’s principals is a defence to breach of the double employment rule.<sup>54</sup> The main focus of the following sections is to see

how these rules operate in the context of a trustee's fiduciary duty to his trust, but it should be borne in mind that the rules apply equally to, and many of the authorities involve, fiduciaries who are not trustees *per se*.

### 10.5.1 ‘Positional breach’ of fiduciary duty

A trustee is subject to a duty never to *put himself* in a position of *potential conflict* with the interests of his trust. According to Nourse LJ in the Court of Appeal in *Sargeant v. National Westminster Bank plc*,<sup>55</sup> the rule is prophylactic: it ‘*holds that prevention is better than cure*’.<sup>56</sup> The rule is breached only if the trustee *puts himself* in the position of potential conflict, so if the settlor puts him in the position of potential conflict, there will be no breach.<sup>57</sup> In *Sargeant*, a testator had appointed his children to be trustees of the freehold title to certain farms of which they were already tenants. They therefore became, at the same time, both landlords and tenants, with an obvious potential for conflict of interest. However, there was no positional breach of trust, because the testator had put them in that situation.<sup>58</sup> In *Mothew*, a mortgage lender claimed, *inter alia*, that its solicitor had put himself in a position of potential conflict with its interests, because the solicitor was also acting for the borrowers (the purchasers) in connection with a conveyance of land. The claim failed because the mortgagee ‘*knew that the defendant was acting for the purchasers when it instructed him*’.<sup>59</sup> If, however, the testator in *Sargeant* or the mortgagee in *Mothew* had not known of the potential breach of trust, their intended trustee or fiduciary would have been obliged to decline the appointment.<sup>60</sup> In *University of London v. Prag*, the university successfully defended a claim that it had breached its fiduciary duty to avoid conflict of interest. The claim alleged that the university had acted inappropriately in the way it allocated central resources between the university as a whole and an institute of which the university was trustee. The court rejected the claim on the basis that when the trust was established it must have been intended that the institute would be funded as part of the university, so that any conflict was to that extent authorized.<sup>61</sup>

The rule against ‘positional breach’ of trust is strictly applied; it is irrelevant that there will probably be no actual conflict or any actual harm to the trust. The inquiry according to which one determines whether there is a conflict of interest is to ask ‘what might be done’: <sup>62</sup>

[I]t is a rule of universal application, that no one, having [fiduciary] duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.<sup>63</sup>

In fact, the rule is not strictly speaking ‘universal’. It is more accurately described as a ‘general’ rule, because cases are frequently decided as exceptions to it:

The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect.<sup>64</sup>

p. 350 ↵ One case decided as an exception to the general rule is *Re Drexel Burnham Lambert UK Pension Plan*.<sup>65</sup> In this case, a scheme to distribute surplus assets in a pension fund was approved, even though it had been proposed by trustees who were beneficiaries under the scheme. Lindsay J recognized that there were many exceptions to the general rule and that the trustees in this case had doubtless been selected as persons able to exercise their discretion properly, despite the potential conflict of interest.

### 10.5.2 ‘Transactional breach’ of fiduciary duty

A trustee must not carry out any transaction in breach of his fiduciary duty. In particular, he must not grant or sell any trust property to himself (this is the rule against self-dealing), and, if he purchases an equitable interest in trust property from a beneficiary, the onus is on the trustee to prove that the purchase was fair and that he took no advantage of his position (this is the fair dealing rule). Related to these rules, there is another, more general, rule that a trustee is not permitted to make an unauthorized profit by reason of his position of trust or his use of trust property. It is crucial to realize that, even if a trustee has been placed in a position of *potential* conflict, he is obliged to avoid any transaction which is actually in conflict of interest. So, although the tenants of the farms in *Sargeant* had committed no ‘positional’ breach of trust by accepting trusts of the freeholds, they would have been guilty of a transactional breach of trust if they had proceeded to take advantage of their position by charging themselves a reduced rent. Generally speaking, it would also have been a breach of trust (a straightforward case of self-dealing) if they had attempted to sell the freeholds to themselves. However, in that case, the tenants’ right to purchase the freeholds pre-dated their acceptance of the trust. Accordingly, the court declared that the tenants would be permitted to purchase freehold title off themselves in their capacity as trustees.<sup>66</sup> Nevertheless, the onus, ‘*on grounds of public policy*’,<sup>67</sup> is on the trustee to show that no advantage has been taken of their position.

### 10.5.3 The self-dealing and fair dealing rules contrasted

The self-dealing and fair dealing rules are distinct, but connected. They are both concerned to prevent a trustee from carrying out a transaction in conflict with the interests of the trust, but, whereas the self-dealing rule is ‘prohibitory’, the fair dealing rule is ↵ merely ‘regulatory’.<sup>68</sup> In *Tito v. Waddell (No. 2)*,<sup>69</sup> Megarry VC summarized them in the following terms:

The self-dealing rule is (to put it very shortly) that if a trustee sells the trust property to himself, the sale is voidable by any beneficiary *ex debito justitiae*,<sup>70</sup> however fair the transaction. The fair-dealing rule is (again putting it very shortly) that if a trustee purchases the beneficial interest of any of his beneficiaries, the transaction is not voidable *ex debito justitiae*, but can be set aside by the beneficiary unless the trustee can show that he has taken no advantage of his position and has made full disclosure to the beneficiary, and that the transaction is fair and honest.<sup>71</sup>

Vinelott J, who had appeared as counsel in *Tito v. Waddell*, was the judge in the later case of *Re Thompson’s Settlement*.<sup>72</sup> In *Re Thompson’s*, his Lordship observed that fair dealing can involve a genuine contract between two independent parties, whereas self-dealing cannot,<sup>73</sup> because in a case of self-dealing, at least one person will appear as a party on both sides of the transaction. If *all* of the parties are exactly the same

on both sides, it will not merely be voidable at the instance of a beneficiary; it will be void *ab initio*, because there can be no contract between identical parties.<sup>74</sup> Despite that rule, a conveyance by trustees of a legal estate in land will be effective even if the trustees on both sides of the conveyance are identical.<sup>75</sup> The explanation for this exception may be that agreement is a fundamental requirement of a contract, but not of a conveyance.

### 10.5.3.1 The self-dealing rule

Where trustees sell trust property to one or more of their number, the trust will notionally continue to bind both the trust property and the proceeds of its sale until the beneficiary is required to elect between the property or its proceeds. If the beneficiary elects to adopt the sale, the trust will bind the proceeds of sale in the hands of the vendor-trustees. If the beneficiary elects to rescind the sale, it must be set aside no matter how fair, or even generous, may have been the price paid. Where the sale is set aside, the original trusts will remain binding on the trust property in the hands of the trustee-purchaser so far as possible as if it had never been sold. Self-dealing by a trustee is contrary to the public interest in exemplary fiduciary propriety and cannot be allowed to stand once a beneficiary's complaint has brought it into the public domain. However, beneficiaries will be unable to assert their right to have the transaction set aside if they gave fully informed consent to the self-dealing or have acquiesced in it, or if they have delayed too long in seeking to have it set aside.

p. 352 ↵ Long delay is a bar because, whereas the policy of exemplary fiduciary propriety presumes *against* the righteousness of a fiduciary transaction and requires a self-dealing to be set aside *ex debito justitiae*, the public interest is in favour of quiescence of title.<sup>76</sup> As Bowen LJ stated in *Re Postlethwaite*: '[T]he general presumption which the law makes is in favour of the good faith and validity of transactions, and not against them.'<sup>77</sup> These two conflicting policies must eventually cancel each other out so as to allow a trustee to retain property which it is alleged was obtained in breach of fiduciary duty.<sup>78</sup> In *Re Postlethwaite*, that point was reached after 34 years. After very long delay, private interests do not readily enter into the picture.<sup>79</sup>

As with many other features of trust law, the rule against self-dealing has been the subject of special consideration in the pensions context: so, for example, there is no hard and fast rule requiring negotiations between pension fund trustees and the employer company to be set aside simply because one or more of the trustees happens to be a director of the company.<sup>80</sup>

### 10.5.3.2 The fair dealing rule

This is a rule designed to regulate contracts made between beneficiaries and their trustees. Such contracts may be genuine contracts between independent parties and are therefore not subject to the same fundamental criticisms that are raised when a trustee deals with himself. Nevertheless, a contract between beneficiaries and their trustees, or between a principal and his fiduciary, must '*be watched with infinite and the most guarded jealousy*'.<sup>81</sup> Accordingly, any trustee entering into a transaction with a beneficiary should protect himself by ensuring that the beneficiary does not enter the transaction without first taking competent and independent advice.<sup>82</sup>

The burden of proof that the transaction was a righteous one rests upon the trustee, who is bound to produce clear affirmative proof that the parties were at arm's length, that the *cestui que* trusts had the fullest information on all material facts, and that, having this information, they agreed to and adopted what was done.<sup>83</sup>

If the trustee fails to make full disclosure to the beneficiaries, even inadvertently, the beneficiaries may elect to rescind the transaction.<sup>84</sup>

### **p. 353 10.5.4 Transactions authorized before acceptance of trusteeship**

We noted earlier that the tenants in the *Sargeant* case had a right to purchase the freeholds of which they were tenants and that this right was not lost when they were subsequently appointed trustees of those freeholds. The reason, as Wynn-Parry J observed of similar facts in *Re Mulholland WT*,<sup>85</sup> is that:

the existence of the fiduciary relationship creates an inability in the trustee to contract in regard to the trust property [but] does not touch the position arising where the contract in question has been brought into existence before the fiduciary relationship.<sup>86</sup>

Thus in *Newman v. Clarke*,<sup>87</sup> a tenant was entitled to exercise his right of enfranchisement (the right to purchase the freehold under the Leasehold Reform Act 1967) even though the freehold was part of an estate of which the tenant was trustee. Crucially, the tenant was already a tenant of the lease at the date of his appointment as trustee.

