> ‘**(1)** No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—
>
> **(a)** in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> **(b)** to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.
>
> **(2)** [Omitted as immaterial]
>
> **(3)** Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a limitation period is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued.’ …

81. The effect of section 36 is to preserve, except as indicated, the cases in which a court of equity would have applied the statutory limitation periods by analogy …

Fiduciary duties and limitation—summary

111. In the light of those cases [authorities cited in the judgment but not extracted here], in our view, it is possible to simplify the court’s task when considering the application of the 1980 Act to claims against fiduciaries. The starting assumption should be that a six year limitation period will apply—under one or other provision of the Act, applied directly or by analogy—unless it is specifically excluded by the Act or established case-law. Personal claims against fiduciaries will normally be subject to limits by analogy with claims in tort or contract (1980 Act s 2, 5 …). By contrast, claims for breach of fiduciary duty, in the special sense explained in*Mothew*, will normally be covered by section 21. The six-year time-limit under section 21(3), will apply, directly or by analogy, unless excluded by subsection 21(1)(a) (fraud) or (b) (Class 1 trust) [.]

112. In the present case, it is clear that these principles were applicable to a director in Mr Koshy’s position. He had ‘trustee-like responsibilities’ in the exercise of the powers of management of the property of GVDC and in dealing with the application of its property for the purposes, and in the interests, of the company and of all its members. In our view, accordingly, the claim for an account, if it was based on a failure in the exercise of those responsibilities, was within the scope of section 21. It was in principle subject to a six-year time-limit under section 21(3). The question is whether it was excluded under either of the two statutory exceptions in section 21(1)(a) and (b) …

The arguments in the Court of Appeal

120. … in our view, GVDC’s case cannot be b[r]ought within section 21(1)(b). It stands or falls on section 21(1)(a), and that depends on establishing fraud …

121. Accordingly, with respect to the impressive learning and industry displayed on both sides, and the many ways in which the various arguments have been put, the determinative issue on this part of the case is the short, but difficult, question whether the breach of fiduciary duty was fraudulent. In other words, was Mr Koshy guilty of simple non-disclosure or of deliberate and dishonest concealment? …

Conclusions on dishonesty

131. In *Armitage v. Nurse* [1998] Ch 241 at 251D, 260G Millett LJ held that, in this context, a breach of trust is fraudulent, if it is dishonest. He accepted counsel’s formulation that dishonesty—

> ‘… connotes at the minimum an intention on the part of the trustee to pursue a particular course of action, either knowing that it is contrary to the interests of the company or being recklessly

indifferent whether it is contrary to their interests or not.'

(p. 426) and added:

'It is the duty of a trustee to manage the trust property and deal with it in the interests of the beneficiaries. If he acts in a way which he does not honestly believe is in the interests of the beneficiaries then he is acting dishonestly.' (p 251D–F) …

135. In the end, the issue for the judge was a very narrow one. The main point of the case against Mr Koshy was not his failure to disclose his interest in Lasco. If that had been the critical factor, it would, in our view, have been difficult to sustain a case of dishonesty … Nor was it the fact that Lasco was making *some* profit, which, as the judge found, was known to the directors. The essential point was, as the judge said, that the profit was not just substantial, but 'massive'. That made it something which was 'obviously' in GVDC's interests to know before committing itself to the Lasco agreements. As he said, the fact that the other directors may have been at fault in not making more diligent inquiries, and might even have accepted the position if they had known the full truth, does not exonerate Mr Koshy. The judge, having heard him in evidence and cross-examination, and after a painstakingly fair analysis of the evidence in this very complex case, was satisfied that the reason for non-disclosure was dishonest. In our view, this is not a conclusion with which this court can or should interfere …

Scope of the account

136. In our judgment, Rimer J was wrong in limiting the scope of the account as he did. For the reasons stated above, no part of the claim against Mr Koshy for an account of profits for dishonest breach of fiduciary duty was statute barred.

137. The point is not, as Mr Page contended, 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 a 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.

