

**BRIBES, SECRET COMMISSIONS,
AND THE INSTITUTION OF THE TRUST:**

A MATTER OF LOYALTY

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Distinguished guests

I. Introduction

1. It is well known that Julius Caesar was assassinated as a result of a conspiracy among a number of Roman senators who feared his growing power following his appointment as dictator in perpetuity. Among them was his friend, Marcus Brutus, who had been persuaded to lead the party that delivered the twenty-three stab wounds from which Caesar died on the steps of the Senate. Brutus evidently did not make his decision lightly. He loved

* I am deeply grateful to my law clerk, Torsten Cheong, and my colleague, Assistant Registrar Scott Tan, for all their assistance in the research for and preparation of this address.

Caesar, but he loved the Republic more; and the senators played on this loyalty to convince him that Caesar had to die, in order that the Republic might be saved.¹

2. The notion of loyalty is freighted with sentiment. It brings to mind feelings for family, country and friends. And its opposite, disloyalty – and, worse, betrayal – is associated with vengeance, humiliation and scandal. It is the stuff of drama and intrigue, and therefore hardly the kind of concept you would expect to find at the heart of any private law doctrine. And yet, it is the chief duty which the law imposes on all who occupy a fiduciary position, including trustees such as yourselves, and public servants such as myself. As the eminent equity judge, Lord Millett, said in a judgment, “The distinguishing obligation of a fiduciary is the obligation of loyalty”.²

3. Because it is the distinguishing obligation of a fiduciary, it is also an abiding one, and that gives it particular significance in these changing times. Much will be said here today about the challenges that trustees face in a world where finance and business, like many other longstanding human activities, are undergoing rapid transformation as a result of technological advances. In terms of technical expertise and experience, many of you are far better

¹ At least according to Shakespeare’s telling of the tale: see William Shakespeare, *Julius Caesar* (Penguin Classics 2015).

² *Bristol and West Building Society v Mothew* [1998] Ch 1, 18 (Millett LJ).

positioned that I am to lead a discussion on how best you, as commercial men and women, will ride these winds of change. The contribution I hope to make to your discussion, therefore, is of a different kind. By drawing upon the law, I want to explore an intangible, unchanging and fundamental duty that we must continue earnestly to discharge, in order for our fiduciary office to stay meaningful and credible in service of the good of an evolving world, and that is the duty of loyalty.

4. How far does the law take the fiduciary duty of loyalty? And more importantly, what recourse does a principal have when she finds that her trust has been misplaced? I hope to sketch an answer to these questions by trying to interest you in a debate which exercised lawyers for well over a century.³ To set the context, it has always been clear that a fiduciary who receives a bribe or secret commission in breach of his duty of loyalty is liable to account for it to his principal. But the question which, until 2014, the English courts answered differently from the rest of the Commonwealth, is whether the injured principal has only a personal claim against the fiduciary or whether she has a proprietary claim over the bribe by way of a constructive trust.

³ Both in England and in Singapore: see Sarah Worthington, 'Four Questions on Fiduciaries' (2018) 1 TL 22, 33; Alvin W-L See, 'Unauthorised Fiduciary Gains and the Constructive Trust' (2016) 28 SAclJ 1014.

5. This is not just a subject of academic interest, but one with important practical ramifications. Assume for a moment that the bribe has been invested in stocks, which then increase dramatically in value. If the principal has only a personal claim, she would be able to recover from the fiduciary the value of the bribe taken, and no more. She could not, for instance, require the fiduciary to transfer the stocks to her. But if the principal has a proprietary claim, she would be seen in equity as the true owner not only of the bribe money, but, as a consequence, also of everything which it was used to purchase. In this case, that would extend to the stocks. This takes on particular significance if the fiduciary has become bankrupt. If the principal has a proprietary claim, her rights may be safeguarded and the stocks would be hers to claim, regardless of the bankruptcy proceedings; but if she has only a personal claim, she would have to stand *pari passu* with the general body of creditors and await the distribution of her share of the bankrupt's estate.

6. *Should* the principal be held to have a proprietary claim? The debate on this question, it has been said, “reveals passions of a force uncommon in the legal world”.⁴ I will address this question in three parts. First, I will trace the historical development of the law on whether a principal has a proprietary interest in a bribe received by his fiduciary, focusing on English and Singapore cases. This will serve to give an impression of the range of scenarios in which

⁴ *FHR European Ventures LLP v Mankarious* [2014] Ch 1 [61] (Pill LJ).

this issue has arisen. I will also discuss the reasoning employed by the courts in working out what the right solution should be, as this might shed light on what the real interests are in this context. Second, I will outline my views on the various justifications for the current position and what they tell us about fiduciary loyalty. Finally, I will close with some thoughts for the future.

II. The development of the law

A. *Origins: Keech v Sanford*

7. I begin with an 18th century dispute concerning Rumford Market in London, which opened in the 13th century as a sheep market, and is still in operation today. In *Keech v Sanford*,⁵ a lease of the market was devised to a trustee for the benefit of an infant. Before the lease expired, the trustee first tried to renew it for the infant's benefit but the landlord refused because he was not satisfied with the proposed security that was offered for rent. Following the refusal, the trustee decided to take the lease for his own benefit on the landlord's terms. The infant subsequently sought an assignment of the lease and an account of all the profits which the trustee had received from the lease. Deciding the matter in 1726, the Lord Chancellor granted the relief and said, "This may seem hard, that the trustee is the only person of all mankind

⁵ (1726) Sel Cas Ch 61.

who might not have the lease: but it is very proper that the rule should be strictly pursued, and not in the least relaxed”.⁶