### **10.5.5 Transactions carried out after retirement from trusteeship**

Continuing trustees are permitted to sell trust property to a retired trustee as long as '*there is nothing to show that at the time of retirement there was any idea of a sale*'.<sup>88</sup> The onus, as always where a transactional breach is alleged, is on the trustees to prove that the transaction was a righteous one. One way in which to prove the transaction was 'righteous' is to demonstrate that it was carried out with the sanction of the court.<sup>89</sup> To prove that a transaction was righteous is no easy task for a retired trustee. In one case, the purchase of trust property by a trustee 12 years after his retirement was allowed to stand,<sup>90</sup> but, in another case, a trustee who retired in order to purchase land was required to give it up even though he had paid a price determined by independent valuers.<sup>91</sup> In the latter case, Viscount Dunedin held that whether the trustee had actually paid a fair or unfair price was irrelevant: '*the criterion ... is not what was done, but what might be done*'.<sup>92</sup>

Courts have sometimes seen fit to relax the strict rule. In *Holder v. Holder*,<sup>93</sup> a testator was survived by his widow, eight daughters, and two sons. Included in his estate were a number of farms. Having performed some minor administrative functions as one of the executors of his father's estate, the younger son purported to renounce the executorship in order to purchase certain of the farms at a fair price at public auction. The elder son, who attended the auction with his solicitor, made no objection at that stage, but later, repeating a theme of great antiquity, he disputed the younger son's right to the farms. He alleged that the younger son, having acted briefly as an executor of the estate, had barred himself from purchasing

trust property. The Court of Appeal allowed the purchase to stand, even though the younger son, having failed effectively to renounce his  $\leftrightarrow$  executorship, remained an executor at the time of the sale. Harman LJ acknowledged that '*there must never be a conflict of duty and interest*', but held that '*in fact there was none here*', on '*the very special circumstances of this case*'. Although this case is generally cited as an exception to, or relaxation of, the strict rule against potential conflicts of interest, it might be better understood as a case in which the trustee was allowed to retain the fruits of the transaction because, as a matter of fact, there was insufficient *causal connection* between his gain and his position of trust. Harman LJ acknowledged that the younger son had acquired his knowledge of his farms, not by reason of his brief status as executor, but in his capacity as a tenant of one of the farms before his father's death. We return to the issue of causation later.

#### **10.5.6 The 'no inhibition' principle**

A fiduciary must not carry out any transaction in breach of his fiduciary duty, but it is also true that a fiduciary must not, in breach of his fiduciary duty, decline to carry out a transaction or to exercise a power or discretion. A '*fiduciary must not be inhibited by the existence of his other employment from serving the interests of his principal as faithfully and effectively as if he were the only employer*'.<sup>94</sup> If, because of a conflict of interest, a fiduciary abstains from exercising a power, he '*must be held to all the same consequences as though that power had been exercised*'.<sup>95</sup>

#### **10.5.7 The 'actual conflict' rule**

We have considered the rule which prohibits fiduciaries from carrying out a transaction in conflict of interest and the rule which prohibits inhibition (by reason of conflict of interest) in the exercise of fiduciary powers, but what happens if a fiduciary is placed in a position in which it is inevitable, if he is to discharge his duties properly, that he will sooner or later breach one of these rules? Suppose, for example, that an estate agent with existing instructions to assist in the purchase of certain land is appointed executor of an estate containing the same land. This fiduciary has been placed in a position of actual conflict where he '*cannot fulfil his obligations to one principal without failing in his obligations to the other*'.<sup>96</sup> Consequently, '*he may have no alternative but to cease to act for at least one and preferably both*'.<sup>97</sup> Note, however, that an estate agent is permitted to act for two or more principals competing to acquire the same property, just as he is able to act for two vendors trying to sell similar neighbouring properties,<sup>98</sup> '*otherwise he could not carry on his business*'.<sup>99</sup>

#### **10.5.8 Conflicting interests and confidential information**

Solicitors,<sup>100</sup> estate agents, accountants, and similar commercial agents are often fiduciaries, and they often associate in commercial partnerships or firms. It is clear that any individual fiduciary who finds himself acting for two clients with conflicting interests must cease to act for one, or '*preferably both*',<sup>101</sup> but what if a fiduciary is already acting for a principal when another fiduciary in the same firm wishes to accept instructions from another principal in circumstances where there is a potential for conflict between

the interests of the two principals? The answer to that question is clear. Unless the fiduciaries have the fully informed consent of both principals, their firm should decline to accept the new, potentially conflicting, instructions.

Less clear-cut is the situation in which an agent *used to act* for a client (Alpha), and another agent in the same firm wishes to accept instructions from a new client—or new instructions from an existing client—in circumstances where there is a potential for conflict between the interests of Alpha and the client (Omega) who is offering new instructions. Because Alpha is no longer instructing the firm and his agent no longer has power to transact in his name, it is arguable that there is no longer any risk (unless the firm fraudulently represents itself still to be Alpha's agent) of positional or transactional breach of fiduciary duty. This certainly appears to be Lord Millett's assessment of such a situation. His Lordship takes the view that the termination of Alpha's instructions terminates the fiduciary relationship and thereby terminates the fiduciary duties owed to Alpha.<sup>102</sup> That view is hard to reconcile with his Lordship's view, expressed elsewhere, that a fiduciary relationship arises out of a fiduciary duty, rather than vice versa.<sup>103</sup> However that may be, his Lordship recognizes that, even if there is no risk of breach of fiduciary duty *per se* after the termination of Alpha's instructions, there is a risk that confidential information relating to Alpha may be disclosed (albeit inadvertently) to Omega. If that risk is real (it need not be a substantial risk, but it must be more than merely '*fanciful*'),<sup>104</sup> the firm must decline to act for Omega unless Alpha and Omega are fully aware of the potential conflict of interest, and still consent to the firm accepting Omega's instructions.

So, are there any circumstances in which a firm may accept instructions from Omega (whose interests are potentially adverse to those of Alpha) without increasing to any 'real' extent the risk that confidential information relating to Alpha will be disclosed to Omega? The answer is 'yes'. In *Rakusen v. Ellis Munday & Clarke*,<sup>105</sup> both partners of a small firm of solicitors carried on separate practices, each with his own clients and without any knowledge of the other's clients. The claimant (Alpha) consulted one of the

p. 356 ↵ partners in relation to a contentious matter and, after he had terminated his instructions, the other partner, who had never met Alpha and was not aware that Alpha had consulted his partner, was instructed by Omega (the party on the other side in the same contentious matter). An injunction restraining the firm from acting for Omega was granted at first instance, but discharged by the Court of Appeal on the ground that there was no risk of disclosure of confidential information.

### 10.5.8.1 Jefri Bolkiah v. KPMG (a firm)

The question in each case is whether the separation between the members of the firm is such that Omega's instructions can be accepted without any real increase in the risk of disclosure of confidential information relating to Alpha. This was precisely the question that fell to be considered by the House of Lords in *Jefri Bolkiah v. KPMG (a firm)*.<sup>106</sup> The firm in this case was a global firm of chartered accountants, which had carried out an annual audit for the Brunei Investment Agency (Omega) since 1983. Prince Jefri (Alpha) is the youngest brother of the Sultan of Brunei. Over a period of 18 months between 1996 and 1998 the firm was retained by one of Alpha's companies on his behalf and at his request to undertake a substantial investigation in connection with major litigation in which he was personally involved. In the course of the investigation, the firm was entrusted with, or acquired, extensive confidential information concerning Alpha's assets and financial affairs. On 14 May 1998, Alpha terminated his instructions to the firm and, two

months later, Omega approached the same department of the firm with a view to instructing it to carry out certain financial investigations, including investigations into transactions carried out by Alpha. The firm took the view that there was no conflict of interest, because it had ceased to act for Alpha and there was no longer a client relationship with him, but it nevertheless took the precaution of putting special arrangements in place designed to prevent the disclosure of confidential information between the relevant departments. The creation of this information barrier or ‘Chinese wall’ involved a number of steps, including interviews of all staff to ensure that nobody engaged in work for Omega had confidential information relating to Alpha. A separate office, with a separate computer server, was established to carry out work on behalf of Omega and information relating to Alpha was deleted from the firm’s computers. Nevertheless, the House of Lords held that such measures had been inadequate to protect Alpha’s interests, because they had been created ad hoc in order to obtain Omega’s instructions. The Chinese wall would only have been effective if it had been in place before Omega had offered to instruct the firm in matters potentially adverse to the interests of Alpha. As in the *Rakusen* case, an effective Chinese wall is an ‘established organizational arrangement’;<sup>107</sup> it is not created ad hoc in response to events.<sup>108</sup>

p. 357 **10.5.8.2 The ‘consent’ defence**

At no stage in the facts of *Jefri v. KPMG* did the firm seek Prince Jefri’s consent before accepting instructions from the Brunei Investment Agency that were potentially adverse to the Prince’s interests. The majority of the Court of Appeal suggested that there had been some element of inferred consent, because Prince Jefri knew that the firm already had a long-standing relationship with Brunei Investment Agency, which the firm would not wish to prejudice. On appeal, Lord Millett accepted that consent could sometimes be inferred, especially in the case of auditors,<sup>109</sup> because ‘*large accountancy firms commonly carry out the audit of clients who are in competition with one another*’ and the ‘*identity of their audit clients is publicly acknowledged*’,<sup>110</sup> but his Lordship held that the consent defence is only relevant where a fiduciary is presently acting (or, presumably, where a fiduciary intends to act) for clients with conflicting interests. It has no relevance where the fiduciary no longer acts for the principal whose interests are at risk. His Lordship’s reasoning appears to be that, in such a case, there is no risk of conflict per se and so the consent of the former client, to the acceptance of ‘potentially adverse’ instructions, is irrelevant.

