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In depth

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Causation and the fiduciary 'No Profit' rule—*Recovery Partners GP Ltd v Rukhadze* Part 1

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ABSTRACT

A critical analysis of what the Supreme Court said about the role of causation in liability to account under the fiduciary 'no profit' rule in *Recovery Partners GP Ltd v Rukhadze* [2025] UKSC 10, [2025] 2 WLR 529. It questions the approach and outcome—at least in part.

INTRODUCTION

Significant pronouncements regarding what is usually called the fiduciary 'no profit' rule have been made in the Supreme Court in *Recovery Partners GP Ltd v Rukhadze*.[1]

In outline, the court purported to reject the introduction of a 'but for' test of causation—a test by which a fiduciary would only be liable to account if they would not have made the profit 'but for' their breach of fiduciary duty. However, the argument predominantly discussed and rejected seems, in truth, not to have been a proposal for a 'but for' test of causation at all, *as that is generally understood in the law*. A secondary argument proposing a *genuine* 'but for' test of causation—as it *is* generally understood in the law—was also rejected; but, it is suggested, without being adequately separated out and given the independent evaluation it merited. To briefly explain. First, the court explicitly reaffirmed an established rule. That is, if a fiduciary is prima facie liable to account for a profit made in breach of fiduciary duty, they cannot escape liability by proving that they *could have* made that profit without breaching their fiduciary duty: meaning, proving there was some hypothetical lawful alternative course of action open to them, which they did not take, instead of committing the breach, by which they could have made the same profit—in particular, proving that if they had, hypothetically, sought their principal's consent to making the profit in the circumstances, it would have been given. In deciding this, the court said they were rejecting a test of 'but for' causation. However, on analysis, we shall see this does not involve rejecting 'but for' causation at all—it involves rejecting what might be called instead merely a 'hypothetically could have' defence. Secondly, the court implicitly extended and hardened that established rule—in a manner that *does* reject 'but for' causation—into a decision that, at least on the facts of the case, the fiduciary could not escape liability even by proving that they *would have* made the profit if there had been no breach of fiduciary duty: meaning, proving that, on a balance of probabilities, but for the breach they would still, in fact, have made the profit—in particular, proving that in the absence of the breach, they would in fact have sought their principal's consent to making the profit in the circumstances, and it would have been given. However, this decision does not mean that it will *never* avail a fiduciary to argue they would have made the same profit even in the absence of any breach of fiduciary duty: it only means such an argument did not avail the fiduciary on the facts. Because we shall see, the court formulated a *very* vague test of causation for the future.[2]

Beyond these points of decision, dicta in the case throw into question the surrounding general parameters of the law, because the court's justices have given us several different explanations of the basic nature of the 'no profit' rule.

This article is in two parts. This first part will examine the decision on causation. The second part will discuss the wider dicta on the fundamental nature of the 'no profit' rule.

THE BACKGROUND LAW

A brief statement of the background general legal context to the decision may be helpful to some readers.

[1] [2025] UKSC 10, [2025] 2 WLR 529. Lord Briggs JSC, delivering the leading judgment, preferred to speak about the 'principles', rather than 'rules', of fiduciary law: [2025] UKSC 10, [2025] 2 WLR 529, [15].

[2] See [2025] UKSC 10, [2025] 2 WLR 529, [63]-[67] for an indication in Lord Briggs JSC's leading judgment that fiduciaries may in some future cases escape liability under the 'no profit' rule on what are essentially—despite this not being acknowledged by the judgment—grounds equivalent to a 'but for' test of causation. cf Lord Leggatt JSC's judgment at [173].

The core of fiduciary duties

Millett LJ gave the classic description of fiduciary duties, delivering the leading judgment in the Court of Appeal in *Bristol and West Building Society v Mothew*[3]:

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr Finn pointed out in his classic work *Fiduciary Obligations* (1977), p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary ... The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.

So, the central duty of a fiduciary is 'loyalty': giving loyal service to the interests of their principal; to the exclusion of the fiduciary's own self-interest; and this core duty then forms the basis of a list of more specific duties.

The 'no conflict' rule

The classic formulation of what is usually called the fiduciary 'no conflict' rule (or more fully, no *unauthorised* conflicts) is the widely quoted statement of principle by Lord Cranworth LC in *Aberdeen Rail Co v Blaikie Brothers*[4]:

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

The House of Lords held that a railway company's contract for the supply of chairs from a firm could not be enforced by the firm because at the time the contract was made, the company's chairman of directors was a partner in the firm.[5] Where a fiduciary breaches the 'no conflict' rule by acting despite a conflict between duty and self-interest, the typical remedy is rescission at the instance of the principal; but other forms of redress are possible.