8. It is worth noting how strict the result was. *Keech v Sanford* was a case in which (a) the trustee *tried* to take the lease for the infant *but failed*, and (b) the infant *could not* have taken the lease in his own name. Hence, the infant was not being denied of anything. Furthermore, there was nothing to suggest that the trustee had acted dishonestly. Despite these facts, the court nonetheless refused to allow the trustee to take the benefit of the lease. This rule of strict fiduciary loyalty⁷ was later applied in the context of a fiduciary making any secret profits, and not just cases where a bribe had been taken.⁸ Thus, where a fiduciary made an undisclosed profit by taking advantage of an opportunity that came to his attention in the course of his office, the court held that the principal had a proprietary interest in the profits that were made.⁹ The rule had become so established by Victorian times that in the 1856 decision of *Sugden v Crossland*, the court was able to state that “[i]t is a well-settled

⁶ *ibid* 62.

⁷ As it is described in the literature: see Andrew Hicks, ‘The remedial principle of *Keech v Sanford* reconsidered’ (2010) 69 CLJ 287, 290.

⁸ See *Fawcett v Whitehouse* (1829) 1 Russ & M 132.

⁹ See *Carter v Palmer* (1842) 8 Cl & Fin 657; *Bowes v City of Toronto* (1858) 11 Moo PC 463.

principle that, if a trustee make a profit of his trusteeship, it shall enure to the benefit of his [beneficiaries]”.¹⁰

B. No proprietary remedy: Lister and Heiron

9. But a number of cases then went the other way. Perhaps the most significant of these is the English Court of Appeal’s 1890 decision in *Lister & Co v Stubbs* (“*Lister*”).¹¹ Mr Stubbs was an employee of Lister & Co, tasked to purchase materials for use in the company’s business. He accepted commissions from a supplier in exchange for buying its materials for the company, and invested the commissions he received in land and securities. When the company found out, it sued to recover the moneys, including the investments to which they had been put. It sought an interim injunction to prevent Mr Stubbs from dealing with the investments, but this was denied by the High Court, on the basis that the commissions never belonged to the company; and that in turn was upheld by the English Court of Appeal.

10. Lindley LJ, who delivered the leading speech, held that Mr Stubbs had only “an obligation to pay and account to Messrs Lister & Co, with or without interest”, such that “the relation between them is that of debtor and creditor” and “not that of trustee and [beneficiary]”.¹² In effect, it was held that

¹⁰ (1856) 3 Sm & G 192, 194 (Stuart V-C).

¹¹ (1890) 45 Ch D 1.

¹² *ibid* 15.

Mr Stubbs's liability was purely personal in nature; and his employer did not have any proprietary claim against him or over his assets. Indeed, Lindley LJ observed that if a proprietary claim were recognised in such circumstances, then were Mr Stubbs to become bankrupt, the property he had acquired using his secret commissions "would be withdrawn from the mass of his creditors and be handed over bodily to Lister & Co".¹³ This, he said, would be a startling result that was "not sound", as it rested on a fundamental confusion of "ownership with obligation".¹⁴

11. The result in *Lister* mirrored what had been decided in *Metropolitan Bank v Heiron*¹⁵ ("Heiron") a decade earlier. There, the English Court of Appeal held that an employee who had received a bribe bore only a personal obligation to return the money he had received. This was significant because the bank had brought an action for the recovery of the money more than six years after the payment of the bribe, and its claim was therefore held to be time-barred. The bank had argued that the time-bar did not apply because the moneys were being held on trust on its behalf, but this was rejected by the Court of Appeal, which held in no uncertain terms that "[n]either in law nor in equity could [the sum received by the employee] be treated as money of the

¹³ ibid 15.

¹⁴ ibid 15.

¹⁵ (1880) 5 Ex D 319.

company, until the Court, in an action by the company, had decreed it to belong to them".¹⁶

C. *Lister eroded: Boardman, Thahir and Reid*

12. The decisions in *Lister* and *Heiron* would hold sway in England for the better part of a century.¹⁷ But the 1967 decision of the House of Lords in *Boardman v Phipps*¹⁸ ("*Boardman*") made a major inroad into their authority. The Phipps family trust held a minority interest in an underperforming company. Mr Boardman, a solicitor for the trust, together with one beneficiary of the trust, Mr Tom Phipps, attempted unsuccessfully to negotiate for the trust to make an appointment to the company's board. After consultations, the trust decided not to make a bid to acquire the majority interest. Following this, Mr Boardman and Mr Tom Phipps acting in their own interest without seeking the permission of and indeed without proper disclosure to the trust,¹⁹ and using the information they gained about the company during the negotiations,

¹⁶ *ibid* 324 (Brett LJ).

¹⁷ See *Powell & Thomas v Evan Jones & Co* [1905] 1 KB 11; *Attorney General's Reference (No 1 of 1985)* [1986] QB 491; *Islamic Republic of Iran Shipping Lines v Denby* [1987] 1 Lloyd's Rep 367.

¹⁸ [1967] 2 AC 46.

¹⁹ The trial judge, Wilberforce J, found that Mr Boardman and Mr Phipps kept only one of the trustees of the Phipps trust informed of their plan, and did not keep their other principals, including the plaintiff, fully informed of the same. Wilberforce J's finding was not challenged on appeal, and Mr Boardman's obtaining an unauthorised profit in breach of fiduciary duty formed the basis of the majority's decision to hold Mr Boardman as constructive trustee of his shares in the company: see *Boardman* (n 17) 104D (Lord Cohen), 112B (Lord Hodson) and 117G (Lord Guest). See also Michael Bryan, '*Boardman v Phipps*' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing 2014) at pp 601–602.

successfully bought out the majority shareholders of the company and then turned its operations around. As a result of their efforts, the value of the shares rose, to their own advantage and also that of the trust. Another beneficiary of the trust subsequently brought an action to recover *both* the shares as well as the profits which Mr Boardman and Mr Phipps had made, and he succeeded.