138. The judge failed to follow through the consequences of his finding of dishonesty on the part of Mr Koshy when he declined to order an account against him of *all* the profits obtained by him from the pipeline loan transactions. It is true that Mr Koshy received profits of the pipeline loan transactions indirectly via Lasco rather than directly from GVDC, but, in our judgment, that fact does not affect the application of the doctrine that the profits made by him, as a result of his dishonest breach of fiduciary duty, belong in equity to GVDC. Mr Koshy is accordingly liable to account to GVDC in respect of all profits made by him …

Laches and acquiescence

140. The defence of laches is not available. As already explained no period of limitation is specified by the 1980 Act in respect of the cause of action for dishonest breach of fiduciary duty. The effect of s 21(1)(a) is that either as a result of direct application, or of analogy, there is no period of limitation applicable to that cause of action …

Equitable Compensation

142. A company director may be held personally liable to pay equitable compensation to a company where, as a result of a breach of fiduciary duty on his part, the company has suffered loss. The paradigm case is the application of the company's property, without authority, for a purpose which is in the interests of the

directors, but is not in the interests of the company. In such cases the measure of compensation is the value of the company's property which has been misapplied. The director may be held liable for the company's loss, even though he has not himself received **(p. 427)** any of the misapplied property. (In cases in which he has actually received property of the company, as a result of a breach of fiduciary duty on his part, the company is more likely to seek to establish liability as a constructive trustee).

143. In view of the judge's findings of a deliberate and dishonest concealment by Mr Koshy of his interest in the pipeline loan transactions it is unnecessary to enter into the debate whether the mere failure by a director to disclose his interest in a transaction with the company is a breach of the fiduciary-dealing rules for which the remedy of equitable compensation, as distinct from the remedies of rescission and account of profits, is available. There are arguments, both on authority and in principle, for holding that the remedy of equitable compensation is available in such a case …

144. It is, however, necessary to consider the question concerning the place of causation in claims for relief for breach of the fiduciary-dealing rules. We agree that causation has no part to play in determining whether there has been non-compliance by the director with the fiduciary-dealing rules. Non-disclosure is non-compliance. If there has been non-compliance, the company is entitled to seek rescission of the transaction and an account of profits made by the director. In order to establish breach of the rules the company does not have to prove that it would not have entered into the transaction, if there had been compliance by the director with the fiduciary-dealing rules and he had made disclosure of his interest in the transaction. As was said by Lord Thankerton in the Privy Council in *Brickenden v. London Loan & Savings Co* (1934) 3 DLR 465 at 469:

> 'When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure would have taken is not relevant.'

145. The strictness of the rule of equity that a fiduciary should not profit from the trust and confidence placed in him in respect of the management of the property and affairs of another is such that the transaction should not be allowed to stand, if it is still possible to rescind it, and that the director, who has failed to disclose his interest in the transaction, should not be allowed to retain the unauthorised gains that he has made from the transaction. In considering whether the transaction should be rescinded for non-disclosure or whether the director should account for unauthorised profits, what would have happened, if the required disclosure had been made, is irrelevant.

146. As with a claim for damages for a common law wrong, such as a tort or a breach of contract, the company, in a claim for compensation for non-disclosure of material facts, must first establish that a wrong has been committed. The wrong in this case was a dishonest and deliberate decision by Mr Koshy not to disclose his interest in the pipeline loan transactions entered into by GVDC with Lasco. As already explained, it is not relevant, when determining whether the non-disclosure was actionable as a civil wrong, to consider what would have happened if Mr Koshy had complied with the fiduciary-dealing rules by making the required disclosure.

147. However, when determining whether any compensation, and, if so, how much compensation, should be paid for loss claimed to have been caused by actionable non-disclosure, the court is not precluded by authority or by principle from considering what would have happened if the material facts had been disclosed. If the commission of the wrong has not caused loss to the company, why should the company be entitled to elect to recover compensation, as distinct from rescinding the transaction and stripping the director of the unauthorised profits made by him? There is no sufficient causal link between the non-disclosure of an interest by Mr Koshy and the loss suffered by GVDC, if it is probable that, even if he had

made the required disclosure of his interest in the transaction, GVDC would nevertheless have entered into it. In our judgment, a director is not legally responsible for loss, which the company would probably have suffered, even if the director had complied with the fiduciary-dealing rules on disclosure of interests. …

(p. 428) *Conclusion*

159. In our judgment, Rimer J was entitled to refuse to order equitable compensation on the factual basis that he was not satisfied that loss had been caused to GVDC as a result of the breaches of duty by Mr Koshy. The crux of Mr Koshy's wrongdoing was non-disclosure of his personal interest in the pipeline loan transactions and the unauthorised profit made by him from the transactions. The appropriate remedy for non-disclosure is to make him account to GVDC for that profit. It is not appropriate, if GVDC so elected, to require him to compensate GVDC for loss suffered in the venture when the probabilities are, as the judge, on the evidence, found them to be, that disclosure by Mr Koshy of his interest would have made no difference to what GVDC would have done.

