

# Four Questions on Fiduciaries

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*This article explores four pressing analytical challenges in fiduciary law. The problems are exposed by seeking answers to the pointed “who, what, and so what?” questions on fiduciaries. In short, “Who is a fiduciary?” and just how far does this protective jurisdiction stretch. Secondly, “What distinctive obligations rest on a fiduciary’s shoulders?” — what is it that defines and sets apart the fiduciary regime, providing it with mechanisms which differ from the routine restrictions applying to anyone who acts for others? And, finally, “What particular and distinguishing consequences follow upon a breach of these special restrictions?” This last question breaks down into two familiar but seemingly intractable parts: when and how do profits need to be disgorged; and when and how do losses need to be compensated? The answers to these four questions have never proved easy, yet these are the questions we must answer. Here it is suggested that a tightly rationalised (and, as it turns out, rather narrow) answer to the first question leads inescapably to more readily defensible answers to the three questions which follow it.*

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## I. Introduction

Some areas of equity seem to have presented practical and analytical challenges almost from their inception. Fiduciary law is just such an area. Given its importance in regulating commercial and domestic life, this is a problem. A more settled landscape might have been expected, especially after 50 years of sustained legal analysis by commentators<sup>1</sup> and longer still by judges. That makes its examination ideally suited to the broad but challenging theme of this special issue of the *Canadian Journal of Comparative and Contemporary Law*, with its focus on “Equity in the 21st Century: Problems and Perspectives”.

In this article I examine the most pressing and persistent challenges in fiduciary law by exposing four questions which seem to have remained the most intractable throughout the development of this area. Instead of adopting the usual journalistic “who, what, when, where, why?” of fiduciaries, I have gone for the rather shorter “who, what, so what?”

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1. Effectively beginning with Leonard Sedgwick Sealy, “Fiduciary Relationships” (1962) 20:1 *Cambridge Law Journal* 69 [Sealy, “Fiduciary Relationships”]; Leonard Sedgwick Sealy, “Some Principles of Fiduciary Obligation” (1963) 21:1 *Cambridge Law Journal* 119; and Leonard Sedgwick Sealy, “Director as Trustee” (1967) 25:1 *Cambridge Law Journal* 83. The earlier work by Austin Scott, by contrast, assumed the category and focused on the consequences: Austin W Scott, “The Fiduciary Principle” (1949) 37:4 *California Law Review* 539 [Scott, “The Fiduciary Principle”].

series of questions: who are we talking about? What activities are being scrutinised? And — so what? — meaning, so what consequences follow? “So what?” is undoubtedly the most important question for lawyers, and especially for common lawyers.<sup>2</sup> It is the question about remedies, and provides the final two of my four intractable questions on fiduciaries. We only really understand our rights and obligations, and by implication who should be the subject of them, if we understand the remedies. In short, “so what?” often tells us quite a lot about “what” and “who?”

For the most part I have tried to address these issues without delving into the detail of specific cases. But, perhaps predictably, two controversial cases on fiduciary remedies are in my sightlines, one on disgorgement, and one on equitable compensation. Both have emerged from the UK Supreme Court. They are selected because they illustrate especially clearly the issues being addressed in all common law jurisdictions, and provide telling vehicles for exposing the problems. The first is *FHR European Ventures LLP v Cedar Capital Partners LLC*<sup>3</sup> (“*FHR*”), on disgorgement of profits made by a disloyal fiduciary agent taking bribes (or secret commissions, an expression less suggestive of moral turpitude); the second is *AIB Group (UK) v Mark Redler & Co Solicitors*<sup>4</sup> (“*Redler*”), on equitable compensation for losses caused when solicitors made unauthorised payments out of their client account.

But the arguments which underpin this article extend well beyond fiduciary law; they embrace the equitable jurisdiction in its entirety. My larger agenda is that we should stop investing equity with mystique and mystery. Most equitable rules do not need a special language, or a special thought process, or a special philosophy, for their explanation or justification.<sup>5</sup> More than that, we should be able to explain all these

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2. This is because common law rights are *defined* by the remedies the courts will award for their protection.
  3. [2014] UKSC 45 [*FHR*].
  4. [2014] UKSC 58 [*Redler*].
  5. Contrast Peter Millett, “The Common Lawyer and the Equity Practitioner” (2015) 6 UK Supreme Court Yearbook 193 (“[e]quity is not a set of rules but a state of mind” at 193) [Millett, “The Common Lawyer”].

rules, and their context, and why they are appropriate, in legal language which makes plain the demarcation between situations where the general (typically common law) rule suffices, and those where some “special” (typically equitable) rule is warranted.<sup>6</sup> The rules may concern legal rights, or obligations, or remedies, or defences. It matters little. Sadly, given the historical baggage and the disinclination to cut free from it, this can probably only be done by the highest courts in each jurisdiction. Only these courts can now give the sort of explanation that cuts through established language and defines principle, doctrine and policy so as to settle, and settle properly, the law in these difficult areas. And by “settle properly” I mean provide judgments which command respect for the force of their reasoning, not merely the weight of their authority.

At least in my two cases on fiduciary remedies, the UK Supreme Court has set out well, exceptionally well in some respects, but (for different reasons in each case) has in the end avoided closing the loop on these difficult issues. I know in saying this I am conforming to academic caricature. During the hearing of *Redler*, Lord Neuberger apparently commented that one thing was certain: whatever the court decided, the decision would be criticised.<sup>7</sup> But I hope this commentary is also appropriately complimentary.

Putting the law on a secure footing is important. Until that is done, debates will persist. These debates create turbulence, destabilising judicial assertions of principle, policy, process, technique and language. They also provide impetus for counsel and courts to seek out exceptions and distinctions and qualifications which, with a more robust rule, perhaps

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6. This was the overarching message in Sarah Worthington, *Equity*, 2d (Oxford: Oxford University Press, 2006) [Worthington, *Equity*]. As I said in the Preface to the first edition, “[a] distinctive equity jurisdiction keeps its resolutions isolated, segregated in a box labelled ‘solutions to hard cases’”. No wonder equity earned a reputation as “hard law”.
  7. Simon Hale, “*AIB v Mark Redler*”, Case Comment, online: The Professional Negligence Bar Association <<http://pnba.co.uk/aib-group-uk-v-mark-redler-co-solicitors/>> (“[l]eading Counsel for AIB, Nicholas Davidson QC, reports that Lord Neuberger wryly observed during argument that ‘*only one thing was certain. Whatever we decide, it will be criticised*’ in the final paragraph of the case note [emphasis in original]).

would not or should not have been sustainable. This is a process that does little for any national or international rule of law and the ambition to treat like cases alike.

In summary, the goal in this article is to expose something of what *does* make the fiduciary jurisdiction special, and what troubling questions most need to be answered if the jurisdiction is to serve the needs of the 21st century.

## II. Who?: Who is a Fiduciary?

This question is not easy. It might seem otherwise, since it is impossible to obtain a law degree, or practise as a lawyer, without finding out something about these people called fiduciaries. We all know that certain individuals — typically catalogued as trustees, company directors, partners, agents, solicitors, and such like — are within the catchment.

Yet, despite the millions of words devoted to the issue,<sup>8</sup> it seems impossible to define a fiduciary in a way which *includes* all these well-recognised fiduciary types, yet excludes others in whom we might legitimately repose trust and confidence without attracting this added

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8. The literature is vast. For a summary of the principal views advanced, see e.g. Ernest J Weinrib, “The Fiduciary Obligation” (1975) 25:1 University of Toronto Law Journal 1; JC Shepherd, “Towards a Unified Concept of Fiduciary Relationships” (1981) 97:1 Law Quarterly Review 51; D Gordon Smith, “The Critical Resource Theory of Fiduciary Duty” (2002) 55:5 Vanderbilt Law Review 1399; Lionel Smith, “The Motive, Not the Deed” in Joshua Getzler, ed, *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (London: LexisNexis, 2003) ch 4; and Paul B Miller, “The Fiduciary Relationship” in Andrew S Gold & Paul B Miller, eds, *Philosophical Foundations of Fiduciary Law* (Oxford: Oxford University Press, 2014) [Miller, “The Fiduciary Relationship”]. And contrast Finn’s approach in his classic monograph, dealing with all the different types of “obligations” the courts have described as “fiduciary”: Paul Desmond Finn, *Fiduciary Obligations* (Sydney: Law Book Co, 1977) [Finn, *Fiduciary Obligations*].

baggage.<sup>9</sup> My solicitor is a fiduciary,<sup>10</sup> but not my plumber, even though I may be equally at the mercy of both, invest both with discretions to exercise on my account, and be compelled to trust both with decisions which affect my welfare and my finances.<sup>11</sup> Similarly, my business partner is a fiduciary, but not the project manager on my building site; the director of my company is a fiduciary,<sup>12</sup> but not my co-shareholders or

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9. Peter Millett, “Equity’s Place in the Law of Commerce” (1998) 114:2 Law Quarterly Review 214 [Millett, “Equity’s Place in the Law of Commerce”] (noting that the task “continues without evident sign of success” at 219). Also see Robert P Austin, “Commerce and Equity: Fiduciary Duty and Constructive Trust” (1986) 6:3 Oxford Journal of Legal Studies 444 at 445; Dennis R Klinck, “The Rise of the ‘Remedial’ Fiduciary Relationship”, Case Comment on *International Corona Resources Ltd v Lac Minerals Ltd*, (1988) 33:3 McGill Law Journal 600 at 603.
  10. Although see the comments later.
  11. Paul Desmond Finn, “Fiduciary Reflections” (2014) 88:2 Australian Law Journal 127 at 137 [Finn, “Fiduciary Reflections”]; also see Paul Desmond Finn, “The Fiduciary Principle” in Timothy G Youdan, ed, *Equity, Fiduciaries and Trusts* (Toronto: Carswell 1989), ch 1 at 46 [Finn, “The Fiduciary Principle”]; and Paul Desmond Finn, “Contract and the Fiduciary Principle” (1989) 12:1 University of New South Wales Law Journal 76. See too *Grimaldi v Chameleon Mining NL (No 2)*, [2012] FCAFC 6 (Austl) at para 177 [*Grimaldi*].
  12. But even then, note that the duties are owed to the *company*, not to the company’s shareholders, despite their vulnerability: *Percival v Wright*, [1902] 2 Ch 421 (Eng); *Peskin v Anderson*, [2001] 1 BCLC 372 (CA (Civ)(Eng)) at paras 29-30, per Mummery LJ; *Re Chez Nico (Restaurants) Ltd*, [1992] BCLC 192 (Ch (Eng)) at 208 obiter, per Nicolas Browne-Wilkinson VC; *Sharp v Blank*, [2015] EWHC 3220 (Ch) at paras 12-13, per Nugee J [*Sharp*]. Of course, a fiduciary relationship explicitly between director and shareholder could arise on the specific facts, if warranted: *Allen v Hyatt* (1914), 30 TLR 444 (PC (Judicial Committee)); *Coleman v Myers*, [1977] 2 NZLR 225 (CA).

co-bondholders.<sup>13</sup> This is despite the fact that all can profoundly affect my interests.<sup>14</sup>

This matters, because rather dramatic obligational and remedial advantages come with the fiduciary label. My solicitor is amenable to such claims; my plumber is not. The territory is fought over precisely because of the attractive idea that fiduciaries must conduct themselves “at a level higher than that trodden by the crowd”,<sup>15</sup> and the remedies for breach are perceived to be better.