13. To be sure, *Boardman* is different from *Lister* and *Heiron* in that it did not involve bribes and secret commissions. What it did involve was an unauthorised profit. And it sits uncomfortably with those earlier decisions in that despite the less egregious nature of the breach, the fiduciary was held liable in a proprietary claim. The primary ground of the majority's decision was that the defendants were accountable as constructive trustees because they had acquired the knowledge and opportunity to purchase the shares while purporting to represent the trust. But this does not appear to be particularly persuasive. For instance, just like the defendants in *Boardman*, Mr Stubbs, too, was able to take the secret commissions only because of his employment with Lister & Co. It just seems unsatisfactory that someone like Mr Stubbs, who took a bribe, should seemingly be in a better position than someone, like Mr Boardman, who although he made use of his position in the company for his own benefit, did not take a bribe or betray his principal.

14. A quarter of a century later and halfway around the world, a court prepared to depart from the path taken by *Lister* and *Heiron*. General Thahir

was an assistant to the president director of the Indonesian state-owned enterprise Pertamina. He opened 17 bank accounts with Sumitomo Bank in Singapore and deposited substantial moneys in those accounts which were said to be bribes paid by German contractors tendering for the construction of steel works in West Java. When he died, the moneys were claimed by his widow, his estate and Pertamina, and their competing claims came before the Singapore High Court. In his landmark 1992 judgment in *Sumitomo Bank Ltd v Thahir Kartika Ratna*²⁰ (“*Thahir*”), Lai Kew Chai J declined to follow *Lister* and declared General Thahir’s estate and his widow, who had title to the moneys, constructive trustees of those sums for Pertamina.

15. After an extensive review of the authorities, Lai J said he was “unable to accept ... that a fiduciary, such as General Thahir ... who accepts illicit bribes is not declared as a constructive trustee and is only liable to account whereas an honest fiduciary, such as Mr Boardman, whose intervention and activities had resulted in benefit to the [beneficiary], is declared to be a constructive trustee”.²¹ In a powerful passage, he held that “*Lister* ... is wrong and its undesirable and unjust consequences should not be imported and

²⁰ [1992] 3 SLR(R) 638.

²¹ *ibid* [241].

perpetuated as part of our law”.²² Lai J’s decision was affirmed in full by the Singapore Court of Appeal.²³

16. Just two years later, the authority of *Lister* was further undermined by the decision of the UK Judicial Committee of the Privy Council in *Attorney-General for Hong Kong v Reid*²⁴ (“*Reid*”), which was an appeal from a decision of the New Zealand Court of Appeal. Mr Reid was a senior government lawyer in Hong Kong who had accepted bribes to obstruct criminal prosecutions, which he then used to purchase properties in New Zealand. The trial judge and the New Zealand Court of Appeal both held, following *Lister*, that the Crown had no equitable interest in the properties and therefore discharged the caveats which had been lodged by the Crown. The Crown appealed to the Privy Council, which allowed the appeal and held that *Heiron* and *Lister* had been wrongly decided.

17. Lord Templeman, who wrote the decision on behalf of the Board, held that *Lister* was “not consistent with the principles that a fiduciary must not be allowed to benefit from his own breach of duty, that the fiduciary should account for the bribe as soon as he receives it and that equity regards as done

²² ibid [241].

²³ *Thahir (Kartika) Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR(R) 312.

²⁴ [1994] 1 AC 324.

that which ought to be done”.²⁵ “From these principles”, Lord Templeman said, “it would appear to follow that the bribe and the property from time to time representing the bribe are held on a constructive trust for the person injured”.²⁶ In the course of his decision, Lord Templeman declared that the Board was “impressed with” the decision of Lai J in *Thahir*, who had “determined robustly” that *Lister’s* “undesirable and unjust consequences should not be imported and perpetuated”.²⁷ Lord Templeman also echoed Lai J’s point that it appeared inconsistent, in the light of *Boardman*, that the law should treat dishonest fiduciaries more leniently than honest ones.²⁸

D. Lister revived: Sinclair

18. However, because it was a decision of the Privy Council, which was a court that served the former colonies of the United Kingdom and is not part of the English judicial hierarchy, *Reid* was, strictly speaking, not binding on any English court. Hence, those who had thought that *Lister* had been laid to rest in 1994 were surprised when it was resurrected by the English Court of Appeal in its 2011 decision in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in administrative receivership) and others*²⁹ (“*Sinclair*”). The

²⁵ ibid 336F.

²⁶ ibid 336F–G.

²⁷ ibid 337C.

²⁸ ibid 338C–D.

²⁹ [2012] Ch 453.

defendant was a director of the claimant company and misused the claimant's funds by channeling them into a set of financial transactions to create the false impression that another company, which he owned, had a larger turnover than was actually the case. The value of his shares in that company increased, and a question arose as to whether he held the profits from the sale of those shares as a constructive trustee for the claimant.