160. We accordingly dismiss GVDC's appeal on the equitable compensation point …

➢ Questions

1. Why, if at all, was it material that Koshy's behaviour was fraudulent?

2. Why was the claimant pursuing both an account of profits and equitable compensation? Could *both* be recovered? Is one generally preferable to the other?

3. Can equitable compensation be claimed in corporate opportunity cases (ie cases not involving the defaulting director contracting with the company) or only in self-dealing cases (ie cases where the impugned transaction is a contract between the defaulting director and his or her company)? Can equitable compensation be claimed in *all* self-dealing cases?

If a defaulting fiduciary is required to disgorge profits, when is the remedy proprietary and when is it only personal?

[7.38] Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (In Administration) [2011] EWCA Civ 349, [2012] Ch 453 (Court of Appeal)

Traders such as Sinclair were promised high returns in exchange for paying funds to Trading Partners Ltd (TPL), which was controlled by Mr Cushnie and his associate, Mr Clough. Mr Cushnie was also the principal shareholder (through his alter ego company) of Versailles Group plc (VGP). Versailles Trade Finance Ltd (VTFL) was VGP's wholly owned principal trading subsidiary and both companies were in administrative receivership. Funds advanced to TPL were duly passed to VTFL, but, rather than being used for genuine purchase or factoring transactions, the funds were either used to pay purported profits to traders, or stolen by Mr Clough, or circulated round a number of other companies also controlled by Mr Cushnie and/or Mr Clough. Both Mr Cushnie and Mr Clough were convicted of criminal offences on discovery of this fraudulent Ponzi-type scheme. Following Sinclair's unsuccessful action to retrieve its money, it took an assignment of all the claims of TPL and of the traders, hence their claims in this action were treated as being brought by the latter. The first claim concerned Mr Cushnie's breach of his director's duties, the details of which appear in the following extract (the other claims are not extracted).

Although the case is clearly not one of fiduciaries taking bribes, the court held that the connection here between the director and the profits made was analogous to that between a fiduciary and a bribe received in the course of performing his duties (see [55] and [56], which also note the relevant differences).

Accordingly, the court was faced with two inconsistent and much debated legal analyses in bribe cases.
In *Attorney General for Hong Kong v Reid* [1994] 1 AC 324, the Privy Council had held that the disgorgement

remedy was proprietary. By contrast, in *Lister & Co v Stubbs* (1890) 45 Ch D 1, the Court of Appeal had held the remedy to be personal only. As outlined in the extract, the Court of Appeal refused to follow the Privy Council's decision in *Reid*, holding **(p. 429)** that it could not do so as a matter of precedent, but nor should it do so as *Reid* was doubted as a matter of principle and policy.

In the event, therefore, the Court of Appeal upheld the decision of Lewison J and held that Sinclair/TPL could not assert a proprietary claim to the profits made by Cushnie from the breach, and that the claim was merely personal.

LORD NEUBERGER MR for the court (LORD NEUBERGER MR, RICHARDS and HUGHES LJJ):

25 The key steps in TPL's argument on this first claim, essentially as summarised by Lewison J, are as follows: (i) Mr Cushnie owed TPL fiduciary duties, including a duty not to make secret or unauthorised profits and not to apply traders' funds in breach of the terms of the agreements with the traders. (ii) Mr Cushnie breached those duties by misusing, or permitting the misuse of, the moneys entrusted to TPL ('the TPL trust moneys') in the cross-firing fraud. (iii) This misuse of the TPL trust moneys was calculated to, and did, increase the share price of VGP above its true value, which was at all times nil. (iv) Mr Cushnie realised the value of this increase on 9 November 1999 by selling the shares for £28.69m. (v) The £28.69m was an unauthorised gain made by Mr Cushnie in the course of his fiduciary relationship with TPL, a gain he was only able to make through the misuse of the TPL trust moneys … [with the issue then being whether this gain was held on constructive trust or not] …

Proprietary claims

37 Whether a proprietary interest exists or not is a matter of property law, and is not a matter of discretion: see *Foskett v McKeown* [2001] 1 AC 102, 109, per Lord Browne-Wilkinson, It follows that the courts of England and Wales do not recognise a remedial constructive trust as opposed to an institutional constructive trust.

