

*The nature of the fiduciary ‘No Profit’ rule
—Recovery Partners GP Ltd v Rukhadze
Part 2*

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In depth

The nature of the fiduciary ‘No Profit’ rule—*Recovery Partners GP Ltd v Rukhadze* Part 2

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ABSTRACT

An examination of the divisions in the Supreme Court in *Recovery Partners GP Ltd v Rukhadze* [2025] UKSC 10, [2025] 2 WLR 529, regarding how the fiduciary ‘no profit’ rule works—including the impact of Professor Lionel Smith’s book *The Law of Loyalty* (OUP 2024).

INTRODUCTION

In *Recovery Partners GP Ltd v Rukhadze*,¹ while the ruling that there was full liability to account under the fiduciary ‘no profit’ rule was unanimous, the Supreme Court was divided when identifying *what the material breach of fiduciary duty actually was*—although Lady Rose JSC chose not to comment on this debate about the nature of the breach involved.²

THE CONVENTIONAL VIEW: LIABILITY TO ACCOUNT UNDER THE ‘NO PROFIT’ RULE AS A REMEDY, EITHER FOR BREACH OF THE ‘NO CONFLICT’ DUTY OR BREACH OF A SEPARATE ‘NO PROFIT’ DUTY

Of the remaining justices, only Lord Burrows JSC took a conventional approach to liability to account under the ‘no profit’ rule.³ That is, he indicated that *either* (assuming one takes the view that the ‘no profit’ rule is merely part of the ‘no conflict’ rule) liability to account under the ‘no profit’ rule operates as one potential remedy for the wrong of breaching the ‘no conflict’ rule. *Or* (if one takes the view that the ‘no profit’ rule is separate from the ‘no conflict’ rule—meaning that the ‘no profit’ rule applies whether or not any conflict between duty and self-interest can be identified), liability to account operates as one potential remedy for the wrong of breaching the distinct ‘no profit’ rule. In either case, liability to account is a potential remedy for the wrong of breaching some prior, separate fiduciary duty.

THE MAJORITY VIEW: LIABILITY TO ACCOUNT UNDER THE ‘NO PROFIT’ RULE AS A DUTY IN ITSELF

As explained in the first part of this article, the ‘majority’ view, in the leading judgment of Lord Briggs JSC, identified the relevant duty as a duty to hand over the profit as soon as it was received—in other words, a claim for liability to account under the ‘no profit’ rule was treated as similar to a contractual action for payment of a debt, the straightforward enforcement of a duty to pay; rather than like a contractual action for damages as a remedy for the wrong of breaching some separate contractual duty. He said⁴:

[It is] a fundamental conceptual error [to treat] an order for an account of profits merely as a remedy for some other type of breach of fiduciary duty, such as the conflict duty. Although it may be regarded as having remedial effect in that common situation, it is not just a remedy ... An order for an account of profits is an order for the specific enforcement of a basic duty of trustees and fiduciaries, to treat any profit arising out of their fiduciary role as belonging to their beneficiaries.

Although he added that demonstrating the breach of some other duty, such as the ‘no conflict’ rule, can be helpful in identifying that the duty to account for a profit has arisen—that is, that the receipt of this particular profit satisfied his test of ‘protean causation’, being a profit ‘made from, out of, or

¹ [2025] UKSC 10, [2025] 2 WLR 529.

² [2025] UKSC 10, [2025] 2 WLR 529, [303].

³ [2025] UKSC 10, [2025] 2 WLR 529, [261]–[265].

⁴ [2025] UKSC 10, [2025] 2 WLR 529, [47]. Lord Reed PSC, Lord Hodge DPSC, and Lord Richards JSC agreeing.

otherwise sufficiently connected with, the fiduciary relationship’, and therefore carried the liability to account.⁵

Disagreement with the majority

There is a natural tendency to think that a recent pronouncement of a Supreme Court majority must be ‘binding’. However, it should be noted that this set of pronouncements conflicts with earlier statements in the House of Lords and by a unanimous Supreme Court.⁶ Moreover, these pronouncements cannot be seen as the ratio decidendi of *Recovery v Rukhadze*: Lord Briggs JSC explicitly acknowledged that the outcome of the case would have been the same on a conventional view of the law.⁷ Finally, there was a highly persuasive, reasoned disagreement within *Recovery v Rukhadze*.

Lord Leggatt JSC was particularly critical of the majority’s reasoning that the liability to account for improper fiduciary profits is the direct enforcement of a duty.⁸ He argued it represents an unnecessary overcomplication of the law to create a supposed immediate duty to account for such a profit as soon as it is received, before a court order; that it is unjust and impractical to say there is an immediate duty to account for a sum that is typically incalculable until a court order; a point exacerbated by the court’s discretion to award an equitable allowance; that there is no authority for the proposition; and the fact a fiduciary liable account is said to hold their improper profit on a constructive trust for the principal does not import a duty to hand it over to them prior to a request from the principal. And, as noted, Lord Burrows JSC also disagreed with the majority on this point.⁹ He said: ‘[A conventional “remedy for a wrong”] analysis of the account of profits finds widespread support in the language and reasoning of the courts and in the pleading of claims.’¹⁰

A THIRD VIEW: LIABILITY TO ACCOUNT UNDER THE ‘NO PROFIT’ RULE AS A REMEDY FOR BREACH OF THE DUTY NOT TO MAKE UNAUTHORISED USE OF THE PRINCIPAL’S PROPERTY, OPPORTUNITY, OR INFORMATION

Lord Leggatt JSC agreed with Lord Burrows JSC that liability to account under the ‘no profit’ rule operates as a remedy for a wrong¹¹; however, he saw it as a remedy for a different

wrong, which we might call the unauthorised use of the principal’s property, opportunity, or information.