**10.5.8.3 The burden of proof**

According to Lord Millett in *Jefri v. KPMG*, the burden of proof is on the former principal (Alpha)<sup>111</sup> to establish two things before he will be able to restrain his former fiduciary from acting in a matter for another client (Omega): first, that the former fiduciary is in possession of information that is confidential to Alpha; second, that the information is or may be relevant to the new matter in which the interests of Omega may be adverse to his own. However, this burden of proof on Alpha is ‘not a heavy one’.<sup>112</sup> The first requirement ‘*may readily be inferred*’ and the second requirement ‘*will often be obvious*’.<sup>113</sup> His Lordship also suggested that Alpha must prove that he did not consent to the disclosure of the information and that such lack of consent may be inferred. However, this aspect of his Lordship’s analysis is, with respect, questionable. Alpha’s consent is no doubt a defence which the former fiduciary could raise to Alpha’s

complaint—but it is hard to see why Alpha should be required to prove his own lack of consent as an element of his cause of action. The burden should surely be on the former fiduciary to prove that Alpha provided express, or inferred, consent.

Once Alpha has proved the two elements—first, possession of confidential information, which, second, may be relevant to a new client (Omega) whose interests are potentially adverse to Alpha—the burden of proof shifts to the defendant to show that there is no real risk that the confidential information will come into Omega's possession. On the facts of *Jefri v. KPMG*, Lord Millett was not satisfied that the firm had discharged this 'heavy burden'. So, leaving aside the controversial question of which party must plead and prove the issue of consent, we may summarize the law by saying that there is  a 'light' burden of proof upon the former principal to establish the factual elements of an adverse disclosure of confidential information, and that there is a 'heavy' burden of proof on the former fiduciary to show that, despite those factual prerequisites, there is no real risk of such disclosure.

### 10.5.8.4 The policy behind 'Chinese walls'

We have seen that, as a matter of policy, fiduciary duties are strictly enforced to set an example to others. The same policy would explain why a perfectly effective Chinese wall will be torn down if it is created ad hoc. However, according to Lord Millett in *Jefri v. KPMG*, Chinese walls are not designed to advance the policy of exemplary fiduciary propriety; they are simply a practical measure designed to prevent a real risk of disclosure of confidential information. Nevertheless, when the information is not merely confidential, but also privileged—as is frequently the case in relation to information acquired by a solicitor from his client—the prevention of disclosure becomes a matter of '*perception as well as substance*'.<sup>114</sup> This is not because of the policy of exemplary fiduciary propriety, but because of the policy on which legal professional privilege is based: '*It is of overriding importance for the proper administration of justice that a client should be able to have complete confidence that what he tells his lawyer will remain secret.*'<sup>115</sup>

## 10.6 The fiduciary duty to account for unauthorized profits

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A trustee or other fiduciary is under a personal obligation to account for any unauthorized profit or gain accruing to him by reason of his office or position of trust, unless all of the persons to whom he is obliged to account freely give their fully informed consent to his retention of it. The rules of the Supreme Court<sup>116</sup> provide a procedure by which the fiduciary duty to account may be summarily enforced. It is a procedure that is '*often resorted to*'.<sup>117</sup> In any case in which there is an allegation of fiduciary relationship or duty, but no allegation of any impropriety, the court tends not to make any order in respect of costs of the summary application, reserving them instead until the final account has been taken. This is because:

if the accounting party is innocent and produces a true and good account, it would be quite wrong that the cost of carrying out that duty should be thrown upon the innocent accounting party.<sup>118</sup>

The duty to account does not preclude the trustee's right to be reimbursed '*expenses properly incurred by him when acting on behalf of the trust*',<sup>119</sup> because expenses cannot properly be described as 'gains'. Which expenses are 'properly incurred' is a nice ↵ question. Where the expense relates to legal action brought by the trustee or defended by the trustee, the trustee should apply to court for a '*Beddoe order*' authorizing the litigation.<sup>120</sup> If the trustees intend to embark on legal action for the benefit only of themselves as beneficiaries, rather than for the benefit of the trust as a whole, the court will refuse to authorize it.<sup>121</sup>

The trustee's right to be indemnified, which is secured as a 'lien' or 'equitable charge' over the trust fund, only covers out-of-pocket *financial expenses* (albeit future and contingent expenses as well as those already incurred).<sup>122</sup> Until 2001, trustees had no right to be indemnified in respect of expenditure of *time and trouble*, except where remuneration had been specifically authorized.<sup>123</sup> Today, as a result of the Trustee Act 2000,<sup>124</sup> certain types of trustee (trust corporations and professional trustees) are presumed to be entitled to reasonable remuneration.<sup>125</sup> Remuneration is considered later in this chapter.

### 10.6.1 Unauthorized profits: the strictness of the rule

According to Lord Herschell in *Bray v. Ford*, the rule that requires a fiduciary to account for unauthorized profits is '*an inflexible one*',<sup>126</sup> but, in the same case, his Lordship acknowledged that the rule might be departed from '*without any breach of morality, without any wrong being inflicted, and without any consciousness of wrongdoing*'.<sup>127</sup> In a later case, a judge suggested that the rule is '*riddled with exceptions*'.<sup>128</sup> Amongst the exceptional circumstances in which a fiduciary has been permitted to retain all, or part, of his gain are cases where the gain was merely trifling,<sup>129</sup> cases where the fiduciary had acted honestly and for the benefit of the trust such that he should be entitled to a *quantum meruit* ('sum deserved'),<sup>130</sup> and cases where the principal or beneficiaries would otherwise have been unjustly enriched at the fiduciary's expense.<sup>131</sup> These exceptions, and the last one in particular, seem at first sight to cut at the very root of the rule and to make a mockery of Lord Herschell's suggestion that the rule is an inflexible one.

However, contrary to first impressions, it is possible to reconcile the inflexible nature of the rule with the significant, extensive exceptions to its operation. One simply has to appreciate that the rule and the exceptions have different concerns.

The rule is inflexible, because it seeks to maintain exemplary fiduciary propriety for symbolic and prophylactic reasons. It was to maintain the symbol or example of fiduciary propriety that Sir Eric Sachs once held that, when a fiduciary duty is established, it is '*contrary to public policy that the benefit of the transaction be retained by the person under the duty unless he positively shows that the duty of fiduciary care has been fulfilled*'.<sup>132</sup> And it was for prophylactic reasons that Lord Herschell upheld the inflexible nature of the rule in *Bray v. Ford* itself:

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 a danger ... of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect.<sup>133</sup>

### 10.6.1.1 No defence to say the fiduciary acted honesty and in good faith

In *Regal Hastings v. Gulliver*, Lord Russell of Killowen observed that '[t]he profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account'.<sup>134</sup> This observation was applied by the House of Lords in *Boardman v. Phipps*,<sup>135</sup> where the fiduciary was held liable to account even though, as Lord Hodson observed, there had been no question of fraud and no suggestion that the fiduciary had acted other than in '*an open and honourable manner*'.<sup>136</sup> Lord Cohen even went so far as to state that the fiduciary had '*acted with complete honesty throughout*'.<sup>137</sup> Boardman was a solicitor acting on behalf of a trust, who, in that capacity and acting as proxy to the trustees, had attended the annual general meeting of a company in which the trust had a substantial shareholding. Unhappy with the state of the company, he and one of the beneficiaries (his co-defendant) decided to launch a takeover bid for those shares in the company that were not already owned by the trust. Boardman wrote to the beneficiaries outlining his plans to take a personal interest in the company, thereby giving them an opportunity to raise any objections they might have to his so doing. No objections having been made; the defendants proceeded with the takeover. In the event, the takeover was very successful and the value of the shares in the company greatly increased in value, to the great profit of the trust and the defendants. Despite this, one of the trust beneficiaries (Phipps) brought an action against Boardman for an account of the unauthorized profits he had made in his fiduciary capacity. The trial judge, Wilberforce J, found that Phipps had not made a fully informed decision to authorize Boardman to make a personal profit from his fiduciary position and ordered

p. 361 Boardman to make → the account. That order was ultimately upheld by a bare majority of the House of Lords (Lord Upjohn and Viscount Dilhorne dissenting).

The fact that honesty and good faith are no answer to the fiduciary duty to account demonstrates that the strict rule against unauthorized gains is not concerned with wrongdoing. It is not even concerned with wrongful omission—namely, the fiduciary's failure to disgorge unauthorized gains. The duty to account does not depend upon the fiduciary's behaviour or culpability at all, even though there will inevitably be cases in which the fiduciary has made his unauthorized gain through some conscious and wrongful act or omission. Rather, the duty is concerned to address a wrongful state of affairs—namely, the retention by a fiduciary of unauthorized gains acquired by reason, and by reason only,<sup>138</sup> of his position of trust. From the fact that the duty to account is not a response to wrongdoing, it necessarily follows that the duty to account cannot properly be described as a forfeiture or a penalty, even though respected authors have described it in such terms in the past.<sup>139</sup> This conclusion should not surprise us. The Court of Chancery, which established the fiduciary duty, never did uphold a forfeiture<sup>140</sup> or exercise a penal jurisdiction.<sup>141</sup>

### 10.6.1.2 No defence to say that the principal profited from the breach of fiduciary duty

We have just noted that in *Boardman*, the value of the shares in the company greatly increased in response to the work and advice of Boardman, the solicitor fiduciary. This was to the great profit of the trust and the defendants, but that fact did not afford Boardman a defence.