38 The *Foskett* case, at pp 127–130, also establishes that, where a person has such a proprietary interest, he may enforce it by (a) following the asset unless and until the asset passes into the hands of a bona fide purchaser for value without notice, and also (b) tracing the value of his proprietary interest into identifiable substitutes for the original asset, unless the substitute has been provided by a bona fide purchaser for value without notice …

Personal claims against fiduciaries

40 If a trustee commits a breach of trust, the beneficiary's remedy against him is a personal one. The basic rule, as stated by Lord Browne-Wilkinson in *Target Holdings Ltd v Redferns* [1996] AC 421, 434, is:

> 'that a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss. Courts of Equity did not award damages but, acting in personam, ordered the defaulting trustee to restore the trust estate … If specific restitution of the trust property is not possible, then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed.'

[Lord Neuberger MR continued, citing various cases and considering equitable compensation in some detail.]

The proprietary claim to the proceeds of sale of the shares: the arguments

…

50 The proprietary claim [advanced by Sinclair] is thus neither to the funds in respect of which Mr Cushnie owed the relevant fiduciary duties to TPL, nor to any asset, or proceeds of any asset, purchased with those

funds; nor is the claim to the proceeds of any right or opportunity which belonged to TPL. Further, Mr Cushnie did not acquire the shares with funds beneficially owned by TPL, or with money derived from those funds; indeed, he did not even acquire those shares as an indirect consequence of his misuse of those funds.

(p. 430) 51 Having said that, there was undoubtedly a close commercial causal connection between Mr Cushnie's misuse of the funds in respect of which he owed fiduciary duties to TPL, and the money which he made on the sale of the shares. Accordingly, on the basis that the misuse of the funds by Mr Cushnie in breach of his fiduciary duty was intended to, and did, enable him to make a profit, there is some common sense attraction in the notion that the profit should be beneficially owned by those to whom he owed the duty.

52 However, there is obvious force in the contention that the mere fact that the breach of duty enabled Mr Cushnie to make a profit should not of itself be enough to give TPL a proprietary interest in that profit. Why, it may be asked, should the fact that a fiduciary is able to make a profit as a result of the breach of his duties to a beneficiary, without more, give the beneficiary a proprietary interest in the profit? After all a proprietary claim is based on property law, and it is not entirely easy to see conceptually how the proprietary rights of the beneficiary in the misused funds should follow into the profit made on the sale of the shares.

53 On this argument, the fact that the breach of fiduciary duty owed to the beneficiary resulted in the profit should not necessarily mean that the profit is treated as the property of the beneficiary. Mr Miles argued, however, that this was the only way of ensuring that those with fiduciary duties were dissuaded from breaching their duties. At least on the basis of the argument we have heard, I do not regard the point as open and shut: it is possible that the assessment of equitable compensation is sufficiently flexible to extend to such a profit (a point touched on again at para 90 below). If, however, equitable compensation cannot extend to include such profits, then Mr Miles's point is correct, and I accept that it has some real force. If it is not correct, it undermines the main policy reason supporting TPL's proprietary claim: it does not matter to the defaulting fiduciary if he is stripped of his profits because they are beneficially owned by the beneficiary, or because he has to account for those profits to the beneficiary.

54 But the difference very much matters to the other creditors of the defaulting fiduciary, if he is insolvent. A person with a proprietary claim to assets held in the name of an insolvent person is better off than a secured creditor, and all such assets are unavailable to other creditors. That is not to suggest that there is anything commercially objectionable about proprietary claims, whose existence is well established and appropriate, but it is, I think, a reason for not extending the reach of such claims beyond what is established by authority and accords with principle.

55 Both the judgment below and the arguments before us focused on [bribe] cases … As in the present case, the money [received] derived from his fiduciary position and was a plain breach of his fiduciary duties, it was not money which was part of the assets subject to his duties, or derived from such assets.

