Neutral Citation Number: [2023] EWCA Civ 1120

Case No: CA-2022-001487

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
Mr Justice Foxton
[2022] EWHC 383 (Comm) and [2022] EWHC 1695 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/10/2023

Before:

LORD JUSTICE NEWEY
LORD JUSTICE MALES
and
LORD JUSTICE BIRSS

- -

Between:

(1) HOTEL PORTFOLIO II UK LIMITED (in liquidation) **(2) ELIZABETH ALEXANDRA AIRD-BROWN (as liquidator of Hotel Portfolio II UK Limited (in liquidation))**	**Claimants/ Respondents**
- and - **(1) ANDREW JOSEPH RUHAN**	**Defendant**
(2) ANTHONY EDWARD STEVENS	**Defendant/ Appellant**
- and - **(1) PHOENIX GROUP FOUNDATION** **(2) MINARDI INVESTMENTS LIMITED** **(3) TANIA JANE RICHARDSON**	**Interested Parties**

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Anthony de Garr Robinson KC, Sebastian Kokelaar and Stephen Ryan (instructed by **Richard Slade and Company**) for the **Appellant**
James Pickering KC and Samuel Hodge (instructed by **Spring Law**) for the **Respondents**

Hearing dates: 25-27 July 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 04 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. This appeal against a decision of Foxton J ("the Judge") raises a novel issue relating to liability for dishonest assistance in a breach of fiduciary duty. The Judge ordered the second defendant, Mr Anthony Stevens, to pay sums amounting to more than £102 million as compensation for dishonest assistance together with almost £60 million in interest. Mr Stevens challenges both the compensation and the interest.

Basic facts

2. Most of this section of this judgment is derived from the judgment ("the Judgment") given by the Judge on 23 February 2022. Following a hearing on 21 and 22 June 2022 at which matters arising from the Judgment were addressed, the Judge gave a further judgment ("the Consequentials Judgment") on 4 July 2022.

3. In May 2003, Orb a.r.l. ("Orb") sold the first claimant, Hotel Portfolio II UK Limited ("HPII"), to companies controlled by the first defendant, Mr Andrew Ruhan, for between £42 million and £47 million. HPII owned a portfolio of hotels, including the Kensington Palace, Kensington Park and Lancaster Gate Hotels in London (collectively "the Hyde Park Hotels"). Mr Ruhan was appointed as a director of HPII on 30 May 2003.

4. The potential of the Hyde Park Hotels for development into "premium residential property" had been identified even by the time Orb sold HPII. As, however, the Judge observed in paragraph 44 of the Judgment, "identifying such development potential, and realising it, are two very different things".

5. On 23 December 2004, Morgan Stanley Bank International Limited ("Morgan Stanley") and Thistle Hotels plc ("Thistle"), to each of which HPII was indebted, agreed a restructuring with Mr Ruhan as a result of which the ownership of HPII was divided equally between the three of them.

6. Shortly before this, on 17 December 2004, the holders of loan notes had passed a resolution authorising Mr Ruhan to accept any bid on the Hyde Park Hotels above £125 million. In paragraph 55 of the Judgment, the Judge said in this connection:

> "I find that the noteholders were not in any sense dependent or reliant upon whatever views Mr Ruhan may have expressed as to the development potential of the Kensington Hotels when passing this resolution, and that the decision taken reflected the extensive professional advice received. … I am satisfied that that the decision taken to accept an offer at the stated prices reflected the extensive professional advice received, and was consistent with an objectively reasonable market valuation of the hotels (with and without planning permission) at that time."

In a similar vein, the Judge said in paragraph 74(i):

> "I am not persuaded that Mr Ruhan gave information to the other shareholders in HPII as to the value or development potential of the Hyde Park Hotels which did not fall within the

> range of reasonable views held at the time, and I am in any event satisfied that the various stakeholders had access to independent professional advice on these subjects, and availed themselves of it. That does not mean, however, that Mr Ruhan did not believe that there was a sufficient prospect of developing the hotels to make an attempt to explore that opportunity a worthwhile commercial gamble."

7. By 23 February 2005, Euro Estates Holdings Limited ("Euro Estates"), which was linked with the second defendant, Mr Anthony Stevens, had become the sole shareholder in a company incorporated in Madeira, Cambulo Comercio e Serviços Sociedade Unipessol LDA ("Cambulo Madeira"). On 1 March 2005, a business sale agreement was concluded between Cambulo Madeira and HPII pursuant to which Cambulo Madeira agreed to buy the Hyde Park Hotels for £127 million, apportioned as to £56 million to the Lancaster Gate Hotel, as to £31 million to the Kensington Palace Hotel and as to £40 million to the Kensington Park Hotel. The £127 million was subsequently reduced to £125 million with agreement that the sale of the Kensington Palace Hotel and Kensington Park Hotel ("the Kensington Hotels") should be completed at a price of £69 million.

8. The Hyde Park Hotels were vested in subsidiaries of Cambulo Madeira. Cambulo Lancaster Gate Development Limited ("CLGD") was used for the purchase of the Lancaster Gate Hotel. Cambulo Kensington Palace Developments Limited ("CPal") and Cambulo Kensington Park Developments Limited ("CPark") became the owners of, respectively, the Kensington Palace Hotel and the Kensington Park Hotel.

9. On 30 August 2006, Cambulo Madeira sold on the Lancaster Gate Hotel (or, strictly, the shares in CLGD) to an unconnected third party for £67.5 million, realising a profit of some £7.76 million.

10. By then, on 4 April 2006, Cambulo Madeira, CPal and CPark had entered into a joint venture (with the project title "Trio") with CPC Group Limited ("CPC"), a company owned by the Candy brothers, to redevelop the Kensington Hotels on a 50:50 basis. On 29 November 2007, the Kensington Hotels were transferred to a jointly-owned company, Cambulo Property Holdings Limited ("CPHL").

11. On 22 February 2008, CPHL agreed to sell the Kensington Hotels to an unconnected third party for £320 million, and completion took place on 25 March 2008. CPHL used the funds to discharge loan accounts with CPal and CPark, which then made dividend payments to CPHL. CPHL in turn declared interim dividends, leading to payments of £100.2 million to CPC and £115.2 million to Cambulo Madeira. A proportion of that latter figure was paid to Wellard Limited, which had acquired a 20% interest in Cambulo Madeira. That left a profit of about £94.5 million.

12. On 21 December 2007, a company associated with Mr Ruhan had obtained a loan of $141 million ("the Mood Facility") from Investec plc ("Investec") for the purposes of a property development project which Mr Ruhan was pursuing in Qatar. The loan was secured over the shares of Euro Estates. When the interim dividends mentioned in the previous paragraph were declared, Investec was paid what it was owed under the Mood Facility, Euro Estates assumed Investec's position as lender to the Qatar Project, and further sums were committed to the Qatar Project. The result, as the

Judge explained in paragraph 143 of the Judgment, was that "the entirety of Euro Estates' return from the Kensington Hotels was committed to Mr Ruhan's Qatar Project".

13. HPII went into creditors' voluntary liquidation on 17 April 2008.

14. The Judge concluded in paragraph 214 of the Judgment that "in acquiring the Hyde Park Hotels through Cambulo Madeira, in the subsequent sale of those hotels, and in the investment of the profits, Mr Stevens was acting at all times as Mr Ruhan's nominee in the sense defined at [5] above". The Judge had explained in paragraph 5 that HPII alleged "an arrangement in which the nominee 'holds on trust for the beneficiary absolutely, but also agrees to do whatever the settlor/principal asks, or at least whatever is asked within a certain range of possibilities'". Mr Ruhan did not, however, disclose his involvement with Cambulo Madeira and its purchase of the Hyde Park Hotels to HPII's other directors or shareholders at the time. To the contrary, he confirmed to Morgan Stanley and Thistle in February 2005 that he was not related to Cambulo Madeira.

15. The Judge said this in paragraph 269 of the Judgment about benefits Mr Stevens had received from acting as Mr Ruhan's nominee:

> "I am far from satisfied that I have the full picture as to the benefits Mr Stevens derived from agreeing to act as Mr Ruhan's nominee in relation to the Hyde Park Hotels. However I am satisfied that it includes at least:
>
> i) The sum of £500,000 paid to VTL [i.e. Value Telecom Limited, a vehicle for Mr Stevens], which even on the Defendants' own case, was paid in connection with the use of Euro Estates' shares as security for the Mood Facility.
>
> ii) The sum of £1,000,000 'lent' to Mr Stevens in August 2012 and 'repaid' from the £92m paid to Mr Stevens for the benefit of Mr Ruhan in November 2012. As a matter of substance, this involved Mr Stevens receiving this sum from the proceeds of the sale of the Hyde Park Hotels, which I am satisfied was in return for the assistance he provided Mr Ruhan in hiding his interest in the Hyde Park Hotels and their proceeds."