‘Unauthorised use’ as a distinct fiduciary wrong

Lord Leggatt JSC explained his understanding of the breach of fiduciary duty involved in *Recovery v Rukhadze* in this way¹²:

The fiduciary duty which references to the “profit rule” obscure is the duty of a trustee or other fiduciary not to use property—or any information or opportunity which is to be treated as if it were property—of the principal for the fiduciary’s own benefit, or indeed for any purpose outside the scope of the fiduciary’s authority, unless the principal has given its informed consent. If, in breach of this duty, the fiduciary enters into a transaction which generates a profit, the fiduciary will be liable to account for the profit to the principal. As well as this personal liability, assets acquired by such a transaction are themselves treated as property of the principal through the imposition of a constructive trust.¹³

Although we are speaking about the view that there is a wrong within fiduciary law, distinct from the ‘no conflict’ rule—which might be called the wrong of unauthorised use of the principal’s property, opportunity, or information—as being the view of Lord Leggatt JSC, note that this view was arguably also endorsed at one point in the majority judgment of Lord Briggs JSC. He said¹⁴:

Nor does the assertion that the duty to account for profits is an obligation which does not always depend upon the identification of any prior breach of duty mean that proof of a prior breach of duty can play no part in answering the question whether particular profits fall within the duty to account. *The making of post-termination profits from the use of information or opportunities that came to the former fiduciary while still in post will (absent consent) always be a breach of duty.*

This was said before going on to discuss breach of the ‘no conflict’ rule as seemingly a separate matter.

⁵ [2025] UKSC 10, [2025] 2 WLR 529, [42]. See the first part of the article for this test.

⁶ See the explanation of the background law in the first part of the article.

⁷ [2025] UKSC 10, [2025] 2 WLR 529, [48].

⁸ [2025] UKSC 10, [2025] 2 WLR 529, [209]–[230].

⁹ [2025] UKSC 10, [2025] 2 WLR 529, [242]. See further [257]–[265].

¹⁰ [2025] UKSC 10, [2025] 2 WLR 529, [261].

¹¹ [2025] UKSC 10, [2025] 2 WLR 529, [94].

¹² [2025] UKSC 10, [2025] 2 WLR 529, [95].

¹³ This must be read in conjunction with another passage of Lord Leggatt JSC’s judgment [2025] UKSC 10, [2025] 2 WLR 529, [137]:

There are important questions which this court may at some stage need to address about what counts as an opportunity of the principal which the fiduciary has a duty not to exploit for her own purposes. Undoubtedly the opportunity must be one which came to the knowledge of the fiduciary in the course of and by reason of her role. It would be consistent with *Regal (Hastings)* [1967] 2 AC 134 (see eg Lord Macmillan at p 153F) and *Boardman v Phipps* [1967] 2 AC 46 (see eg Lord Hodson at p 109G) to require also that knowledge used to exploit the opportunity was special information not publicly available; and that the opportunity was procured through the principal’s efforts (as in *Regal (Hastings)*) or assets (as in *Boardman v Phipps*: see paras 98–100 above). There is an illuminating exploration of these questions, including comparison with how the concept of a “corporate opportunity” has been more fully developed in the United States, in a book by David Kershaw, *The Foundations of Anglo-American Corporate Fiduciary Law* (2018), chapters 12–14.

¹⁴ [2025] UKSC 10, [2025] 2 WLR 529, [42] (emphasis added). See also at [36].

Lord Leggatt JSC's formulation could be seen as just another way of saying there has been a breach of the 'no conflict' rule.¹⁵ Indeed, Lord Burrows JSC said¹⁶:

The making of ... profits for the fiduciary's benefit rather than for the benefit of the beneficiary is commonly a breach of fiduciary duty because the fiduciary, by the very making of the profit, has allowed its self-interest and duty to conflict. Put another way still, the fiduciary commits a breach of fiduciary duty where, without authority, it exploits for its own benefit an opportunity that has arisen from its fiduciary position.

However, Lord Leggatt JSC saw a real and substantial difference between the 'no conflict' and 'unauthorised use' rules.

Reasons for separating an 'unauthorised use' rule from the 'no conflict' rule—in particular, the duration of fiduciary duties

Lord Leggatt JSC's position was influenced by academic commentary. He says in his judgment¹⁷:

In his stimulating recent book *The Law of Loyalty* (2023), chapter 4 and pp 200–207, Lionel Smith has examined this question in depth and given what I consider compelling reasons for regarding the ['no conflict' and 'no profit'] rules as separate. As he explains, although both rules are rooted in the same underlying idea of loyalty, they operate differently and, when infringed, lead to different remedies.