19. The Court of Appeal held, perhaps surprisingly, that he did not. Lord Neuberger (then the Master of the Rolls), who wrote the main judgment, held that this was so because a constructive trust could not be imposed on property acquired in the context of a breach of fiduciary duty unless that property had been "beneficially owned by the [principal] or derived from opportunities beneficially owned by [him]".³⁰ Lord Neuberger declined to depart from *Lister* in favour of the position taken in *Reid* for a number of reasons, one of which was his view that the position taken in *Reid* unfairly prejudiced the interests of the fiduciary's unsecured creditors.³¹ In Lord Neuberger's view, there was 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".³² He held that a constructive trust would be imposed in only

³⁰ *ibid* [89].

³¹ *ibid* [83].

³² *ibid* [80].

the former category, which involved injury to the property interests of a claimant,³³ but not in the latter, which did not implicate such a property interest. And because a bribe was never the asset of the principal to begin with, he held that it could not be the subject of a trust.³⁴ There was no appeal from this decision.

E. Lister overruled: FHR

20. The final word in this account belongs to a 2014 decision of the UK Supreme Court, *FHR European Ventures LLP v Cedar Capital Partners LLC*³⁵ (“*FHR*”). Cedar Capital Partners was a property agent that acted for FHR European Ventures in connection with the purchase of a hotel in Monte Carlo. Cedar failed to disclose to FHR that it would receive a commission of €10m on the sale and when it learnt of this, FHR sought a declaration that Cedar held the commission on constructive trust for its benefit. The English Court of Appeal found in FHR’s favour on the basis that the money paid as commission should be regarded as the traceable proceeds of property belonging to FHR. It reasoned that the benefit of the brokerage agreement, pursuant to which the commission had been paid, was held by Cedar on constructive trust for FHR.

³³ See eg *Daraydan Holdings Ltd v Solland International Ltd* [2005] Ch 119. See also *Cook v Deeks* [1916] 1 AC 554, where the profit derived from the exploitation of an opportunity which was available to the principal and would have benefited him had the fiduciary not intervened.

³⁴ *ibid* [80].

³⁵ [2015] AC 250.

On appeal, the Supreme Court affirmed this result, but it did so on the wider basis that *all* bribes and secret commissions should be impressed with a constructive trust for the principal. In so doing, the court endorsed *Reid*, overruled all previous contrary decisions such as *Heiron*, *Lister* and *Sinclair*, and thus brought English law in conformity with the rest of the Commonwealth.³⁶

21. Somewhat poetically, it was again Lord Neuberger, now President of the Supreme Court, who delivered the unanimous judgment of the court to reverse his own decision in *Sinclair*, which he had handed down barely three years prior to that. So what changed his mind? Three factors, it seems.

22. The first was the simplicity of the position in *Reid*. To set the context, one of the principal reasons given in *Sinclair* for rejecting *Reid* was that it seemed to ignore the distinction between a case where the fiduciary had enriched himself at the principal's expense by *depriving the principal of an asset* and one where he had enriched himself *by doing a wrong to the principal that did not entail an interference with the principal's property rights*, for instance, by taking a bribe. The court had held that it was only in the former

³⁶ See eg the decision of the Full Court of the Federal Court of Australia in *Grimaldi v Chamelon Mining NL (No 2)* (2012) 200 FCR 296, the decision of the Supreme Court of British Columbia in *Insurance Corporation of British Columbia v Lo* (2006) 278 DLR (4th), and the decision of the Singapore Court of Appeal in *Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR(R) 312.

case that the principal could assert a “proprietary basis” for asking that it be recognised that the asset was held on constructive trust for him.³⁷ It was argued on this basis that a principal cannot establish a proprietary claim to a bribe received by his fiduciary because *neither of them were ever supposed to have taken the bribe*. However, reliance on the concept of such a “proprietary basis” can lead to contrived reasoning just to bring a case within the principle. For instance, the Court of Appeal in *FHR* granted relief on the basis that in taking the commission, Cedar had deprived FHR of the “opportunity” to purchase the hotel at a lower price. The approach in *Reid*, on the other hand, had “the merit of simplicity” because it would hold that *all* profits arising from any breach of fiduciary duty are held on constructive trust for the principal.³⁸ As Lord Neuberger put it, having noted the difficulty in determining precisely when a proprietary claim could be asserted, where there was “no plainly right answer ... it would seem right to opt for the simple answer”.³⁹ To this might be added the advantage of doing away with the unprincipled differentiation in the treatment of a dishonest fiduciary like Mr Stubbs, and an honest one like Mr Boardman.

³⁷ See also Graham Virgo, ‘Profits obtained in breach of fiduciary duty: Personal or proprietary claim?’ (2011) 70 CLJ 502, 504.

³⁸ *FHR* (n 35) [35].

³⁹ *ibid* [35].

23. The second factor which seems to have made a difference was the policy of discouraging bribery. Lord Neuberger echoed Lord Templeman's sentiment in *Reid* that "bribery is an evil practice which threatens the foundations of any civilised society",⁴⁰ and added that "[s]ecret commissions ... tend to undermine trust in the commercial world".⁴¹

24. The third factor was that other jurisdictions were aligned with the position in *Reid*, and it seemed to him "highly desirable" to "lean in favour of harmonising the development of the common law around the world".⁴²

III. The modern rule

25. *FHR* has settled the position, at least for now, that a constructive trust will be imposed over the proceeds of every bribe and secret commission received in breach of trust, and endorses the imposition of a constructive trust over all gains made by a fiduciary in breach of his duty.⁴³ In a sense, this is the natural outworking of the principle of strict fiduciary loyalty that was articulated in *Keech v Sanford*, with which I began this account.

⁴⁰ *Reid* (n 24) 330H.

⁴¹ *FHR* (n 35) [42].

⁴² *ibid* [45].