16. In paragraph 249 of the Judgment, the Judge noted that HPII had:

> "not sought to advance any case that:
>
> i) it was paid less than the market value of the Hyde Park Hotels;
>
> ii) if it had not sold the Hyde Park Hotels pursuant to the terms of the Cambulo Madeira Transaction, it would

> have sold the Hyde Park Hotels on more favourable terms; or
>
> iii) it would have exploited the development opportunity presented by the Hyde Park Hotels itself."

17. The present proceedings, brought by HPII and its current liquidator, were issued on 6 April 2018. By them, HPII alleged that Mr Ruhan acted in breach of fiduciary and similar duties he owed to the company. As the Judge explained in paragraph 3 of the Judgment, HPII further sought "an account of profits, equitable compensation and damages from Mr Stevens, on the basis that he dishonestly assisted in breaches of fiduciary duty by Mr Ruhan and was a participant in an unlawful means conspiracy with Mr Ruhan".

18. Summarising his conclusions in paragraph 342 of the Judgment, the Judge said:

> "i) HPII's claim against Mr Ruhan for (at its election) an account of profits or equitable compensation for breach of fiduciary duty succeeds (as does its claim against Mr Ruhan for breach of s.320 of the Companies Act 1985 for an account under s.322(3)(a) only).
>
> ii) HPII's claim against Mr Stevens for (at its election) an account of profits or equitable compensation for dishonest assistance in breach of fiduciary duty succeeds.
>
> iii) HPII's claims against Mr Ruhan and Mr Stevens in the tort of unlawful means conspiracy fail."

19. In essence, the Judge considered that:

    i) Mr Ruhan's failure to disclose his interest in Cambulo Madeira to HPII meant that he had acted in breach of fiduciary duty and made it appropriate to order him to account for profits;

    ii) HPII was also entitled to assert a proprietary claim in respect of the Hyde Park Hotels and their proceeds;

    iii) Mr Stevens dishonestly assisted in Mr Ruhan's breach of fiduciary duty and made it appropriate to order him to account for profits he had himself made;

    iv) While the sale of the Hyde Park Hotels to Cambulo Madeira had not of itself been shown to have caused any loss to HPII, HPII could, as an alternative to an account of profits, claim compensation against Mr Ruhan on the basis that he had committed further breaches of duty in failing to account for, and disbursing, the proceeds of sale, which were themselves trust property;

    v) Likewise, HPII could claim compensation instead of an account of profits as against Mr Stevens on the basis that he had assisted Mr Ruhan in his failure to account for, and disbursement of, the proceeds of the Hyde Park Hotels.

20. HPII elected for an account of profits as against Mr Ruhan and equitable compensation as against Mr Stevens. Accordingly, the Judge's order, made on 7 July 2022, required:

    i) Mr Ruhan to account to HPII for £7.76 million in respect of the Lancaster Gate Hotel and £94.5 million in respect of the Kensington Hotels;

    ii) Mr Stevens to pay HPII equitable compensation of £7.76 million in respect of the Lancaster Gate Hotel and £94.5 million in respect of the Kensington Hotels;

    iii) Mr Ruhan and Mr Stevens each to pay pre-judgment interest, compounded with half-yearly rests, in the following sums:

        a) £5,990,559.42 in respect of the Lancaster Gate Hotel; and

        b) £53,942,066.62 in respect of the Kensington Hotels.

21. Mr Stevens now appeals against the Judge's decision. He does not challenge the Judge's conclusions that he acted as Mr Ruhan's nominee and that he thereby dishonestly assisted in breach of fiduciary duty on the part of Mr Ruhan. That being so, he now has to accept that he could properly be ordered to account for such profits as he made personally. However, he disputes that any award of equitable compensation should have been made and further contends that the Judge had no power to order *compound* interest to be paid.

22. There is no appeal by Mr Ruhan. Even so, I shall make some comments on the position of Mr Ruhan before turning to that of Mr Stevens.

Mr Ruhan's position

23. The Judge considered that Mr Ruhan owed, and breached, the fiduciary "no conflict" and "no profit" rules and also section 320 of the Companies Act 1985. With regard to the "no conflict" and "no profit" rules, the Judge said in paragraph 220 of the Judgment:

> "There was no dispute that if Mr Ruhan had an interest in Cambulo Madeira or the Hyde Park Hotels following their acquisition by Cambulo Madeira (as I have found he did), and he did not disclose that interest to HPII before the Cambulo Madeira Transaction [i.e. the sale of the Hyde Park Hotels to Cambulo Madeira] (as it is common ground he did not), then he was in breach:
>
> i) of the fiduciary's duty not to place themselves in a position where their interest and duty conflict, by dealing with the company in their own interest: *Boardman v Phipps* [1967] 2 AC 46 and *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; and
>
> ii) the fiduciary's duty not to make an unauthorised profit from property which is subject to the fiduciary

> relationship: *Gwembe Valley Development Co Ltd v Koshy* [2004] 1 BCLC 131."

24. The Judge further accepted that Mr Ruhan's conduct gave rise to proprietary claims. In that connection, the Judge said in paragraph 224 of the Judgment:

> "I accept that when a director receives or disposes of the company's property in breach of fiduciary duty, the company is in principle entitled to trace the asset or its proceeds for the purposes of asserting a proprietary claim: *JJ Harrison (Properties) Ltd v Harrison* [2002] BCC 729, [25]-[28]. This case has been argued on the basis that, if the nominee case succeeds, there was beneficial receipt by Mr Ruhan …. Any proprietary claim by the beneficiary might be defeated because it ceases to be possible to identify the proceeds of the trust property and/or because the trust property (or property which represents it) is acquired by a bona fide purchaser for value."

25. Applying those principles to the facts, the Judge explained in paragraphs 270 and 271 of the Judgment that HPII contended that the "profits which Mr Ruhan was in a position to accrue by reason of his undisclosed self-dealing with HPII, but for which he did not account to HPII", were "themselves trust property, being the traceable proceeds of the Hyde Park Hotels sold to Cambulo Madeira in breach of trust". The Judge continued:

> "I accept that, in the absence of any defence of bona fide purchaser for value in relation to the acquisition by the Cambulo entities, the profits received from the on-sale of the Hyde Park Hotels are themselves trust property, in which HPII's existing beneficial interest continued: *Foskett v McKeown* [2001] AC 102, 127. In these circumstances, as against Mr Ruhan, those proceeds stand in the same position as the interests in the hotels did before them. It is well-settled that a director who acquires the company's property in breach of fiduciary duty holds that property on trust for the company (*JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467, [27]). As Chadwick LJ explained, this trusteeship is described as a constructive trusteeship, but it is what has been referred to as a 'type one' constructive trust because it arises by reason of a pre-existing fiduciary duty owed to HPII (adopting Millett LJ's categorisation in *Paragon Finance plc v Thakerar* [1999] 1 All ER 400, 408-409). If that is true of the hotels themselves, then I accept that is also true of their traceable proceeds in Mr Ruhan's hands."

26. As I understand it, the Judge's analysis in these respects reflected the parties' submissions. I find it helpful, however, to consider Mr Ruhan's position in more detail.

27. It is plain that, on the Judge's findings, Mr Ruhan breached the "self-dealing" rule. Megarry V-C expressed that rule in this way in *Tito v Waddell (No. 2)* [1977] Ch 106, at 241:

> "if a trustee sells the trust property to himself, the sale is voidable by an beneficiary ex debito justitiae, however fair the transaction".

The rule "is based, not only upon the consideration that a trustee cannot be both seller and buyer … but also on the wider principle that a trustee must not put himself in a position where there is a conflict or possible conflict between his interest and duty" (*Lewin on Trusts*, 20th ed., at paragraph 46-008; see also e.g. *Wright v Morgan* [1926] AC 788, at 797). Further, it does not apply only to trustees but extends to fiduciaries generally: see e.g. *Snell's Equity*, 34th ed., at paragraph 7-021, and *De Bussche v Alt* (1878) 8 Ch D 286.

28. In *Tito v Waddell (No. 2)*, Megarry V-C drew a distinction between disabilities and duties. He took the view that, where the self-dealing rule applies, that is not because the fiduciary in question has committed a breach of duty, but because "what equity does is to subject trustees to particular disabilities in cases falling within the self-dealing and fair-dealing rules": see 248. However, in *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048, [2004] 1 BCLC 131 ("*Gwembe Valley*") Mummery LJ, giving the judgment of the Court of Appeal, concluded at paragraph 108 that the distinction was "an unnecessary complication" and inconsistent with Millett LJ's exposition of the nature of fiduciary duties in *Bristol and West Building Society v Mothew* [1998] Ch 1: "Whether viewed as duties or disabilities", Mummery LJ said, "all such incidents are aspects of the fiduciary's primary obligation of loyalty".