In England we have not troubled ourselves much by these boundaries. As Lord Millett put it, writing extra-judicially, “as usual, we [the English] have tried to muddle through without attempting a definition, believing that anyone can recognize a fiduciary when he sees one”.<sup>16</sup>

But it is far from clear that we can. We understand the consequences clearly enough, but not when to expect them. Absent a fiduciary relationship, the basic premise of party dealings is assumed to be “buyer beware”, with each party looking to its own interests.<sup>17</sup> Within a fiduciary relationship, however, the fiduciary is expected to be “on the other party’s

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13. Although there will be constraints on the exercise of power by both. For shareholders, see *Allen v Gold Reefs of West Africa Ltd*, [1900] 1 Ch 656 (CA (Eng)) at 671, per Lord Lindley MR; *Peter’s American Delicacy Co Ltd v Heath* (1939), 61 CLR 457 (HCA) at 504, per Dixon J. In the US the assertion is subject to special treatment of shareholders in closely held corporations in some states. For bondholders, see *Redwood Master Fund Ltd v TD Bank Europe Ltd*, [2002] EWHC 2703 (Ch) at paras 105-106, per Rimer J; *Azevedo v Imcopa Importação, Exportação E Indústria De Oléos Ltda*, [2013] EWCA Civ 364; *Assénagon Asset Management SA v Irish Bank Resolution Corp Ltd (formerly Anglo Irish Bank Corp Ltd)*, [2012] EWHC 2090 (Ch).

14. Indeed, the scale of the discretion or the likely harm is not determinative: both fiduciaries and non-fiduciaries cover a broad spectrum. On fiduciaries, see the classic statement in *Re Coomber*, [1911] 1 Ch 723 (CA (Eng)) at 728-29, per Fletcher Moulton LJ.

15. *Meinhard v Salmon*, 164 NE 545 at 546 (NY App Ct 1928).

16. Millett, “Equity’s Place in the Law of Commerce”, *supra* note 9 (adding that “[r]ecent experience shows this to be optimistic” at 218, n 11).

17. Although even that is modified by a good number of common law, equitable and statutory rules.

side” — loyalty is claimed. When is the line crossed?

The line is not crossed simply because we have handed over some part of our autonomy to another,<sup>18</sup> or (saying much the same thing) invested another with powers and discretions which must be exerted in the interests of the principal and not the fiduciary power-holder.<sup>19</sup> Of course, exactly this fiduciary limitation on power is true *if* the power-holder is a fiduciary. But not all power-holders are fiduciaries. And constraints on the exercise of power do not depend on fiduciary status; all power-holders are equally constrained.<sup>20</sup> What the fiduciary context adds, if it applies, is that the *purpose* of the exercise of the powers is unequivocally to advance the principal’s interests, and any considerations which call into play the fiduciary’s interests are either “irrelevant considerations” or reflect “improper purposes”. The same easy assertion is not possible with other power-holders, such as shareholders, or bondholders, or ordinary contracting parties, even though these are all people to whom we might delegate powers or in whom we might vest part of our decision-making autonomy.

Just last year the UK Law Commission suggested that “[t]he key test [for a fiduciary] is whether there is a *legitimate expectation* that one

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18. Lionel Smith, “Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another” (2014) 130:4 Law Quarterly Review 608.

19. This is an increasingly common view, perhaps intuitively seeking out the circumstances when a fiduciary relationship might be needed. The clearest exponent of the “powers” view is Miller, “The Fiduciary Relationship”, *supra* note 8; and Paul B Miller, “Justifying Fiduciary Duties” (2013) 58:4 McGill Law Journal 969.

20. *Vatcher v Paull*, [1915] AC 372 (HL) at 378, per Lord Parker; *Equitable Life Assurance Society v Hyman*, [2002] 1 AC 408 (HL) at 451-62. Also see the references at note 13, above.

party will act in another's interest".<sup>21</sup> But this repeats the question rather than delivering the answer: *when* is there a legitimate expectation that one party will act in another's interest? There are many instances where one party has an expectation, perhaps even a well-founded expectation, that the other will act in their interests.<sup>22</sup> But the real question is whether the law will *insist* that this expectation, and indeed perhaps even more than this expectation, is delivered. This is rarer than we might think. The hurdle might seem to be overcome by suggesting that the fiduciary rule applies only when there is an "undertaking" by one party to perform

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21. UK Law Commission, *Fiduciary Duties of Investment Intermediaries* (Law Commission No 350)(1 July 2014), online: UK Law Commission <[http://lawcommission.justice.gov.uk/docs/lc350\\_fiduciary\\_duties.pdf](http://lawcommission.justice.gov.uk/docs/lc350_fiduciary_duties.pdf)>, discussing the definition of a fiduciary generally at 3.16-3.24, and finally settling on the cited definition at 3.24 [emphasis added], adding that discretion, power to act and vulnerability are all indicators of such an expectation. See the references cited there, especially *Arklow Investments Ltd v Maclean*, [2000] 1 WLR 594 (PC (NZ)) at 598; and James Edelman, "When Do Fiduciary Duties Arise?" (2010) 126:2 Law Quarterly Review 302 [Edelman, "When Do Fiduciary Duties Arise?"]. See also Finn, "Fiduciary Reflections", *supra* note 11.
22. See for example, *JP Morgan Chase Bank v Springwell Navigation Corporation*, [2008] EWHC 1186 (Comm)(Gloster J rejecting Springwell's contention that, although the relationship of investment advisor and client was not one of the categories of relationship where a fiduciary relationship would simply be presumed by the law, such a relationship arose on the facts. She observed: "[b]ut the mere fact that one party to a commercial relationship 'trusts' the other does not predicate a fiduciary relationship. The word 'trust', like the word 'advice' has a variety of meanings. ... Springwell no doubt 'trusted' Chase to conduct itself in a commercially appropriate manner. But I do not consider that Springwell had any legitimate expectation that, in its commercial dealings with Springwell, Chase would subordinate its interests to those of Springwell" at para 574). See also *Barclays Bank v Svizera Holdings BV*, [2014] EWHC 1020 (Comm) at para 8; *Bailey v Barclays Bank*, [2014] EWHC 2882 (QB) at paras 89-90 (appeal outstanding).

in this way,<sup>23</sup> but in all the recognised fiduciary contexts we want the fiduciary requirement enforced regardless: we do not want trustees or company directors to be able to escape the fiduciary regime simply by denying an undertaking to comply with it.<sup>24</sup>

Despite all the effort, therefore, we still lack a compelling way of describing, never mind rationalizing, the imposition of fiduciary rules.<sup>25</sup> These rules impose heavy constraints on the fiduciary's personal autonomy, and should be imposed only when nothing else will do the

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23. For suggestions that an “undertaking” is important, see *Hospital Products Ltd v United States Surgical Corporation* (1984), 156 CLR 41 (HCA) at paras 96-97, per Mason J [*Hospital Products Ltd*]; *Bristol and West Building Society v Mothew*, [1998] Ch 1 (CA (Civ)(Eng)) [*Bristol*]; Scott, “The Fiduciary Principle”, *supra* note 1; Sealy, “Fiduciary Relationships”, *supra* note 1; Edelman, “When Do Fiduciary Duties Arise?”, *supra* note 21 at 317-318.
24. Although contrast the findings in other circumstances: see *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Limited (ACN 113 114 832)(No. 4)*, [2007] FCA 963 (Austl) at paras 276-81, per Jacobson J (finding that an exclusion clause was effective (the clause providing that Citigroup was engaged “[a]s an independent contractor and not in any other capacity including as a fiduciary” at para 145). This conclusion was roundly criticised in Finn, “Fiduciary Reflections”, *supra* note 11 at 140ff. Note that purported exclusion of the fiduciary duty entirely is quite different from the permissible express curtailment of its scope, see for example, *New Zealand Netherlands Society Oranje Inc v Kuys*, [1973] 2 All ER 1222 (PC (NZ)) [*Kuys*]; *Hospital Products Ltd*, *supra* note 23 at paras 97, 102; *Kelly v Cooper*, [1993] AC 205 (PC (Bermuda)) at 213-215, (or the whitewash provided by the fiduciary giving advance notice of, and obtaining the principal's agreement to, the pursuit of conflicting opportunities).
25. There is debate over whether these duties are “imposed” or “undertaken”. While I agree a person will not be a fiduciary if ignorant of any circumstances which ought to affect her behaviour (as with ignorant recipients of trust property or of mistaken payments), I otherwise favour the view that these duties are imposed by the law in a limited range of circumstances. See *Westdeutsche Landesbank Girozentrale v Islington LBC*, [1996] AC 669 (HL); Finn, “The Fiduciary Principle”, *supra* note 11.

job.<sup>26</sup> But when is that?

In seeking answers, I suggest that our language is impeding our analysis. In particular, the search for a category of *person* is doomed to failure. For good reason the law typically seeks to define categories of *obligations*, *duties* and *remedies*, not categories of people. It may look to relationships, but generally only to explain the context in which particular obligations and duties are owed. By contrast, the search for categories of people who will be obliged to “act in another’s interest” makes us forget that there are very many categories of obligations which might deliver these ends. Even a short list would include: contractual regimes, tort rules, duties of confidence, duties to provide full information,<sup>27</sup> the undue influence and fair-dealing rules,<sup>28</sup> and duties controlling the exercise of powers. But the people who owe some — or even all — of these duties are not necessarily fiduciaries. Equally, even though people who *are* fiduciaries are likely to owe all these duties, it is not this which attracts the fiduciary

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26. Worthington, *Equity*, *supra* note 6 at 127ff; and Sarah Worthington, “Fiduciaries: When is Self-Denial Obligatory?” (1999) 58:3 Cambridge Law Journal 500 [Worthington, “Fiduciaries: When is Self-Denial Obligatory?"]. Also see Millett, “Equity’s Place in the Law of Commerce”, *supra* note 9 at 217-218.