⁴³ English judicial statements to this effect were noted by Lord Neuberger: see *ibid* [19]–[20]. Expansive dicta to the same effect can be found from elsewhere in the Commonwealth: see *Grimaldi* (n 35) [575] (Finn, Stone and Perram JJ).

26. I have already alluded to the benefits of the modern rule, but to summarise, they are three-fold. First, it is simple and therefore certain. A blanket rule that a constructive trust is imposed on all profits obtained as a result of a breach of fiduciary duty allows all parties to know exactly when a constructive trust will arise. Second, it is consistent. As observed in *Thahir*, one of the unsatisfactory features of *Lister* is that it gives the impression that the law deals more leniently with dishonest fiduciaries than with honest ones. The modern rule avoids this reproach.⁴⁴ Third, it deters corruption by fully disgorging any profits acquired by a fiduciary in breach of his duty of loyalty.

A. Some difficulties

27. That said, the modern rule is not without difficulty. As one commentator has pointed out, even if it were accepted that disloyal gains must be disgorged because the fiduciary cannot be allowed to profit from his wrongdoing, there is no inherent reason why the principal alone should benefit from the disgorged gains and thereby earn a windfall.⁴⁵ If we go back to *Reid*, Lord Templeman's reasoning on this point may be summarised as follows:⁴⁶

- (a) first, a fiduciary must not be allowed to benefit from his own breach of duty and so must account for the bribe;

⁴⁴ See David Cowan, "Lister & Co v Stubbs: who profits?" (1996) JBL 22, 37–38.

⁴⁵ Worthington (n 3) 35.

⁴⁶ *Reid* (n 24) 336F.

(b) second, equity regards as done that which ought to be done;
and

(c) third, therefore, “the bribe and the property ... representing the
bribe are held on a constructive trust for the person injured”.

28. The first and second propositions are unobjectionable, but the third is questionable. As Lord Neuberger pointed out in *Sinclair*, it is not at all clear why giving the principal a proprietary interest in the bribe is what “ought to be done” in a case like this.⁴⁷ In fact, there would appear to be two reasons why it ought *not* to be done. The first is the fact that neither the principal nor the fiduciary could have ever had any property interest or expectation in the bribe. The second, and perhaps more powerful, point is that giving the principal a proprietary interest in the bribe has the potential to compromise the interests of other innocent parties, particularly, the unsecured creditors of the fiduciary because their claims would rank lower than the principal’s, in the event of the fiduciary’s bankruptcy.⁴⁸

29. One might therefore be tempted to say that the modern rule is really the result of a policy choice in favour of maintaining consistency with other jurisdictions, ensuring certainty in the law, and deterring corruption by means

⁴⁷ See *Sinclair* (n 29) at [78].

⁴⁸ *ibid* at [83].

of a strict disgorgement of corrupt gains.⁴⁹ On this last point of deterrence, the attitude of the common law has always been clear. In the 1874 decision of the English Court of Appeal in *Parker v McKenna* it was said, perhaps somewhat excessively, that the prevention of bribery was vital for the “safety of mankind”.⁵⁰ But, nonetheless, the point is that if Mr Reid knew he would be stripped of any asset that he purchased with the bribes he took, he might have thought twice about doing as he did.

30. Yet the trouble is that the issue is not merely whether the modern rule has the effect of deterring corruption, which it clearly does, but whether it is the only or the best way to achieve this, and that is not so clear.

31. The principal advantage of granting a proprietary remedy in this context is that it disgorges not only the principal sum received as a bribe, but also all the other *gains* that might have been made from it, such as an increase in the value of the stocks which were bought using the bribe. This is the so-called “secondary gain”. In this way, an errant fiduciary will not derive any benefit from his actions. But holding that a constructive trust arose over the bribe as soon as it was received is not the only method for disgorging secondary gains. It may be possible, for instance, for the law to impose

⁴⁹ As Worthington concludes: see Worthington (n 3) 36.

⁵⁰ (1874) LR 10 Ch App 96, 125.

personal liability in respect of such gains.⁵¹ While this has not been sufficiently explored by the courts,⁵² it may be appreciated that the prospect of such liability may have an equally deterrent effect as does the modern rule. If so, then it seems a viable alternative to the modern rule, whose blanket effect might fail to account for differences in the positions and interests of others with an interest in the fiduciary's assets especially in the context of the latter's insolvency.

32. But perhaps the better point is that the modern rule seems to apply satisfactorily in some cases and not others. In some situations, the principal may have a real basis for a proprietary claim which should be upheld even in the event of the fiduciary's bankruptcy; but in others, the case for holding this may not be so compelling. To account for these differences, the answer is perhaps not to reject the modern rule, but to modify it to achieve the deterrent effect of depriving the fiduciary of any benefit in the asset in question but in a way that is fairer to all stakeholders.

⁵¹ David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton: Law of Trusts and Trustees* (19th edn, LexisNexis 2016) para 27.109.

⁵² In *Sinclair* (n 29), Lord Neuberger appeared to think that such personal liability was not possible because it was contrary to the notion that the fiduciary's obligation is an obligation to pay "equitable compensation" (see [53] and [90]). This is criticised in *Underhill and Hayton* (n 51) para 27.71 on the basis that the fiduciary's liability is a liability to disgorge his gain, not to compensate the principal for his loss.