29. As Megarry V-C's summary of the self-dealing rule indicates, breach of it has generally been understood to render the relevant transaction voidable rather than void. Thus, in *Re Cape Breton* (1885) 29 Ch D 795 (affirmed: (1887) 12 App Cas 652) ("*Cape Breton*"), Cotton LJ said at 803:

> "Where a trustee, purchasing on behalf of his *cestui que trust*, purchases his own estate without disclosing his own interest in it, the *cestui que trust*, when he discovers the fact, may, if he pleases, set aside the contract altogether, but then he must return that which has been purchased. The same rule applies, in the case of a purchase by a director on behalf of a company, of property in which he has any interest: if the company repudiates the contract, the property must be returned."

A century later, in *Guinness plc v Saunders* [1990] 2 AC 663 ("*Guinness*"), Lord Goff, after citing the judgments of Lords Wilberforce and Pearson in *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549, said at 697 that, to the extent that a director had failed to comply with the duty of disclosure imposed by the company's articles:

> "As a matter of general law, … the contract (if any) between [the director] and [the company] was no doubt voidable under the ordinary principles of the general law to which Lord

> Pearson refers. But it has long been the law that, as a condition of rescission of a voidable contract, the parties must be put in statu quo; for this purpose a court of equity can do what is practically just, even though it cannot restore the parties precisely to the state they were in before the contract."

The company, Lord Goff said at 698, "cannot short circuit an unrescinded contract simply by alleging a constructive trust". In a similar vein, Millett LJ, whose views were endorsed on appeal (see [2000] 1 AC 293, at 305 and 310) said in *Ingram v Inland Revenue Commissioners* [1997] 4 All ER 395 of "the rule which precludes a trustee from purchasing the trust property", at 424-425, "The purchase is not a nullity, though it is voidable at the instance of any beneficiary however honest and fair the transaction may be and even if it is at a price higher than that which could be obtained on the open market".

30. On this basis, contrary to the views which the Judge accepted in paragraph 271 of the Judgment, the Hyde Park Hotels will not themselves have been held on trust for HPII. The position will rather have been that HPII was entitled to rescind their sale. As I understood his submissions, Mr Pickering maintained that, notwithstanding the absence of rescission, HPII was the beneficial owner of the hotels as well as the owner of the money that Cambulo Madeira had paid for them. This would not obviously make sense. However, Mr Pickering argued that he was supported in this by *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467, [2002] 1 BCLC 162 ("*JJ Harrison*").

31. In *JJ Harrison*, the defendant, Mr Harrison, had bought land from a company of which he was the managing director without disclosing matters within his knowledge which were relevant to its development potential. By the time the claim was brought, the land had long since been sold on so there could be no question of the Court ordering it to be transferred back to the company. Mr Harrison, however, was ordered to account for his profits.

32. In the Court of Appeal, Chadwick LJ, with whom Laws LJ and Sir Anthony Evans agreed, concluded at paragraph 30 that Mr Harrison had held the relevant land "as a constructive trustee, in the sense described by Millett LJ in the first of the two categories identified in the *Paragon Finance* case". The "*Paragon Finance* case" was *Paragon Finance plc v Thakerar & Co* [1999] 1 All ER 400. Millett LJ had there explained the categories to which Chadwick LJ referred as follows at 408-409:

> "Regrettably, however, the expressions 'constructive trust' and 'constructive trustee' have been used by equity lawyers to describe two entirely different situations. The first covers those cases already mentioned, where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff.

> A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first class of case, however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust ….
>
> The second class of case is different. It arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be 'liable to account as constructive trustee'. Such a person is not in fact a trustee at all, even though he may be liable to account as if he were …."

33. In *JJ Harrison*, Chadwick LJ said:

> "[27] It follows … from the principle that directors who dispose of the company's property in breach of their fiduciary duties are treated as having committed a breach of trust that, a director who is, himself, the recipient of the property holds it upon a trust for the company. He, also, is described as a constructive trustee. But, as Millett LJ explained in *Paragon Finance plc v D B Thakerar &* Co [1999] 1 All ER 400 at 408–409, his trusteeship is different in character from that of the stranger. He falls into the category of persons who, in the words of Millett LJ ([1999] 1 All ER 400 at 408) . . . 'though not strictly trustees, were in an analogous position and who abused the trust and confidence reposed in them to obtain their principal's property for themselves.'
>
> [28] Millett LJ referred to persons within that category – that is to say, persons who had abused their powers so as to obtain their principal's property for themselves – as 'persons [who] are properly described as constructive trustees' ….
>
> [29] There is no doubt that Millett LJ regarded it as beyond dispute that a director who obtained the company's property for himself by misuse of the powers with which he had been entrusted as a director was a constructive trustee within the first category. … There is also no doubt, if I may say so, that he was correct to do so …. The reason is that a director, on appointment to that office, assumes the duties of a trustee in relation to the company's property. If, thereafter, he takes

> possession of that property, his possession 'is coloured from the first by the trust and confidence by means of which he obtained it'. His obligations as a trustee in relation to that property do not arise out of the transaction by which he obtained it for himself. The true analysis is that his obligations as a trustee in relation to that property predate the transaction by which it was conveyed to him. The conveyance of the property to himself by the exercise of his powers in breach of trust does not release him from those obligations. He is trustee of the property because it has become vested in him; but his obligations to deal with the property as a trustee arise out of his pre-existing duties as a director; not out of the circumstances in which the property was conveyed.
>
> [30] In the present case the judge found that, on the conveyance of the development land to Mr Harrison in February 1986, there was a failure by Mr Harrison to comply with the requirements of s 199 of, and regulation 84 in Pt 1 of Table A in Sch 1 to, the Companies Act 1985. But, more pertinently in this context, the judge also found that Mr Harrison acted in breach of his fiduciary duties as a director in failing to ensure that the land was sold at its full value – see the passage at para 58 of the judgment to which I have referred ([2001] 1 BCLC 158 at 174). Not only did Mr Harrison fail to make a proper disclosure of his interest; his existing duties as a director required him to ensure that the development land was not conveyed at all until the company had received and considered advice as to its value in the light of the change in planning potential …."

34. Chadwick LJ referred in this passage to paragraph 58 of the judgment of the trial judge, Mr Kevin Garnett QC. Mr Garnett had said in that paragraph:

> "Further, I accept that Peter Harrison was in breach of his duty to act bona fide in the best interests of Harrison Properties. It seems to me that his breaches included his failure to inform the other directors of the company fully of the facts about the planning status of the development land, his failure to do what he could to ensure that, if the company decided to sell the land, whether to him or someone else, steps were taken such that it was sold at its full market value, and finally the use of the company's resources to prepare and apply for planning permission in the company's name at a time when Peter Harrison intended that he should buy the property and thus have the benefit of that work."

35. Mr Pickering argued that *JJ Harrison* shows that, where a person buys property from a company of which he is a director in breach of the self-dealing rule, there is from the start a true trust in favour of the company. In my view, however, Chadwick LJ's judgment should not be understood in that way. I do not think he will have intended to indicate that property transferred to a person in breach of the self-dealing rule is always and at once held on trust for the transferor regardless of whether the transferor

has opted for rescission. The key to Chadwick LJ's judgment is, as it seems to me, to be found in the fact that Mr Harrison did not merely "fail to make a proper disclosure of his interest", but "acted in breach of his fiduciary duties as a director in failing to ensure that the land was sold at its full value" or (in Mr Garnett's words) "was in breach of his duty to act bona fide in the best interests of Harrison Properties". That being so, the transfer of the land to Mr Harrison must have been seen, not just as offending the self-dealing rule, but as unauthorised, with the result that there was a misapplication.

36. Where it has become impossible to rescind a transaction to which the self-dealing rule applied, it may nonetheless be possible, as the passage from *Guinness* quoted above indicates, to make a monetary award to similar effect: to "do what is practically just". The decision of Dixon A-J in *McKenzie v McDonald* [1927] VLR 134 may be said to provide an example of such "pecuniary rescission". While cases such as *Cape Breton* might have suggested otherwise, there may also be scope for awarding compensation for loss. In *Barnsley v Noble* [2014] EWHC 2657 (Ch), Nugee J said at paragraph 262, citing *Tito v Waddell (No. 2)* at 249, that "there is no doubt that in principle [a claim for 'equitable compensation'] lies for breach of the self-dealing rule". On appeal, Sales LJ, with whom Etherton C and Patten LJ expressed agreement, said that where a trustee acts in breach of the self-dealing rule, " the transaction will be liable to be rescinded (if that remedy is sought and remains available) and the trustee may be liable to pay equitable compensation": see [2016] EWCA Civ 799, [2017] Ch 191, at paragraph 29.