27. *Sharp*, *supra* note 12.

28. Despite some suggestions that the fair-dealing rule is merely an application of the fiduciary no-conflict rule: see *e.g. Re Thompson’s Settlement*, [1986] Ch 99 (Eng) at 115, per Vinelott J; and Matthew Conaglen, “A Re-Appraisal of the Fiduciary Self-Dealing and Fair-Dealing Rules” (2006) 65:2 Cambridge Law Journal 366. For the argument that they are distinct, see *Tito v Waddell (No 2)*, [1977] Ch 106 (Eng) at 241, per Megarry VC; and Finn, *Fiduciary Obligations*, *supra* note 8 ch 20-21. Also see Sarah Worthington, “Fiduciaries: Following Finn” in Tim Bonyhady, ed, *Finn’s Law: An Australian Justice* (Leichhardt, Austl: Federation Press, 2016)(forthcoming).

label. The fiduciary label (as we now understand it)<sup>29</sup> describes people who are expected “act in another’s interest” in a very special way: these are people who are required to put the other’s interests *ahead* of their own, and to the extent that they do not do this they will have to disgorge the benefits thereby obtained. This is quite unusual intervention.<sup>30</sup> This duty can be breached even when all the other duties are not.<sup>31</sup> When is this sort of intervention *necessary* if the arrangement between the parties is to be functional? In short, moving from the language of people-labelling to the language of obligation-labelling,<sup>32</sup> when are obligations of self-denial *needed*? When is it appropriate to prevent one party pursuing conflicting

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29. Contrast the approach taken in Finn’s classic work on fiduciaries, Finn, *Fiduciary Obligations*, *supra* note 8. There, *all* the equitable duties just listed were covered. This was done precisely because the courts had used the word “fiduciary” to describe the people subject to these rules. But Finn made the point that very different people were subject to each rule, and the consequences varied for each rule, and each therefore needed to be considered quite independently.
30. See Worthington, *Equity*, *supra* note 6 ch 5. See, for example, *Henderson v Merrett Syndicates Ltd*, [1995] 2 AC 145 (HL) at 206, per Lord Browne-Wilkinson. Note that there are some exceptions. *Attorney General v Blake*, [2000] UKHL 45 [*Blake*] is an exception in contract law, although it has not been widely adopted despite early fears; see Sarah Worthington & Roy Goode, “Commercial Law: Confining the Remedial Boundaries” in David Hayton, ed, *Law’s Future(s): British Legal Developments in the 21st Century* (Oxford: Hart Publishing, 2000) at 281-312. See too the various interpretations of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*, [1974] 1 WLR 798 (Ch (Eng)), discussed in Andrew Burrows, “Are ‘Damages on the Wrotham Park Basis’ Compensatory, Restitutionary, or Neither?” in Djakhongir Saidov & Ralph Cunnington, eds, *Current Themes in the Law of Contract Damages* (Oxford: Hart Publishing, 2008) 165 at 165-85; and Sarah Worthington, “Reconsidering Disgorgement” (1999) 62:2 *Modern Law Review* 218.
31. *Boardman v Phipps*, [1967] 2 AC 46 (HL) is typically cited.
32. It turns out that this is crucial across the board, but especially so in considering remedies: see the discussion in Part IV below, and also *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*, [1999] 1 NZLR 664 (CA) at 686, per Tipping J [*Bank of New Zealand*].

gains?<sup>33</sup>

This question clearly requires more work. A move on language is unlikely to be the only move needed in delivering a tighter analysis of “who is a fiduciary”, but it has some ramifications which are immediately evident. The fiduciary no-conflicts rule is, at base, directed at ensuring that the fiduciary does not *compete*, *i.e.* does not pursue her own interests in arenas which lie within the scope of her fiduciary role, however wide or narrow that might be. It says nothing about carrying out the tasks which are assigned; nothing, for example, about making shrewd investments or distributing assets properly and wisely. Other rules are required to deliver those ends. So the question becomes, when is a “non-compete” rule *essential*, so much so that the law will impose it? It is perhaps easy to see why it is needed with company directors (especially since companies can act only through human agents, and, primarily, precisely the agents on whom the non-compete restriction is imposed);<sup>34</sup> similarly with trustees, and by extension with agents.<sup>35</sup> But it is far less clear that it is needed with solicitors (unless they too are also holding assets on trust), or Crown servants, even though these people are commonly included in lists of

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33. And constraints should not be imposed unless they are essential, not merely pleasing extras: see generally, Sarah Worthington, “Common Law Values: The Role of Party Autonomy in Private Law” in Andrew Robertson & Michael Tilbury, eds, *The Common Law of Obligations: Divergence and Unity* (Oxford: Hart Publishing, 2016) ch 14. Also see Millett, “Equity’s Place in the Law of Commerce”, *supra* note 9 (“[i]t is of the first importance not to impose fiduciary obligations on parties to a purely commercial relationship who deal with each other at arms’ length and can be expected to look after their own interests” at 117-118).

34. Noting that the fiduciary duty is owed to the company, not to the shareholders.

35. This is so even though in some cases the only thing these people have to do is comply with directions concerning the disposition of property. In these circumstances the non-compete rule is then limited to preventing the fiduciary from using the property to generate private gains: see *Foskett v McKeown*, [2001] 1 AC 102 (HL) [*Foskett*] (although the trustee in that case undoubtedly had broader duties).

status-based fiduciaries. This may be an historical hangover:<sup>36</sup> with these people, surely, all the duties mentioned earlier will cover the required territory, providing adequate and appropriate protection to the parties to the relationship.<sup>37</sup>

These are just the sorts of issues which must be addressed. What do we mean by the word “fiduciary”, and who is caught within its web? The modern battleground for applying the fiduciary label is typically joint venturers and financial advisers. The problems are easily extended

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36. See Finn, *Fiduciary Obligations*, *supra* note 8. Note *e.g.* the common use of expressions such as “relationships of trust and confidence” and “confidential relationships”. These relationships are not necessarily “fiduciary”, in the sense that the conflicts rule applies, although other equitable restrictions are apt. Employees provide an illustration. Older cases might have included employees in the list of status-based fiduciaries; see *e.g.* *Hospital Products Ltd*, *supra* note 23 at para 68. But the modern approach is quite different: see *Ranson v Customer Systems*, [2012] EWCA Civ 841; *Helmet Integrated Systems Ltd v Tunnard*, [2006] EWCA Civ 1735; *University of Nottingham v Fishel*, [2000] ICR 1462 (QB (Eng)) especially at 1491, per Elias J.

37. It is not to the point that fiduciary constraints would provide even better protection: they always would. With a few notable exceptions, the cases seem to support the non-fiduciary approach mooted here. “Fiduciary” cases concerning solicitors typically seek remedies for non-disclosure, fair-dealing, proper purposes, negligence, etc., *or* misuse of client trust funds. These are not remedies for “competition”/breach of the no-conflict rule (unless in making profits from the trust fund, which is caught by “trustee” fiduciary rules). So far as Crown or public servants are concerned, the general rule is that employees are not fiduciaries: see note 36. The well-known exceptional cases are *Attorney General v Goddard* (1929), 98 LJKB 743 (Eng); *Reading v Attorney General*, [1951] AC 507 (HL); and *Attorney General for Hong Kong v Reid*, [1994] 1 AC 324 (PC (NZ)) [*Reid*]. The former decisions have been criticised by many commentators: see *e.g.* Gareth Jones, “Unjust Enrichment and the Fiduciary’s Duty of Loyalty” (1968) 84:4 Law Quarterly Review 472; Finn, *Fiduciary Obligations*, *supra* note 8 at 215. And the last case, along with *Blake*, *supra* note 30, might be seen as a hard case making bad law, both cases being stymied by jurisdictional issues in pursuing what were seen a justified remedies (although, to be fair, there is no hint of this motivating the courts or affecting their deliberations).

to all commercial intermediaries. When Sir Anthony Mason described fiduciary law as “a concept in search of a principle” he made a troubling assessment of the territory under discussion and our inability to be certain about rights and duties and the reasons for imposing them.<sup>38</sup> This, then, is the first question which needs a compelling answer: who *is* a fiduciary? Or, as I would prefer to put it, who is subject to the no-conflicts/non-compete rule, and therefore to the unusual disgorgement liabilities which then follow?

### III. What?: What do Fiduciaries Have to Do?

The question here is clear. Even if we cannot say precisely *who* is a fiduciary, can we at least say precisely *what* such a person, once identified, will have to do? Although I start with the now conventional divisions of the duties owed by fiduciaries, the point I want to make in this Part is more subtle: it is to highlight the modern risk of misjudging the *non-fiduciary* duties owed by fiduciaries.

The words of Lord Millett (Millett LJ as he was) are familiar:

[t]he distinguishing obligation of a fiduciary is the obligation of loyalty ... [This] core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict ...<sup>39</sup>

Note that Lord Millett speaks of the distinguishing obligation, not the only obligation. This was a point made in the previous Part. It is now accepted modern orthodoxy that “[n]ot every breach of duty by a

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38. Anthony Mason, “Themes and Prospects” in Paul Desmond Finn, ed, *Essays in Equity* (Sydney: Law Book Co, 1985) 242 at 246.

39. *Bristol*, *supra* note 23 at 18.

fiduciary is a breach of fiduciary duty”.<sup>40</sup> Note too that this distinguishing obligation — an obligation of loyalty — does not raise an expectation of benefits to be delivered. It requires only that the fiduciary counterparty will not exploit the relationship for personal gain, but will — and will be obliged to — put the principal’s interests *ahead* of the fiduciary’s. Only to the extent that she acts contrary to that will fiduciary law intervene.