33. Perhaps, then, the chief virtue of the modern rule is also its chief weakness: it is *too* simple. The rule imposes the same solution on gains acquired in breach of fiduciary duty in a variety of different factual scenarios, and that might be unsatisfactory. In some cases, there are third party interests, and in others, there are not. In some cases, the breach of fiduciary duty is the result of dishonesty, and in others, it is the result of poor judgment. In some cases, the breach consists in a failure to avoid a conflict of interests, and in others, it consists in a failure to obtain permission to make a profit. These different scenarios may exist in different permutations, all of which may not be morally equivalent. To the extent that the modern rule applies to them equally, is the law avoiding the task of drawing principled distinctions which would better achieve justice in the individual case? Or is there something fundamental about a breach of fiduciary duty which disables a fiduciary from keeping any gain he acquires as a result of it? Might the distinctions be reflected not through a different rule altogether but through a discretion in the remedy?

34. These difficulties suggest two things. First, a more nuanced approach to the modern rule may be desirable. I will explore this towards the end of this address. Second, and for present purposes, the difficulties show that the singular focus on the desire to deter bribery may not be an adequate justification for the modern rule.

B. A different kind of justification

35. In my view, its better justification may lie in the special duty of loyalty that the law places on fiduciaries. Traditionally, writers of equity regarded the essence of being a fiduciary as consisting in a kind of law-imposed disability.⁵³ The basic idea is that a fiduciary's actions are restricted by a set of rules, and if he tries to enter into a transaction for his own benefit in breach of those rules, the transaction is simply ineffective to secure that benefit. For example, if a trustee uses trust property to buy a car for himself, the law automatically gives the beneficiary a proprietary interest in the car without her even having to bring an action. The modern champion of the disability model of fiduciary relationships is Lord Millett, who has argued that an order directing a fiduciary to account for unauthorised profits "is not a monetary award for wrongdoing",⁵⁴ in the style of an award of damages, but simply an order that gives effect to a rule that the fiduciary is legally *incapable* of, or legally disabled from, acquiring such gains for himself.⁵⁵

⁵³ *ibid* para 27.7. As noted in that reference, the language of disability appears in cases throughout the nineteenth and twentieth centuries: see *Ex parte Bennett* (1805) 10 Ves Jun 381, 385 (Lord Eldon LC); *Transvaal Lands Co v New Belgium (Transvaal) Land and Development Co* [1914] 2 Ch 488, 502 (Swinfen Eady LJ); *Guinness plc v Saunders* [1988] 1 WLR 863, 869B (Fox LJ).

⁵⁴ Lord Millett, 'Book review' (2002) 2 OUC LJ 291, 295.

⁵⁵ A trace of this idea is contained in an article he wrote which was quoted by Lord Templeman in *Reid*, although little was made of the idea itself in the judgment: see *Reid* (n 24) 337F–H.

36. One version of this theory is built on the concept of agency. On this view, the fiduciary manages the affairs of the principal within a defined sphere, and any benefit that arises from acts done in the context of the fiduciary relationship would presumptively accrue to the principal. Applying this analysis, it is said that it is “not possible, within the logic of such a relationship, for the fiduciary lawfully to extract wealth from the sphere of fiduciary management”,⁵⁶ except and unless this has been duly authorised. On this view, everything in that sphere, including both the costs and the profits of fiduciary management, are attributed to the principal “as a matter of primary right”.⁵⁷ In other words, no proof of wrongdoing is needed for a remedy to be granted, and as long as the costs were borne or the profit was obtained within the sphere of fiduciary management, it will be attributed to the principal as a matter of law.

37. This provides a viable explanation for the modern rule. On this analysis, it is not necessary to ask whether opportunities or information “belong” to the principal in some proprietary sense.⁵⁸ Instead, the fiduciary is simply disabled from profiting from the use of any kind of opportunity or information obtained in the course of her role for her own benefit. That is why

⁵⁶ Lionel Smith, ‘Can We Be Obligated to Be Selfless?’ in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press 2014) 150.

⁵⁷ *ibid* 150.

⁵⁸ Lionel Smith, ‘Constructive Trusts and the No-Profit Rule’ (2013) 72 CLJ 260, 262.

General Thahir, Mr Reid and Cedar – all of whom received benefits while acting within the scope of their fiduciary relationship but without being authorised to receive them – were caught by the rule. Equally, it is unnecessary to see the result as a remedy only for wrongful conduct. That is why it did not matter that Mr Boardman had acted in good faith towards the beneficiaries of the Phipps trust. All that mattered was that the profit he had obtained was unauthorised.

38. Another way to look at this is to analyse the position in terms of the notion that a fiduciary owes a duty not to promote his personal interest in circumstances in which there is a real possibility of a conflict between his personal interests and those of the persons whom he is bound to protect.⁵⁹ Breach of this duty is seen as a civil wrong that triggers a secondary obligation to account for unauthorised gains or to pay compensation for loss. On this model, the receipt of a bribe immediately triggers an obligation to surrender the unauthorised gains, both primary and secondary, to the principal.

39. It is not my point to debate the relative merits of these two models for explaining the modern rule.⁶⁰ Instead, I want to focus on the way that they both

⁵⁹ See *Hospital Products Ltd v United States Surgical Corporation and Others* (1984) 55 ALR 417, 459 (Mason J).