37. More importantly in the context of the present case, the fiduciary can potentially be ordered to account for profits. *Gwembe Valley* is relevant in this context. In that case, a company referred to as "GVDC", of which the defendant, Mr Koshy, was the managing director, acknowledged a debt of $5.8 million to a company referred to as "Lasco", of which Mr Koshy was a director and controlling shareholder, on the basis of advances in Zambian currency totalling K56.4 million. Lasco, had, however, been able to obtain the K56.4 million at a cost of only just over $1 million, as a result of a process called "pipeline dismantling". Mr Koshy was thus able to make a very large profit.

38. The Court of Appeal concluded that Mr Koshy should be ordered to account for his profits. In paragraph 118(ii), Mummery LJ explained:

> "Mr Koshy's personal liability to account to GVDC for profits made by him from his fiduciary position as a director is not dependent on establishing that he has received any money or other property belonging to GVDC as a result of the misapplication of GVDC's assets, whether in the form of payments made by GVDC directly to him, or in the form of payments made, via Lasco, indirectly to him. GVDC's causes of action against Mr Koshy were based on the equitable disabilities or the fiduciary duties to which he was subject as a director of GVDC. As such, he was under a personal liability in equity to account to GVDC for unauthorised profits: either because he was disabled in equity from making an unauthorised personal profit out of the position occupied by him and/or because he acted in dishonest breach of fiduciary duty by

> deliberately and secretly doing so. The profits made by him are treated as taken for and on behalf of GVDC, as the person to whom he owed the duty to account. As between him and GVDC, equity prevents Mr Koshy from asserting, in answer to the claim for an account, that he is entitled to retain the profits (if any) made by him for his own benefit."

Later in his judgment, in paragraph 137, Mummery LJ said:

> "The point is not … whether the loan transactions are void or voidable, or whether they were rescinded or not, or whether the property in the sums repaid passed out of the beneficial ownership of GVDC and became the property of Lasco, or even whether Lasco received the sums as trust property. The point is that Mr Koshy was not, as a fiduciary vis-à-vis GVDC, entitled to retain for his personal benefit any of the unauthorised profits dishonestly made from transactions between him and the company. If he received those profits directly in the form of payments to him or indirectly by, for example, the consequent increase in the value of his shareholding in Lasco, he cannot be heard to say, as against the beneficiary company, that he was entitled to retain any of the profits for himself."

Mr Koshy was, accordingly, liable to account to GVDC in respect of all profits made by him: see paragraph 138.

39. Mummery LJ observed in paragraph 119 that "any trust imposed on Mr Koshy is a class 2 trust, within Millett LJ's classification". He considered, in other words, that there was no true trust. That view, though, requires reassessment in the light of the decision of the Supreme Court in *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250 ("*FHR*"). It was there held that an agent who receives a bribe or secret commission holds it on his trust for the principal. The Supreme Court appears, however, to have taken the view that a principal can more generally assert a proprietary claim where an agent acquires a benefit which came to his notice as a result of his fiduciary position, or pursuant to an opportunity which resulted from his fiduciary position. Lord Neuberger, giving the judgment of the Court, saw virtue in "align[ing] the circumstances in which an agent is obliged to account for any benefit received in breach of his fiduciary duty and those in which his principal can claim the beneficial ownership of the benefit": see paragraph 36. There is now, therefore, a compelling argument that Mr Koshy in fact held his profits on a true trust for GVDC.

40. Mr Anthony de Garr Robinson KC, who appeared for Mr Stevens with Mr Sebastian Kokelaar and Mr Stephen Ryan, accepted that Mr Ruhan should likewise be considered to have held the profits derived from the Hyde Park Hotels on a true trust for HPII. Referring to paragraph 88 of the decision of the Supreme Court in *Aquila Advisory Ltd v Faichney* [2021] UKSC 49, [2021] 1 WLR 5666, Mr de Garr Robinson submitted that the trust will have arisen automatically as the profits were made. He added, however, that, if a principal elected to claim equitable compensation in place of an account of profits, the trust would come to an end retrospectively. That

submission reflected the fact that equitable compensation and an account of profits are alternative remedies. In *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514, Lord Nicholls said in this connection at 521:

> "The law frequently affords an injured person more than one remedy for the wrong he has suffered. Sometimes the two remedies are alternative and inconsistent. The classic example, indeed, is (1) an account of the profits made by a defendant in breach of his fiduciary obligations and (2) damages for the loss suffered by the plaintiff by reason of the same breach. The former is measured by the wrongdoer's gain, the latter by the injured party's loss ….
>
> Faced with alternative and inconsistent remedies a plaintiff must choose, or elect, between them. He cannot have both."

Dishonest assistance

41. To succeed in a claim for dishonest assistance, a claimant must prove (a) that there was a breach of trust or fiduciary duty, (b) that the defendant assisted in the breach, (c) that the defendant was dishonest and (d) a causal link with relevant loss or gain.

42. In *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC, Lord Nicholls, giving the judgment of the Privy Council, summarised the law in these terms at 392:

> "A liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation."

43. Lord Nicholls had in mind a claim for loss. It is now clear, however, that a dishonest assistant can be held liable for personal profit. In *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), Lewison J concluded that compensation is not the only remedy available against a dishonest assistant, but that a dishonest assistant could be ordered to account for any profit he had himself made. In paragraph 1600, Lewison J said:

> "I can see that it makes sense for a dishonest assistant to be jointly and severally liable for any *loss* which the beneficiary suffers as a result of a breach of trust. I can see also that it makes sense for a dishonest assistant to be liable to disgorge any profit which he *himself* has made as a result of assisting in the breach. However, I cannot take the next step to the conclusion that a dishonest assistant is also liable to pay to the beneficiary an amount equal to a profit which he did not make and which has produced no corresponding loss to the beneficiary."

44. The Court of Appeal took a similar view in *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] QB 499 ("*Novoship*"). Longmore LJ, giving the judgment of the Court of Appeal, said that "[t]he nature of the liability … is that the … dishonest assistant has, in principle, the responsibility of an express trustee" (paragraph 82); that

that responsibility "would include, in an appropriate case, a liability to account for profits" (paragraph 82); and that where an equitable wrong is linked with a breach of fiduciary duty, the Court saw "no reason why a court of equity should not be able to order the wrongdoer to disgorge his profits in so far as they are derived from wrongdoing" (paragraph 84). Longmore LJ concluded in paragraph 93 that "the remedy of an account of profits is available against one who dishonestly assists a fiduciary to breach his fiduciary obligations, even if that breach does not involve a misapplication of trust property". Such an account is, however, limited to profits of the *dishonest assistant*. Longmore LJ noted in paragraph 77 that "even in Australian law a knowing participant is not generally required to account for profits that he did not make: *Grimaldi v Chameleon Mining NL (No 2)* (2012) 287 ALR 22, para 536".

45. In contrast, the authorities indicate that a dishonest assistant is jointly and severally liable with the fiduciary for loss. In *Cowper v Stoneham* (1893) 68 LT 18, Stirling J said at 19 that trustees and solicitors who were said to have become constructive trustees were "all equally liable". In *Trustor AB v Smallbone* (Court of Appeal, 9 May 2000, unreported), Scott V-C, with whom Buxton LJ and Gage J agreed, held at paragraph 97 that a dishonest assistant, Mr Smallbone, "would be liable jointly and severally" and his "joint and several liability would not be confined to the part that he personally received". In *Ultraframe*, as can be seen from the passage from his judgment quoted above, Lewison J said that he could "see that it makes sense for a dishonest assistant to be jointly and severally liable for any *loss* which the beneficiary suffers as a result of a breach of trust".

46. That a dishonest assistant's liability for loss is reflective of the fiduciary's is also suggested by *Grupo Torras SA v Al-Sabah*. At first instance, Mance LJ said at page 238:

> "the requirement of dishonest assistance relates not to any loss or damage which may be suffered but to the breach of trust or fiduciary duty. The relevant enquiry is … what loss or damage resulted from the breach of trust or fiduciary duty which has been dishonestly assisted. In this context, as in conspiracy, it is inappropriate to become involved in attempts to assess the precise causative significance of the dishonest assistance in respect of either the breach of trust or fiduciary duty or the resulting loss."