### 10.6.1.3 No defence to say the principal suffered no harm

The fiduciary duty to account for unauthorized gains applies even where the fiduciary's gain was made without harm or expense to his principal, a point made forcefully by 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.<sup>142</sup>

The point was taken up by Lord Wright in *Regal (Hastings) Ltd v. Gulliver*:<sup>143</sup>

p. 362 [B]oth in law and equity, it has been held that, if a person in a fiduciary relationship makes a secret profit out of the relationship, the court will not inquire whether the other person is damaged or has lost a profit which otherwise he would have got. The fact is in itself a fundamental breach of the fiduciary relationship.<sup>144</sup>

Regal Ltd had been financially unable to take up a business opportunity due to limited finances and so the company's directors took up the opportunity on their own behalf. They were held liable to account to the company for the gains they had made. The outcome would have been the same even if the business opportunity had never been offered to the company, but had instead been offered directly to the directors personally.<sup>145</sup> Only if the offer had been made to the defendants independently of their status as directors would they have been permitted to take it up on their own account.

In *Keech v. Sandford*,<sup>146</sup> a trustee sought to take advantage of an opportunity to renew a lease when the landlord made it clear that he would not offer the renewal to the beneficiary of the trust who was the current tenant. The trustee's gain was, in no sense, made at the expense of the trust, but the trustee was still barred from taking the renewal. Lord King LC held that:

[t]his may seem harsh that the trustee is the only person of all mankind who might not have the lease; but it is very proper that the rule should be strictly pursued, and not in the least relaxed.<sup>147</sup>

It may be that, by excluding entirely any inquiry into harm to the principal, the inflexible rule goes too far. The prophylactic aims of the policy of exemplary fiduciary propriety would be served sufficiently well by restricting the duty to account to cases in which there is at least a *real risk of harm*. However, the merit of excluding all inquiry into harm is the merit of simplicity. If harm is irrelevant, the principal is only required to show that his fiduciary made a gain without authority and by means of his position of trust. The rule is therefore easily understood, and the onus will undeniably be upon the fiduciary to anticipate its effects by gaining his principal's authority or consent before obtaining or retaining any such gain.

John H. Langbein argues that the technique of avoiding all possible conflicts sometimes obstructs the aim of serving the beneficiaries' best interest and he calls for the law to '*allow inquiry into the merits of a trustee's defense that the conduct in question served the best interest of the beneficiary*'.<sup>148</sup> He identifies four historical trends, which he says justify a relaxation of the strict rule: first, the courts are more efficient in fact-finding than they were when the strict rule was established, so there is no need for '*crude over-deterrence*'; second, the shift from reliance upon the unskilled gentleman amateur trustee to the skilled paid professional trustee; third, improvements in trust accounting and information retention brought about by the IT revolution; fourth:

Professional trustees do not serve for honor, they serve for hire; accordingly, they serve not in the sole interest of the beneficiary but also to make money for themselves and their shareholders.

p. 363 ↵ Significant though these trends are, only the first and third indicate clearly that the original reasons for the rule might no longer apply. If anything, the historical moves towards paid professionalism (Langbein's second and fourth trends) suggest that the strict rule may be more necessary than ever. One thing is clear: in this jurisdiction, any relaxation of the strict equitable principle must be left to the Supreme Court.<sup>149</sup>

### 10.6.1.4 No defence to say that the fiduciary has suffered harm

*Boardman v. Phipps* illustrates that a fiduciary will be required to account for unauthorized gains even if they are, to a large extent, attributable to the fiduciary's hard work. Regardless of the hardship to the fiduciary, he has a duty to account if the gains could not have been made without his position of trust. Professor Peter Birks has criticized cases such as *Boardman*, because they tend to produce '*windfalls to rather sharp plaintiffs at the expense of honest and industrious defendants*'.<sup>150</sup> That may be true, but the fiduciary duty to account is not susceptible to a straightforward restitutionary critique, as Birks himself acknowledges.<sup>151</sup> If it were, every account would be limited to the reversal of the fiduciary's unjust enrichment, and, a fortiori, no account could be so extensive as to unjustly enrich the principal at the fiduciary's expense. Justice between the particular fiduciary and the particular principal is not the only matter with which the duty to account is concerned. The gist of the fiduciary duty to account for unauthorized gains is the maintenance of exemplary fiduciary propriety, not the reversal of unjust enrichment of the particular parties. As one Australian judge put it: '*the law relating to sustaining the integrity of fiduciary relationships enunciates the [sic] higher principle than that of restitutio in integrum*'.<sup>152</sup>

### 10.6.2 Unauthorized profits: exceptions to the rule

There is no doubt that strict enforcement of the fiduciary duty to account can produce an unfair imbalance between fiduciaries and principals in individual cases. Therefore, although public policy requires that the rule be maintained in its strict form in the generality of cases, in particular cases, the courts are willing to employ a number of techniques to ensure that the rule does not produce harsh results. Even if courts were not motivated by a basic concern for *inter partes* justice to create exceptions to the strict rule, they might be motivated by pragmatic and policy reasons to maintain some reasonable relation between the obligations of fiduciaries and the rights of their principals—because the policy of exemplary fiduciary propriety must be weighed against the public interest in attracting persons to accept fiduciary obligations in the first place.

p. 364 **10.6.2.1 The quantum meruit exception**

Their Lordships in *Boardman v. Phipps* upheld the judgment of Wilberforce J, not only in respect to the strict enforcement of the fiduciary duty, but also with regard to his decision that Boardman should be paid a *quantum meruit* out of the trust fund '*on a liberal scale*', by way of remuneration for his hard work in

service of the trust. We might say that their Lordships in *Boardman* modified the strict rule of fiduciary propriety by whispering *inter partes* justice beneath an inflexible fiduciary rule that is shouted out to be heard by the public at large.<sup>153</sup> A *quantum meruit* will only be awarded in exceptional circumstances and it will not be awarded where gains take the form of bribes or secret commissions, as confirmed by the UK Supreme Court in *FHR European Ventures LLP v. Cedar Capital Partners LLC*.<sup>154</sup>

### 10.6.2.2 Is there an ‘unjust enrichment’ exception?

Is the award of a *quantum meruit* an instance of a more general ‘unjust enrichment’ exception to the strictness of the strict rule of fiduciary accountability? Professor Gareth Jones argued many years ago that as a general rule the fiduciary duty to account should be restricted to cases in which the fiduciary had been unjustly enriched at his principal’s expense and that making a public example of innocent fiduciaries, who had caused no harm, should be the exception rather than the rule.<sup>155</sup> That position has not been adopted by the English courts, but the point can be turned on its head, to ask whether a fiduciary should be required to account if the account might *unjustly enrich his principal*. The Australian High Court has answered that question, saying in *Warman International Ltd v. Dwyer* that: ‘*the liability of the fiduciary should not be transformed into a vehicle for the unjust enrichment of the plaintiff*’.<sup>156</sup> In *Crown Dilmun v. Sutton*,<sup>157</sup> Peter Smith J did not rule out the possibility that the fiduciary’s liability to account may be reduced where it would otherwise unjustly enrich his principal, but noted that in this area, ‘*the law favours conferring benefits on the wronged even though that is at the expense of the wrongdoer*’<sup>158</sup> and stressed that, if the fiduciary has acted dishonestly, there can be no question of reducing his liability to account.

In *Foster v. Spencer*,<sup>159</sup> Paul Baker QC J made an award of remuneration to trustees of a cricket club in respect of past service to the trust. Refusal of the award, he said, would ‘*result in the beneficiaries being unjustly enriched at the expense of the trustees*’.<sup>160</sup> The judge held the enrichment to be unjust, because the trustees had assumed office at a time when the club could not afford to offer remuneration and, in the years following their appointment, the trustees’ service to the club was far more extensive than they could have anticipated at the date of their appointment. It is arguable that such special facts justify the decision in *Foster v. Spencer*, but in the generality of cases, trustees assume office knowing that, unless authorized to the contrary, they are obliged to provide their services for free. So, in the vast majority of cases, there can be no suggestion that services provided by trustees have *unjustly enriched* the beneficiaries and the existence of an unjust enrichment exception should be considered doubtful at best.

### 10.6.2.3 The ‘practical justice’ exception

Suppose a court were asked to rescind a transaction, carried out by a fiduciary with his principal’s consent, on the ground that the principal’s consent had been obtained by undue influence. An example would be a financially unfavourable contract entered into by a young and inexperienced ‘pop star’ under the undue influence of their manager. In such a case, the manager’s fiduciary duty to account for his illegitimate fiduciary gains is not an automatic duty, but one that is indirectly dependent upon judicial discretion to order rescission on the ground of undue influence. The court’s discretion to decline to award rescission in such a case has sometimes been seized upon as a basis for introducing considerations of fairness and

justice between the parties into the quantification of the account. Thus, in a case concerning a young pop star ‘Gilbert O’Sullivan’ who successfully claimed that he had signed an unfavourable contract due to his manager’s undue influence, Dunn LJ held that:

in taking the account the defendants are entitled to an allowance ... for reasonable remuneration, including a profit element, for all work done in promoting and exploiting O’Sullivan and his compositions.<sup>161</sup>

Crucially, his Lordship held that:

although equity looks at the advantage gained by the wrongdoer rather than the loss to the victim, the cases show that in assessing the advantage gained the court will look at the whole situation in the round.<sup>162</sup>

In reaching this conclusion, his Lordship applied the maxim ‘he who seeks equity must do equity’.<sup>163</sup>

### 10.6.2.4 Causation defence

Lord Hodson summarized the fiduciary duty to account in the following terms:

[N]o 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 ... is entitled to defeat the claim upon any ground save that he made profits with the knowledge and assent of the other person.<sup>164</sup>

p. 366 ← This summary suggests that two major defences are available to the fiduciary when called upon to account: the first is the causation defence—for the account only applies where the unauthorized gains were acquired *by reason of* his fiduciary position; the second is the consent defence.