In the language we are used to, fiduciary rules are proscriptive rules,

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40. Millett, “Equity’s Place in the Law of Commerce”, *supra* note 9 at 218. In *Bristol*, *supra* note 23 (Millett LJ rejected “unthinking resort to verbal formulae”, insisting that the fiduciary label should be “confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties” at 16). Also see Finn, “The Fiduciary Principle”, *supra* note 11 at 27-28. See too, *Chan v Zacharia* (1984), 154 CLR 178 (HCA) (Deane J put it this way: “... the one ‘fundamental rule’ embodies two themes. The first is that which appropriates for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest. The second is that which requires the fiduciary to account for any benefit or gain obtained or received by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it: the objective is to preclude the fiduciary from actually misusing his position for his personal advantage. Notwithstanding authoritative statements to the effect that the ‘use of fiduciary position’ doctrine is but an illustration or part of a wider ‘conflict of interest and duty’ doctrine [see *e.g.* *Kuys*, *supra* note 24] the two themes, while overlapping, are distinct. Neither theme fully comprehends the other and a formulation of the principle by reference to one only of them will be incomplete” at 198-99) [*Chan*]; and *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 per Sopinka J (“not all obligations existing between the parties to a well-recognized fiduciary relationship will be fiduciary in nature” at 597).

not prescriptive ones.<sup>41</sup> The fiduciary is not positively obliged to act in the interests of the principal, with damages awarded for failure to deliver some advantageous end-point.<sup>42</sup> This is important. What is special about the fiduciary role is something essentially negative:<sup>43</sup> fiduciary relationships demand self-denial, not due care and obedience to agreed terms.<sup>44</sup> As already noted, this rather dramatic constraint on party autonomy is rare in private law.

But notice too that the resulting interventions are rather narrow. Paul Finn stressed the consequences of this realignment from the older approach to fiduciaries to this new more restrictive approach, and the detail merits repeating:

[L]oyalty is thus exacted, often in a draconian way. But ... no more than loyalty is exacted. This warrants emphasis. It is not the case that the pure negligence of a lawyer, an agent's excess of authority, a partner's breach of the partnership contract or a trustee's improvident investment is, as such, a breach of fiduciary duty, no matter how harmful to the interests of the client, the principal, etc. If no issue of disloyalty is involved, such matters will be actionable through those primary bodies of law which constitute or govern the ordinary incidents of the

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41. *P & V Industries Pty Ltd v Porto*, [2006] VSC 131 (Austl) (“[t]his means that the no conflict and no profit rules encompass the whole content of fiduciary obligations and the duty of loyalty imposed on a fiduciary is promoted by prohibiting disloyalty rather than by prescribing some positive duty” at para 23). Similarly, see *Bristol*, *supra* note 23 at 18; *Breen v Williams* (1996), 186 CLR 74 (HCA) at 113 [*Breen*]; *Attorney-General v Blake*, [1998] Ch 439 (CA (Civ)(Eng)) at 455 (not affected by the appeal).
42. *Ibid* at 137-38; *Pilmer v Duke Group Ltd*, [2001] HCA 31 at para 74, but generally, see also paras 69-83. Also see Geraint Thomas, “The Duty of Trustees to Act in the ‘Best Interests’ of their Beneficiaries” (2008) 2:3 *Journal of Equity* 177.
43. See Millett, “Equity’s Place in the Law of Commerce”, *supra* note 9 (“[i]t is the principle that a man must not exploit the relationship for his own benefit. This is what distinguishes a fiduciary relationship from a commercial one” at 222), but generally, see also 219-21. Millett was clearly much influenced by Finn’s work, citing it here with warm approval.
44. Although those duties, and others too, may well be owed by the fiduciary. See Worthington, “Fiduciaries: When Is Self-Denial Obligatory?”, *supra* note 26.

relationship in question – negligence, breach of contract or breach of trust.<sup>45</sup>

That is worth reading twice. Modern fiduciary law — and the particular idea of “loyalty” it describes — may be comprehensively addressed by rather tightly defined proscriptive obligational rules relating exclusively to improper profits from misuse of position and the avoidance of conflicts of interest and duty.<sup>46</sup> But inevitably fiduciaries, as individuals, are subject to a great number of other legal rules, breach of which will also deliver useful remedies.

This means there are two different answers to the “What?” question. There is the narrow proscriptive conflicts/misuse of position rule which constrains fiduciary activity, and is accepted as defining the territory of the rules which are unique to fiduciaries. But there are also all the other obligations to which a fiduciary may be subject — typically to:<sup>47</sup> (i) comply with the terms of the engagement; (ii) in an appropriate manner; and — returning to fiduciary proscriptions — (iii) do so loyally.

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45. Finn, “The Fiduciary Principle”, *supra* note 11 at 28.

46. Dividing these two limbs is common modern practice (see *e.g.* *Chan*, *supra* note 40 at 198-99, per Deane J) but in practice it is difficult to think of misuses of position which do not also involve conflicts of duty and interest: see the discussion in Sarah Worthington, “Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae” (2013) 72:3 Cambridge Law Journal 720 at 732-35 [Worthington, “Fiduciary Duties and Proprietary Remedies”] (suggesting that *Reid*, *supra* note 37, might provide a very rare illustration; it seems that all the other classic fiduciary cases can be classified, or re-classified, with relative ease as conflicts cases).

47. Typically we do not separate out clearly enough exactly what — from the various options on this list — the trustee has done which counts as a wrong and has caused the loss, etc. Often the identified categories are called different things by different judges and academics (see *Redler*, *supra* note 4 at paras 59-60; and *Bank of New Zealand*, *supra* note 32 at 687, per Tipping J). Often the context is identified rather than the particular duty in issue: *e.g.* custodial and management stewardship. This then leads to talk of substitutive and reparative compensation, falsifying and surcharging, accounting on the basis of wilful default, and restitutive and restitutionary damages, all aligned precisely with particular different contexts, but perhaps not precisely enough with particular different wrongs. Not much of this is then sufficiently useful or informative.

Another way of making the same point is to consider not the duties themselves, but the context of what can go wrong. Take the case of a trust, as it provides a simple illustration with several possibilities for mistakes to be made:

- *Wrongful paying out of assets*: this covers payments out contrary to terms (either payments for disallowed investments or to disallowed beneficiaries) *or* payments out based on a wrong decision-making process, etc. (*e.g.* in determining which investments/exchanges to pursue, or which beneficiaries should receive a share). Note that the former attracts strict liability; the latter requires proof of the abuse. And note too that the wrongful disposition may have been in return for something now in the trust fund (or now on-delivered to the beneficiary — as indeed in *Target Holdings Ltd v Redferns*<sup>48</sup> (“*Target Holdings*”) and *Redler*<sup>49</sup>), or may have been paid to a beneficiary who is not entitled (as in *Re Diplock*<sup>50</sup>), or indeed may be a “hand in the till” breach by the trustee (as in *Foskett v McKeown*<sup>51</sup> — and note that here, but only here, there is disloyalty as well as breach of trust, and the disgorgement remedy is an alternative); or
- *Wrongful management of the assets*: this typically involves negligence of some form or other (*e.g.* in investment, custody, insurance, taking advice, etc.). Here there is an obvious overlap with the previous category: is a negligent investment decision the “wrongful paying out of assets?” But the former category does not cover the field: *e.g.* negligent custody leading to theft or damage of the Picasso painting is clearly in this category, but is not a “wrongful paying out”.

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48. *Target Holdings Ltd v Redferns*, [1996] AC 421 (HL) [*Target Holdings*]. See the discussion below in Part IV.B: What Losses Must be Compensated?

49. *Redler*, *supra* note 4. See the discussion below in Part IV.B: What Losses Must be Compensated?

50. *Ministry of Health v Simpson*, [1951] AC 251 (HL)(*sub nom Re Diplock*).

51. *Foskett*, *supra* note 35.

- *Disloyalty*: this involves the trustee acting disloyally in her own interests, for gain. Then the remedy is disgorgement of the disloyal gain: the focus is on fiduciary's enhanced position, not claimant's damaged one. The gain in question may have come directly from the trust fund (as when the trustee puts her hand in the till, or enters into a self-dealing sale or purchase transaction), or may be gained from an independent source, but one which must necessarily involve a conflict of duty and interest or a misuse of fiduciary position. Absent a breach of this "non-compete" rule, the fiduciary's gain is not disloyal and need not be disgorged.

This multiplicity of duties to which the typical fiduciary is subject creates a potential problem which is not often highlighted. In older cases, decided before much of the modern writing on fiduciaries emerged, judges typically identified *relationships* as fiduciary (or not), and with that label then felt able to fine tune every aspect of the relationship to ensure that moral ends were delivered, often with little explanation or justification. As Robert Austin put it:

[i]f a relationship was fiduciary, that characteristic was taken to be at the heart of the entire relationship, identifying more than merely one or a few duties amongst many. ... Generally, fiduciary terminology was applied, often loosely, to standards of good faith, disclosure standards, limits on the proper exercise of discretionary powers, and even 'fiduciary care'.<sup>52</sup>

More than that, the remedies — if I can pre-empt the next Part, but at this stage only for the purpose of illuminating the "What?" question

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52. Robert P Austin, "Moulding the Content of Fiduciary Duties" in AJ Oakley, ed, *Trends in Contemporary Trust Law* (New York: Oxford University Press, 1996) 153 at 156-57. See too the earlier comments on solicitors and employees, *supra* notes 36 and 37.

— were typically discussed through the language of “account”.<sup>53</sup> This language was routinely used to deal with *all* these duties, regardless of whether the duties were especially fiduciary, or even especially equitable. The modern debates over the nature of the fiduciary’s duty of care are stark reminder of this sort of slippage, with only slow realisation that the duty of care owed by a fiduciary is of the same nature as the duty of care owed by other parties.<sup>54</sup> The risk is then very high that like cases will not be treated alike. The remedies for *fiduciary* negligence, for example, or *fiduciary* abuse of powers, or *fiduciary* failure to comply with the terms of the engagement, are at risk of being determined on a different basis from breaches of the same sorts of rules by non-fiduciary parties. This may be the right approach, but it needs more by way of justification than mere assertion that “[t]he fiduciary relationship is a creature of equity and the remedy for breach of a fiduciary’s equitable obligations lies within equity’s exclusive jurisdiction”.<sup>55</sup> The key issue is the particular *obligation* in issue, not the particular *relationship*.