The duration of fiduciary duties was a key point. In *Recovery v Rukhadze*, the trial judge, Cockerill J, had interpreted the authorities as saying that there can only be a breach of fiduciary duty during the continuance of the fiduciary relationship, not after a fiduciary has left their position; although actionable consequences might flow from an in-post breach after the relationship is terminated, such as receipt of a resulting profit.¹⁸ Hence, her focus, when identifying the relevant breaches of fiduciary duty, on preparatory steps and a bad-faith resignation. But Lord Leggatt JSC wished to be clear that in a case like *Recovery v Rukhadze* the defendants would be liable to account for the profits made even if there had been no disloyal actions by them prior to or during resignation—exploiting the opportunity and information of the principals post-resignation would in itself still lead to liability, because there would be an ongoing fiduciary duty not to exploit these.¹⁹ And it now seems clear that there are ongoing fiduciary duties that can be breached after the termination of a fiduciary relationship on any of the approaches taken in the Supreme Court. Not only

did Lord Leggatt JSC accept this on his individual approach, but Lord Burrows JSC also seemingly accepted it on a conventional view of liability to account under the 'no profit' rule for breach of the 'no conflict' rule or a separate 'no profit' rule²⁰; and it is plainly implicit within the majority view, whereby the receipt of the profit several years after termination of any fiduciary relationship was itself an independent breach of fiduciary duty.²¹ But Lord Leggatt JSC believed that the 'no conflict' rule cannot apply to actions of a fiduciary after they have left their position. This follows from his acceptance, from Professor Smith's writings, of a restricted definition of the 'no conflict' rule, explained below. Accordingly, Lord Leggatt JSC had to find some *other* breach of the fiduciary duty, which could be committed after leaving the fiduciary position.

Is recognising an 'unauthorised use' wrong redundant?

The obvious response for those who take a conventional view of the 'no conflict' rule and surrounding law—and indeed, it is submitted, the correct response under current English law—is that, having recognised a continuing 'no unauthorised use' duty after a fiduciary has left their position,²² we can now say there is a conflict between *that* duty and the self-interest of the former fiduciary, meaning the 'no conflict' rule is engaged. In other words, the creation of a new, separate 'unauthorised use' wrong—beyond the 'no conflict' wrong—is redundant.

Is recognising an 'unauthorised use' wrong objectionable?

However, is there any positive harm in recognising, as Lord Leggatt JSC suggests, that it is an independent breach of fiduciary duty, distinct from the 'no conflict' rule, 'to use property—or any information or opportunity which is to be treated as if it were property—of the principal for the fiduciary's own benefit, or indeed for any purpose outside the scope of the fiduciary's authority, unless the principal has given its informed consent'? The law of unintended consequences suggests there may well be risks. For example, Lord Leggatt JSC's formulation lacks any explicit link to loyalty. It therefore potentially undermines the very basis of modern fiduciary law as defined by Millett LJ in *Bristol and West Building Society v Mothew*.²³ For example, if a trustee applies trust property for a purpose which is not, in fact, authorised by the trust instrument, but mistakenly believing it is, this literally falls within Lord Leggatt JSC's formulation. However, while this may be a breach of trust, and it may or may not have involved negligence, where is the disloyalty (or risk of disloyalty) required for a breach of fiduciary duty? Of course, this is not what Lord Leggatt JSC meant: doubtless the word 'purpose' in his formulation is intended to connote the

¹⁵ Lord Leggatt JSC's 'unauthorised use' formulation might be thought to go wider: talking about use 'for the fiduciary's own benefit, or indeed for any purpose outside the scope of the fiduciary's authority' (emphasis added). But this a minor, superficial matter: it is easy to fit any unauthorised use a fiduciary chooses to make of the principal's property—even if it were, for example, an altruistic use for a charity venture, for which the fiduciary received a modest gift—into the expression 'conflict between duty and *self-interest*': it is a matter of self-interest because it something the fiduciary wished to do. It is clear that the expression self-interest encompasses acting out of a desire to confer a benefit on others, although typically a relative or friend.

¹⁶ [2025] UKSC 10, [2025] 2 WLR 529, [261].

¹⁷ [2025] UKSC 10, [2025] 2 WLR 529, [114].

¹⁸ [2018] EWHC 2918 (Comm), [2019] Bus LR 1166, [69]–[84].

¹⁹ [2025] UKSC 10, [2025] 2 WLR 529, [123]–[135].

²⁰ [2025] UKSC 10, [2025] 2 WLR 529, [243].

²¹ [2025] UKSC 10, [2025] 2 WLR 529, [4].

²² The precise source(s) and nature of such a duty may be debated: Cockerill J reviewed various 'no unauthorised use' obligations owed by the defendants in *Recovery v Rukhadze*—including contractual and statutory duties—at [2018] EWHC 2918 (Comm), [2019] Bus LR 1166, [306]–[348].

²³ [1998] Ch 1 (CA), as quoted in the first part of this article.

requisite disloyalty. The point is made only to highlight the risks—doubtless there are other less obvious ones—inherent in departing from long-standing formulations such as ‘conflict between duty and self-interest’. Moreover, the formulation of an ‘unauthorised use’ wrong does not provide a convincing overall explanation of liability to account under the ‘no profit’ rule: in particular, that remedy is also often applied to bribes and secret commissions taken by fiduciaries, which are hard to describe as involving the unauthorised use of an opportunity belonging to the principal.²⁴

Is recognising an ‘unauthorised use’ wrong inconsistent with statute?

Statute endorses the conventional view of the law: that the ‘no conflict’ rule can apply after a fiduciary has left their position, and that a breach of the ‘no conflict’ rule is the specific wrong committed when there is post-termination ‘unauthorised use’. This is at odds with Lord Leggatt JSC’s understanding. By the Companies Act 2006, section 170:

- 1) The general duties specified in sections 171 to 177 are owed by a director of a company to the company.
- 2) A person who ceases to be a director continues to be subject—
 - a) to the duty in section 175 (duty to avoid conflicts of interest) as regards the exploitation of any property, information or opportunity of which he became aware at a time when he was a director ...
- 3) The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director.
- 4) The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties.