56 I am prepared to accept for present purposes that, if a claimant beneficially owns a bribe received by a fiduciary, it follows that TPL's proprietary claim to the proceeds of sale of the shares must succeed. None the less it is worth pointing out that a fiduciary who accepts a bribe receives it directly because of his fiduciary function, eg as the principal's agent, in order to induce him to place a contract for the principal with the bribe payer. Not only did Mr Cushnie not acquire the shares with, or as a result of, his breach of duty as director of TPL, but the profit which he made on the shares was as a shareholder in VTFL (indirectly through VGP) not as a director of TPL. Having pointed out that distinction I can well see that, for practical as well as principled reasons, the proceeds of sale of the shares, as an unauthorised secret profit, should be treated for present purposes in the same way as a bribe.

The proprietary claim to the proceeds of sale of the shares: the cases up to 1993

57 In the famous, if rather unsatisfactorily reported, decision of Lord King LC in *Keech v Sandford* (1726) Sel Cas Ch 61 … the normal rule that a trustee who renews a lease held on trust holds the renewed lease

on trust applied …

58 [Despite the absence of analysis in the judgment], it is possible to regard *Keech v Sandford* as an example of a trustee acquiring an asset through seizing for his own benefit an opportunity which was effectively owned by the trust. As explained by Andrew Hicks in 'The Remedial Principle **(p. 431)** in *Keech v Sandford*Reconsidered' [2010] CLJ 287, 295–298, the opportunity to renew a tenancy, although not strictly a legal right, was effectively recognised as such by the courts in the 18th century. … Viewed in this way [the case] can be said to be an orthodox, if rather strict, application of the principle that where a trustee takes advantage of an opportunity, which is really owned by the beneficiary, he holds the consequent proceeds for the beneficiary …

[Lord Neuberger MR then went on to consider the bribe cases.]

66 *Lister & Co v Stubbs* (1890) 45 Ch D 1 is to the same effect.[73] In [*Lister*] an employee received a bribe from one of his employer's suppliers. He retained part of it in cash, and invested the remainder. The Court of Appeal (Cotton, Lindley and Bowen LJJ) unanimously held that the bribe could not be considered to be the property of the employers. Lindley LJ said, at p 15:

> 'Then comes the question, as between [employer] and [employee], whether [the employee] can keep the money he has received without accounting for it? Obviously not. I apprehend that he is liable to account for it the moment that he gets it. It is an obligation to pay and account to [the employer] … But the relation between them is that of debtor and creditor; it is not that of trustee and cestui que trust. We are asked to hold that it is—which would involve consequences which, I confess, startle me. One consequence, of course, would be that, if [the employee] were to become bankrupt, this property acquired by him with the [bribe] would be withdrawn from the mass of his creditors and be handed over bodily to [the employer]. Can that be right? Another consequence would be that … [the employer] could compel [the employee] to account to them, not only for the money with interest, but for all the profits which he might have made by embarking in trade with it. Can that be right? It appears to me that those consequences show that there is some flaw in the argument.'

The last three sentences indicate that Lindley LJ thought that equitable compensation would not have extended to enabling the employer to claim the full value of the profits made on the business or asset purchased by the employee with the bribe, which, as Mr Miles said, rather undermines Mr Collings's suggestion that equitable accounting would enable a fiduciary to be held accountable for any profit he made on an asset which he acquired with a bribe … [and then continuing with his review of the authorities …].

71 While both the *Heiron* 5 Ex D 319 and *Lister* 45 Ch D 1 cases were followed and applied in at least three subsequent decisions of this court, they were disapproved by the Privy Council in *Attorney General for Hong Kong v Reid* [1994] 1 AC 324. In that case a public prosecutor employed by the Hong Kong administration had received bribes for not pursuing accused persons. Lord Templeman who gave the opinion of the Board said, at p 331:

> 'When a bribe is offered and accepted in money or in kind, the money or property constituting the bribe belongs in law to the recipient. Money paid to the false fiduciary belongs to him. The legal estate in freehold property conveyed to the false fiduciary by way of bribe vests in him. Equity, however, which acts in personam, insists that it is unconscionable for a fiduciary to obtain and retain a benefit in breach of duty. The provider of a bribe cannot recover it because he committed a criminal offence when he paid the bribe. The false fiduciary who received the bribe in breach of duty must pay and account for the bribe to the person to whom that duty was owed. In the present case, as soon as the first respondent received a bribe in breach of the duties he owed to the Government of Hong Kong, he became a debtor in equity to the Crown for the amount of that bribe. So much is admitted. But if the bribe consists of property which increases in value or if a cash bribe is invested advantageously, the false fiduciary will receive a benefit from his breach of duty unless he is

accountable not only for the original amount or value of the bribe but also for the increased value of the property representing the bribe.'