The 'no profit' rule

The general view has been that the fiduciary 'no profit' rule (or more fully, no *unauthorised* profits) is a sub-rule of the 'no conflict' rule. That is, the 'no profit' rule prohibits a fiduciary profit where a fiduciary has acted while facing a conflict between duty and self-interest and because of the breach of the 'no conflict' rule involved. Lord Neuberger PSC, delivering the judgment of a unanimous Supreme Court, said in *FHR European Ventures LLP v Cedar Capital Partners LLC*[6]:

> [A fiduciary] "must not make a profit out of his trust" and "must not place himself in a position in which his duty and his interest may conflict"—and, as Lord Upjohn pointed out in *Phipps v Boardman* [1967] 2 AC 46, 123, the former proposition is "part of the [latter] wider rule".

However, the 'no profit' rule's evolution has not left it wholly clear whether a breach of the 'no conflict' rule is a precondition to liability under the 'no profit' rule.[7] Practitioner texts differ on the issue.[8]

The 'no profit' rule is often traced back to *Keech v Sandford*.[9] Lord Leggatt JSC gave a clear account of the case and its apparent rationale in *Recovery v Rukhadze*[10]:

> In *Keech v Sandford* a lease of the profits of a market was held on trust for a child. Before the lease expired, the trustee asked the landlord to renew it for the benefit of the child, which the landlord refused to do. The trustee then acquired the lease for himself. Lord King LC ordered him to assign the lease to the beneficiary of the trust and to

3 [1998] Ch 1 (CA), 18.

4 [1843-60] All ER Rep 249, 252.

5 Lord Cranworth LC said [1843-60] All ER Rep 249, 253: 'His duty to the company imposed on him the obligation of obtaining these iron chairs at the lowest possible price. His personal interest would lead him in an entirely opposite direction—would induce him to fix the price as high as possible. This is the very evil against which the rule in question is directed ... '.

6 [2014] UKSC 45, [2015] AC 250, [5].

7 Perhaps the most widely accepted academic view is that of Matthew Conaglen, *Fiduciary Loyalty* (Hart 2011), esp 120-25. That is, the 'no profit' principle is *justified by* the 'no conflict' principle, but a specific conflict *need not* be proven to apply the 'no profit' rule. The likelihood that any fiduciary profit will have arisen from a conflict is sufficient for the law to apply the 'no profit' rule, as an independent rule, on a prophylactic basis. But he accepts that there is no clear answer as to whether a breach of the 'no conflict' rule is a precondition to liability under the 'no profit' rule, or whether instead the latter operates as an independent rule. He says, 115-18 (note omitted): 'Deciding between these two views is difficult because the facts of any case can generally be explained on the basis that the fiduciary made a profit out of his position or on the basis that, in so doing, his personal interest in making the profit conflicted with the duties that he owed to his principal. The possibility of analysing most cases on either, or both, of these bases makes it difficult to isolate cases that prove clearly the existence of separate principles ... One cannot be categorical, one way or the other, regarding the existence of a separate profit principle, as the courts may simply have used the profit principle as a convenient ellipsis for a full explanation of the conflict involved in these cases: one can conceive of conflicts that could have been relied upon to justify the result in most of these kinds of cases.' The acid test would be a case where a profit very clearly arises from a fiduciary's position, but there is equally clearly no conflict between duty and self-interest involved in receiving the profit: a hypothetical example is discussed in the second part of this article.

8 Paul Matthews, Charles Mitchell, Jonathan Harris, and Sinéad Agnew (eds), *Underhill and Hayton Law Relating to Trusts and Trustees* (20th edn, LexisNexis 2022), paras 29.5-29.7 appears to treat the 'no profit' rule as part of the 'no conflict' rule; Geraint Thomas and Alastair Hudson, *The Law of Trusts* (2nd edn, OUP 2010), paras 29.02 and 29.26, certainly does. Lynton Tucker, Nicholas le Poidevin, and James Brightwell (eds), *Lewin on Trusts* (20th edn, Sweet & Maxwell 2020), para 45.033, expresses doubts whether the 'no profit' rule is part of the 'no conflict' rule, but treats it as an open question. John McGhee and Steven Elliott (eds), *Snell's Equity* (34th edn, Sweet & Maxwell 2020), para 7.008, takes the view that the 'no profit' rule grew out of the 'no conflict' rule; but that it has reached the point where it can apply despite there being no conflict.

9 (1726) Sel Cas t King 61, 25 ER 223.