Lord Leggatt JSC refers to the relevant provisions of the Act and seems to regard the Act as simply wrong on this point.²⁵ The relevant provisions did not apply to the company directorship forming part of the case in *Recovery v Rukhadze*, as it was a British Virgin Islands company.²⁶ However, it would be extraordinary if, in a case involving several companies, some within the Act and others not, different rules applied regarding fiduciary duties owed to the two sets of companies.

An overly technical view of the ‘no conflict’ rule?

It might also be objected that Lord Leggatt JSC’s reasoning rests on a move away from the law’s traditional, common-sense notion of a conflict between duty and self-interest to a technical definition of such a conflict that can be difficult to understand and apply. For example, Lord Leggatt JSC’s own

explanation of the foundational case of the ‘no profit’ rule, *Keech v Sandford*, was quoted in the first part of this article, centred on an apparent conflict between duty and self-interest. Yet Lord Leggatt JSC, later in his judgment, says there was no such conflict involved in the case, to help demonstrate that liability to account under the ‘no profit’ rule is not based on a breach of the ‘no conflict’ rule. He believes this follows from Smith’s technical definition of a conflict between duty and self-interest, which will be examined in greater depth below, but which basically says there is only such a conflict when a fiduciary is exercising in their role a power to affect the legal relations of their principal, which requires the exercise of discretion, and the fiduciary’s judgement in this regard may be impaired by a subsisting conflict between duty and self-interest. Lord Leggatt JSC says.²⁷

A conflict of interest exists when a person in a fiduciary position has an interest which compromises her ability to act in the best interests of the principal *when exercising her fiduciary powers* ... [T]ransactions in which a fiduciary exploits relevant information or a business opportunity for personal gain do not necessarily involve a conflict of interest ... In *Keech v Sandford*, for example, the trustee was *not exercising any power on behalf of the trust* when he entered into a new lease in his personal capacity after the landlord had refused to renew the lease for the benefit of the child. His duty to act loyally in the best interests of the trust was therefore not engaged and he was not in a position of conflict of interest.

However, is it correct to say the ‘no conflict’ rule, on the posited technical definition, was not involved? The trustee’s decision whether to renew the lease for the beneficiary was the exercise of a discretionary power, requiring judgement, within the fiduciary’s role to affect the legal position of their principal. The temptation to take the lease personally instead might prejudice that judgement. So why was there no conflict between duty and self-interest? It could be argued that, on the facts, the trustee had decided to renew the lease for the beneficiary—so unimpaired judgement had clearly been exercised—but the landlord refused, and it was only then that the trustee took the lease personally. But was there not an ongoing conflicted judgement involved here? Right up to the last moment of taking the lease, was the trustee not making a continuous choice whether to press one more time for a renewal of the lease in favour of the beneficiary or to take the lease personally? And does this fall within the technical definition, or not?

Does treating information and opportunity as equivalent to property cut both ways?

A further issue is how far Lord Leggatt JSC’s treatment of information and opportunities ‘as if they are property’ should be taken. In particular, for consistency, should this treatment hold in joint-venture cases, where the information and opportunity are furnished *by the fiduciary*, and the principal

²⁴ See *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250.

²⁵ [2025] UKSC 10, [2025] 2 WLR 529, [124].

²⁶ [2025] UKSC 10, [2025] 2 WLR 529, [110].

²⁷ [2025] UKSC 10, [2025] 2 WLR 529, [115]–[118], emphasis added.

contributes something else, such as investment? For example, consider the leading case of *Murad v Al-Saraj*.²⁸ Because of a relationship of trust and confidence, it was accepted that a businessman owed fiduciary duties to two sisters. He persuaded them to enter a joint venture with him to buy a hotel. He provided the opportunity and all relevant information. The parties were to make defined contributions to the purchase price, and they were to receive defined shares of the profits from running and selling the hotel. The fiduciary dishonestly misled the sisters into believing his purchase contribution of £500,000 was in cash; in fact, the amount was simply offset against unenforceable obligations owed to him by the vendor, including £369,000 commission for introducing the sisters. The hotel was run and sold at a substantial profit. For breaching his fiduciary duties, the businessman was held liable to account to the sisters for the profits he made from the transaction. But he argued in the Court of Appeal that he should not have to account for all of his profit; because the trial judge had found that, if the fiduciary had told the sisters the truth about his contribution, they would still have proceeded with the purchase, but would have insisted on different terms, giving the fiduciary a lesser share of the profits in the deal. The fiduciary argued he should be allowed to keep the profit the sisters *would have consented to* if he had told the truth. The argument was rejected: the fiduciary had to account for all his profits. And in calculating the measure of his profits, he could not deduct the £369,000 element of his contribution to the purchase price: that secret commission was itself an unauthorised profit. But if we treat the initial opportunity and information the fiduciary supplied as in effect ‘property’ that he contributed to the venture, then when calculating his profits, there should in principle be a deduction for that contribution—and the difficult task of placing a valuation on it would have to be undertaken. That valuation might well be close to the profit share the sisters *would have consented to* if the fiduciary had told the truth. In other words, the law would be letting in through the back door (as calculation of the profit) essentially the same credit for the fiduciary that was refused entry at the front door (as a share of the profit). Lord Leggatt JSC would apparently not be too unhappy at such an outcome: he pronounced *Murad v Al-Saraj* wrongly decided in *Recovery v Rukhadze*.²⁹