A fiduciary is only required to account for unauthorized gains made *by reason of* his fiduciary position. He is not required to account for gains acquired by other means, for ‘*it is one thing to strip a fiduciary of profit without much enquiry; it is another to hold him accountable for all loss without enquiring into relative causes*’.<sup>165</sup> Hence Lord Cohen’s observation in *Boardman v. Phipps*:<sup>166</sup> ‘*had the company been a public company and had the appellants bought the shares on the market, they would not, I think, have been accountable*’.<sup>167</sup> Viscount Sankey had reached a similar conclusion in *Regal (Hastings) Ltd v. Gulliver*:<sup>168</sup>

[H]aving obtained ... shares by reason and only by reason of the fact that they were directors of Regal and in the course of the execution of that office, [they] are accountable for the profits which they have made out of them.<sup>169</sup>

This dictum is, at first sight, hard to reconcile with the judgment of Morritt LJ in the Court of Appeal in *United Pan-Europe Communications NV v. Deutsche Bank AG*,<sup>170</sup> where his Lordship 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'.<sup>171</sup>

The implication of this statement is that a solicitor, such as Mr Boardman, should sometimes be disqualified from purchasing shares even if they are quoted on the public stock exchange and that directors, such as those in *Regal*, should sometimes be accountable for profits made on shares, even if they might have been acquired independently of their fiduciary position. In *United Pan-Europe* itself, the defendant had received documents from the claimant in confidence and, on the basis of information contained within the documents, had proceeded to purchase shares in competition with the claimant. However, Morritt LJ does not remove considerations of causation entirely. His Lordship still required that the conduct complained of must '*fall within the scope of*' the fiduciary duty. There must, in other words, be a basic factual connection between the particular gains and the defendant's lack of authority to retain such gains. His Lordship's point is that the duty to account should arise directly when profits are made in breach of fiduciary duty without any additional requirement to prove that such profits arise from a fiduciary position as such. Thus in *Parr v. Keystone Healthcare Ltd*,<sup>172</sup> the Court of Appeal rejected an argument by Parr, a former director of Keystone, that he owed no duty to account for unauthorized profit made by selling his shares in Keystone to a holding company. The director had breached his fiduciary duty to Keystone by committing a fraud of which the other shareholders were not aware. Due to this bad behaviour, the director was contractually bound to offer his shares to the other shareholders at a 50 per cent discount. Instead he sold them to one of the innocent shareholders at full price via the medium of the holding company. The director sought to keep the 50 per cent profit made on the deal on the basis that it was not caused by his breach of fiduciary duty to Keystone. The court rejected this, holding that it would suffice for the claimant company to show that there was a sufficient degree of connection between the breach of fiduciary duty and the unauthorized profit.<sup>173</sup> The point of substance was that Mr Parr's breach of fiduciary duty (whether the original fraudulent behaviour or failing to disclose that breach to the shareholders) led to his receipt of double what he was entitled to.

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### 10.6.2.5 The consent defence

The basic rule is that, apart from statute, a fiduciary may only make or retain a relevant personal gain if authorized to do so by his principal or by the court. Likewise, a trustee may be authorized by the trust instrument, or by the trust beneficiaries, or by the court. However, in the absence of advance authority to make a gain, it is nevertheless a good defence to an action for an account for the fiduciary or trustee to prove that his principal (or every beneficiary) has given their fully informed consent to the retention of the gain.<sup>174</sup> Furthermore, a principal is not permitted to gamble at his fiduciary's expense, so if he is aware that his fiduciary has made an unauthorized gain—for example, the purchase of profitable shares with his own money as a result of information acquired in his fiduciary capacity—the principal must call for an account without undue delay or he may be taken to have acquiesced in the fiduciary's retention of the unauthorized gain.

### 10.6.3 Is there a duty to account for gains made from trust ‘information’?

A fiduciary will be liable to account for any gain made by virtue of his position of trust or his use of trust property. We have so far assumed that Mr Boardman was accountable because of his position of trust, but he wasn’t actually a trustee, so the question arises: in what sense was he acting in a fiduciary capacity for the trust? The answer seems to be that he had voluntarily assumed a fiduciary position, but their Lordships’ judgments on this point were not clear. Two of their five Lordships (Lords Guest and Hodson) upheld, as an alternative basis for the account, the view taken by Wilberforce J at first instance that Boardman was liable to account not merely because he had held a fiduciary position, but because his gains were derived from the use of trust property.<sup>175</sup> The relevant trust property was the ‘knowledge’ that Boardman had acquired in the course of acting as a solicitor to the trust and, in particular, that which he had acquired when acting as proxy to the trustees at the annual general meeting of the trust-owned company. Lord Upjohn and Viscount Dilhorne dissented from this analysis of the case. Lord Upjohn held that information relating to a trust ‘is not property in any normal sense but equity will restrain its transmission to another if in breach of some confidential relationship’.<sup>176</sup> The ‘casting vote’ on this possible ratio of the decision fell to Lord Cohen and his Lordship declined to exercise it, stating simply that ‘[i]nformation is, of course, not property in the strict sense of that word’.<sup>177</sup> Echoing this, Sir Peter Millett, writing extra-judicially, has suggested that ‘the categorisation of information as property owes more to metaphor than to legal accuracy’.<sup>178</sup>

### 10.6.4 Trustee remuneration

It is hard to say whether trustee remuneration properly belongs in this chapter or the next, so it may serve as a bridge between the two. The justification for placing the topic in this chapter is the basic presumption that a trustee is not entitled to remuneration unless directly or indirectly authorized by the trust instrument.<sup>179</sup> This rule of ‘gratuitous service’ is an extension of the rule that a fiduciary is not entitled to unauthorized gains acquired by virtue of his fiduciary position. However, the argument for placing this topic in Chapter 11 is that the law relating to trustee remuneration has been amended by Part V of the Trustee Act 2000,<sup>180</sup> which applies regardless of when the trust was created. Since the Act came into force, on 1 February 2001, the basic presumption of gratuitous service no longer applies to a trust corporation that is not a charitable trust,<sup>181</sup> nor to a trustee ‘acting in a professional capacity’,<sup>182</sup> provided that he is not a sole trustee and provided that his remuneration has been agreed in writing by every other trustee.<sup>183</sup> Such trustees are now entitled to reasonable remuneration out of the trust fund if the trust instrument is silent on the issue of remuneration.<sup>184</sup> ‘Reasonable remuneration’ means such remuneration as is reasonable in the circumstances for the provision of trust services. Expressly included are reasonable banking charges levied by trustees who are authorized institutions (typically, banks) under the Banking Act 1987.<sup>185</sup> Also included is remuneration for services that a lay trustee could have provided.<sup>186</sup>

Cases decided before the 2000 Act demonstrate that, when the presumption of the general law was against trustee remuneration, the courts were not slow to find that a trust instrument had indirectly authorized remuneration. Thus in *Re Llewellyn’s Will Trust*,<sup>187</sup> Jenkins J allowed a clause in a trust instrument its ordinary construction even though this meant that the trustees would be able to appoint themselves to be directors of a company the shares of which they held on trust. As directors, they were empowered to award

themselves remuneration at a level that they themselves could fix.<sup>188</sup> Now that the presumption in the case of trust corporations and professional trustees is in favour of remuneration, it will be interesting to see if the courts will be as quick to treat the indirect provision of remuneration by the trust instrument as a sufficient basis for *excluding* such trustees' statutory right to reasonable remuneration.

Where the trust instrument expressly authorizes the remuneration of a trust corporation or professional trustee, such a trustee is deemed to be entitled under the trust instrument to receive payment in respect of services even if they are services which are capable of being provided by a lay trustee.<sup>189</sup> However, this provision only applies to a professional trustee of a charitable trust if he is not a sole trustee and if he has the agreement of a majority of the other trustees.<sup>190</sup>

Apart from the case of trust corporations and trustees acting in a professional capacity, as outlined earlier, the general rule is still that trustees must act gratuitously. The Act also confirms the established rule that a trustee's right to be remunerated from the trust is not a beneficial interest in the trust fund,<sup>191</sup> but merely a personal entitlement, albeit one secured by an equitable charge over the trust fund.

### 10.6.4.1 The court's inherent jurisdiction to award remuneration

Courts have an inherent jurisdiction to grant or to increase remuneration to trustees (whether corporate, professional, or lay) if it is in the interests of the beneficiaries on the facts of a particular case.<sup>192</sup> Such an award is usually prospective, with a view to ensuring the sound administration of the trust. Remuneration can be awarded retrospectively (see the *quantum meruit* exception, discussed earlier), but the fate of the amateur trustee in *Brudenell-Bruce v. Moore* shows that retrospective remuneration is highly exceptional and the consequences for the trustee can be serious. In this case, the trustee mistakenly thought that he was entitled to fees he had taken from the fund to compensate him for his efforts on behalf of the trust, but the court refused to authorize those payments and ordered him to repay them as well as removing him from office.<sup>193</sup>

The court's inherent jurisdiction to award remuneration may be exercised even when the trust instrument authorizes remuneration:

One can ... see some force [in the] view that, as a matter of policy the court should *not* exercise its jurisdiction to bail out professional trustees who have made a bad bargain. But given that a trustee may retire and that there is no means of compelling him to continue in office, the fact must be faced that there will often be a stark choice between increasing the remuneration of a skilled trustee familiar with the trust property and being forced to look for new trustees who may well not undertake the office without the inducement of higher fees.<sup>194</sup>

p. 370 ↵ Lord Herschell had made the same observation in *Bray v. Ford*:

[I]t might sometimes be to the advantage of the beneficiaries that their trustee should act for them professionally rather than a stranger, even though the trustee were paid for his services.<sup>195</sup>

However, a trustee cannot, by merely threatening to resign, coerce the court into awarding remuneration. In *Foster v. Spencer*,<sup>196</sup> which concerned trustees of a cricket club, the judge was satisfied that the trust business was not unduly complex and that other trustees could be found who would be willing to discharge it without remuneration.