10 [2025] UKSC 10, [2025] 2 WLR 529, [87].

account for any profits made since it was concluded. The Lord Chancellor said, at p 62, that:

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

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

The expression 'conflict between duty and self-interest' was not actually used in *Keech v Sandford* (where it would have been anachronistically premature by a century or so). But the apparent basis of the decision is that the trustee, by taking the lease, was acting in a situation where there was a conflict between duty—to seek renewal of the lease for the beneficiary—and self-interest—to obtain the lease for himself. In that sort of conflict situation, there is a danger that a fiduciary might not try hard enough in their duty. And so, despite the absence of any evidence that the fiduciary did in fact want in effort, it was ruled that merely acting in that situation of a conflict between duty and self-interest was a breach of the 'no conflict' rule, the remedy for which was liability to account for the profit—that is, application of the 'no profit' rule. The obvious intention was to protect principals from any risk of disloyalty and to serve as a warning to fiduciaries in general.

The leading modern authority on the 'no profit' rule is usually taken to be *Boardman v Phipps*.[11] It will be examined in greater detail in the second part of this article. But suffice to say for the moment that the case, like many others, again leaves us reading between the lines. One commentator observed[12]:

> Any analysis of *Boardman v Phipps* has to overcome an initial difficulty that the judgments at all levels failed to identify the precise basis on which Boardman and Tom Phipps were held accountable. It was never definitively stated whether the defendants were accountable because they had placed themselves in a position of conflict of interest; because they had made a profit from their fiduciary position; or because they had acted in disregard of both fiduciary prohibitions. The case is … not unique in this respect.

What the case did at least confirm and clarify is that it is irrelevant to liability under the 'no profit' rule that the fiduciary: (1) acted in good faith; (2) caused no loss to the principal by their actions; (3) benefited the principal by their actions; and (4) earned the profit by their own investment and work. However, if it is fair, the courts can authorise a fiduciary to keep part of the profit for their work and skill: usually called the 'equitable allowance'.[13]

On breach of the no profit rule, a principal's typical remedies (which the principal may need to elect between) are an order for an account of profits, a declaration of a constructive trust over the profit or its traceable proceeds, and an award of equitable compensation for loss.

No 'hypothetically could have' defence

The Court of Appeal made clear that a fiduciary cannot claim a deduction from liability to account for an improper profit based on proving that, *if asked*, the principal would have authorised a part of the profit, in *Murad v Al-Saraj*.[14] All the profit is stripped as a deterrent to fiduciaries, and also because of the difficulty of establishing what *might* have happened—often based on matters only within the knowledge of the fiduciary. Moreover, the burden is on the fiduciary to prove that anything received was not part of the improper profit. In other words, the court ruled out a 'hypothetically could have obtained authorisation' defence.

THE FACTS OF THE CASE

In *Recovery v Rukhadze*, the claimants were a British Virgin Island company, Recovery Partners GP Ltd—claiming in large part as successor to another British Virgin Island company, Salford Capital Partners Inc—and an English limited liability partnership, Revoker LLP. The defendants were three individuals, Irakli Rukhadze, Igor Alexeev and Benjamin Marson, who were sued along with associated corporate entities. While the claimants were undertaking asset recovery services for the family of a deceased billionaire, the defendants acted for the claimants in various senior fiduciary capacities. The claimants had commenced the services on an ad hoc basis while they sought to negotiate a contract for the services with the bereaved family. The defendants fell out with the claimants. In bad faith, the defendants took preparatory steps towards resigning and securing the asset recovery business opportunity for themselves, denigrating the claimants to the family. The defendants then resigned and negotiated a contract with the family to provide the services themselves, using confidential information they had acquired while acting for the claimants. The claimants sued for breach of fiduciary duty and elected to pursue an account of profits. The trial judge ordered the defendants to pay $134 m, representing the defendants' net profits from providing the recovery services minus 25% by way of equitable allowance for the defendants' work and skill in providing those services.

THE ISSUE FOR DECISION

The defendants argued on appeal that they should be entitled to keep all, or at least half, of the net profits. The basic case

[11] [1967] 2 AC 46 (HL).
[12] Michael Bryan, '*Boardman v Phipps* (1967)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart 2012), 585-86.
[13] The facts and decision are explained in the second part of this article.
[14] [2005] EWCA Civ 959, [2005] WTLR 1573. For criticism of this decision in *Recovery v Rukhadze*, see below n 22.

raised by the defendants on appeal was put in this way in the leading judgment of Lord Briggs JSC[15]:

> [O]ne thing has been clear: the former fiduciary is not allowed to defend his retention of the profit for himself by saying that he would have made it anyway, even if he had not committed a breach of fiduciary duty. Thus he may not say that, if asked, the principal or beneficiary would have consented, or that he could, for example by resigning earlier than he did, have made the same profit with no breach of duty. In this context, equity has invariably regarded these types of "what if" counterfactuals as illegitimate and irrelevant speculation, at least in the courts of England and Wales.
>
> This appeal challenges the principle that counterfactuals of that kind are to be excluded. The appellants say that, wherever the issue arises as to whether a fiduciary is liable to account for profits, whether made before or after termination of the fiduciary relationship, the court must always answer it by reference to a common law "but-for" test of causation, ie by asking whether the fiduciary would have made the same profits if he had avoided any breach of fiduciary duty. This familiar common law test would, they say, bring much needed clarity, predictability, common sense and even justice to an area of equity which has been hitherto disfigured by imprecision, uncertainty, difficulty and occasionally excessive harshness in its effect. They point to what they call a similarly refreshing intrusion of firm common law principle into the field of equitable compensation, in *Target Holdings Ltd v Redferns* [1996] AC 421, and ask why the same improvement should not now be made to the equitable rules about accounting for profits.

Lord Leggatt JSC elaborated[16]:

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

THE DECISION

The Supreme Court unanimously ruled that the appeal failed: the defendants were liable to account for all of the profits (subject to the equitable allowance). However, there were differences in the reasoning. The leading judgment was delivered by Lord Briggs JSC, with Lord Reed PSC, Lord Hodge DPSC, and Lord Richards JSC agreeing. The majority departed from the prior conventional understanding of the law. They said that liability to account under the 'no profit' rule is not a remedy for breach of the 'no conflict' rule. Instead, liability to account for improper fiduciary profits involves the direct enforcement of a duty. Lord Burrows JSC, who we shall see below disagreed, nevertheless gave a helpful analogy to explain the majority position: the majority treated the liability to account as analogous to a contractual liability for debt, as opposed to damages—the amount is simply owed and due, there is no room for a 'but for' test of causation as would apply to damages.[17] Lord Briggs JSC, leading the majority, said:[18]

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

The majority did, however, accept a limited role for causal reasoning. Lord Briggs JSC said[19]:

> The duty, which may well extend beyond the end of the fiduciary relationship, is to account for profits made from, out of, or otherwise sufficiently connected with, the fiduciary relationship.

15 [2025] UKSC 10, [2025] 2 WLR 529, [5]-[6].
16 [2025] UKSC 10, [2025] 2 WLR 529, [85].
17 [2025] UKSC 10, [2025] 2 WLR 529, [260], using the terminology of a 'primary duty', in contrast to a remedial 'secondary duty'.
18 [2025] UKSC 10, [2025] 2 WLR 529, [20].
19 [2025] UKSC 10, [2025] 2 WLR 529, [25]-[26], [34], [36].

> Judges have over many years used a variety of different phrases to encapsulate that requirement for a link between the relationship and the profit …
>
> The extent to which a causal test of some kind is already built into the law about the identification of profits falling within the duty to account is the main issue about the current law which calls for close analysis. In the end it depends upon what is meant by causation and a causative test. If it is used as a label for the well-known causation tests which the common law routinely applies for the purpose of identifying the loss or damage flowing from a tort or a breach of contract, then it clearly has no place in this equitable context, as the further citations from authority will clearly show, and the parties agree. But if it is used in a wider sense, so as to refer to and then exclude any causative analysis of the question whether a person has made a profit out of his fiduciary position, then I would say that it goes too far. Causation, in the protean sense of asking whether event A played a causative part in the occurrence of event B is inherent in phrases such as "by reason of", "out of", "by virtue of", "owing to" or "resulting from" used in the well-known cases … But the analysis of causation in that "A led to B" sense differs from common law causation in this critical respect: it does not, whereas the common law test usually does, require the erection of a "but for" type of counterfactual …
>
> The cases in which the more protean causation analysis had been undertaken for the purpose of identifying accountable profits in the hands of a fiduciary have not involved or required the erection of any such "but for" type of counterfactual. The question is not, would the profit have been made even if there had been no antecedent breach of fiduciary duty, but did the profit owe its existence to a significant extent to the application by the fiduciary of property, information or some other advantage which he enjoyed as a result of his fiduciary position, or from some activity undertaken while he remained a fiduciary which the conflict duty required him to avoid altogether. For that purpose the court looks closely at the facts, ie what actually did happen, but does not concern itself with what might have happened in a hypothetical "but for" situation which did not in fact occur.