PROFESSOR SMITH’S VIEWS ON THE ‘NO CONFLICT’ RULE AND ITS RELATIONSHIP TO THE ‘NO PROFIT’ RULE

At the risk of digressing, Professor Smith’s academic positions on the ‘no conflict’ rule and its relationship to the ‘no profit’ rule, incorporated by reference into Lord Leggatt JSC’s judgment, warrant examination to see whether they constitute—as

Lord Leggatt JSC says—a ‘compelling’ case for reformulating traditional understandings of the law, despite the concomitant problems. Smith’s book is characteristically impressive, but, writing in a difficult area, it leaves considerable scope for debate.³⁰

For Smith, the ‘no conflict’ rule only applies in one specific situation: when a fiduciary is exercising in their role a power to affect the legal relations of their principal, which requires the exercise of discretion, and the fiduciary’s judgement in this regard may be impaired by a conflict between duty and self-interest. There must be an actual existing conflict—not merely a potential future one. And the only remedy for breach is rescission (plus possible compensation for non-disclosure).³¹ His reason for limiting the ‘no conflict’ rule specifically to the exercise of discretionary powers is that a wider understanding of conflicts between duty and self-interest would be unworkable. He points out that the interests of fiduciaries and their principals *always* diverge: giving as particular examples ‘shirking and looting’—that is, the interest of the fiduciary is typically in doing as little work as possible for the principal, whereas the principal’s interest is in diligent work by the fiduciary; and the fiduciary’s interest lies in defrauding the principal, whereas the principal’s interest is in their property not being taken by the fiduciary. Because of such inescapable conflicting interests, if we characterised such matters as conflicts between duty and self-interest within the ‘no conflict’ rule, these conflicts would be pervasive in every fiduciary relationship, and Smith suggests fiduciary relationships could therefore not lawfully exist. However, it is not clear that Smith’s approach to limiting the field is the best one. We could simply say that such pervasive conflicts are obvious and taken for granted by the law (and indeed by principals when they engage fiduciaries); what the ‘no conflict’ rule is concerned with is instead special conflicts, above and beyond such obvious and pervasive ones, arising from some particular factor, such as receipt of a bribe, the existence of a family relationship, etc. And there is no reason to suppose that such special factors only operate in the exercise of discretionary powers. This seems to be more in line with the way the expression ‘conflict between duty and self-interest’ has traditionally been used in the law.

Hypothetical examples

Smith then attempts to refute the conventional view that liability to account under the ‘no profit’ rule is a remedy for breach of the ‘no conflict’ rule.³² He starts with a hypothetical illustration intended to demonstrate that the ‘no profit’ rule can apply despite the absence, on the facts, of any breach of the ‘no conflict’ rule. However, the example seems questionable.³³

A neighbour gives you a key and asks you to keep an eye on her house for a period; council workers need to enter the

²⁸ [2005] EWCA Civ 959, [2005] WTLR 1573.

²⁹ [2025] UKSC 10, [2025] 2 WLR 529, [184]–[195]. See further Paul Matthews, Charles Mitchell, Jonathan Harris, and Sinéad Agnew (eds), *Underhill and Hayton Law Relating to Trusts and Trustees* (20th edn, LexisNexis 2022), para 29.62.

³⁰ The book is positively reviewed by Rachel Leow (2025) 88 MLR 225—but raising questions.

³¹ Lionel Smith, *The Law of Loyalty* (OUP 2024) esp ch 4 (read in conjunction with definitions in ch 1). Smith’s topic—which is not restricted to English law—is wider than, but includes, fiduciary law; and it is of course also concerned with conflicts between duty and duty. But here we are concerned only with what he says about fiduciaries and conflicts between duty and self-interest.

³² Lionel Smith, *The Law of Loyalty* (OUP 2024) esp ch 5.

³³ Lionel Smith, *The Law of Loyalty* (OUP 2024), 181–182 (notes omitted). The initial issue that the scenario does not seem to involve a fiduciary relationship at all will be skipped over: Smith treats the ‘no profit’ rule as not being limited to fiduciary relationships. However, it is not clear that the scenario involves even a relationship of administration, which Smith says is his concern (see ch 1 of his book—and cf there at 26: ‘A person who mows my lawn pursuant to our contract is acting, in a way, on my behalf, and in

garden to work, and they pay a sum for the inconvenience. Smith says, ‘Can you keep it? In my view, the answer is “no”, and the reason is ... you were acting on her behalf ...’ But is the ‘no profit’ principle involved here at all? Surely the money simply belongs beneficially to the householder as an increment to her property: it is no different from the householder owning an adjoining house rented out to tenants, and those tenants coming by to pay the rent while the householder is away. Of course, these payments are beneficially the householder’s property. That the recipient is acting on behalf of another by looking after the house seems irrelevant here. Indeed the result would be exactly the same had the recipient not been looking after the house on behalf of their neighbour: for example, if the recipient had simply been aware, from nosy observation, of where the neighbour kept a hidden key, and had used it to enter the house without permission, out of curiosity over what was going on in the garden.