Moreover, the language of account brings added disadvantages. First, it is not illuminating. An assertion that

[t]he primary remedy for breach of trust is not equitable compensation but account, and the orders which follow are not compensatory but restorative; the court enforces the trustee’s duty to account for his stewardship of the trust

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53. This is certainly true for trustees, and generally true for agents and partners; it is not common with company directors. For a short description of account, see Peter Birks, “Equity in the Modern Law: An Exercise in Taxonomy” (1996) 26:1 University of Western Australia Law Review 1, especially at 45-48; and *Libertarian Investments Ltd v Hall* (2013), 16 HKCFAR 681 at paras 166-73, per Lord Millett NPJ [*Hall*].

54. Now see *Permanent Building Society v Wheeler* (1994), 11 WAR 187 (SC (Austl)) at 238, per Ipp J; *Bristol*, *supra* note 23 at 17; *Hall*, *ibid* at 77. Of course, the fiduciary context will influence what counts as a breach: contrast the duty of care in trust investment (see *Trustee Act 2000* (UK), c 29, s 1; and *Speight v Gaunt*, [1883] 9 App Cas 1 (HL) [*Speight*]) with that which might be owed in other contexts (including other fiduciary contexts).

55. Millett, “The Common Lawyer”, *supra* note 5 at 194.

fund and to make good any deficit which appears when the account is taken<sup>56</sup>

says little which helps in deciding the basis by which to measure the “deficit” which must be made good (or, in other contexts, the profits which must be disgorged).<sup>57</sup> Secondly, the language of account necessarily segregates fiduciary analysis from common law notions of compensating for loss (surely not too far removed from “making good a deficit?”). The inevitable consequence is that potentially relevant analogies are missed.

In considering the duties owed by fiduciaries, two ideas are important. First, that modern analysis recognises that fiduciaries typically owe their principals a good number of different duties. Many are of the same type as owed by non-fiduciaries in similar contexts. Only one — the proscriptive fiduciary duty of loyalty — is unique to fiduciaries. And secondly, going against this, historical fiduciary language was to the opposite effect: “fiduciary” described a relationship, embracing all the relationship duties, and “account” provided the vehicle for all the remedies. The tension in moving forward is obvious.

It follows that my second intractable question is this. Given the history of assessing all fiduciary remedies in a distinctive way — by account — and given that remedial consequences depend on the precise nature of the particular obligation breached or right infringed,<sup>58</sup> *is* there anything which renders all the various non-fiduciary duties somehow different when owed by a fiduciary from when they are not? I suggest there is not, or no more than merely reflects the different context. If this is true, then principle, policy, language and analysis must be appropriately and carefully attuned to reflect that truth.

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56. *Ibid.* Although contrast the assertion in *Hall*, *supra* note 53, per Lord Millett NPJ (“[i]t is often said that the primary remedy for breach of trust or fiduciary duty is an order for an account, but this is an abbreviated and potentially misleading statement of the true position. In the first place an account is not a remedy for wrong ... “ at para 167).

57. See the section on account in Worthington, “Fiduciary Duties and Proprietary Remedies”, *supra* note 46.

58. *Redler*, *supra* note 4 at para 76, per Lord Toulson.

## IV. So What?: What Remedies Follow a Breach of Duty by Fiduciaries

The previous Parts provide an entrée to the core debates over remedies. This is always where the battles are hardest fought. A discussion of remedies is often assisted by examples, and, as indicated at the outset, I will use two cases by way of illustration: *FHR*<sup>59</sup> on the remedies for breach of the proscriptive fiduciary duty, and *Redler*<sup>60</sup> on the remedies for breach of the non-fiduciary duties owed by fiduciaries. Both are controversial; both were decided over a year ago, and neither seems to have settled the debates completely.

### A. What Profits Must be Disgorged?: Constructive Trusts and Personal Disgorgement of Profits

Disloyal profiteering by fiduciaries comes in two basic guises. These reflect the two broad practical ways in which a fiduciary holding assets under management (whether on trust or not) can make an unauthorised personal profit. First, the fiduciary can deal disloyally with the assets themselves. She can do this simply by taking these assets without authority (a “hand in the till” type of breach); alternatively, she can engineer a transaction where she is on both sides of the deal, either buying from or selling to herself on behalf of her principal (a “self-dealing” transaction). In either case the dealing clearly involves a conflict between duty to the principal and personal self-interest. In these circumstances the disgorgement remedy is universally conceded to exist, and to be proprietary. If the trustee simply takes the asset from a trust fund, the asset will continue to be held on the original trusts, and its traceable proceeds will be held

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59. *FHR*, *supra* note 3.

60. *Redler*, *supra* note 4.

on constructive trust.<sup>61</sup> Alternatively, if the transaction is a self-dealing transaction, then a different route leads to the same ultimate ends: the transaction is voidable at the election of the principal (subject to the usual constraints on rescission), thus compelling the fiduciary to return the original managed asset (or its value), but requiring the principal to return whatever was received in exchange.<sup>62</sup> Of course, the principal's remedy can only be proprietary if the assets which must be handed back to the principal are identifiable; even if they are not, the fiduciary will still be subject to a personal obligation to disgorge profits.<sup>63</sup> These outcomes are not in dispute and are not considered further.

Secondly, the fiduciary may make a disloyal profit without directly subtracting assets from the trust fund or fiduciary "pot". This is typically done by competing with the principal (or "the trust") for an opportunity or advantage which, if the fiduciary had acted loyally, might have been acquired for the principal.<sup>64</sup> This can include pursuing competing business opportunities, or taking a bribe or secret commission from the counterparty to a deal being done on behalf of the principal. This latter was the *FHR* context: that case involved a £10 million bribe, or a secret commission, taken by an agent who was negotiating the sale of a hotel complex. The principal sued the agent for disgorgement, successfully alleging the remedy was proprietary: *i.e.* the bribe was held

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61. Many cases could be cited, but see *e.g.* *Docker v Soames* (1834), 39 ER 1095 (Ch); *Aberdeen Town Council v Aberdeen University* (1877), 2 App Cas 544 (HL); *Scott v Scott* (1963), 109 CLR 649 (HCA); *Paul A Davies (Aus) Pty Ltd v Davies (No2)*, [1983] 1 NSWLR 440 (CA (Austl)); and perhaps most famously *Foskett*, *supra* note 35. And in the corporate context, where there is no initial trust or title split, the misappropriated corporate funds will be held on constructive trust.
  62. See *e.g.* *Erlanger v New Sombbrero Phosphate Co* (1878), 3 App Cas 1218 (HL); *Re Cape Breton Co* (1885), 29 Ch D 795 (CA (Eng)); *P&O Steam Navigation Co v Johnson* (1938), 60 CLR 189 (HCA); *Maguire v Makaronis* (1997), 188 CLR 449 (HCA).
  63. *McKenzie v McDonald*, [1927] VLR 134 (SC (Austl)) (also noting compensation as a further alternative remedy if raised on the facts (as it was here)).
  64. Classic modern descriptions would also add the possibility of disloyal gains made by "misuse of position", but see *supra* note 46.

by the fiduciary on constructive trust for the principal. Here the remedial analysis is more difficult.

Everyone concedes that the disloyal fiduciary cannot keep the gains: the fiduciary must “account” to the principal for them. What had been in dispute in England for 20 years or more was whether the disgorgement remedy was proprietary or personal. This is the debate which *FHR* settled: the remedy is proprietary. Settlement of the issue is certainly welcome, although we might now say that in England we know that the remedy *is* proprietary, because the Supreme Court has said so, but we still do not know quite *why* it is, or why it *should* be so. This question needs answering, or its ramifications will return to haunt us.

Almost twenty years before *FHR*,<sup>65</sup> the Privy Council in *AG for Hong Kong v Reid*<sup>66</sup> (“*Reid*”) had suggested that, if the fiduciary had to account, it then followed from the very nature of things that such a remedy would be proprietary if the gain was identifiable, since “equity treats as done that which ought to be done”.<sup>67</sup> This held sway as the dominant view for decades, both in England and in many Commonwealth jurisdictions. It was a view which had explicitly rejected an earlier Court of Appeal

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65. This description of context is abbreviated from Worthington, “Fiduciary Duties and Proprietary Remedies”, *supra* note 46 at 723-24.

66. *Reid*, *supra* note 37. A public prosecutor in Hong Kong took bribes to “lose” files, thus subverting prosecutions. The bribes were used to buy houses in New Zealand, held in the names of the fiduciary’s wife and solicitor. The Privy Council held that the fiduciary (or his wife or solicitor) held the bribes or their proceeds on constructive trust for the Crown.

67. *Ibid* at 331. If it makes a difference, Lord Millett has added a further gloss to this, suggesting that the conclusion can be justified on the basis that the breach was not the fiduciary’s receipt of the bribe, but the failure to hand it over: Peter Millett, “Restitution and Constructive Trusts” (1998) 114:3 Law Quarterly Review 399 at 407. Also see Peter Millett, “Proprietary Restitution” in Simone Degeling & James Edelman, eds, *Equity in Commercial Law* (Sydney: Lawbook Co, 2005) 309 at 324 [Millett, “Proprietary Restitution”].

decision in *Lister & Co v Stubbs*<sup>68</sup> (“*Lister*”) which had held that proprietary remedies would lead to such unacceptable consequences for third parties that they could not possibly represent the law. In short, at least in relation to bribes, *Reid* took one firm view of what ought to be done, and *Lister* another. Commentators were divided.

The difference matters because all sides are agreed that *if* the principal’s remedy is proprietary then it carries with it a number of significant advantages. Most obviously, it entitles the principal to insolvency protection as against the fiduciary’s creditors; to trace into identifiable exchange products; and to follow the asset or its traceable proceeds into the hands of third parties who are not bona fide purchasers for value without notice of the principal’s interest. All these proprietary consequences significantly privilege the principal, and all are contingent on the initial claim to the disloyal profits being proprietary.

In the face of this longstanding debate, the UK Supreme Court judgment was relatively brief: fifty-one paragraphs, none of them especially long. Lord Neuberger PSC delivered the judgment for the court, and made little of the fact that he was overruling his own sustained deliberations in *Sinclair v Versailles*,<sup>69</sup> an earlier case in the Court of Appeal, where — supported by precedent<sup>70</sup> — he had preferred the outcome in *Lister*. It does not omit much detail to summarise the Supreme Court judgment as follows: the choice between the two competing views (*i.e.* proprietary and non-proprietary disgorgement) must be based on “legal principle, decided cases, policy considerations, and practicalities”;<sup>71</sup> neither decided cases nor the writings of academics suggest any plainly right or plainly wrong answer;<sup>72</sup> in these circumstances, and “in the absence of any other

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68. (1890), LR 45 Ch D 1 (CA (Eng)). In *Lister & Co v Stubbs*, an agent took bribes from the vendor in return for contracts with his principal. The Court of Appeal held that the agent was personally liable to the principal for the value of the bribe only, and neither the bribe nor its successful investment proceeds were held on constructive trust for the principal.