(p. 432) *The proprietary claim to the proceeds of sale of the shares: principle and precedent*

[Lord Neuberger MR then had to consider which approach was correct, *Lister* (CA) or *Reid* (PC).] 76 Although it is possible that the Supreme Court would follow the*Reid* case rather than the *Heiron* and *Lister* cases, I am far from satisfied that they would do so. In any event it does not seem to me right to follow the *Reid* case …

77 First, there are five decisions of this court … spread over 95 years, all of which have reached the same conclusion [as *Lister*] on the point, and there is the reasoning of the House of Lords in *Tyrrell v Bank of London* 10 HL Cas 26 [… and then dismissed conflicting authorities.]

78 Secondly, much of the reasoning of Lord Templeman in [*Reid*] seems to me to beg the question, or to assume what it asserts (although I suppose that the same can be said about the views expressed in the *Heiron* 5 Ex D 319 and *Lister* 45 Ch D 1 cases). Thus before setting out to explain his reasoning, Lord Templeman asserts [at p 331B–C] that a bribe paid to a 'false fiduciary' vests in him and he must pay and account for it to 'the person to whom [the] duty is owed'. But that is the very issue he then purports to decide.

79 Thirdly, the concern which Lord Templeman expressed at the end of the passage I have quoted in para 71 above might well be met by ordering an equitable account: there was apparently no argument before the Privy Council to that effect.

80 Fourthly, it seems to me that there is a real case for saying that the decision in [*Reid*] is unsound. In cases where a fiduciary takes for himself an asset which, if he chose to take, he was under a duty to take for the beneficiary, it is easy to see why the asset should be treated as the property of the beneficiary. However, a bribe paid to a fiduciary could not possibly be said to be an asset which the fiduciary was under a duty to take for the beneficiary. There can thus be said to be a fundamental distinction between (i) a fiduciary enriching himself by depriving a claimant of an asset and (ii) a fiduciary enriching himself by doing a wrong to the claimant. Having said that, I can see a real policy reason in its favour (if equitable accounting is not available), but the fact that it may not accord with principle is obviously a good reason for not following it in preference to decisions of this court.

81 Fifthly, not only has there been much academic commentary since [*Reid*] which supports the approach in [*Heiron* and *Lister*], but, at least from what I have seen, there is significantly more support for the approach for those cases in scholarly articles than there is for the *Reid* case. It is true that Lord Millett … strongly agrees with the *Reid* case. However, the reasoning in the *Lister* case is supported by Professor Peter Birks …, Professor [Sir] Roy Goode, … [etc]

82 As for the textbooks, the majority appear to accept the *Reid* case as correct … [but] do not devote much analysis to the point at issue …

83 Sixthly, it seems to me that Lord Templeman may have given insufficient weight to the potentially unfair consequences to the interests of other creditors, if his conclusion was right. His dismissal of their concerns on the basis that they should be in no better position than the defaulting fiduciary [see 331F–H] stands in rather stark contrast with what was said in the *Lister* case 45 Ch D 1, 15, … as well as more recently in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 716 E …

84 Seventhly, there are some relevant domestic decisions subsequent to the *Reid* case [both for and against …].

Conclusion on the proprietary claim to the proceeds of sale of the shares

88 In my view, Lewison J was right to reject TPL's proprietary claim to the proceeds of sale of the shares. It

is true that the decisions in [*Reid* and a number of other cases] go the other way. However, there is a consistent line of reasoned decisions of this court (two of which were decided within the last ten years) stretching back into the late 19th century, and one decision of the House of Lords 150 years ago, which appear to establish that a beneficiary of a fiduciary's duties cannot claim a proprietary interest, but is entitled to an equitable account, in respect of any money or asset acquired by a fiduciary in breach of his duties to the beneficiary, unless the asset or money is or has **(p. 433)** been beneficially the property of the beneficiary or the trustee acquired the asset or money by taking advantage of an opportunity or right which was properly that of the beneficiary.