A counter-hypothetical might be suggested. Suppose a solicitor acts as a paid trustee of a discretionary trust under which the main beneficiary is a young heiress. She has proven considerably more trouble than anyone anticipated—with problems of drug addiction, criminality, and so on. Her uncle dies, leaving the solicitor-trustee £50,000 in his will, saying that the family is very grateful for the work of the solicitor-trustee, and that the legacy is in recognition of a moral obligation to pay a supplement to the agreed fees, given the degree of trouble the heiress has been. The day the solicitor-trustee is notified of, and paid, the legacy happens to be the very same day as the trust is finally discharged, leaving the solicitor-trustee with no further duties to perform under it; and, indeed, the very day on which they retire from their career entirely. An unauthorised profit has been received—in the form of supplementary remuneration—which is clearly derived from the fiduciary position: so much so that it would be taxed as professional income from the office of trustee.³⁴ But there is no conceivable conflict between duty and self-interest arising from accepting the gift.³⁵ Is the former solicitor-trustee *really* accountable for this unauthorised profit despite the absence of any conflict between duty and self-interest? What reason on earth does the former solicitor-trustee have to feel it would be improper to accept the legacy? Surely the law should reflect basic notions of right and wrong. There is an escape route from the strange conclusion of accountability here in the majority judgment of Lord Briggs JSC in *Recovery v Rukhadze* via the ‘protean’ test of causation, or attribution, ‘to account for profits made from, out of, or otherwise sufficiently connected with, the fiduciary relationship’; with various other formulations possible. But would that not just be using unclear verbiage to mask a recognition that *there is no conflict between duty and self-interest*?

a way, is carrying out a mission; but although the person has been authorized to be on my land, they have not been granted any power to affect my legal position. This is not a relationship of administration.)

³⁴ *Simpson v John Reynolds & Co (Insurances) Ltd* [1975] 1 WLR 617 (CA), read in conjunction with Income Tax (Trading and Other Income) Act 2005, s 16(c).

³⁵ The position would be different if the uncle—while still alive—handed the solicitor-trustee—while still administering the trust—£50,000 in a brown envelope, expressing similar sentiments. Alarm bells would now be ringing for any sensible fiduciary: there would now be a perceptible risk of a conflict between duty and self-interest—the risk that the uncle may seek to influence the administration of the trust by virtue of the payment, or the prospect of further payments—and so the fiduciary should not accept the payment without authorisation.

³⁶ [1967] 2 AC 134 n (HL) (decided in 1942 but only noted in *The Law Reports* later).

³⁷ Lionel Smith, *The Law of Loyalty* (OUP 2024), 185 n 9, citing [1967] 2 AC 134n (HL), 153 (Lord MacMillan) and 159 (Lord Porter).

³⁸ [1967] 2 AC 134n (HL), 137 (Viscount Sankey) and 154 (Lord Wright).

³⁹ [1967] 2 AC 46 (HL), 124 and 131. See further Richard Nolan, ‘*Regal (Hastings) Ltd v Gulliver* (1942)’, in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart 2012).

Authority

Smith then turns to authority. The central precedent relied on to demonstrate that the ‘no profit’ rule will apply even where there is no conflict between duty and self-interest is *Regal (Hastings) Ltd v Gulliver*.³⁶ In that case, a company formed a subsidiary to obtain a lease of two cinemas. A profitable resale deal for the lease was already in place. The company’s directors decided its investment of £2,000 in the subsidiary’s shares was all it could afford, meaning the arrangements required more investors to buy additional shares in the subsidiary. The directors themselves bought additional subsidiary shares to make the overall transaction viable. The resale deal collapsed, but a good replacement was found, involving the directors selling their shares in the subsidiary at a profit. It was decided that the directors were liable to account to the company for the profit they made on the subsidiary shares: as fiduciaries, they had used information and an opportunity acquired through their positions to make a profit without the fully informed consent of their principal. It was emphasised that they were liable even if they had acted in good faith, had benefited the company by their actions, and the profit they made was not open to the company because it could not afford to buy more subsidiary shares.

Nothing was said to identify explicitly any conflict between duty and self-interest involved in the situation. Smith draws the conclusion that the liability to account did not depend upon any such conflict. In particular, he cites statements in the judgments that *could* be read as indicating no such conflict was necessary for liability³⁷—although they could equally be read as meaning that *no proof that the fiduciary succumbed to the temptation involved in any conflict* was necessary. However, there are equally statements in the judgments indicating that a conflict *was* required for liability—and that the House of Lords took the matter for granted.³⁸ Later, Lord Upjohn identified the conflict involved in the case, in *Boardman v Phipps*³⁹:

That was an obvious case where duty of the director and his interest conflicted. The scheme had been that Regal would make the profit, in fact its directors did ... [I]n *Regal* ... the directors acted so as to deprive their beneficiary of a profit in respect of property of which the beneficiary has contemplated the purchase and which the directors as trustees should have preserved at all costs.

In other words, it was the directors themselves who took the decision about how much their company could afford to invest in the subsidiary, leaving the rest of the subsidiary’s shares available for themselves to make a personal profit from. It is now clear by statute, in relation to benefits received from third parties, that a company director is liable to account for an

unauthorised fiduciary profit only if a conflict between duty and self-interest is identified: Companies Act 2006, section 176(4).

Illustrations

Finally, Smith gives three specific situations he claims show the ‘no profit’ rule operating where there is no conflict between duty and self-interest.⁴⁰

Former fiduciaries

First, Smith suggests that the ‘no profit’ rule can apply to a receipt by a fiduciary after they have left their role, in circumstances where there is no conceivable conflict between duty and self-interest. But no authority is cited, we are given only another hypothetical example—too sketchy, with respect, to comment on meaningfully—and the author’s opinion that the ‘no profit’ rule would apply.⁴¹

Alignment of interests

Secondly, Smith argues that case law shows the ‘no profit’ rule can apply even where the interests of the fiduciary and principal are entirely aligned. He cites again the case of *Regal v Gulliver* recounted above, saying that the directors and the company had a shared, aligned interest in a profitable joint transaction. But this overlooks the conflict between duty and self-interest identified above, at the stage where the directors determined *in what proportions* those profits would be shared between themselves and the company.