69. [2011] EWCA Civ 347 [*Sinclair*].

70. Although he defended his conclusions on the basis of precedent, principle and policy.

71. *FHR*, *supra* note 3 at para 12.

72. *Ibid* at para 32.

good reason, it would seem right to opt for the simple [*i.e.* proprietary] answer”;<sup>73</sup> that other common law countries do this;<sup>74</sup> that principle<sup>75</sup> and policy<sup>76</sup> (both rather scantily addressed) support this approach; and precedent<sup>77</sup> does not contradict it. Especially in the latter steps, there seems to be an implicit presumption that almost universally conceded *personal* obligations to disgorge are, and should be, the equivalent of proprietary remedies, at least when owed by fiduciaries.<sup>78</sup> This may well be right, but it is the question in issue, not its robust answer. And I say that as one who has argued that the remedy should indeed be proprietary in every case I can think of other than *Reid*.

This criticism is hardly fair, perhaps. Even the most committed adherents seem to have problems justifying the move from widely-accepted personal remedies for fiduciary disgorgement to the more contested remedies by way of a constructive trust. It was Lord Millett’s article in the *Restitution Law Review*<sup>79</sup> which underpinned Lord Templeman’s proprietary analysis in *Reid*, and Lord Millett has pursued this theme in the intervening 20 odd years, including commenting on *FHR* itself.<sup>80</sup>

Lord Millett’s most recent elaboration of the outcome is that equity does not provide a proprietary remedy for breach of a personal obligation; it “provides a personal remedy which has proprietary consequences”.<sup>81</sup> The footnoted explanation of this is that it “is in accordance with the

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73. *Ibid* at para 35.

74. *Ibid* at para 45.

75. *Ibid* at paras 33, 36.

76. *Ibid* at paras 42-43.

77. *Ibid* at para 45.

78. *Ibid* at paras 33, 36, 42-44.

79. Peter Millett, “Bribes and Secret Commissions” (1993) 1 *Restitution Law Review* 7.

80. See *e.g.* Millett, “Proprietary Restitution”, *supra* note 67; Peter Millett, “Bribes and Secret Commissions Again” (2012) 71:3 *Cambridge Law Journal* 583 [Millett, “Bribes and Secret Commissions Again”]; and Millett, “The Common Lawyer”, *supra* note 5.

81. Millett, “The Common Lawyer”, *supra* note 5 at 196.

obligational theory of the [express] trust” and with Maitland’s ideas.<sup>82</sup> And so it is. But an obligation to hold assets on an express trust for certain beneficiaries is quite some distance from an obligation to disgorge disloyal gains to the principal. However, Lord Millett takes some time to explain why the outcome for express trusts is equally applicable in this disgorgement context. The core idea depends on accounting, and comes from an assertion that where equity enforces performance of a personal obligation in relation to specific property, it does so by ordering accounts to be taken as if the obligation had been performed when it should have been, and this, in modern terminology, constitutes a proprietary remedy.<sup>83</sup>

Accounting is surely a distraction: it does not indicate whether the remedy is personal or proprietary.<sup>84</sup> The accounting process can be adopted in compensation cases when the remedy can only be personal. And in earlier bribe cases the defaulting fiduciary’s obligation to “account in equity”<sup>85</sup> was taken by some to indicate that the disgorgement obligation was personal only (*Lister, Sinclair*)<sup>86</sup> and by others to indicate precisely the opposite, that it was inherently proprietary (*Reid*).

Omitting the accounting distraction, it certainly seems true that specific enforcement of an obligation in relation to identified property has proprietary consequences. This explains express trusts and equitable security interests; it explains proprietary estoppel; it explains constructive and resulting trusts in all the cases other than fiduciary disgorgement. So why not in the fiduciary disgorgement cases too?

True, it *might* do that, but before we can say so it is important to

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82. *Ibid* at 196, n 10.

83. *Ibid* at 196-98.

84. See Worthington, “Fiduciary Duties and Proprietary Remedies”, *supra* note 46 at 736-38.

85. And indeed it is a moot point whether the language applies only to trustees or more widely to fiduciaries in general. It is commonly said that fiduciaries (using the expression generally) are obliged to “account in equity”, but assertions that the principal can “falsify” or “surcharge” the accounts is typically confined to express trustees.

86. Also see William Swadling, “The Fiction of the Constructive Trust” (2011) 64:1 Current Legal Problems 399.

notice one very dramatic difference between the last example and all the others. Disloyal gains must be disgorged because the fiduciary *must not* have them, even though there is no inherent and often no particular reason why the principal *must* have them. This is why they are often described as windfalls to the principal. By contrast, in all the other examples above the core purpose of the obligation is to deliver a particular asset *to the claimant*, and, where a constructive trust is recognised, that is simply shorthand for the assertion that equity recognises that the claimant *must* have the asset in question, and can insist on having it not only as against the defendant but also as against any stranger to that relationship. This is what it means to have a proprietary interest in an asset. It follows that in the distinctive disgorgement cases there may be no reason to treat the principal as (already) owning the asset in equity. This may not be “what ought to be done”; it may not be the function of the disgorgement obligation.

Put another way, if the purpose or objective of the disgorgement remedy is specifically to take the *fiduciary* back to first base, and not specifically to situate the *principal* at a particular endpoint, then the desired protection can be secured without the need for proprietary attributes.<sup>87</sup> Of course, and by contrast, if the remedy *is* designed to give the principal what a proper performance of the fiduciary’s obligations is designed to deliver, then the answer is different, and the remedy might legitimately be proprietary, provided the underlying relationship is seen

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87. See the argument in Vanessa Finch & Sarah Worthington, “The Pari Passu Principle and Ranking Restitutionary Rights” in Francis Rose, ed, *Insolvency and Restitution* (London: Mansfield Press, 2000) ch 1.

as sufficiently valuable to warrant “over-protecting” it in this way.<sup>88</sup>

I attempted in my 2013 *Cambridge Law Journal* article to put forward just such an argument, and concluded that the disgorgement remedies could be justified as being proprietary on the basis that the principal did indeed have an entitlement to the disloyal gains in every case I could think of bar *Reid*.<sup>89</sup> In short, in all cases bar this one, there was not merely a reason to *remove* the disloyal gains from the fiduciary; there was also a reason to give them *to* the principal. But the Supreme Court in *FHR* did not adopt this analysis. And nor did it provide one of its own, or not one which provides a compelling analytical foundation.

The issue matters. The right analysis needs to settle conclusively and convincingly the competing arguments of principle and policy. Courts in other common law jurisdictions are clearly sufficiently alert to the competing policy arguments to have settled universally on the view that the constructive trust in these circumstances is “remedial”.<sup>90</sup> This means that, just when proprietary consequences really matter, these courts have

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88. This last qualification is necessary. We are used to constructive trusts where common law damages are inadequate: this explains the vendor/purchaser constructive trust (of land and Picasso paintings, etc., but not ordinary goods or shares), equitable security interests, etc. Here the law protects — “over-protects” — assets regarded as unusually special. But the protective title split in express trusts, and the proprietary remedies which follow mis-dealings in the trust assets, are not protecting “special” property. They might, however, be justified as “over-protecting” relationships regarded as especially deserving, being fiduciary relationships. This was the argument advanced in Worthington, *Equity*, *supra* note 6 ch 6. But even here the pre-requisite for this sort of protection ought to be that the asset in question is being held specifically for the principal, as indicated in the text above.

89. This was the distinction sought to be addressed in Worthington, “Fiduciary Duties and Proprietary Remedies”, *supra* note 46 at 731-35. The conclusion reached was that *all* the cases on fiduciary breaches fell into the category meriting proprietary protection *other* than *Reid*, *supra* note 37, despite this being a case where it *was* awarded. See the similar argument, but focusing more on policy concerns, in Worthington, *Equity*, *supra* note 6 ch 5.

90. For the detail, see *Grimaldi*, *supra* note 11; and Millett, “Bribes and Secret Commissions Again”, *supra* note 80.

the right to, and may well, decide that a proprietary remedy should be denied.<sup>91</sup> On insolvency, but also more generally, this discretionary approach to proprietary entitlements has little to recommend it.<sup>92</sup> But just as it seems inappropriate for judges to “play God” over a claimant’s property rights — asserting that although there is an “entitlement” to a constructive trust or profits, this remedy might then be withheld if the circumstances are inappropriate — so too is it inappropriate in England to “play God” by insisting that the claimant does have a property right without properly justifying that superior level of protection. This is because granting the principal a proprietary right will inevitably have profound and generally detrimental effects on the rights of third parties not before the court. In this context the court cannot therefore simply take the simplest and most convenient approach to dealing with the two parties before the court.

This choice about where the benefits should lie is difficult because it is not a matter of doctrine; it is exclusively a matter of policy: what is the obligation in issue and what is its purpose? The appropriate remedy follows ineluctably from that. The essential choice is between seeing the fiduciary non-compete rule as so important to protecting the fiduciary relationship that, when the fiduciary does compete, the benefits of that competition should go *to* the principal, and do so in an “over-protective”

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91. See *Grimaldi*, *supra* note 11, per Finn J (“[t]o accept that money bribes can be captured by a constructive trust does not mean that they necessarily will be in all circumstances. As is well accepted, a constructive trust ought not to be imposed if there are other orders capable of doing full justice ... Such could be the case, for example, where a bribed fiduciary, having profitably invested the bribe, is then bankrupted and, apart from the investment, is hopelessly insolvent. In such a case a lien on that property may well be sufficient to achieve ‘practical justice’ in the circumstances. This said, a constructive trust is likely to be awarded as of course where the bribe still exists in its original, or in a traceable, form, and no third party issue arises” at paras 582-83).