On appeal, the Court of Appeal endorsed that comment: see [2001] CLC 221, at paragraph 119.

47. With regard to the assistance element of a claim for dishonest assistance, Lord Millett pointed out in *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 ("*Twinsectra*"), at paragraph 107, that liability:

> "extends to everyone who consciously assists in the continuing diversion of the money. Most of the cases have been concerned, not with assisting in the original breach, but in covering it up afterwards by helping to launder the money".

The compensation claim against Mr Stevens

The Judge's approach

48. The Judge concluded in paragraph 294 of the Judgment that "HPII's claim for equitable compensation succeeds both against Mr Ruhan and against Mr Stevens". He did so on the basis that "Mr Ruhan did commit separate breaches of fiduciary [duty] when acquiring the Hyde Park Hotels, and in applying the profits for his own purposes, and … there are separate causes of action against Mr Stevens for dishonestly assisting in those breaches": see paragraph 285. The Judge went on:

> "286. First, the beneficiary's ability to trace into profits made by the trustee through unauthorised dealings with trust assets is often rationalised on the basis that the beneficiary has a right of election between treating such an unauthorised act as a wrong causing loss for which equitable compensation can be claimed, or adopting the act and treating the proceeds as trust property (see for example Lord Millett in *Foskett v McKeown* [2001] 1 AC 102, 130-131, citing Professor Williston's statement that 'the cestui que trust should be allowed to regard the acts of the trustee as done for his benefit'). It can be argued that if the beneficiary takes this course, then there can be no dishonest assistance in respect of acts of the fiduciary which are so adopted, leaving only such breaches as the beneficiary does not choose to adopt, which can be the subject of a claim in dishonest assistance.
>
> 287. Second, the fiduciary does appear to commit a separate breach of duty when it applies the proceeds of trust property (in this case the profits of the sale) for its own purposes, and if there is a separate and significant act of dishonest assistance by the original assistant at that stage, there should be a separate cause of action against the assistant at that point. The issue can be tested by considering the position of a fresh assistant, who arrives after the fiduciary has realised a profit from trust property acquired in breach of the self-dealing rule. It seems clear that someone who dishonestly assists the fiduciary in moving or dissipating the profits held by the fiduciary on constructive trust is liable for that dishonest assistance: see [277] above and also Lord Millett's comment in *Twinsectra Ltd v Yardley* [2002] 2 AC 164, [107], that liability for dishonest assistance:
>
> > 'extends to everyone who consciously assists in the continuing diversion of the money. Most of the cases have been concerned, not with assisting

> in the original breach, but in covering it up afterwards by helping to launder the money'.
>
> If the actions of the new assistant give rise to a cause of action at that point, I have struggled to see why a further act of assistance by the original dishonest assistant has a different status.
>
> 288. Third, if the position of the corporate recipient of the property (Cambulo Madeira) is brought into the analysis at this point, and it is treated as having received the property beneficially but with the fiduciary's notice attributed to it … , then the payment of the profits away by the corporate body would be a breach of the type-2 constructive trust which arose by reason of its knowing receipt, and if the dishonest assistant assisted that breach, it would be liable …. I cannot see why a different result follows if (as is the assumed position here) the corporate vehicle receives as nominee for the fiduciary, who committed a breach of fiduciary duty in acquiring trust property, and then uses the profits for their own purposes, the dishonest assistant assisting at both stages.
>
> 289. If, by contrast, I had concluded that there was a single breach of fiduciary duty by Mr Ruhan, in which Mr Stevens committed two distinct acts of dishonest assistance, then HPII's claim would have run into greater difficulties. This is because the authorities hold … that the causal test to be applied when assessing a claim for equitable compensation for the equitable wrong of dishonest assistance is the loss caused by the breach of fiduciary duty which has been assisted, rather than by the acts of dishonest assistance themselves. Given my conclusion that there were distinct breaches of fiduciary duty by Mr Ruhan, I do not need to consider those difficulties further."

49. With regard to whether, on the facts, Mr Stevens could be seen to have assisted in Mr Ruhan's "failure to account for the profit to HPII and/or his application of that profit for his own use", the Judge said this in paragraph 293 of the Judgment:

> "i) As the individual in whose name and under whose nominal control the profit was held, and who applied that profit for Mr Ruhan's purposes on Mr Ruhan's instructions, I am satisfied that Mr Stevens played a sufficient role in relation to the acquisition, retention and disposal of those profits to meet the causal requirements of the equitable wrong of dishonest assistance at that stage.

> ii) If that is the case, whatever causal test is to be applied, Mr Stevens is liable for the loss caused by the failure to hand-over the profits, those being losses which necessarily flow from the breach of what is sometimes referred to as the 'custodial' duty of the constructive trustee (whether properly characterised as fiduciary or equitable)."

50. The Judge explained in paragraph 296 of the Judgment that he had not found the answer at which he had arrived "entirely satisfactory or wholly intuitive". In that connection, he said:

> "i) It might be said that the success of the argument elides many of the distinctions between claims for an account of profits and claims for equitable compensation, despite the very different nature of those two remedies and the legal regimes which govern them.
>
> ii) In substance, HPII's complaint here is that Mr Ruhan abused his position as a fiduciary to make a profit which HPII would not have made for itself, and that Mr Stevens dishonestly assisted him in that. It might be said that, as a matter of substance, that is a claim for an account, and it should carry whatever legal consequences follow from that categorisation.
>
> iii) In certain factual scenarios, including this one, the argument might be said to come close to rendering the dishonest assistant liable for the profits made by the fiduciary even though English law has not chosen to render dishonest assistants directly so liable, and to permit such a claim 'as of right', notwithstanding the 'strong' discretion which exists in determining whether to order the dishonest assistant to account for their profits and (perhaps) without the benefit of the more exacting causation test which would have applied to such a claim.
>
> iv) The result might be thought particularly strict, because of the consequences which follow from applying the causation test set out in [293] above to claims for dishonest assistance in the breach of purely custodial duties (as opposed to a test considering the effect on the beneficiary of the acts of dishonest assistance)."

The parties' cases in outline

51. As I indicated earlier, Mr de Garr Robinson did not dispute that the profits derived from the Hyde Park Hotels were held on a true trust for HPII. Nor did he maintain that there could never be a claim for breach of that trust or dishonest assistance in such a breach. His position was that, on the facts of this case, any such breach and assistance

were so inextricably bound up with Mr Ruhan's original breach of fiduciary duty that HPII's claim for compensation had to be assessed by reference to the overall effect of the parties' conduct rather than merely what happened to the profits once they had been achieved. Any breach of duty as regards the profits, Mr de Garr Robinson submitted, could not be seen as an independent or distinct breach. That being so, the Judge should have concluded that, while Mr Stevens could be called on to account for the profits he had himself derived, he was not liable for any compensation for loss. There being no suggestion that HPII was paid less than market value for the Hyde Park Hotels or that it would otherwise have realised a better return on them, the Judge should have held that there was no relevant loss.

52. In contrast, Mr James Pickering KC, who appeared with Mr Samuel Hodge for HPII and its liquidator, supported the Judge's decision. The profits generated from the Hyde Park Hotels having been held on trust for HPII, it was entitled to complain of Mr Ruhan's failure to account for, and dissipation of, them. Moreover, Mr Stevens could be seen to have assisted in such breaches of duty. There were separate and distinct breaches of duty, and acts of assistance, in relation to the profits. As the Judge found, "Mr Stevens played a sufficient role in relation to the acquisition, retention and disposal of those profits to meet the causal requirements of the equitable wrong of dishonest assistance at that stage". In the circumstances, the Judge was right to hold that Mr Stevens was liable for the loss of the profits and, hence, to order him to pay sums totalling £102.26 million by way of compensation. The profits to which HPII had had a proprietary claim no longer being traceable, HPII had plainly suffered loss.

53. By way of respondent's notice, Mr Pickering contended that the Judge's decision could also be justified by reference to the distinction between "substitutive" and "reparative" compensation. Mr Pickering argued that Mr Ruhan was liable to pay compensation on a "substitutive" basis (and so by reference to the value of the relevant property) in respect of the loss of the profits which had been held on trust for HPII and that, having dishonestly assisted Mr Ruhan, Mr Stevens was liable to the same extent.