Smith also cites *Boardman v Phipps*.⁴² As mentioned in the first part of this article, this is a difficult case—in many respects. But, again, a conflict between duty and self-interest can be identified: there was not full alignment of interests. A trust held shares in a private company. The trustees’ solicitor, together with one of the beneficiaries, sought to improve the value of the shareholding. The solicitor and beneficiary were given a degree of permission by the trustees to act as representatives of the trust, using its substantial shareholding to obtain valuable information about the company. This ultimately led to a takeover of the company, through combining the existing trust shareholding with additional shares purchased by the solicitor and beneficiary personally, which, following reorganisation of the company, proved hugely profitable both for the original shares of the trust and for the shares newly acquired by the solicitor and beneficiary. There had been obstacles to the trust acquiring the additional shares for itself, so as to make the whole profit: it lacked the necessary money; they were not an authorised investment so the permission of the court would have been required, and this permission was believed unlikely to have been granted; and the trustee in effective control ruled out a purchase under any circumstances.

The solicitor and beneficiary obtained the consent of all the other beneficiaries to purchase shares for themselves personally, and so potentially making a profit for themselves although they had been acting as representatives of the trust; but it was held they did not give sufficient information to one of the beneficiaries to have his fully informed consent. The House of Lords decided, by a majority of three to two, that the solicitor and beneficiary had to account for their profit to the trust’s other beneficiaries, subject to liberal payment for their work and skill in the takeover, by way of equitable allowance. If this bare majority decision is indeed justified, the most convincing basis for liability (as Smith agrees)—although this represents much more an *ex post* rationalisation than a strictly faithful reading of the somewhat unclear and divergent House of Lords judgments—is that the solicitor and beneficiary became agents *de son tort* of the trust.⁴³ A conflict between duty and self-interest was then evident: the solicitor and beneficiary, as fiduciaries, might not have tried hard enough to persuade the trust to acquire at least some of the additional shares for itself, and so make a greater share of the profit rather than the fraction received.⁴⁴

Smith’s account of what the judgments in *Boardman v Phipps* said about whether a conflict between duty and self-interest was needed for application of the ‘no profit’ rule is questionable. He says⁴⁵:

Two of the judges in the House of Lords dissented, on the ground that they could not identify any relevant conflict. The three majority judges realized that this was quite unnecessary ... One of judges in the majority, Lord Guest, did not even mention conflicts, noting that liability arose because the profits were derived from acting in an administrative role. [Footnote: The other judges in the majority, Lords Cohen and Hodson, both made it clear that the rules on conflicts were not necessary to decide the case, although they went on to discuss them.]

It can be agreed that Viscount Dilhorne⁴⁶ and Lord Upjohn,⁴⁷ both dissenting on the outcome, required a breach of the ‘no conflict’ rule as a precondition to liability under the ‘no profit’ rule; but they did not perceive a conflict on the facts. However, among the majority judges, it is submitted that, contrary to what Smith suggests, Lord Hodson also made clear that a breach of the ‘no conflict’ rule was a precondition to liability under the ‘no profit rule’, saying, ‘the question of conflict of interest directly emerges from the facts pleaded, otherwise no question of entitlement to a profit would fall to be considered’.⁴⁸ Indeed, he stressed the importance of the

⁴⁰ Lionel Smith, *The Law of Loyalty* (OUP 2024), 204–207.

⁴¹ The present writer has already given a counter-hypothetical above seeking to demonstrate that the ‘no profit’ rule should not apply in such a situation.

⁴² [1967] 2 AC 46 (HL).

⁴³ Michael Bryan, ‘*Boardman v Phipps* (1967)’ in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart 2012), 592: ‘What remains is the imposition of accountability on the uncommon but not unprecedented basis of the defendants having intermeddled with the administration of a trust as agents *de son tort*.’

⁴⁴ It was, of course, unlikely that the trust could have been persuaded to do this—but this does not appear to matter, just as it was irrelevant in *Keech v Sandford* (1726) Sel Cas t King 61, 25 ER 223 (discussed previously) that it was highly unlikely the landlord could have been persuaded to grant the lease there to the beneficiary. Despite the small possibilities, the conflict is still there in both cases. It is not realistic to suggest that the trust in *Boardman v Phipps* might have taken *all* of the additional shares: in particular because the profit made depended in large part on the work done by the solicitor and beneficiary in reorganising the company, and they needed *some* financial incentive to do this work. For a more painstaking analysis of the conflict arising, see JE Penner, *The Law of Trusts* (12th edn, OUP 2022), paras 14.68–14.81. And for a different view of the conflict, see Charlie Webb and Tim Akkouch, *Trusts Law* (5th edn, Palgrave 2017), para 10.6.

⁴⁵ Lionel Smith, *The Law of Loyalty* (OUP 2024), 206 (note omitted)

⁴⁶ [1967] 2 AC 46 (HL), 88–89, 92, 94.

⁴⁷ [1967] 2 AC 46 (HL), 123–134.

⁴⁸ [1967] 2 AC 46 (HL), 112.

conflict point repeatedly.⁴⁹ And again, contrary to what Smith suggests, it is submitted that Lord Cohen was not *clear* that a conflict was unnecessary. The key passage seemingly relied on by Smith is *ambiguous*. Lord Cohen said⁵⁰:

In these circumstances it seems to me that the principle of [*Regal v Gulliver*] applies and that the courts below came to the right conclusion.