…

90 [And so far as the problem of a fiduciary being left with the profits of successful investment of the bribe moneys (as happened in both *Lister* and *Reid*)], then it seems to me that this should be dealt with by extending, or adjusting, the rules relating to equitable compensation rather than those relating to proprietary interests. Such a course, as I see it, would do less violence to the law as consistently laid down … whereas it would involve little interference with established authority relating to equitable compensation. In addition, the law relating to proprietary interests, being within the law of property, is inherently rather less flexible than the law relating to equitable compensation. Furthermore, extending the law relating to equitable compensation in such a case would interfere far less with the legitimate interests of other creditors than extending the law relating to proprietary interests.

91 (It may even be that tracing can be invoked to support such a personal claim. I find it a little hard to see how that could work, save where the tracing exercise is being pursued in respect of a defendant's proprietary interest by a claimant with a personal claim against the defendant. In *Foskett v McKeown* [2001] 1 AC 102, 128, after explaining that 'Tracing is thus neither a claim nor a remedy', Lord Millett said that 'The successful completion of a tracing exercise may be preliminary to a personal claim … or a proprietary one, to the enforcement of a legal right … or an equitable one'. Lord Steyn said much the same thing, at p 113.)

RICHARDS and HUGHES LJJ concurred.

➢ Notes

1. For commentary, see Hayton (2011) 127 LQR 487; Goode (2011) 127 LQR 493; and, in detail, Lord Millett [2012] CLJ 583.

2. A number of cases have applied this decision. In *Cadogan Petroleum plc v Tolley* [2011] EWHC 2286 (Ch), another bribe case, Newey J took the view that Lord Neuberger's three categories in *Sinclair* were necessarily mutually exclusive (or at least that Category 3 did not overlap with Categories 1 and 2). In particular, and by way of*dicta*, he doubted that a bribe could fall into Category 1 merely because the bribe money was originally the claimant's (as in cases where the briber/vendor pays the bribe out of purchase money received from the claimant), at least 'when the Claimants (a) made their payments on an out-and-out basis [to the briber] and (b) have not elected to rescind the contracts pursuant to which the payments were made' [36], since in such circumstances the claimant could not show that the money still belonged to it, at least in equity, at the time the fiduciary received it.[74] And, so far as Category 2 was concerned, he expressed the view that:

30. … In *Sinclair*, Lord Neuberger said that there is a 'fundamental distinction between (i) a fiduciary enriching himself by depriving a claimant of an asset and (ii) a fiduciary enriching himself by doing a wrong to the claimant' and that 'a bribe paid to a fiduciary could not possibly be said to be an asset which the fiduciary was under a duty to take for the beneficiary'. A bribe is to be seen as something the fiduciary obtained by doing a wrong rather than by depriving the beneficiary of an opportunity. Were the position otherwise, beneficiaries would (contrary to the view of the Court of Appeal in *Sinclair*) very frequently have

proprietary interests in bribes and secret commissions since they could commonly be said to have been derived from opportunities to obtain a reduced price (or, where an asset is being sold, an increased one), …'

3. By contrast, in just such circumstances in *FHR European Ventures LLP v Mankarious* [2013] EWCA Civ 17, the Court of Appeal determined[75] that an agent for the purchaser held a secret **(p. 434)** commission on constructive trust. The commission was €10 million received by the agent from the vendor of property which the purchaser bought for €200 million, being the price negotiated on his behalf by the agent.

LEWISON LJ:

59. In my judgment there is no need to enquire whether the opportunity to acquire the hotel at a lower price can be characterised as an opportunity separate from the opportunity to acquire the hotel at all. I do not, therefore, agree with Newey J in *Cadogan Petroleum plc v Tolley* that it is necessary to isolate the opportunity to acquire an asset at a lower price from the opportunity to acquire an asset at all. Nor is there any need to enquire whether the [claimant] can be said to have a proprietary interest, in the strict sense, in that opportunity. In my judgment the principle we must apply is that stated by Jonathan Parker LJ in *Bhullar v Bhullar***[7.25]**: is the fiduciary's exploitation of the opportunity such as to attract the application of the rule? In the present case the exclusive brokerage agreement was part of the overall arrangement surrounding the purchase of the hotel. … In my judgment the exploitation of the opportunity by [the agent] was such as to attract the operation of the rule with the consequence that [the agent] held the benefit of the contract on a constructive trust for the [claimant]. Thence it is possible to trace into the money paid under that contract which Cedar likewise held on a constructive trust for the Investor Group.