We are therefore left with a 'protean'—shape-shifting—test of causation, or attribution, under the 'no profit' rule: 'to account for profits made from, out of, or otherwise sufficiently connected with, the fiduciary relationship'; with various other formulations possible. However, matters are yet more complicated. Lord Briggs JSC said later[20]:

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

The example given seems questionable: it appears not to be a case of liability to account under the 'no profit' rule at all, but a simple case of misappropriation of company funds by a fiduciary, for which there is a proprietary claim through following or tracing, with the alternative of a claim to equitable compensation.[21] However, accepting the point made, we appear to be left with a shape-shifting test of causation *that may not always apply*.

LORD LEGGATT JSC'S VIEWS ON CAUSATION

Lord Leggatt JSC, concurring in the court's overall decision of the case, but speaking alone on this point, saw the defendants' argument that they could win their case through the introduction of a 'but for' test of causation into the 'no profit' rule as fundamentally misconceived. Lord Leggatt JSC sought to explain at length that liability to account for profits made in breach of fiduciary duty *already* depends on the breach of fiduciary duty being a 'but for' cause of the profit: it must be shown that the fiduciary's profit would not have been obtained 'but for' the breach.[22] He argued that a causation test was inherent within other forms of words used by the courts, such as the formulations favoured in the majority judgment: 'profits made from, out of, or otherwise sufficiently connected with', etc. And there was no reason why the causation test for identifying profits when an account is sought should be any different from the test for identifying losses when compensation is sought: a 'but for' test, plus a 'remoteness' test.[23] And, he argued, the authorities, read as a whole, supported this already being the existing law. But, he said, on a correct analysis, the 'but for' test was satisfied on the facts of *Recovery v Rukhadze*, and the defendants were liable.

In his application of the 'but for' test, Lord Leggatt JSC was perhaps on stronger ground in relation to the defendants' primary argument for zero liability than their secondary argument for 50 percent liability.

'But for' causation and the defendants' argument for zero liability

When the defendants contended for zero liability, because they might have resigned earlier or obtained consent and still have made the same profits, what they were really arguing for was—however they formulated it—something quite different from a 'but for' test of causation, *as that is generally understood*

[20] [2025] UKSC 10, [2025] 2 WLR 529, [41].
[21] *Foskett v McKeown* [2001] 1 AC 102 (HL).
[22] [2025] UKSC 10, [2025] 2 WLR 529, [154]-[208]. The discussion rejects contrary statements in the Court of Appeal, [154]-[159]; and includes a pronouncement that the decision of the Court of Appeal in *Murad v Al-Saraj* [2005] EWCA Civ 959, [2005] WTLR 1573 went wrong on this point, [184]-[195].
[23] [2025] UKSC 10, [2025] 2 WLR 529, [193].

in the law.[24] It was an argument for what has been labelled above, merely a 'hypothetically could have' defence. Most lawyers probably first encounter 'but for' causation when studying criminal law, before moving on to its equivalent application in civil law. A simple example taken from the criminal law therefore perhaps best makes the point. Suppose a charge of assault occasioning actual bodily harm against a defendant who, in a mutually abusive relationship, has inflicted on their partner a bruising blow and a bite. It is a simple matter to say the bruise and the bite mark were caused by the assault: they would not have happened 'but for' the assault. Now suppose the defendant says that, given the nature of their relationship, had the defendant asked their partner, they would have consented to the bruise but not the bite, *therefore the assault was not a 'but for' cause of the bruise*.[25] Or the defendant says that, had they left their partner a week earlier, there would have been no assault by them, while the partner would doubtless have resumed cohabitation with their more violent ex and have accordingly sustained even worse injuries, and *therefore assault was not a 'but for' cause of any harm*. It is plain that these arguments—such as they are—make no sense in terms of conventional 'but for' causation reasoning: arguing that the assault did not cause the injuries would—as the expression goes—be thrown out of court. Yet these arguments are basically parallel to those made by the defendants (in an admittedly much more complex legal setting) in *Recovery v Rukhadze*.

In *Recovery v Rukhadze*, the fact that there might, hypothetically, have been some quite different lawful alternative course of action, which the defendants never pursued, to make similar profits is—on general understandings of 'but for' causation—neither here nor there. Just as it is irrelevant that our criminal defendant might have found some lawful way to interact with their partner instead of attacking them.

It should be noted that this purported defence of 'hypothetically could have' is all that the majority judgment ever expressly addresses, when rejecting 'but for' causation. So the merits of *true* 'but for' causation, as that is usually understood, were never really dealt with by the majority.

'But for' causation and the defendants' argument for 50 percent liability

It is understandable that the defendants put their argument for zero liability to the forefront, as the most favourable potential outcome. But it was only their secondary argument for 50 percent liability that was truly based on a 'but for' test of causation *as that is conventionally understood*. To repeat Lord Leggatt JSC's formulation, quoted above:

> This contention is based on the judge's finding that, if all had gone forward absent a breach, it is most likely that the parties would have concluded a profit-sharing agreement under which the defendants would have received 50% of the profits earned.