92. See the robust analysis in David Neuberger, “The Remedial Constructive Trust: Fact or Fiction” (speech delivered at the Banking Services and Finance Law Association Conference, New Zealand, 10 August 2014), online: The Supreme Court website <[www.supremecourt.uk/docs/speech-140810.pdf](http://www.supremecourt.uk/docs/speech-140810.pdf)>.

proprietary sense. (An allied conclusion might be that the fiduciary rule on disloyalty is comprehensively embraced by the non-compete rule, and that the misuse of position rule is merely a sub-category. I doubt anything would be lost by this move.) The alternative is that the fiduciary disloyalty rule *is* only proscriptive, not prescriptive, and its purpose is simply fiduciary profit-stripping, not delivery of any end-point for the principal, not even the one that the fiduciary has disloyally and competitively chosen for himself. The remedy would then be exclusively personal. This choice is not easy; there are good arguments both ways. But note that this choice concerns the non-*compete* rule, and could, if thought appropriate, be isolated from the remedies which follow misuse of any *assets* held in a fiduciary capacity.<sup>93</sup>

So my third question on fiduciaries is this: *what* makes the disgorgement remedy proprietary? This question is difficult precisely because the answer depends on policy: what *is* the purpose of the fiduciary non-compete rule? The arguments are finely balanced. In this sense, the UK Supreme Court's conclusion in *FHR* cannot be criticised — they plumped for a proprietary conclusion, as would I — but it would have been reassuring to have the problem and its resolution set out more robustly.

## B. What Losses Must be Compensated?: Equitable Compensation and Accounting

The previous sub-Part dealt with the disgorgement remedy for breach of the non-compete/no conflicts fiduciary rule. This sub-Part deals with equitable compensation for losses caused by breach of the fiduciary's *non-fiduciary* duties. These include the fiduciary's custody and management duties in relation to assets held in a fiduciary capacity,<sup>94</sup> although

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93. Although those remedies also need work, especially when the fiduciary makes a profit from use of the assets. See Sarah Worthington, "Justifying Claims to Secondary Profits" in E.J.H. Schrage, ed., *Unjust Enrichment and the Law of Contract* (The Hague: Kluwer Law International, 2001) 451 at 451 and the references cited there.

94. *E.g.* held by the fiduciary on trust or held by the director-fiduciary's company.

fiduciaries without such responsibilities are also in the frame.<sup>95</sup> A simple illustration is provided by *Redler*,<sup>96</sup> where solicitors paid away client trust assets contrary to settled instructions. The breach was clear, but the remedy disputed.

Something should be said at the outset about language. Had the claim in *Redler* been simply that the solicitors had committed a breach of contract, or been negligent, there would have been no debate about quantum.<sup>97</sup> The dispute arose because the breaches also concerned fiduciaries dealing with trust assets. This meant that equitable obligations, equitable remedies (especially equitable compensation) and accounting all moved centre stage.

These equitable tags are not necessarily illuminating. “Equitable compensation” illustrates the problem: the term is used even when the breach is not of an equitable obligation<sup>98</sup> and the remedy is not compensating a loss.<sup>99</sup> Labels aside, however, the legal question is important. Does the remedy available against the defaulting solicitors in *Redler* depend on their fiduciary status or the fact that they were misapplying trust assets?<sup>100</sup> The question has been debated in England for over two decades, with two significant decisions defining the context: *Redler* in the Supreme Court in 2014 and *Target Holdings*<sup>101</sup> in the House of Lords in 1996.

Both *Redler* and *Target Holdings* involved claims by banks against

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95. See e.g. *Nocton v Lord Ashburton*, [1914] AC 932 (HL); *Bristol*, *supra* note 23.

96. *Redler*, *supra* note 4.

97. *Ibid* at para 71 (in the end, the Supreme Court held that the quantum of the remedy was the same for all the common law and equitable breaches).

98. Being, alternatively, a breach by a fiduciary of non-fiduciary duties. See *supra* notes 52-58 and their associated texts.

99. It is, instead, merely describing the provision of a monetary remedy rather than a remedy *in specie*, but the money may be providing compensation for loss, disgorgement of profits, or restitution of an unjust enrichment.

100. Of course it would matter if the trust assets or their traceable proceeds remained in existence, but that was not the case here and can be ignored for present purposes.

101. *Target Holdings*, *supra* note 48.

solicitors. In both cases the banks had lent large sums to purchasers of property, requiring those loans to be secured against the purchase property. In both cases the solicitors paid out the funds before obtaining the necessary security. In *Target Holdings*, security was obtained a short time later, so one might think no real harm was done. In *Redler* the result was that a first mortgage which should have been cleared was not, and it ranked ahead of AIB's security to the extent of £300,000. In both cases, the purchasers defaulted on their repayments and the banks sought to enforce their security. And in both cases the property market had collapsed between the time of the initial loan and the time that enforcement was sought. As a result both banks faced large losses<sup>102</sup> and both sought to make their trustee solicitors liable.

The banks' arguments were simple. The loan funds had passed from the banks to their solicitors' client accounts. These funds were held on trust, subject to the clients' instructions: the funds should have been held until paid out as instructed. Instead, the funds were paid out contrary to instructions. The appropriate remedy in these circumstances, it was urged, was reinstatement of the trust fund wrongly paid away — *i.e.* replacement of the total loan funds, being £3.3 million for AIB and £1.5 million for Target — but with both banks being required to bring into account what they had actually recovered from the sale of the properties. In this way, both banks would obtain effective protection against *all* their losses on the deals, recovering roughly £2.4 million from the solicitors in *Redler*, and £1 million in *Target Holdings*.

The solicitors' counterarguments were equally simple. The solicitors pointed out that even if they had performed precisely according to their instructions, Target would have suffered exactly the same loss, that loss being caused entirely by the fall in the property market not by any failure to get in the security; and AIB would have suffered a loss of only £300k, being the sum paid in priority to Barclays as a result of a first mortgage which it otherwise would not have had.

In short, depending on which argument was accepted, Target would recover either £1 million or nothing, and AIB would recover either £2.4

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102. £2.4 million for AIB and £1 million for Target Holdings.

million or £300,000. The argument was clearly worth pursuing. In both cases the solicitors won, with the Supreme Court in *Redler* accepting the core argument in *Target*.

The problem looks relatively simple, and common sense might suggest that a different answer from that given by the courts would have been bizarre.<sup>103</sup> But the Supreme Court did not simply rely on common sense. Their entire analysis was driven by one utterly compelling principle. This was that *any* analysis of remedial consequences must start with a precise understanding of the obligation which had been breached and the detailed performance requirements demanded by it.<sup>104</sup> Only this would reveal the position the claimant would have been in if the obligation had *not* been breached. Knowing that was crucial if the remedial goal was to make the claimant “whole”, *i.e.* to give the claimant the money equivalent of what should have been given by proper performance.<sup>105</sup> This focus on the *particular* obligation in issue is perhaps the most important message in the entire judgment, and is at risk of being lost sight of precisely because it is so simple.

Following this approach, the court identified the relevant obligation as being to ensure that the trust fund was duly administered, and the remedy of equitable compensation as being designed to make good any loss suffered by reason of a failure to perform in that way.<sup>106</sup> Of course, that does not deal with the peculiarly “equitable” features noted earlier,

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103. Although see the warning against the value of common sense in Leonard Hoffmann, “Common Sense and Causing Loss” (Lecture to the Chancery Bar Association, 15 June 1999), online: The Chancery Bar Association <[www.chba.org.uk/for-members/library/annual-lectures/common-sense-and-causing-loss](http://www.chba.org.uk/for-members/library/annual-lectures/common-sense-and-causing-loss)>.

104. See *e.g. Redler*, *supra* note 4 at paras 52, 59, 61, 64, 66, 70, 76, per Lord Toulson SCJ, and paras 92-93, 138, per Lord Reed SCJ. Also see *Bank of New Zealand*, *supra* note 32, per Tipping J — cited in *Redler* at para 59 — noting that the characterisation of the *obligation* in issue is what is crucial, not the characterisation of its historical source or of the entire relationship.

105. Of course there are other remedial goals, typically delivered by punitive, exemplary, restitutionary, disgorgement and reliance damages, but no one was suggesting that these were relevant on the facts here.

106. *Redler*, *supra* note 4, per Lord Toulson SCJ at paras 64, 66.

but, if this analysis is right, then there seems to be no good reason for treating the claim in equity any differently from a claim for damages for wrongdoing at common law. The duty is *precisely* the same whether defined in contract or in equity (if such is even possible). Even the critics agree with this.<sup>107</sup>

But this approach did not silence the critics. They suggest, variously, that the courts in *Redler* and *Target Holdings* had misunderstood the problem, or the solution, or both. One group of “dissentients” suggests that the flaw in both cases is a failure to appreciate the full range of different claims available against defaulting fiduciaries.<sup>108</sup> On their analysis, there is effectively one additional claim in equity where both breach and loss are irrelevant. This, they say, was inexplicably ignored by both the Supreme Court and the House of Lords. For this reason they may well regard the issue as still open in the UK.

By contrast, Lord Millett considers the Supreme Court to have delivered the right answer, but for the wrong reasons,<sup>109</sup> and indeed that it granted the wrong remedy.<sup>110</sup> He thinks the remedy should not

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107. See note 108, below.

108. Most forcefully, see Charles Mitchell, “Causation, Remoteness, and Fiduciary Gains” (2006) 17:2 *Kings College Law Journal* 325; Charles Mitchell, “Stewardship of Property and Liability to Account” (2014) 78 *Conveyancer* 211; Charles Mitchell, “Equitable Compensation for Breach of Fiduciary Duty” (2013) 66:1 *Current Legal Problems* 307; S Elliott & James Edelman, “Target Holdings Considered in Australia” (2003) 119:4 *Law Quarterly Review* 545. Also see *Agricultural Land Management Ltd v Jackson (No 2)*, [2014] WASC 102, per Edelman J; and James Edelman, “An English Misturning with Equitable Compensation” (delivered at the UNSW Australia colloquium on equitable compensation and disgorgement of profit, Australia, 7-8 August 2015), online: Federal Court of Australia <[www.fedcourt.gov.au/publications/judges-speeches/justice-edelman/edelman-j-201508](http://www.fedcourt.gov.au/publications/judges-speeches/justice-edelman/edelman-j-201508)>. These are the “dissentients” referred to in the discussion which follows. Taking a different but still critical line, see Millett, “Equity’s Place in the Law of Commerce”, *supra* note 9 (criticising *Target Holdings* as “disquieting”, “disappointing” and “misleading” at 224).