That is enough to dispose of the case but I would add that an agent is, in my opinion, liable to account for profits he makes out of trust property if there is a possibility of conflict between his interest and his duty to his principal.

An explanation of the conflict perceived by Lord Cohen to be present in the *Boardman v Phipps* case followed. Smith appears to interpret this passage as meaning that Lord Cohen was deciding *Boardman v Phipps* based on the principle in the *Regal* case, which—in Smith’s view—does not require a conflict between duty and self-interest, but then wished to mention an *alternative* possible ground for deciding *Boardman v Phipps*, based on a conflict between duty and self-interest. However, the passage can equally be read as saying that Lord Cohen was deciding *Boardman v Phipps* by following the authority of the *Regal* case, but that he wished to make clear *what the underlying principle of the Regal case was*—namely, that it requires there to be a conflict between duty and self-interest involved.⁵¹ Regarding Lord Guest, Smith is correct to say that he did not mention a conflict, but that is consistent with either his seeing a conflict as irrelevant to liability, or his seeing it as essential to liability, but taking it for granted on the facts.

So, a majority of three from five judges pronounced that a breach of the ‘no conflict’ rule was a precondition to liability under the ‘no profit’ rule (although they differed on whether there was a conflict present). A fourth judge was ambiguous on the point, and the fifth judge was silent on the issue. An earlier passage in Smith’s book, in fact, acknowledges that the reasoning of the House of Lords in the case is widely understood as indicating—contrary to his views—that a conflict between duty and self-interest is a necessary foundation for applying the ‘no profit’ rule.⁵²

Fiduciaries with no discretionary powers

Thirdly, Smith suggests that the ‘no profit’ rule can apply to some who are incapable of facing a conflict between duty and self-interest, because they hold no discretionary powers to exercise. The example of a ‘bare trustee’ is given. Accepting that

the ‘no profit’ rule can apply to a bare trustee, the suggestion that they cannot face a conflict between duty and self-interest only holds if one accepts Smith’s unduly narrow understanding of such conflicts. A bare trustee is typically defined as one whose only obligation is to hold and then transfer the trust property at the order of the beneficiary.⁵³ If a beneficiary instructs a bare trustee to make a transfer of funds next Wednesday, and the trustee accepts a bribe from a third party to time and route the transfer in such a way as to facilitate hacking and misappropriation of the funds, would a court really say there was no conflict between duty and self-interest in breach of fiduciary duty here?⁵⁴ Likewise, it seems to the present writer that a court would identify a conflict and breach in the example that Smith himself gives: ‘If a bare trustee or other non-discretionary trustee were able to turn to profit some information acquired while acting in that role, the trustee would be accountable to the beneficiaries.’⁵⁵

Conclusion on Professor Smith’s arguments

Overall, the present writer is not persuaded that this is a ‘compelling’ case for reformulating traditional understandings of the ‘no conflict’ rule and its relationship to the ‘no profit’ rule.

CONCLUSIONS

In *Recovery v Rukhadze*, the Supreme Court went some way to clarifying one disputed point: it now seems that there can be ongoing fiduciary duties after the termination of a fiduciary relationship.⁵⁶ But beyond that, the justices were divided. Lord Leggatt JSC observed in *Recovery v Rukhadze* that ‘the common law develops best through the competition of ideas ...’⁵⁷ From that perspective, it can be seen as a positive thing that we now have several different competing conceptions of the ‘no profit’ rule at the highest judicial level. Others, however, might argue that they would prefer the Supreme Court to focus more on providing clarity and a degree of stability in the law. Each is, of course, a legitimate viewpoint.

AUTHOR BIOGRAPHY

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⁴⁹ [1967] 2 AC 46 (HL), 106 and 111–112.

⁵⁰ [1967] 2 AC 46 (HL), 103.

⁵¹ Graham Virgo, *The Principles of Equity and Trusts* (5th edn, OUP 2023), 495, apparently reads the judgment this way:

Lord Cohen ... considered that the defendants were liable for breach of fiduciary duty, because there was a conflict of personal interest and duty to the trust ... Although the majority suggested a number of different reasons why the defendants should be held liable, the *ratio* of the case can be identified as being that the personal interests of the defendants conflicted with their duty to the trust and that they had profited from their position as fiduciaries by exploiting information that they had obtained whilst acting as fiduciaries.

(cf Virgo’s overall view of the case law, however, that breach of the ‘no conflict’ rule is not a precondition to liability to account under the ‘no profit’ rule: para 15.6.2.)

⁵² Lionel Smith, *The Law of Loyalty* (OUP 2024), 191: ‘The source of the confusion between the rule against unauthorized profits and the rules about conflicts of interest may be attributable to a later decision of the House of Lords. [Footnote: *Boardman ...*].’

⁵³ For helpful discussion, see Robert Flannigan, ‘Resolving the Status of a Bare Trust’ [2019] Conv 207.

⁵⁴ Smith acknowledges the need for fiduciary loyalty even when a bare trustee is carrying out a mere simple directed transfer; but labels the power of transfer as ‘non-discretionary’ meaning there is no scope for a conflict between duty and self-interest in his use of terminology: Lionel Smith, *The Law of Loyalty* (OUP 2024), 107–109.

⁵⁵ Lionel Smith, *The Law of Loyalty* (OUP 2024), 207.

⁵⁶ Although it could be argued that, while this was supported by the judgments, it was technically not part of the ratio, since the trial judge had found pre-termination breaches.

⁵⁷ [2025] UKSC 10, [2025] 2 WLR 529, [77].

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