This contention appears to simply assert that half of the profit would still probably have been made had there been no breach, but surrounding events were otherwise unaltered. So, the breach was not a 'but for' cause of the full measure of profits, only 50 percent. But Lord Leggatt JSC disagreed with this assertion, setting out what he believed to be the correct application of a 'but for' causation test to the facts[26]:

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

However, it is submitted, with great respect, that this may not be correct. Lord Leggatt JSC said the relevant hypothetical scenario by which to test 'but for' causation—deleting any breach of duty in as minimally invasive a manner as possible—'is one in which the defendants resigned from their positions with the claimants but did not take any steps to exploit the opportunity to provide the recovery services themselves'. But arguably, this statement is incomplete. Instead, the relevant scenario 'is one in which the defendants resigned from their positions with the claimants but did not take any steps to exploit the opportunity to provide the recovery services themselves *without the fully informed consent of their former principals*'. Only exploiting the opportunity *without consent* could be a breach. In other words, the defendants would be free in this hypothetical scenario to negotiate a profit-sharing deal with the claimants based on the value of their potential contribution, and to persuade the family to press for this. This seems to broadly fit the gist of what the trial judge found would probably have happened, resulting in a deal for a 50 percent share of the profits—a share that had been long discussed and expected between the parties prior to their parting of the ways.[27]

EVALUATION OF THE CAUSATION ISSUES

Taking the conventional view that the liability to account under the 'no profit' rule arises on breach of the 'no conflict' rule, and accepting the point made by Lord Leggatt JSC, above, that a 'but for' test of causation is inherent within that—supplemented by a 'remoteness' test—might be thought to give clearer criteria by which to identify liability to account for improper fiduciary profits than the majority's

[24] See the exposition by Lord Leggatt JSC at [2025] UKSC 10, [2025] 2 WLR 529, [160]-[166].
[25] Assuming consent would be valid in such circumstances, which was just about a credible argument the last time I opened my criminal law books.
[26] [2025] UKSC 10, [2025] 2 WLR 529, [206].
[27] [2022] EWHC 690 (Comm), [419]-[434]—although Cockerill J was contemplating a 50% deal in a scenario where the defendants had stayed in post, rather than one in which they resigned without a breach. Staying in post may, however, in truth be the relevant scenario to test these things by. If there had been no preparatory steps and no bad faith resignation—if the defendants had been persuaded not to commit any breach—it must be questionable whether the defendants would have resigned at all: it may well have been more likely they would have stayed in post to stand their ground.

shape-shifting test of causation, which may not always apply. On this approach to *Recovery v Rukhadze*, arguably the decision was wrong: arguably the defendants should only have been liable for 50 percent of the profits—but, of course, without any equitable allowance: so their reward would have been the amount they would probably have negotiated with the claimants, rather than an amount granted in the discretion of the court.[28]

Fine distinctions

On the other hand, this approach may seem to involve a hair-splitting distinction. A fiduciary cannot reduce their liability by arguing that, if, *hypothetically*, they had sought their principal's consent, they would probably have been allowed half of the profit. But a fiduciary can reduce their liability by arguing that, in the absence of the breach, they would probably, *in fact*, have negotiated with their principal and obtained consent to half of the profit. However, it is suggested that the distinction between the merely hypothetical and the materially probable is one of substance—a distinction the law draws all the time.

Deterrence

It could also be objected that, on a 'but for' approach, fiduciary law would not be adequately serving its deterrent function of discouraging breaches. The defendants in *Recovery v Rukhadze* would have ended up with a huge payday—50 percent of the profits from their asset recovery work—directly in line with what they would have received had they not breached their fiduciary duties to the claimants. Where, it might be asked, is the deterrence against a breach? However, the defendants would still have been stripped of the remaining 50 percent, some $90 m, which—from their perspective—they had earned from years of endeavour after a 'six of one and half-a-dozen of the other' falling out with their principals. The conventional understanding of deterrence under the 'no profit' rule has been deterrence *through stripping the wrongdoing fiduciary of their unauthorised gain*—not through the imposition of additional penalties, such as would be involved in denying a fiduciary remuneration for work done, which the principal has had the full benefit of.[29] There should be nothing surprising in a fiduciary being stripped of an unauthorised profit but otherwise remaining well rewarded for their work: for example, a well-paid professional trustee who, at the end of their term, takes an unauthorised profit being stripped only of that profit. There is admittedly, to the contrary, a confused and unprincipled body of case law suggesting that deterrence goes further: that where a fiduciary is liable to account under the 'no profit' rule, equity may also forfeit even a contractual entitlement to remuneration for work done in the relationship, as a matter of 'deterrence'.[30] But, to repeat, the traditionally understood notion of 'deterrence' under the 'no profit' rule has been through stripping the unauthorised profit—not the seizing of other assets (why not also the fiduciary's house, or their savings?).[31] If this is correct, there should be nothing too shocking in a test of causation, leaving fiduciaries with the payment that, on a balance of probabilities, would have been agreed for their work.