⁶⁰ Indeed, the observation has been made that *Reid* was decided on the basis of both models, and that they are mutually inconsistent: see James Penner, 'The difficult doctrinal basis for the fiduciary's proprietary liability to account for bribe' (2012) 18 *Trusts & Trustees* 1000.

deal with the theme of loyalty. The first model is founded on a robust conception of the office of the fiduciary under which every benefit that the fiduciary receives within the scope of fiduciary management is necessarily attributed to the principal as a matter of primary right and the fiduciary is disabled from taking any unauthorised benefit. This rests on an unbending view of loyalty which requires the fiduciary to adopt his principal's cause as his own, and to do all that he can to seek its fulfillment.⁶¹

40. In like manner, the second model is predicated on a robust conception of the duty of loyalty that arises by virtue of the fiduciary's position. Its essence is that the fiduciary must always place the interest of the beneficiary above his own. And it is this duty of loyalty which Commonwealth courts around the world today consider to be so important that it is thought to justify the grant of a proprietary remedy.⁶² This should give fiduciaries an impression of the high demand of loyalty that the law makes of us.

C. Loyalty as a fiduciary distinctive

41. Indeed, I would say that loyalty is the unique hallmark of the fiduciary office. The word "fiduciary" derives from the Latin *fiducia*, meaning trust or

⁶¹ See Arthur Laby, 'The Fiduciary Obligation as the Adoption of Ends' (2008) 56 Buffalo L Rev 99, 129, cited in Smith (n 56) 141. For detailed and critical examination on the role of loyalty in fiduciary law, which is beyond the scope of this lecture, see *Philosophical Foundations of Fiduciary Law* (n 56) 125–194.

⁶² See text at n 36 above.

confidence, and the ideal underpinning fiduciary law is to ensure that fiduciaries serve the best interests of those who reasonably repose trust in them with undivided loyalty.⁶³

42. What then does loyalty mean? Professor Simon Keller puts it this way:⁶⁴

Loyalty is the attitude and associated pattern of conduct that is constituted by an individual's taking something's side, and doing so with a certain sort of motive: namely, a motive that is partly emotional in nature, involves a response to the thing itself, and makes essential reference to a special relationship that the individual takes to exist between herself and the thing to which she is loyal.

43. I think the idea of taking someone's side in the context of a special relationship captures the essence of fiduciary loyalty. A fiduciary is one who is put in a position to exercise power over the affairs of another.⁶⁵ In each of these cases of an established fiduciary relationship – trustee and beneficiary; employee and employer; director and company – the former is able to exercise discretionary power and make significant decisions on the latter's behalf. This

⁶³ Joshua Getzler, 'Ascribing and Limiting Fiduciary Obligations' in *Philosophical Foundations of Fiduciary Law* (n 56) 39.

⁶⁴ Simon Keller, *The Limits of Loyalty* (Cambridge University Press 2007) 21, cited in James Penner, 'Is Loyalty a Virtue?' in *Philosophical Foundations of Fiduciary Law* (n 56) 161.

⁶⁵ Paul B Miller, 'The Fiduciary Relationship' in *Philosophical Foundations of Fiduciary Law* (n 56) 70.

is an awesome power, and it comes with a heavy responsibility – the fiduciary who wields that power must take the side of his principal and treat the interests of the principal *as his own*.

44. How should we understand this in practical terms? I suggest that it involves a combination of at least three things which are somewhat distinct though they might also overlap. The first is the “no-conflict” rule, which requires that fiduciaries avoid placing themselves in positions where they might have interests that do or might conflict with their duty to their principals.⁶⁶ Just as important is the “no-profit” rule, which proscribes a fiduciary from making a profit out of his trust.⁶⁷ The second is the duty to act in the principal’s best interests. Some have described this as a form of affirmative devotion – that is, always to do one’s best for the principal and to avoid waste.⁶⁸ The third is the notion of being “true”,⁶⁹ which implicates the idea of being dependable, reliable, honest, and trustworthy. This is a stringent standard, because it means that there are certain forms of conduct or behaviour which are simply incompatible with a fiduciary relationship. For instance, a fiduciary who misleads his principal or keeps him in the dark would have fallen short of the

⁶⁶ See Andrew S Gold, ‘The Loyalties of Fiduciary Law’ in *Philosophical Foundations of Fiduciary Law* (n 56) 178.

⁶⁷ *Guy Neale and others v Nine Squares Pty Ltd* [2015] 1 SLR 1097 at [128(b)] (Sundaresh Menon CJ), citing *FHR* (n 35) [5] (Lord Neuberger).

⁶⁸ See Gold (n 66) 179.

⁶⁹ See *ibid* 180.

requisite standard, even if he acted with the best of intentions. As one scholar puts it: “even a justified betrayal is a betrayal”.⁷⁰

45. The case of *Boardman* is a good illustration of some of these dimensions of loyalty. By taking control of a company in which the Phipps trust was invested through an opportunity that came to him *only through* his capacity as solicitor of the Phipps trust, Mr Boardman put himself in a position of potential conflict which he ought to have avoided. Even though the company prospered under new management, he still fell short of the standard the law expected, because he had failed to stay true to the trust. The trust had earlier rejected a plan to obtain a controlling stake in the company, and it was not for Mr Boardman, regardless how well intentioned he might have been, to go behind the trust’s back to pursue a course of action for his own benefit which the trust had expressly disavowed. While I am not suggesting that these dimensions are exhaustive of the notion of loyalty, they are helpful pointers of what the law demands of those of us who hold fiduciary office.

46. While the concept of loyalty is not unique to fiduciary law, it is of the essence here. For example, in the criminal law, it is not unusual to describe an offender as having abused his position of trust if he has, for example,

⁷⁰ Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986) 354, cited in *Philosophical Foundations of Fiduciary Law* (n 56) 180.

sexually assaulted someone in his care. In this example, the disloyalty makes the act more egregious, but it is not the *essence* of the crime.⁷¹ By contrast, loyalty is central to the law of fiduciaries.