Authorities

54. Searching for analogies, Mr de Garr Robinson referred us to *Bartlett v Barclays Bank Trust Co Ltd (Nos. 1 and 2)* [1980] Ch 515 ("*Bartlett*"). In *Bartlett*, a trust had held almost all the shares in a property company ("BTL") which had embarked on a policy of speculative development. In pursuance of that policy, the company undertook projects in Guildford and in Old Bailey, in London. A profit was realised on the Guildford project, but the Old Bailey project resulted in a large loss. Brightman J held that the bank which had been the trustee of the trust had failed in its duties and was liable for the loss suffered by the trust, but he also concluded that the profit on the Guildford project should be taken into account when determining the extent of the bank's liability. In that context, he said at 538:

> "There remains this defence, which I take from paragraph 26 of the amended pleading:
>
> > 'In about 1963 [BTL] purchased a site at Woodbridge Road, Guildford, pursuant to the policy pleaded in paragraph 19 hereof, for the sum of £79,000, and re-

> sold the same for £350,000 to MEPC Ltd. in 1973. The net profit resulting from such sale was £271,000. If, which is denied, the defendant is liable for breach of trust whether as alleged in the amended statement of claim or otherwise, the defendant claims credit for such sum of £271,000 or other sum found to be gained in taking any accounts and inquiries.'

> The general rule as stated in all the textbooks, with some reservations, is that where a trustee is liable in respect of distinct breaches of trust, one of which has resulted in a loss and the other in a gain, he is not entitled to set off the gain against the loss, unless they arise in the same transaction: see *Halsbury's Laws of England*, 3rd ed., vol. 38 (1962), p. 1046; *Snell's Principles of Equity*, 27th ed. (1973), p. 276; *Lewin on the Law of Trusts*, 16th ed. (1964), p. 670 and *Underhill's Law of Trusts and Trustees*, 12th ed. (1970), p. 634. The relevant cases are, however, not altogether easy to reconcile. All are centenarians and none is quite like the present. The Guildford development stemmed from exactly the same policy and (to a lesser degree because it proceeded less far) exemplified the same folly as the Old Bailey project. Part of the profit was in fact used to finance the Old Bailey disaster. By sheer luck the gamble paid off handsomely, on capital account. I think it would be unjust to deprive the bank of this element of salvage in the course of assessing the cost of the shipwreck. My order will therefore reflect the bank's right to an appropriate set-off."

55. Mr de Garr Robinson also relied on *Geldof Metaalconstructie NV v Simon Carves Ltd* [2010] EWCA Civ 667, [2010] 1 CLC 895 ("*Geldof*"), where Rix LJ considered the circumstances in which equitable set-off is available. One of the authorities which Rix LJ cited was *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc (The Nanfri)* [1978] 2 QB 927 ("*The Nanfri*"), where Lord Denning MR said at 974-975:

> "it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim".

In paragraph 43(vi) of his judgment in *Geldof*, Rix LJ said that he would "underline Lord Denning's test, freed of any reference to the concept of impeachment, as the best restatement of the test, and the one most frequently referred to and applied, namely: 'cross-claims … so closely connected with [the plaintiff's] demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim'." Earlier in paragraph 43, Rix LJ had observed that "[t]here is clearly a formal requirement of close connection" (paragraph 43(ii)) and that "[t]here is also

clearly a functional requirement whereby it needs to be unjust to enforce the claim without taking into account the cross-claim" (paragraph 43(iv)).

56. For his part, as well as pointing out that *Bartlett* and *The Nanfri* were concerned with issues different to that which arises in the present case, Mr Pickering took us to *Brown v KMR Services Ltd* [1995] 4 All ER 598. In that case, the claimant, who had been an underwriting name at Lloyd's, had suffered losses in 1988, 1989 and 1990 but made profits in 1986 and 1987. The majority of the Court of Appeal held the principle applied by Brightman J in *Bartlett* to be inapplicable and that the profits could not be set against the losses. Hobhouse LJ, with whom Peter Gibson LJ agreed, said at 640-641:

> "The correct analysis is that there have been a series of separate breaches of contract on the part of the defendants. In each year it was the contractual duty of the defendants to advise Mr Brown on his allocations for the following year. The plaintiff therefore has an independent and separate cause of action in respect of each year. His cause of action in respect of an earlier year might become time-barred when that in respect of a later year was not. The cause of action in respect of the underwriting year 1990 is under a different contract to that covering the previous years.
>
> Mr Brown is entitled to sue in respect of each distinct cause of action. Each cause of action gives rise to a right in law to recover the damages which the plaintiff has suffered by reason of the breach which constitutes that cause of action. The cause of action is a legal one arising under contract and is not dependent upon any equitable or restitutionary principle (see *Westdeutsche Landesbank Girozentrale v Islington London BC, Kleinwort Benson Ltd v Sandwell BC* [1994] 4 All ER 890, [1994] 1 WLR 938). It was not an action for an account. Although there was an element of repetition in the defendants' breaches, it was not a case of a continuing breach. Each breach was complete when the plaintiff had been committed to that year's allocation. Accordingly, the function of the court in the present case, and its sole function, is to find and award to the plaintiff the damages which the plaintiff has proved that he has suffered as a result of, respectively, the three distinct breaches of contract upon which he has succeeded: in 1987 for the year 1988, in 1988 for the year 1989 and in 1989 for the year 1990.
>
> … Where a plaintiff has distinct legal causes of action he is entitled to choose in respect of which causes of action he sues. Other potential causes of action are irrelevant, just as it is irrelevant in the present action whether the plaintiff made a profit or a loss on the underwriting year 1991.
>
> …

> Stuart-Smith LJ, with whom I have the misfortune to disagree on this point, has referred to the case *Bartlett v Barclays Bank Trust Co Ltd* ….
>
> Brightman J observed that part of the profits from the company's successful speculation had been used to finance the unsuccessful speculation, adding, 'I think it would be unjust to deprive the [trustee] of this element of salvage in the course of assessing the cost of the shipwreck' …. The principle applied by Brightman J arose from the context of that particular case. It cannot, in my judgment, properly be applied to the legal remedies being enforced in the present case. Indeed, the principle applicable to such cases is summarised in the recently published 48 *Halsbury's Laws* (4th edn reissue) para 954, in terms which are scarcely helpful to the defendants:
>
> > 'Where a trustee is liable in respect of distinct breaches of trust, one of which has resulted in a loss and the other in a gain, he is not entitled to set off the gain against the loss, but is liable for the whole loss occasioned by the one breach, while the estate is entitled to the whole gain realised by the other.'
>
> The defendants seek to invoke a consequence of the principle of indemnity but, as I have sought to explain, that principle does not disentitle the plaintiff from recovering what he has lost in respect of each of his three causes of action."

57. With regard to "substitutive" and "reparative" compensation, Mr Pickering relied on *Interactive Technology Corporation Ltd v Ferster* [2018] EWCA Civ 1594, where David Richards LJ (with whom I agreed) said:

> "16. … Equitable compensation is apt to include a payment made to restore to a claimant the value of assets or funds removed without authority by a trustee or other fiduciary, such as a director. It may also include reparation for losses suffered by the claimant, such as in this case any tax penalties and interest resulting from the payment of the unauthorised remuneration. But, it is not restricted to reparation for losses ….
>
> 17. The position is stated in *Underhill and Hayton: Law Relating to Trusts and Trustees* (19th ed., 2016) at para 87.11:
>
> > 'Equity recognises two types of compensation claim against trustees, which will be termed substitutive performance claims and reparation claims. Substitutive performance claims are claims for a money payment as a substitute for performance of the trustee's obligation to produce trust assets *in specie* when called upon to do so. Claims of this sort are apposite when trust property has been misapplied in

> an unauthorised transaction, and the amount claimed is the objective value of the property which the trustees should be able to produce. Reparation claims are claims for a money payment to make good the damage caused by a breach of trust, and the amount claimed is measured by reference to the actual loss sustained by the beneficiaries. Claims of this sort are often brought where trustees have carelessly mismanaged trust property, but they lie more generally wherever a trustee has harmed his beneficiaries by committing a breach of duty.'

18. In the same work, the means by which these two types of equitable compensation are given through an accounting process are explained at para 87.7:

> 'As discussed below, there are two types of compensatory claim which can lie against trustees: substitutive performance claims and reparation claims. These are mediated through proceedings for an account in different ways. In the case of a substitutive performance claim where the trustees have made an unauthorised distribution of trust property or used trust funds to purchase an authorised investment, the court will not permit the trustees to enter the distribution or expenditure into the accounts as an outgoing because it will not permit the trustees to say that they acted in breach of duty. Instead, they will be treated as though they have spent their own money and kept the trust assets intact. The accounts will be falsified to delete the unauthorised outgoing, and the trustees will be ordered to produce the relevant trust property *in specie* or pay a money substitute out of their own pockets. Reparation claims are brought into the scheme of the accounts in a different way. The loss claimed by the beneficiaries is translated into an accounting item by surcharging the trustees with the amount of the loss as if they had already received this amount for the beneficiaries. They must then pay this sum into the trust funds out of their own pockets.'