The difficulties in distinguishing between the three categories—or especially between Categories 2 and 3—were described thus:

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100. That review of situations within Category 2, as a matter of established case law which has not be overruled by *Sinclar Investments*, is the necessary backdrop for an attempt to distinguish between Category 2 and Category 3. It shows that the mere fact that the fiduciary obtains the benefit from a third party, or obtains a benefit that could never be or would never be obtained by the principal, or that the principal has obtained what he or she wanted or intended from the opportunity, is not necessarily a bar to a constructive trust of the benefit wrongly obtained by the fiduciary by taking advantage of the opportunity. Those are all features of bribe and secret commission cases. The challenge raised by *Sinclair Investments* and *Reid*, therefore, is to identify other features which make the difference between Category 2 and Category 3. It is a very considerable challenge because neither of those cases gives any clear guidance.

And, finally, Lewison LJ explained why parties are often so keen to prove entitlement to a proprietary remedy:

LEWISON LJ:

14. … Why, one might ask, does it matter? In some cases it matters because the fiduciary is insolvent; and the establishment of a proprietary remedy may mean that the profit is unavailable for distribution among his creditors … where that is the case the argument is in essence about priorities. In some cases it is said to matter because the secret profit has been invested in an asset that has itself increased in value. Where that is the case the argument is in essence about what counts as the profit that the defaulting fiduciary has made as a result of his breach of fiduciary duty. Sometimes it matters because the defaulting fiduciary no longer has the profit and the principal wishes to recover it from a third party into whose hands it has come

> … Those [secondary] proceedings are likely to be more effective 'in ensuring payment in full' if the [claimant] can establish a proprietary interest in the commission. [In these cases] the argument … is really about following and tracing.

4. In Australia, where the imposition of a remedial constructive trust is a discretionary remedy, *Sinclair v Versailles* has not been followed:[76] *Grimaldi v Chameleon Mining NL (No 2)* **(p. 435)** [2012] FCAFC 6. In the Full Court of the Federal Court of Australia, Finn J refused to follow *Sinclair*, but nevertheless did not award a constructive trust notwithstanding that this was a case where the claimant's funds had been diverted in part-payment (an exceptionally tiny part) of the purchase price of a mining venture. According to Finn J at [584]:

> … First, to accept that money bribes can be captured by a constructive trust does not mean that they necessarily will be in all circumstances. As is well accepted, a constructive trust ought not to be imposed if there are other orders capable of doing full justice … Such could be the case, for example, where a bribed fiduciary, having profitably invested the bribe, is then bankrupted and, apart from the investment, is hopelessly insolvent. In such a case a lien on that property may well be sufficient to achieve 'practical justice' in the circumstances. This said, a constructive trust is likely to be awarded as of course where the bribe still exists in its original, or in a traceable, form, and no third party issue arises.

➢ Question

Pill LJ in *FHR European Venture LLP*, see Note 3, said, at [64]: 'At bottom, this is a question of public policy. There would be a case for deciding that whenever, as in the present case, the agent payee is a wrongdoer, the law, applying equitable principles, should grant a proprietary remedy to the principal. A principal shall stand in his agent's shoes.' If the principal can stand in the agent's shoes, will every disgorgement remedy invariably be proprietary, provided the property to be disgorged is still identifiable? What, if anything, is the flaw in that logic?

Further issues on remedies

Extent of liability for profits

See *Regal (Hastings) Ltd v Gulliver* **[7.23]**; *Ultraframe (UK) Ltd v Fielding* **[7.44]** (director only liable for profits made personally, not for profits made by others, unless the claim can be brought under some other head of liability, eg knowing receipt, dishonest assistance, partnership law).

Equitable allowance granted to the director

For cases taking a restrictive approach, see: *Murad v Al-Saraj* **[7.35]**; *Guinness plc v Saunders*

[5.01]; for a more lenient approach, see: *Warman International Ltd v Dwyer* (cited extensively in *Murad* **[7.35]**); *Boardman v Phipps* (see the Note following *Peso Silver Mines Ltd (NPL) v Cropper* **[7.32]**, p 404).

Rescission

See *Cook v Deeks* **[7.22]** explaining the incidence of rescission. Also see the Note following *Aberdeen Rly Co v Blaikie Bros* **[7.34]**, p 412.

Equitable compensation

The orthodox view is that equitable compensation is not available for breach of the equitable no conflict and no