Test your understanding of this chapter with essay questions and problem scenarios <https://iws.oupsupport.com/ebook/access/content/watt-trustequity1oe-student-resources/watt-trustequity1oe-chapter-10-essay-questions-and-problem-scenarios?options=showName> and accompanying answer guidance <https://iws.oupsupport.com/ebook/access/content/watt-trustequity1oe-student-resources/watt-trustequity1oe-chapter-10-guide-answers-to-the-essay-questions-and-problem-scenarios?options=showName>. Further improve your approach by reading general guidance on answering essay questions and problem scenarios <https://iws.oupsupport.com/ebook/access/content/watt-trustequity1oe-student-resources/watt-trustequity1oe-general-guidance-on-answering-essay-questions-and-problem-scenarios?options=showName>.

Use the flashcard glossary <https://iws.oupsupport.com/ebook/access/content/watt-trustequity1oe-student-resources/watt-trustequity1oe-flashcard-glossary?options=showName> to help consolidate your knowledge of key terms.

### 10.7 Further reading

In addition to the following print sources, expand your learning with web links <https://iws.oupsupport.com/ebook/access/content/watt-trustequity1oe-student-resources/watt-trustequity1oe-chapter-10-web-links?options=showName> to further reading on this topic.

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WORTHINGTON, S., ‘Fiduciary duties and proprietary remedies: addressing the failure of equitable formulae’ (2013) 72(3) CLJ 720–52.

## Notes

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<sup>1</sup> [1998] Ch 1 at 18.

<sup>2</sup> These opening lines are intended to echo Professor Paul Finn’s seminal analysis of the subject (see P. Finn, *Fiduciary Obligations* (Sydney: Law Book Co, 1977) and ‘Fiduciary law’ in *Commercial Aspects of Trusts and Fiduciary Obligations* (E. Kendrick, ed.) (Oxford: Oxford University Press, 1992)) as approved in the important judgment of Millett LJ in *Bristol and West BS v. Mothew* [1998] Ch 1 at 18.

<sup>3</sup> From the Latin *fides* (faith) and *fiducia* (trust).

<sup>4</sup> J.-P. Béraudo, *Les Trusts Anglo-Saxons et Le Droit Français* (Paris: LGDA, 1992) at 9, para. 21: ‘le mot fiduciaire joue dans l’esprit des juristes anglo-saxons comme une sorte de signal.’ This might be translated: ‘The word “fiduciary” rouses the spirit of Anglo-Saxon jurists like a sort of alarm.’

<sup>5</sup> Attributed to Chief Justice Mason of the High Court of Australia (quoted in M. McInnes, ‘A new direction for the Canadian law of fiduciary relations?’ (2010) 126 LQR 185).

<sup>6</sup> *M (K) v. M (H)* [1992] 3 SCR 6.

<sup>7</sup> Matthew Conaglen emphasizes the importance of the fiduciary duty from another perspective. He acknowledges that the fiduciary duty is ‘ultimately one of public policy’ (‘The nature and function of fiduciary loyalty’ (2005) 121 LQR 452 at 478), but regards the fiduciary duty as purely accessory or ‘subsidiary’ to non-fiduciary duties; the function of fiduciary duties being merely ‘to protect the proper performance of non-fiduciary duties’ (480) by prohibiting ‘the fiduciary from acting in a situation where he has a personal interest which is inconsistent with his non-fiduciary duty’ (462).

<sup>8</sup> *Towers v. Premier Waste Ltd* [2011] EWCA Civ 923; [2012] 1 BCLC 67, CA, per Mummery LJ at para. [2]. His Lordship was speaking in the context of company directors’ fiduciary duties.

<sup>9</sup> *New Zealand Netherlands Society v. Kuys* [1973] 1 WLR 1126, PC, per Lord Wilberforce at 1130.

<sup>10</sup> *Regal (Hastings) Ltd v. Gulliver (Note)* [1967] 2 AC 134, HL, at 157B; Law Commission Consultation Paper No. 151, *The Limitation of Actions*, para. 13.100 and Law Reform Committee, *Twenty-First Report (Final Report on Limitation of Actions)* (1977) Cmnd. 6923 at para. [3.82].

<sup>11</sup> G. Jones, ‘Unjust enrichment and the fiduciary’s duty of loyalty’ (1968) 84 LQR 477 at 487.

<sup>12</sup> ‘To encourage the others’: F.-M. A. Voltaire, *Candide* (1759) ch. 23.

<sup>13</sup> P. Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, revd edn 1989) at 339, 332–3, referring to King LC in *Keech v. Sandford* (1726) Sel Cas Ch 61 at 62. ‘Prophylaxis’ is derived from the Greek for ‘to guard against’.

<sup>14</sup> (1874) LR 10 Ch App 96.

<sup>15</sup> *Ibid.* at 125.

<sup>16</sup> *Re Condon* (1874) LR 9 Ch App 609 at 614. Approved in *R. v. Tower Hamlets LBC, ex p Chetnik Developments Ltd* [1988] AC 858, *per* Lord Bridge of Harwich at 874, HL.

<sup>17</sup> See *Kinloch v. Secretary of State for India* (1882) LR 7 App Cas 619 and *Tito v. Waddell (No. 2)* [1977] Ch 106 at 221.

<sup>18</sup> *Henderson v. Merrett Syndicates Ltd* [1995] 2 AC 145, HL, *per* Lord Browne-Wilkinson at 206B.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Eze v. Conway* [2019] EWCA Civ 88.

<sup>21</sup> In *Button v. Phelps* [2006] EWHC 53; 2006 WL 584571 (Ch D) the defendant’s liability for promoting a rival bid when contractually bound to promote another bid was held to be limited to contractual damages, rather than liability for an account of profits for breach of fiduciary duty.

<sup>22</sup> *Clark Boyce v. Mouat* [1994] 1 AC 428, *per* Lord Jauncey of Tullichettle at 437g–h.

<sup>23</sup> D. W. M. Waters, ‘The protector: new wine in old bottles?’ in *Trends in Contemporary Trust Law* (A. J. Oakley, ed.) (Oxford: Clarendon Press, 1996) 63 at 101.

<sup>24</sup> *Pilcher v. Rawlins* (1872) LR 7 Ch App 259; *Taylor v. London and County Banking Co* [1901] 2 Ch 231, CA, at 256.

<sup>25</sup> ‘A fiduciary must act in good faith’: *per* Millett LJ in *Mothew* at 18.

<sup>26</sup> P. Finn, *Fiduciary Obligations* (Sydney: Law Book Co, 1977) at 48.

<sup>27</sup> [2005] 1 WLR 567; [2005] UKHL 8.

<sup>28</sup> ‘*A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal*’: *Aberdeen Railway Co v. Blaikie Bros* (1854) 1 Macq 461, HL (SC), *per* Lord Cranworth LC at 471–2, applied in *Guinness plc v. Saunders* [1990] 2 WLR 324, HL.

<sup>29</sup> Each partner is both principal and fiduciary to every other partner in relation to matters within the ambit of partnership business. See *Aas v. Benham* [1891] 2 Ch 244 at 256. Considered in *Boardman v. Phipps* [1967] 2 AC 46, *per* Viscount Dilhorne at 70.

<sup>30</sup> [1998] 1 Ch 1. See, also, *Lac Minerals Ltd v. International Corona Resources Ltd* [1990] FSR 441, Supreme Court of Canada, *per* Wilson J (at 444) and La Forest J (at 455).

<sup>31</sup> [1998] 1 Ch 1. *per* Millett LJ at 18, approving the analysis of Finn, *Fiduciary Obligations* (Sydney: Law Book Co, 1977) at 2. See, also, P. Finn, ‘Fiduciary law and the modern commercial world’ in *Commercial Aspects of Trusts and Fiduciary Obligations* (E. McKendrick, ed., Oxford: Oxford University Press, 1992) at 7.

<sup>32</sup> *Re Hallett’s Estate* (1880) LR 13 Ch D 696 at 712.

<sup>33</sup> [1998] 1 Ch 1.

<sup>34</sup> Ibid. at 18.

<sup>35</sup> According to Lord Mustill in *Re Goldcorp Exchange* [1995] 1 AC 74 at 98: ‘high expectations do not necessarily lead to equitable remedies’. See, also, R. P. Austin ‘Moulding the content of fiduciary duties’ in *Trends in Contemporary Trust Law* (A. J. Oakley, ed.) (Oxford: Clarendon Press, 1996) at 161.

<sup>36</sup> *Norberg v. Wynrib* (1992) 92 DLR (4th) 449 (SCC) per McLachlin J at s. 68.

<sup>37</sup> *Burdick v. Garrick* (1869–70) LR 5 Ch App 233 at 240.

<sup>38</sup> R. P. Austin, ‘Moulding the content of fiduciary duties’ in *Trends in Contemporary Trust Law* (A. J. Oakley, ed.) (Oxford: Clarendon Press, 1996) at 169.

<sup>39</sup> W. Fratcher, *Scott on Trusts*, 4th edn (Boston: Little Brown & Co, 1987) at 43.

<sup>40</sup> (1866) LR 2 Ch App 55.