Lord Briggs JSC's leading judgment gave a lengthy list of reasons for not changing the current law, in response to wide-ranging arguments by the defendant appellants.[32] At the heart of Lord Briggs JSC's reasoning was the view that it is important to preserve the deterrent functioning of fiduciary law. In particular, he said:[33]

> At present the inevitability of a duty to account for profits (subject only to a discretionary and uncertain equitable allowance, or an election by the claimant to take equitable compensation instead) is the principal disincentive apart from loyalty itself to fiduciaries from even entering into activities which involve a conflict between interest and duty. The proposed change would water down the simple duty not to go there at all without the principal's informed consent into a duty only to avoid making and keeping profits from a conflict situation which you cannot show that you would have been able to make anyway, *eg by an earlier resignation, or by showing that the principal would have consented if asked* …
>
> The appellants did not, and could not, submit that the fundamental reason for the strictness of the profit rule, namely human frailty in the face of temptation, has diminished, let alone gone away.

As the emphasised words show—in line with the whole of the rest of the judgment—what Lord Briggs JSC's leading judgment expressly contemplated throughout was the introduction of a 'hypothetically could have' defence; not the recognition of a true 'but for' test. It is easy to see that a 'hypothetically could have' defence has a far greater potential to undermine the deterrent impact of the 'no profit' rule than a straightforward 'but for' causation test. So, in that sense, the judgment was, with respect, weighing up the wrong issue. Lord Burrows JSC emphasised the same key point of deterrence, but again in a judgment that did not give (explicit) separate consideration to the defendants' argument for 50

[28] On the determination of the equitable allowance amount, see the Court of Appeal's judgment at [2023] EWCA Civ 305, [2023] Bus LR 646, [102]-[151].

[29] John McGhee and Steven Elliott (eds), *Snell's Equity* (34th edn, Sweet & Maxwell 2020), para 7.055: 'The governing principles are that the fiduciary must account for all of the profit which he made in breach of fiduciary duty, but this accounting must not be allowed to operate so as to unjustly enrich the claimant.'

[30] See Seb Oram 'Forfeiture of Fiduciary Remuneration Following Breach of Duty: from Contract to Conscience' [2010] LMCLQ 95, Peter Watts, 'Forfeiture of Agents' Remuneration' in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart 2018), and Peter Devonshire. 'Forfeiture of Payment to a Delinquent Agent' (2019) 70 NILQ 263, commenting on the leading modern case suggesting this, *Imageview Management Ltd v Jack* [2009] EWCA Civ 63, [2009] 2 All ER 666. In *Recovery v Rukhadze*, the Court of Appeal added to the confusion by purporting to distinguish between a proprietary entitlement to payment, which cannot be forfeited, and a contractual entitlement to payment, which can: [2023] EWCA Civ 305, [2023] Bus LR 646, [30]-[45]. Toby Graham and David Russell, 'Account of Profits—the Link Between Profits Earned and the Breach of the Fiduciary Duty' (2024) 30 T&T 111, 116, commented: 'For what it is worth, we find the Court of Appeal's interpretation strained and at odds with … expressed concerns about an account leading to a disproportionate outcome or becoming a vehicle for unjust enrichment of the Claimant.'

[31] The point is reiterated in *Recovery v Rukhadze* by Lord Leggatt JSC [2025] UKSC 10, [2025] 2 WLR 529, [199]: '[Penal] deterrence is not a proper aim of the law of equity. If it were, then why not require the fiduciary to pay over, say, three times the amount of the profit that he received? What equity requires is the defendant to surrender to the claimant all those profits, but only those profits, made from the breach of duty and in that way seek to make it as if the wrong had not occurred.'

[32] [2025] UKSC 10, [2025] 2 WLR 529, [43]-[76].

[33] [2025] UKSC 10, [2025] 2 WLR 529, [47] and [52], emphasis added.

percent liability—the only true 'but for' argument.[34] Lady Rose JSC preferred to base her decision on the point that it is a decision for Parliament whether to change the law in this area, which it has shown no sign of doing in recent legislation regulating companies and limited liability partnerships[35]—but this assumed a proposal to change the law; rather than one to recognise what, arguably, the law already (implicitly) said, a requirement of 'but for' causation.