19. These claims for equitable compensation were described with characteristic lucidity by Lord Millett NPJ in *Libertarian Investments Ltd v Hall* [2014] 1 HKC 368, a decision of the Court of Final Appeal of Hong Kong. At [168], he referred to substitutive compensation:

> 'Once the plaintiff has been provided with an account he can falsify and surcharge it. If the account discloses an unauthorised disbursement the plaintiff may falsify it, that is to say ask for the disbursement to be disallowed. This will produce a deficit which the defendant must make good, either *in specie* or in money. Where the defendant is ordered to make good the deficit by the payment of money, the

> award is sometimes described as the payment of equitable compensation; but it is not compensation for loss but restitutionary or restorative. The amount of the award is measured by the objective value of the property lost determined at the date when the account is taken and with the full benefit of hindsight.'

20. At [170], Lord Millett addressed reparative compensation:

> 'If on the other hand the account is shown to be defective because it does not include property which the defendant in breach of his duty failed to obtain for the benefit of the trust, the plaintiff can surcharge the account by asking for it to be taken on the basis of 'wilful default', that is to say on the basis that the property should be treated as if the defendant had performed his duty and obtained it for the benefit of the trust. Since *ex hypothesi* the property has not been acquired, the defendant will be ordered to make good the deficiency by the payment of money, and in this case the payment of 'equitable compensation' is akin to the payment of damages as compensation for loss.'"

Mr Pickering also cited, among other authorities, *Auden McKenzie (Pharma Division) Ltd v Patel* [2019] EWCA Civ 2291, [2020] BCC 316 and *Davies v Ford* [2021] EWHC 2550 (Ch) and, on appeal, [2023] EWCA Civ 167.

58. Mr de Garr Robinson, however, disputed the usefulness and validity of the "substitutive"/"reparative" distinction, referring in particular to *Burrows, "Remedies for Torts, Breach of Contract, and Equitable Wrongs"*, 4th ed., at 515-520, *Worthington, "Four Questions on Fiduciaries"* (2016) 2 CJCCL723 (and also (2018) 1 TL 22), *Target Holdings Ltd v Redferns* [1996] AC 421 and *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58, [2015] AC 1503.

Analysis

59. The Judge himself expressed a degree of unease about the approach he was adopting. He recognised that it might be said that it "elides many of the distinctions between claims for an account of profits and claims for equitable compensation".

60. A specific point which the Judge identified was that "the argument might be said to come close to rendering the dishonest assistant liable for the profits made by the fiduciary even though English law has not chosen to render dishonest assistants directly so liable". The Judge was clearly right about this. In *Ultraframe*, Lewison J could see that it made sense for a dishonest assistant to be liable to disgorge "any profit which he *himself* has made as a result of assisting in the breach", but he did not think it right to conclude that a dishonest assistant was liable to pay "an amount equal to the profit which he did not make and which has produced no corresponding loss to the beneficiary". Likewise, in *Novoship* the Court of Appeal considered that a dishonest assistant could be ordered to account for *his* profits, but not for the fiduciary's. The Judge, however, has given judgment against Mr Stevens in the amounts of the profits which accrued to Mr Ruhan.

61. The Judge saw, too, that HPII's complaint was, "[i]n substance, … that Mr Ruhan abused his position as a fiduciary to make a profit which HPII would not have made for itself, and that Mr Stevens dishonestly assisted him in that". The conventional understanding would, I think, have been that, in such a situation, the claimant cannot have both an account of profits and compensation for loss. As Lord Nicholls said in *Tang Man Sit v Capacious Investments Ltd*, the "classic example" of remedies between which a claimant must choose is "(1) an account of the profits made by a defendant in breach of his fiduciary obligations and (2) damages for the loss suffered by the plaintiff by reason of the same breach".

62. Of course, it is HPII's case that it is seeking compensation for loss in respect of a different breach of fiduciary duty from that for which it has claimed an account of profits. According to HPII, the account arises out of the original sale of the Hyde Park Hotels while the compensation relates to the misapplication of the profits held on trust for HPII.

63. However, the Judge's order does not distinguish between different breaches of fiduciary duty by Mr Ruhan. The Judge held that HPII was entitled to "(at its election) an account of profits or equitable compensation for breach of fiduciary duty" (see paragraph 342(i) of the Judgment), and HPII unsurprisingly opted for an account of profits. Paragraph 7 of the Judge's order accordingly provides baldly for Mr Ruhan to "account to HPII" for sums of £7,760,000 and £94,500,000. An order for an account of profits has thus been made in respect of the *totality* of Mr Ruhan's conduct. There is nothing to indicate that either HPII's election for an account of profits, or the order made on the strength of it, was limited to the original sale of the Hyde Park Hotels, leaving HPII free to claim compensation from Mr Ruhan for misapplication of the profits.

64. In any event, the sale was inextricably connected to the profits for whose loss HPII is seeking compensation. Mr Ruhan evidently caused Cambulo Madeira to buy the Hyde Park Hotels in the hope that he could generate a profit from them, and he did so. Not only were the profits derived from the purchase of the hotels, but there is no question of their being the product of an independent plan. To the contrary, they brought to fruition the scheme on which Mr Ruhan had embarked with the acquisition of the hotels. Moreover, Mr Stevens was involved from the start.

65. It is true that, as Mr Pickering stressed, the process took some time. Even the Lancaster Gate Hotel profit was not realised until about 18 months after Cambulo Madeira had bought the Hyde Park Hotels, and the Kensington Hotels were not sold until some three years after Cambulo Madeira had first acquired them. However, it is not surprising that there should be such lapse of time where redevelopment is proposed and, in any event, there was no interruption in the implementation of Mr Ruhan's overall scheme or Mr Stevens' role in it. It simply took time to carry the scheme into effect.

66. Another way in which the sale of the Hyde Park Hotels and the compensation claim are tied together is to be found in the basis on which the profits to which the compensation claim relates are said to have been subject to a trust in favour of HPII. The trust reflects, and is a product of, the liability to account arising from the original sale. Had HPII opted against any account of profits as against Mr Ruhan, it could not have maintained the claim that the profits were held on trust for it and the foundation

for the order requiring Mr Stevens to pay compensation equal to the amount of the profits would have fallen away.

67. Standing back from the detail, there was a single and uninterrupted course of conduct which, taken as a whole, caused HPII no loss. That being so, it strikes me as just that Mr Stevens' liability should be limited to his personal profit. That conclusion is borne out by *Ultraframe* and *Novoship*, where the Courts took the view that a dishonest assistant should be liable for any profit he had himself made, but not for the fiduciary's. To adapt language used in *The Nanfri* and *Geldof*, the account and compensation claims are, as it seems to me, "so closely connected" that it would be "manifestly unjust" to allow HPII to focus exclusively on Mr Ruhan's failure to account for the profits once they had accrued. Whether or not HPII has suffered a loss should be determined by reference to the total effect of Mr Ruhan's scheme. To put things differently, the "loss" stemming from Mr Ruhan's treatment of the profits must be balanced against the claim to recover those very profits which arose from the same plan.

68. I do not consider that the observation of Lord Millett in *Twinsectra* which I have quoted in paragraph 47 above and to which the Judge referred in paragraph 287 of the Judgment detracts from this analysis. Lord Millett's point was that liability can arise from complicity in a cover-up. He did not in terms address the basis on which compensation should be assessed in such a case, and it may well be that he envisaged the dishonest assistant being liable for the loss flowing from the "original breach" which had been concealed. At any rate, Lord Millett was not saying anything about whether, where a dishonest assistant has been involved with both an initial breach of fiduciary duty and a failure to account for profits derived from it, compensation can be assessed by reference to the loss of the profits alone.

69. Nor do I think it assists HPII to invoke the (controversial) distinction between "substitutive" and "reparative" compensation. It appears to me that, for the reasons I have given, HPII is not entitled to compensation of *any* kind.

70. That, in my view, is a sufficient reason to allow the appeal. I would add, however, that it seems to me arguable that there is a further (and perhaps more fundamental) objection to HPII's compensation claim.

71. While it has become clear that an errant fiduciary and a dishonest assistant cannot be held liable for each other's profits but only for their own, liability for loss is understood to be joint and several. To this extent, the dishonest assistant's liability mirrors the fiduciary's. That does not mean that a claimant cannot succeed against a dishonest assistant without also bringing proceedings against the fiduciary; in fact, it is not difficult to envisage circumstances in which it could make sense to sue a dishonest assistant alone. There might, moreover, be room for argument over whether a dishonest assistant could escape liability merely because the fiduciary was protected by an exemption clause. Supposing, however, that, as regards the relevant breach of fiduciary duty, the claimant had elected for an account of profits instead of compensation as against the fiduciary (as, in fact, could be said to have happened in the present case), I should not have thought that compensation could be sought from the dishonest assistant. That it would not be possible to claim compensation from the dishonest assistant in such circumstances might, I suppose, follow simply from the need to choose between inconsistent remedies. More generally, though, it seems to me

that, for there to be scope for a claim for compensation for loss from a dishonest assistant, the fiduciary should also be so liable.