<sup>41</sup> Ibid. at 60–1.

<sup>42</sup> Compare *O’Sullivan v. MAM Ltd* [1985] QB 428.

<sup>43</sup> Robert Flannigan, ‘The Court of Appeal Recasts Fiduciary Accountability’ (2019) 25(7) *Trusts & Trustees* 737–41, criticizing the decision of the Court of Appeal in *Eze v. Conway* [2019] EWCA Civ 88.

<sup>44</sup> [2019] EWCA Civ 83.

<sup>45</sup> Robert Flannigan, ‘The Court of Appeal Recasts Fiduciary Accountability’ (2019) 25(7) *Trusts & Trustees* 737–41.

<sup>46</sup> L S. Sealy, ‘Fiduciary obligations, forty years on’ (1995) 9 JCL 37 at 40.

<sup>47</sup> R. P. Austin, ‘Moulding the content of fiduciary duties’ in *Trends in Contemporary Trust Law* (A. J. Oakley, ed.) (Oxford: Clarendon Press, 1996) 153 at 174.

<sup>48</sup> On contributory fault, see 13.2.2.5.

<sup>49</sup> Ibid. at 175.

<sup>50</sup> *Bristol and West Building Society v. Mothew* [1998] 1 Ch 1, per Millett LJ at 19.

<sup>51</sup> *Public Trustee v. Cooper* [2001] WTLR 901.

<sup>52</sup> The Companies Act 2006 requires that there should be full disclosure of the directors’ interests (ss. 177, 182), and it imposes a duty to avoid actual or potential conflicts between the directors’ interests and those of the company (s. 175). However, the statute seriously dilutes the traditional fiduciary safeguards. For example, s. 175 does not apply to directors’ transactions with the company and in relation to other transactions it permits directors of private companies to authorize conflicts with the interests of the company unless the company’s constitution expressly prohibits the activity in question.

<sup>53</sup> *Bristol and West Building Society v. Mothew* [1998] 1 Ch 1 at 18–19.

<sup>54</sup> *Clark Boyce v. Mouat* [1994] 1 AC 428, PC, per Lord Jauncey of Tullichettle at 435G; *Kelly v. Cooper* [1993] AC 205, PC.

<sup>55</sup> (1990) 61 P & CR 518.

<sup>56</sup> Ibid. at 519.

<sup>57</sup> *Kelly v. Cooper* [1993] AC 205.

<sup>58</sup> The principle that a trustee conflict will not be actionable if it was created by the appointment of the trustee also applies in Scotland; see *The Earl of Cawdor's case* [2006] CSOH 141; 2006 SLT 1070.

<sup>59</sup> Millett LJ in *Bristol and West Building Society v. Mothew* [1998] 1 Ch 1 at 19A. See, also, Finn, *Fiduciary Obligations* (Sydney: Law Book Co, 1977) at 254.

<sup>60</sup> See *Wight v. Olswang* [2001] Lloyds' Rep PN 269, in which a solicitor was held to have placed himself in an untenable position for a trustee.

<sup>61</sup> [2014] EWHC 3564; [2014] All ER (D) 79 at para. [127].

<sup>62</sup> *Wright v. Morgan* [1926] AC 788, per Viscount Dunedin at 798.

<sup>63</sup> *Aberdeen Railway Co v. Blaikie Bros* (1854) 1 Macq 461, HL (SC), per Lord Cranworth LC at 471–2 (emphasis added).

<sup>64</sup> *Regal (Hastings) Ltd v. Gulliver* [1967] 2 AC 134, HL, per Viscount Sankey at 137G.

<sup>65</sup> [1995] 1 WLR 32.

<sup>66</sup> Transactions pursuant to rights arising before trusteeship, and transactions occurring after retirement from trusteeship, are considered later.

<sup>67</sup> *Goldsworthy v. Brickell* [1987] 2 WLR 133, CA, per Nourse LJ at 150B.

<sup>68</sup> Hon. Mr Justice B. H. McPherson CBE, 'Self-dealing trustees' in *Trends in Contemporary Trust Law* (A. J. Oakley, ed.) (Oxford: Clarendon Press, 1996) 135 at 150.

<sup>69</sup> [1977] Ch 106.

<sup>70</sup> 'Out of a debt to justice'.

<sup>71</sup> [1977] Ch 106 at 241A–B.

<sup>72</sup> [1986] Ch 99.

<sup>73</sup> Ibid. at 115H–116A.

<sup>74</sup> *Mainwaring v. Newman* (1800) 2 Bos & Pul 120, 126 ER 1190; *Ellis v. Kerr* [1910] 2 Ch 529 at 534–6; *Boyce v. Edbrooke* [1903] 1 Ch 836; Hon. Mr Justice B. H. McPherson CBE, 'Self-dealing trustees' in *Trends in Contemporary Trust Law* (A. J. Oakley, ed.) (Oxford: Clarendon Press, 1996) at 135.

<sup>75</sup> Law of Property Act 1925, s. 72(3), (4).

<sup>76</sup> '[I]t is the public policy that possession should remain undisturbed': *Chalmondeley v. Clinton* (1821) 4 Bligh 1, per Lord Redesdale at 74–5.

<sup>77</sup> (1889) 60 LT Rep 514 at 520.

<sup>78</sup> See G. Watt, 'Laches election and estoppel' in *Breach of Trust* (P. Birks and A. Pretto, eds) (Oxford: Hart Publishing, 2002) at 354.

<sup>79</sup> J. Brunyate, *Limitation of Actions in Equity* (Cambridge: Cambridge University Press, 1932) at 243–4.

<sup>80</sup> *Edge v. Pensions Ombudsman* [2000] Ch 602 at 632.

<sup>81</sup> *Ex p. Lacey* (1802) 8 Ves Jun 625 at 626; 31 ER 1228.

<sup>82</sup> *Rhodes v. Bate* (1865–6) LR 1 Ch App 252 at 257; *BCCI v. Aboody* [1990] 1 QB 923, CA, at 964.

<sup>83</sup> *Williams v. Scott* [1900] AC 499, *per* Sir Ford North at 508.

<sup>84</sup> Millett LJ speaking obiter in *Mothew* [1998] 1 Ch 1 at 18D.

<sup>85</sup> [1949] 1 All ER 460.

<sup>86</sup> *Ibid.* at 463. See, also, *Vyse v. Foster* (1874–75) LR 7 HL 318 and *Re Macadam* [1946] Ch 73.

<sup>87</sup> [2016] EWHC 2959 (Ch); [2017] 4 WLR 26.

<sup>88</sup> *Re Boles* [1902] 1 Ch 244, *per* Buckley J.

<sup>89</sup> See, for example, *Holder v. Holder* [1968] Ch 353, *per* Danckwerts LJ at 398D.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Wright v. Morgan* [1926] AC 788, PC.

<sup>92</sup> *Ibid.* at 798.

<sup>93</sup> [1968] Ch 353.

<sup>94</sup> Millett LJ in *Mothew* at 19F.

<sup>95</sup> *Gilbert's Case* (1869–70) LR 5 Ch App 559 at 566; *Wight v. Olswang* [2001] Lloyds' Rep PN 269.

<sup>96</sup> *Bristol and West BS v. Mothew* [1998] Ch 1 at 19G.

<sup>97</sup> *Ibid.* at 19G–H, *per* Millett LJ, referring to *Moody v. Cox* [1917] 2 Ch 71 and *Commonwealth Bank of Australia v. Smith* (1991) 102 ALR 453.

<sup>98</sup> *Kelly v. Cooper* [1993] AC 205, PC.

<sup>99</sup> R. Goode, *Commercial Law*, 2nd edn (London: Penguin, 1995) at 177.

<sup>100</sup> See F. M. B. Reynolds, 'Solicitors and conflicts of duties' (1991) 107 LQR 536.

<sup>101</sup> See the Section 10.5.7 on the actual conflict rule.

<sup>102</sup> In *Jefri Bolkiah v. KPMG* [1999] 2 AC 222 at 234.

<sup>103</sup> *Bristol and West BS v. Mothew* [1998] Ch 1.

<sup>104</sup> Lord Millett in *Jefri Bolkiah v. KPMG* [1999] 2 AC 222. See, also, Lightman J in *Re a firm of solicitors* [1995] 3 All ER 482 at 488–9; [1997] Ch 1 at 9; Drummond J in *Carindale Country Club Estate Pty Ltd v. Astill* (1993) 115 ALR 112.

<sup>105</sup> [1912] 1 Ch 831.

<sup>106</sup> [1999] 2 AC 222.

<sup>107</sup> Lord Millett's term. *Ibid.* at 238B.

<sup>108</sup> See, generally, the Core Conduct of Business Rules (Financial Services Authority) and Law Commission Consultation Paper No. 124, *Fiduciary Duties and Regulatory Rules* (1992).

<sup>109</sup> And in relation to estate agents: see *Kelly v. Cooper* [1993] AC 205, PC.

<sup>110</sup> *Jefri Bolkiah v. KPMG* [1999] 2 AC 222 at 235A.

<sup>111</sup> Alpha and Omega are the author's terms.

<sup>112</sup> *Jefri Bolkiah v. KPMG* [1999] 2 AC 222 at 235E.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.* at 236G.

<sup>115</sup> *Ibid.*

<sup>116</sup> Order 43.

<sup>117</sup> Harman J, *AG v. Cocke* [1988] Ch 414 at 420F.

<sup>118</sup> *Ibid.* at 420–1, approving *Re Richardson* [1920] 1 Ch 423, CA.

<sup>119</sup> Trustee Act 2000, s. 31(1).

<sup>120</sup> *Re Beddoe* [1893] 1 Ch 547, CA.