109. Millett, “The Common Lawyer”, *supra* note 5 at 199.

110. *Ibid* at 203.

have been “[equitable] compensation for loss but payment of the sum necessary to make good a deficit in the trust account. A common lawyer should recognise the distinction; it is the difference between debt and damages”.<sup>111</sup> It could equally well be called “reconstituting the trust fund” or “redrawing the trust account”.<sup>112</sup>

But “reconstituting the trust fund” or “redrawing the trust account” does not tell you what *ought* to be there, which can then be compared with what is *actually* there, so that the deficit can be made good. That is precisely the question the Supreme Court sought to answer, and the question which the dissentients think they got wrong. Lord Millett’s debt analogy is one they use, and use to reach very different conclusions. How do they manage that?

These dissentients run their argument using either the old language of account or the modern language of compensation. In examining the trustee’s duties, they divide them this way: there are primary duties (to perform the trust) and secondary duties (to compensate for losses from non-performance or faults in performance), and of course fiduciary duties requiring disgorgement of disloyal benefits which can be left to one side for present purposes.

They then describe the different claims which are available for breaches of these different duties. The language used is important, and not necessarily easy or intuitive. In summary, a claimant might seek to:

- i. Enforce the primary duties: this is effectively the seeking of an order for specific performance of the trust obligations, or the money equivalent of specific performance. No breach is needed, so no issues of causation and remoteness arise. In accounting language, the beneficiary seeks to “*falsify* the account” — or seeks “*substitutive* compensation” — the objective is to “preserve the trust assets”.
- ii. Enforce the secondary duties: this is effectively the seeking of an order for repair of the damage caused to the trust fund by the breach (and is what the court did in *Target Holdings* and *Redler*). In accounting language, the beneficiary seeks to “*surcharge* the account” — or seeks

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111. *Ibid.*

112. *Ibid.*

“*reparative* compensation” — the objective is to “manage the trust assets”.

- iii. Enforce fiduciary loyalty: this does what it says. In accounting language, the beneficiary seeks an “account of profits” — or seeks “restitutionary/restorative compensation” (*i.e.* disgorgement) — the objective is to ensure “loyalty”.

A beneficiary can elect between the first two remedies, and can have the third too if it is not inconsistent.<sup>113</sup>

In *Target Holdings* and *Redler*, the proponents of this analysis note that the third option is not available, but suggest that the court focused on the second option and inexplicably ignored the first. According to the first option, they suggest, the trustee is obliged to *hold* the fund transferred on trust until it is paid out in an authorised way. This obligation to hold only comes to an end if the conditions for payment out are satisfied. The claim under the first option is a claim to enforce this duty of the trustee to hold the assets in this way, not a claim for compensation for breach. Under this head, the solicitors are obliged to restore the fund — *i.e.* pay into the trust fund £1.5 million in *Target Holdings* and £3.3 million in *Redler*.

They further suggest that if a common law analogue is thought helpful, the correct one is the action for the agreed sum (a debt, as Lord Millett put it), not a claim for damages. In this context, it is simply not to the point, they suggest, to insist that even if things had been done as they should have been, the funds would nevertheless have been lost. The clock is stopped before then, and there is no escape by arguing the counterfactual.

These arguments are invariably put very elegantly. And the analogy with contract is apt, certainly, but not a contract for an agreed sum, and not in a context where the clock can stop in this way. Two mistakes are being made here. First, the fiduciary’s obligation (the fiduciary’s primary duty) is not to pay an agreed sum, nor to hold a specific fund in a client account. The fiduciary’s obligation is far more complex, involving a series of steps which must all be taken if due performance is to be delivered. In

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113. *Tang Man Sit v Capacious Investments Ltd*, [1996] AC 514 (PC (HK)).

the *Redler* context, these steps were designed to deliver a particular agreed end result. Theoretically, if specific performance were ordered against a recalcitrant solicitor, the requirement would be to perform fully, to execute all the steps, not merely to complete one or two steps and then stop. This is the obligation in issue. It is not merely a custodial obligation (to hold an asset with due care, etc.); it is a more complex mix of custodial and management obligations. Many contracts are of this form; so too are many trusts. Rather fewer are of the form “simply hold, carefully”, or “hold carefully and then hand over”, although perhaps trusts of family castles and art collections illustrate this genre.

Secondly, the analogy with debt is typically used to demonstrate a common law disregard for the claimant’s personal circumstances. When a claim is made in debt, proof of loss to the claimant is not part of the claim: it is irrelevant what the claimant intended to do with the money; it matters nought that she might either have invested it to great effect or simply given it away. The trust analogy, it is suggested, is that in cases such as *Redler* and *Target Holdings*, it matters not what would have happened after the restored funds were received; they must simply be restored. Performance is key, not loss.

But this reflects a second mistake. Performance of trustee obligations, or remedies for failure to perform, *never* look to the personal circumstances of the beneficiary or to making the beneficiary “whole”.<sup>114</sup> The trustee’s obligations relate exclusively to custody and management of the pot of trust assets, and both trustee performance and trustee remedies are directed solely to ensuring that the trust pot is kept in the state it ought to be in, or returned to that state if there has been any slippage. Unless the trust is terminated or the trustee dismissed, this duty persists. It follows that when the court assesses what ought to be in the trust pot, and makes that assessment at the date of judgment, it is *not* (despite its own assertions to contrary) making that assessment “with the benefit of hindsight”. It is simply assessing what state the trust pot ought to be at that date *given the trustee’s ongoing duties up to that date*. This does

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114. Other than in the incidental manner which may be required in a discretionary trust in deciding which beneficiaries should receive benefits.

not always make valuation easy,<sup>115</sup> although typically there are fewer unknowns than with many complex contract and tort claims. And if the funds should have been dispersed to the beneficiary, an assessment is made of what ought to have been dispersed, at the appropriate date, from a trust pot which is presumed to have been in its required state, and *that* too then needs to be valued at the date of judgment and delivered to the beneficiary: that is what the beneficiary should have received.<sup>116</sup> Similarly, the rules of remoteness and foreseeability are not somehow uniquely inapplicable to the assessment of trust remedies. Given the focus on the identified pot of assets under the trustee's management, it would simply be impossible for loss to the pot from a breach of the trustee's duty to be either unforeseeable or too remote. Loss, and the kind of loss, is invariably foreseeable, even if its quantum is not. It is the particular trust context which denies these rules any relevance, not some peculiar equitable quirk. All this is a trap which both the House of Lords and the Supreme Court may equally have fallen into, given some of their general comments.

The issues can be seen more clearly if illustrated. Take a simple example: a trustee takes £1 million from the trust funds for his own use, and uses it non-traceably. Assume that what he should have done, according to the trust deed, was invest these particular funds in shares which would now be worth £½ million. On these facts, two claims are open to the beneficiary. The first is a profits disgorgement claim for £1 million: this is the gain the trustee made from appropriating the assets for himself, acting with a personal conflict, and the profits gained in this way must be disgorged; in assessing the gain, it is irrelevant what the trustee then does with the money.<sup>117</sup> Alternatively, but to less advantage,

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115. See *e.g.* *Hall*, *supra* note 53; and even *Dawson (dec'd), Re* (1966), 2 NSW 211 (SC (Aust)) [*Dawson*].

116. *Dawson ibid*; *Hall, Ibid*. The beneficiary will not be able to argue that she would have made profitable investments, etc., in the interim, unless regard for this is also a provable part of the trustee's (non-fiduciary) duties.

117. Unless of course the trustee uses the funds in a successful investment. Then the beneficiary might claim disgorgement of *that* benefit: *Foskett*, *supra* note 35.

the beneficiary could claim equitable compensation for breach of trust, requiring the trustee to restore the trust fund to the state it *would* have been in if proper performance had been delivered (or the state it would have been in had there been no breach; there is no difference between the two):<sup>118</sup> *i.e.* £½ million. Of course, the market could equally well have moved the other way, and the nominated shares might now be worth £5 million. This, then, would be the measure of compensation required. Note that on these facts the required calculation is easy. It is a little more difficult if the trustee were obliged to *manage* the fund in the best interests of the beneficiary; then some “guessed” but rational assessment of the likely proper state of the fund would have to be made.<sup>119</sup>

The cases routinely notice these two options — the disgorgement remedy and the compensation remedy — and notice too that the compensation remedy depends crucially on what *ought* to have been done with the fund. Merely insisting that a trustee must “account”, or pay “compensation” labelled in a particular way (see above), does not answer the question about what ends the remedy should deliver and how this is quantified. As the Supreme Court in *Redler* so clearly identified, the key issue in this analysis is determining exactly what proper performance of the obligation should have delivered to the principal. The gap between factual delivery and what ought to have been delivered gives the measure of equitable compensation.

This exposes my fourth question on fiduciaries. It is whether, in a modern context, we have any further need for this historical and distinctive language of “equitable compensation” or the process of “accounting” (other than “giving an account”, in the simple sense of requiring the fiduciary to provide information)? The focus should, it seems, be straightforwardly on the precise nature of the particular obligations in issue and their intended objectives. As it is, the language of equitable compensation and accounting lies like a cloak over so much

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118. Which makes the point that the remedies for breach of the trustee’s primary and secondary obligations come to the same thing. This is the conclusion also reached in *Redler*, *supra* note 4.

119. See *Bartlett v Barclays Bank Trust Co Ltd (No 2)*, [1980] Ch 515 (Eng); *Speight*, *supra* note 54.

of fiduciary law. It does not illuminate, explain or justify what goes on under its cover.

## V. Conclusion

And that is it. The “Who?”, “What?” and “So what?” of fiduciary law, suggesting four questions which still bedevil this area: who is a fiduciary? What, if anything, does the fiduciary role add to the nature of the non-fiduciary obligations owed by fiduciaries? Why is the disgorgement remedy proprietary? And what, if anything, does it mean by way of distinctive remedy to say the fiduciary must “account” or deliver “*equitable* compensation”?

In all of this I am making a claim for more (or even more) rigorous analysis of the fiduciary terrain and careful exposure of its detail. This is far more effectively achieved if we untangle the precise obligations in issue and their particular objectives or goals, and, further, if we describe these findings in a simple, common, legal language. This will enable important comparisons to be made across the common law landscape, and ensure significant analogies are not missed. Lord Millett’s assertion that “[e]quity is not a set of rules but a state of mind”<sup>120</sup> is a typically beguiling turn of phrase, but more progress will be made by following Lord Reed’s claim that “[l]egal analysis is as important in equity as in the common law”.<sup>121</sup>

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120. Millett, “The Common Lawyer”, *supra* note 5 at 193.

121. Redler, *supra* note 4 at para 95.