SCOPE FOR FUTURE RELAXATION OF THE 'NO PROFIT' RULE?

However, Lord Leggatt JSC did suggest scope for some relaxation of the strictness of the 'no profit' rule, in an important passage worth quoting at length:[36]

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

- (i) The defendants had acted honestly and in the best interests of their principals;
- (ii) The defendants' conduct had positively benefited their principals by generating profits for them (from the principals' own shareholdings) which they would and could not otherwise have made; and
- (iii) The only way of obtaining that benefit for the principal was by the defendants investing their own money alongside that of the principal.

> Although Lord Russell in *Regal (Hastings)* in the passage quoted at para 89 above asserted that these matters were irrelevant, I have struggled to find either in his speech or in any of the other speeches in that case or in *Boardman v Phipps* any justification in terms of legal principle or policy for that assertion. In *Boardman v Phipps* the majority rested their conclusion on the authority of *Regal (Hastings)*, which they regarded, with good reason, as indistinguishable on its facts. Given that the appeal to the House of Lords in *Boardman v Phipps* was argued before the Practice Statement (quoted by Lord Briggs JSC at para 43 of his judgment) was made which allowed the possibility that the House might depart from its own previous decisions, that at the time was justification enough. In *Regal (Hastings)*, at p 145A, Lord Russell justified his statement of the law by citing *Keech v Sandford* as "an illustration of the strictness of this rule of equity in this regard". The facts of *Keech v Sandford*, however, did not include the features that the conduct of the fiduciary had positively benefited the beneficiary by producing a profit for him which he could not otherwise have made and that the investment by the fiduciary of his own money was necessary to produce that profit.
>
> Those features might today reasonably be regarded as material. As Jones and Langbein pointed out, it is hard to see what policy is served by discouraging fiduciaries from making profits for their principals in such circumstances. As John Langbein put it, at p 955: "The House of Lords' message to trustees is: Thou shalt not create value for thy trust beneficiary in circumstances in which there may be actual or potential benefit to thyself." It may be said with force that in such cases the rule adopted by the House of Lords contradicts the purpose of the rule, which is to benefit the beneficiary.
>
> Had the features listed at para 139 above all been present here, and had it been argued that on such facts the Supreme Court should now depart from *Regal (Hastings)* and *Boardman v Phipps*, that argument would in my opinion have deserved serious consideration. It is not, however, an argument made, or which could be made, on this appeal. That is because this case has none of those features.

CONCLUSION

Whether a just outcome was reached in *Recovery v Rukhadze* depends on whether one believes the disloyal fiduciaries—who would say they were provoked by their principals—should have been rewarded for their considerable efforts at the rate they were well on course to negotiating, or at the lower rate granted by the court as an equitable allowance. All 11 judges involved at the various levels—High Court, Court of Appeal, and Supreme Court—favoured the equitable allowance rate, emphasising the deterrent function of the fiduciary 'no profit' rule. So there was a very clear judicial consensus, a point it would be foolish to discount. But it is worth considering that deterrence is supposed in principle to be limited to stripping unauthorised profits—not stripping agreed remuneration for work done within the fiduciary relationship (or its equivalent); and that not all wronged principals are sainted martyrs, and not all wayward fiduciaries are fiendish devils.[37]

Regarding the Supreme Court's formulation of the law on causation, those advising clients or adjudicating cases must now contend with a 'protean' (shape-shifting) test of causation, or attribution, which may not always apply, to determine whether a profit is made 'from, out of, or otherwise sufficiently connected with' a fiduciary relationship—with other

[34] [2025] UKSC 10, [2025] 2 WLR 529, [266]-[301].
[35] [2025] UKSC 10, [2025] 2 WLR 529, [325]-[335].
[36] [2025] UKSC 10, [2025] 2 WLR 529, [139]-[142].
[37] Lady Rose JSC's judgment at [2025] UKSC 10, [2025] 2 WLR 529, [312]-[318] is an interesting read on the attitude of the main fiduciary defendant, Irakli Rukhadze, towards his business-vehicle principals, which may resonate with many in commerce.

formulations possible. Lord Briggs JSC's leading judgment commented[38]:

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

One may question whether the familiar tests of 'but for' causation and 'remoteness' might have been preferable—the judgment of Lord Leggatt JSC is highly persuasive on this point.

AUTHOR BIOGRAPHY

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38 [2025] UKSC 10, [2025] 2 WLR 529, [54].

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In depth