<sup>121</sup> *Pettigrew v. Edwards* [2017] EWHC 8 (Ch); *Airways Pension Scheme Trustee Ltd v. Fielder* [2019] EWHC 29 (Ch).

<sup>122</sup> *X v. A* [2000] 1 All ER 490.

<sup>123</sup> Russell J in *Williams v. Barton* [1927] 2 Ch 9 at 11: ‘[o]n the same principle [that a trustee may not profit from their trust] a trustee has no right to charge for his time and trouble’; Paul Baker QC in *Foster v. Spencer* [1996] 2 All ER 672 at 678.

<sup>124</sup> Part V, which came into force on 1 February 2001.

<sup>125</sup> The presumption may be rebutted by express contrary provision in the trust instrument or statute.

<sup>126</sup> [1896] AC 44 at 51.

<sup>127</sup> *Ibid.*

<sup>128</sup> Lindsay J in *Regal (Hastings) v. Gulliver* [1967] 2 AC 134 at 137. In *Murad v. Al-Saraj* [2005] EWCA Civ 959, CA, Arden LJ stated, obiter, that it ‘may be ... the court should revisit the operation of the inflexible rule of equity in harsh circumstances, as where the trustee has acted in perfect good faith and without any deception or concealment, and in the belief that he was acting in the best interests of the beneficiary’ (at para. [8.2]).

<sup>129</sup> *Rhodes v. Bate* (1865–6) LR 1 Ch App 252: ‘the conferment of a trifling benefit will not be undone without evidence of mala fides’ (at 258).

<sup>130</sup> *Boardman v. Phipps* [1967] 2 AC 46.

<sup>131</sup> *Foster v. Spencer* [1996] 2 All ER 672.

<sup>132</sup> *Lloyds Bank Ltd v. Bundy* [1975] QB 326 at 346B.

<sup>133</sup> *Bray v. Ford* [1896] AC 44. Lord Herschell’s exposition was described by Lord Upjohn in *Boardman v. Phipps* [1967] 2 AC 46 at 123 as being the best statement of the rule.

<sup>134</sup> [1967] 2 AC 134 at 144G–145A.

<sup>135</sup> [1967] 2 AC 46.

<sup>136</sup> [1967] 2 AC 46 at 105G.

<sup>137</sup> *Ibid.* at 104E.

<sup>138</sup> This causation-based qualification is the subject of debate. See later.

<sup>139</sup> A. J. Oakley refers to this, *Constructive Trusts*, 3rd edn (London: Sweet & Maxwell, 1997) at 236 as ‘*the penal attitude displayed by the authorities*’; G. Jones, ‘Unjust enrichment and the fiduciary’s duty of loyalty’ (1968) 84 LQR 472.

<sup>140</sup> G. Watt, ‘Property rights and wrongs: the frontiers of forfeiture’ in *Modern Studies in Property Law: Property 2000* (E. Cooke, ed.) (Oxford: Hart Publishing, 2001) vol. I at 115.

<sup>141</sup> *Vyse v. Foster* (1872) LR 8 Ch App 309.

<sup>142</sup> (1874) LR 10 Ch App 124 at, 125.

<sup>143</sup> [1967] 2 AC 134.

<sup>144</sup> At 154F.

<sup>145</sup> *Industrial Development Consultants Ltd v. Cooley* [1972] 1 WLR 443.

<sup>146</sup> (1726) Sel Cas Ch 61.

<sup>147</sup> *Keech v. Sandford* (1726) Sel Cas Ch 61 at 62. In *Re Biss, decd* [1903] 2 Ch 40, CA.

<sup>148</sup> ‘Questioning the trust law duty of loyalty: sole interest or best interest?’ (2005) 114 Yale LJ 929; 987–90.

<sup>149</sup> *Murad v. Al-Saraj* [2005] EWCA Civ 959, per Arden LJ at para. [82]; *Wrexham Association Football Club Ltd v. Crucialmove Ltd* [2006] EWCA Civ 237; [2007] BCC 139, CA, per Sir Peter Gibson at para. [51].

<sup>150</sup> ‘Civil wrongs: a new world’, Butterworth Lecture, 1990 (London: Butterworths, 1991) 55 at 97.

<sup>151</sup> P. Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, revd edn 1989).

<sup>152</sup> *Maguire v. Makaronis* 1995 VIC LEXIS 1425, 17 August 1995, Supreme Court of Victoria, Appeal Division, per Nathan J at 48; but see the dissenting judgment of Brooking J at 32.

<sup>153</sup> This approach has been approved by the Court of Appeal (*Murad v. Al-Saraj* [2005] EWCA Civ 959) and by the High Court of Australia (*Warman International Limited v. Dwyer* (1994–5) 182 CLR 544) even though the practical outcome looks somewhat akin to profit-sharing between the innocent fiduciary and their principal.

<sup>154</sup> [2014] UKSC 45. Considered in detail in Chapter 8.

<sup>155</sup> ‘Unjust enrichment and the fiduciary’s duty of loyalty’ (1968) 84 LQR 472 at 502.

<sup>156</sup> (1995) 128 ALR 201 at 211–2.

<sup>157</sup> [2004] 1 BCLC 468; [2004] EWHC 52 (Ch).

<sup>158</sup> Ibid. at para. [212].

<sup>159</sup> [1996] 2 All ER 672.

<sup>160</sup> At 681B–C.

<sup>161</sup> *O’Sullivan v. MAM Ltd* [1985] QB 428 at 459. The manager’s efforts must have been very considerable indeed.

O’Sullivan met the agent in 1969, having had no real success on his own and yet, by 1972, he was the biggest selling solo artist in the world.

<sup>162</sup> Ibid. at 458.

<sup>163</sup> For further application of this maxim, see *Re Berkeley Applegate Ltd* [1989] Ch 32, *per* Edward Nugee QC, and *Spence v. Crawford* [1939] All ER 271 at 288–9.

<sup>164</sup> In *Boardman v. Phipps* [1967] 2 AC 46 at 105.

<sup>165</sup> J D. Heydon, ‘Causal relationships between a fiduciary’s default and the principal’s loss’ (1994) 110 LQR 328 at 332.

<sup>166</sup> [1967] 2 AC 46, HL.

<sup>167</sup> *Ibid.* at 100–1.

<sup>168</sup> [1967] 2 AC 143.

<sup>169</sup> *Ibid.* at 149. See, also, Lord Porter at 158E–F; Lord Macmillan at 153D–E; Lord Wright at 154B.

<sup>170</sup> [2000] 2 BCLC 461.

<sup>171</sup> *Ibid.* 484A–B.

<sup>172</sup> [2019] EWCA Civ 1246; [2019] 4 W.L.R. 99.

<sup>173</sup> Applying *Murad v. Al-Saraj* [2005] EWCA Civ 959; *CMS Dolphin Ltd v. Simonet* [2002] BCC 600, [2001] 5 WLUK 607 and *Ultraframe (UK) Ltd v. Fielding* [2005] EWHC 1638 (Ch), [2006] FSR 17, [2005] 7 WLUK 862.

<sup>174</sup> Lord Cohen confirmed that the consent must be ‘*informed consent*’ (*Boardman v. Phipps* [1967] 2 AC 46 at 101).

<sup>175</sup> [1964] 1 WLR 993 at 1012. See, further, Russell LJ’s vigorous defence of this view in the Court of Appeal ([1965] Ch 992 at 1031).

<sup>176</sup> *Boardman v. Phipps* [1967] 2 AC 46 at 128A.

<sup>177</sup> *Ibid.* at 102G.

<sup>178</sup> ‘Remedies: the error in *Lister v. Stubbs*’ in *The Frontiers of Liability* (P. Birks, ed.) (Oxford: Oxford University Press, 1994) 51 at 53; echoing in turn F. Gurry, *Breach of Confidence* (Oxford: Clarendon Press, 1984) at 46–8.

<sup>179</sup> Even now such ‘charging’ clauses will be construed against the trustee, which is to say that the trustee, as the accounting party, has the onus of establishing the reasonableness of the remuneration charged. In *Pullan v. Wilson* [2014] EWHC 126 (Ch), senior solicitors acting as trustees were permitted to charge nearly £400 pounds per hour because that was the going industry rate for solicitors’ professional work.

<sup>180</sup> Sections 28–33.

<sup>181</sup> Section 29(1).

<sup>182</sup> A trustee acts in a professional capacity if ‘*he acts in the course of a profession or business which consists of or includes the provision of services in connection with (a) the management or administration of trusts generally or a particular kind of trust, or (b) any particular aspect of the management or administration of trusts generally or a particular kind of trust, and the services he provides to or on behalf of the trust fall within that description*’ (s. 28(5)).

<sup>183</sup> Section 29(2).

<sup>184</sup> Section 29(5) and subject to any legislation to the contrary.

<sup>185</sup> Section 29(3).

<sup>186</sup> Section 29(4).

<sup>187</sup> [1949] 1 Ch 225.

<sup>188</sup> See, also, *Guinness plc v. Saunders* [1990] 2 WLR 324, HL.

<sup>189</sup> Section 28(1), (2).

<sup>190</sup> Section 28(3)(b). In the case of charitable trusts, s. 30 of the Act provides that the Secretary of State may make special provision for the remuneration of professional trustees and trust corporations.

<sup>191</sup> Section 28(4).

<sup>192</sup> *Re Duke of Norfolk's ST* [1981] 3 All ER 220, CA, *per* Fox LJ.

<sup>193</sup> [2014] EWHC 3679 (Ch).

<sup>194</sup> K. Hodkinson (1982) 46 Conv 231 at 233.

<sup>195</sup> [1896] AC 44 at 52.

<sup>196</sup> [1996] 2 All ER 672.

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