72. In the present case, the Judge concluded in paragraph 287 of the Judgment that HPII's claim for equitable compensation succeeded against Mr Ruhan as well as Mr Stevens (see paragraph 294), having observed in paragraph 287 that "the fiduciary does appear to commit a separate breach of duty when it applies the proceeds of trust property (in this case the profits of the sale) for its own purposes". However, I find it hard to see that HPII could both have made the election in favour of an account of profits without which there would have been no trust and have had a claim (or at any rate one of any significance) for compensation for breach of that trust. A trust of the kind HPII alleges may enable a claimant to trace profits into the hands of third parties, improve the claimant's position in an insolvency and allow the Court to order a transfer in specie. It does not appear, though, to have all the usual incidents of a trust. In *Lonrho plc v Fayed (No 2)* [1992] 1 WLR 1, Millett J observed at 12 that "[i]t is a mistake to suppose that in every situation in which a constructive trust arises the legal owner is necessarily subject to all the fiduciary obligations and disabilities of an express trustee". Thus, I am not aware of any suggestion that a trust such as found in the present case gives rise to a duty to invest. It is also, I think, open to serious question whether a fiduciary can incur liability to pay compensation for breaching a trust of this type and, still more, whether any substantial sum could be recovered on this basis. The parties did not refer us to any case in which such a claim has been asserted, let alone succeeded, and it is not obvious that the law should deem such a liability to have arisen. It is by no means evident that a fiduciary is, or ought to be, vulnerable to a claim going beyond what could be recovered by way of account of profits. In *Re Caerphilly Colliery Co, Pearson's Case* (1877) 5 Ch D 336, Jessel MR said in a passage quoted by Lord Neuberger in *FHR* at paragraphs 19 and 36 that a director who had obtained a benefit "must be deemed to have obtained it under circumstances which made him liable, at the option of the cestuis que trust, to account either for the value at the time of the present he was receiving, or to account for the thing itself and its proceeds if it had increased in value". It strikes me as arguable that no separate claim for compensation for misapplication of a benefit could be maintained and that, even if that were possible in principle, no substantial amount could be awarded in respect of it.

73. Be that as it may, however, it seems to me that, for the reasons given earlier in this judgment, HPII has not established any liability to pay equitable compensation as against Mr Stevens.

Compound interest

74. The Judge concluded in the Consequentials Judgment that it was appropriate to order both Mr Ruhan and Mr Stevens to pay compound interest at a rate of 2.5% over Bank of England base rates with six-monthly rests. Mr Ruhan and Mr Stevens were each, accordingly, ordered to pay interest of £5,990,559.42 in respect of the Lancaster Gate Hotel and £53,942,066.62 in respect of the Kensington Hotels for the period up to 4 July 2022.

75. As part of his appeal, Mr Stevens challenged the award of compound interest as against him. In the event, however, the order for him to pay HPII compensation is to be set aside in its entirety and an order for an account of profits substituted. Mr

Pickering said that he would prefer to reserve his position as to whether compound interest should be paid until the outcome of the account was known, and on balance I think it preferable to defer any argument about compound interest to that stage. That appears the more desirable since we were not referred to, and so heard no argument about, *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561, which on the face of it would be relevant.

Overall conclusion

76. I would allow the appeal. More specifically, I would set aside the order for Mr Stevens to pay equitable compensation and, with it, the order requiring him to pay interest on that compensation. Further, I would leave all issues as to interest to be reconsidered in the context of the account of profits.

Lord Justice Males:

77. I agree with the judgment of Lord Justice Newey. I add these further comments on the approach to be taken when a defendant has committed two breaches of duty.

78. As the judge found, HPII was aware of the development potential of the hotels, but was not itself in a position to exploit it. Instead it sold them to Cambulo Madeira for an objectively reasonable market price after taking extensive professional advice. Nevertheless the sale to Cambulo Madeira was in breach of a fiduciary duty owed to HPII by Mr Ruhan, a director of HPII, because he failed to disclose that Cambulo Madeira was his nominee. Mr Stevens assisted dishonestly in that breach of duty.

79. Cambulo Madeira (or companies connected with it) then sold on the hotels to unconnected third parties for a substantial profit, which accrued to Mr Ruhan. The sale constituted a further breach of fiduciary duty by Mr Ruhan because he had made an unauthorised profit, for which he failed to account to HPII, from property which was subject to a fiduciary relationship. Again Mr Stevens assisted dishonestly in that breach of duty.

80. There were therefore two breaches of fiduciary duty by Mr Ruhan, in each of which Mr Stevens assisted. Considered by itself, the first breach of duty (the sale to Cambulo Madeira) caused HPII no loss. HPII received the market price for the assets which it owned. Likewise, if both breaches are considered together as a single transaction or course of conduct, HPII has suffered no loss. It received the market price for the assets which it owned and was never in a position to obtain the profits from exploiting the development potential of the hotels which Mr Ruhan was able to obtain.

81. However, HPII contends that it is able to recover from Mr Stevens, as equitable compensation, the profits made by Mr Ruhan from the sale of the hotels (i.e. compensation for the second breach) while ignoring the fact that it was only because of the first breach that these profits were able to be made.

82. There are apparently conflicting authorities on the question whether a claimant is entitled to recover damages or compensation for a loss suffered as a result of one breach of duty while ignoring a gain obtained as a result of another breach of duty. In

Bartlett v Barclays Bank Trust Co Ltd (Nos. 1 and 2) [1980] Ch 515, Mr Justice Brightman said that:

> "The general rule as stated in all the textbooks, with some reservations, is that where a trustee is liable in respect of distinct breaches of trust, one of which has resulted in a loss and the other in a gain, he is not entitled to set off the gain against the loss, unless they arise in the same transaction: see *Halsbury's Laws of England*, 3rd ed., vol. 38 (1962), p. 1046; *Snell's Principles of Equity*, 27th ed. (1973), p. 276; *Lewin on the Law of Trusts*, 16th ed. (1964), p. 670 and *Underhill's Law of Trusts and Trustees*, 12th ed. (1970), p. 634. The relevant cases are, however, not altogether easy to reconcile."

83. However, in *Brown v KMR Services Ltd* [1995] 4 All ER 598, Lord Justice Hobhouse said that:

> "The correct analysis is that there have been a series of separate breaches of contract on the part of the defendants. In each year it was the contractual duty of the defendants to advise Mr Brown on his allocations for the following year. The plaintiff therefore has an independent and separate cause of action in respect of each year. …
>
> Where a plaintiff has distinct legal causes of action he is entitled to choose in respect of which causes of action he sues. Other potential causes of action are irrelevant …"

84. I would suggest that the key to reconciling these apparently conflicting statements is to be found in Mr Justice Brightman's reference to gains and losses arising "in the same transaction" and that a useful guide to whether a gain and a loss arise in the same transaction is to be found in the analogy with equitable set off, according to which set off arises when a cross claim is so closely connected with the claimant's demands that it would be manifestly unjust to allow the claimant to enforce payment without taking into account the cross claim (*Geldof Metaalconstructie NV v Simon Carves Ltd* [2010] EWCA Civ 667, [2010] CLC 895).

85. Applying that test in the present case, in my judgment it would be manifestly unjust to hold Mr Ruhan (and hence Mr Stevens) liable to pay compensation for the profits for which he failed to account on sale of the hotels without taking into account that those profits could not have been obtained by HPII itself and were only obtained by Mr Ruhan as part of a single scheme to generate a profit from the development of the hotels. The gain and the loss in this case are inextricably connected and plainly do arise "in the same transaction". In contrast with the position in *Brown v KMR Services Ltd*, the causes of action cannot be regarded as "independent and separate".

86. Equitable compensation is concerned with loss, but when the transaction is considered as a whole, HPII has suffered no loss. In contrast, an account of profits is concerned with the defendant's gain. Equity is satisfied in this case by the award of an account of profits. Mr Ruhan is therefore liable to account as a fiduciary for the profits which

he has derived from his breaches of duty, notwithstanding that they have caused no loss to HPII. Mr Stevens is similarly liable to account, but only for the profits which he himself has made from assisting Mr Ruhan.

Lord Justice Birss:

87. I agree.