D. A nuanced approach to protecting loyalty

47. Yet, as important as loyalty is to fiduciary law, it need not be blind to the interests of all others aside from the beneficiary. To illustrate the point, I return to the issue of whether a principal should have a proprietary claim over a bribe disloyally taken by his fiduciary. Singapore's position on this issue has remained unchanged since Lai J's decision in *Thahir*. In 2015, our Court of Appeal cited *Thahir* in holding that any benefit acquired by an agent in the course of his agency and in breach of his fiduciary duty would be held on trust for his principal; and that in order to give effect to this, specific property can be ordered to be delivered up to the principal.⁷²

48. However, one possible line of development from this position is worth highlighting. Singapore, unlike England, does not take the view that constructive trusts are only institutional, in the sense that they arise only by operation of law by reference to the parties' conduct in the past. Instead, Singapore law accepts that, in principle, constructive trusts can also be

⁷¹ See Penner (n 56) 172–173.

⁷² *Guy Neale* (n 67) [130] (Sundaresh Menon CJ).

remedial, in the sense that they can be granted as a discretionary remedy.⁷³ To be sure, the Court of Appeal has clarified that the courts are to be circumspect in their use of this tool;⁷⁴ but beyond the proposition that the remedy will not be granted unless the defendant's conscience is affected, the principles governing the remedial discretion are still in development.⁷⁵

49. This means that a Singapore court could potentially be flexible in devising an appropriate remedy. In this regard, Professor Alvin See has proposed a calibrated approach.⁷⁶ He argues that the principal's interest should generally be protected by way of an institutional constructive trust that arises automatically in two main situations. The first is where the principal's claim is based on an existing proprietary right.⁷⁷ An example of this is *Aberdeen Town Council v Aberdeen University*,⁷⁸ where trustees who had bought land using trust funds were granted the right to fish opposite the land, and the House of Lords held that the trustees held the right on trust for the

⁷³ *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit* [2001] 1 SLR(R) 856 [36] (L P Thean JA).

⁷⁴ *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 [170] (Andrew Phang JA).

⁷⁵ See *ibid* [169] (Andrew Phang JA).

⁷⁶ See generally Alvin See (n 3).

⁷⁷ *ibid* para 57.

⁷⁸ (1877) 2 App Cas 544.

beneficiaries.⁷⁹ The second situation is where the fiduciary's gain was obtained at the principal's expense. Thus, in *Daraydan Holdings Ltd v Solland International Ltd*,⁸⁰ there was evidence to show that the bribe taken by the fiduciary was actually paid out of the money advanced by the principal, and the English High Court had no hesitation in deciding that the fiduciary held the bribe on trust for the principal.⁸¹

50. But in other types of case where the principal's assets have not been exploited, and where there is a wider range of third party interests, Professor See suggests that the courts should have the liberty to fashion an appropriate remedy that balances all competing interests through the use of the remedial constructive trust.⁸² He thinks that *Boardman* would belong to this category of case.⁸³ Mr Boardman's investment in the failing company came from his own

⁷⁹ Lord Cairns LC stated the principle as follows (ibid 549): "[I]t is one of the first principles in regard to the doctrine of trusts, – a principle founded upon no technical rule of law, but upon the highest principles of morality, – that wherever a trustee, being the ostensible owner of property, acquires any benefit as the owner of that property, that benefit cannot be retained by himself, but must be surrendered for the advantage of those who are beneficially interested."

⁸⁰ *Daraydan Holdings* (n 33).

⁸¹ Lawrence Collins J said (at [87]): "This is not a case where the price is presumed (for the purposes of the personal remedy) to have been increased by the amount of the bribe. Rather, it is a case where the evidence is that the price was actually increased by the amount of the bribe, and where the bribe was paid out of the money paid by the claimants for what they thought was the price." The difference between *Daraydan* and *FHR* is that in *FHR*, it was not possible to say, applying the rules of tracing, that the secret commission came from the moneys advanced by the principal: see *Mankarious* (n 4) [105] (Sir Terence Etherton C).

⁸² Alvin See (n 3) para 57.

⁸³ ibid para 52.

money and not from trust property, and it eventually increased the value of the Phipps trust's shareholding in that company, rather than causing the trust any loss. In such a case, the principal's claim might reasonably be regarded as being weaker relative to that of third parties, such as unsecured creditors, where the fiduciary has become bankrupt.

51. A similar approach has already been adopted in Australia, which also recognises the existence of the remedial constructive trust. In *Grimaldi v Chameleon Mining NL (No 2)*, the Full Court of the Federal Court of Australia endorsed *Reid*, but clarified that the fact that "money bribes can be captured by a constructive trust does not mean that they necessarily will be in all circumstances".⁸⁴ The court noted in this context that a constructive trust ought not to be imposed if other orders may be suitable. Taking the example of a bribed fiduciary who had profitably invested his bribe and later was bankrupted, it observed that a lien on the investment property might well be sufficient to achieve "practical justice" in such a case.⁸⁵ The thinking behind this is that the grant of a lien would give the principal security for his claim over the fiduciary's disloyal gains, and to the extent that that claim has been satisfied, the balance can then be distributed *pari passu* among the fiduciary's creditors, including those whose claims are unsecured. The court nonetheless

⁸⁴ *Grimaldi* (n 36) [583] (Finn, Stone and Perram JJ).

⁸⁵ *ibid* [583].

qualified that “where the bribe still exists in its original, or in a traceable, form, and no third party issue arises”, a constructive trust would likely be awarded.⁸⁶

52. It remains to be seen whether our courts will adopt a similar approach, but the short point I wish to make for now is that there are many ways of approaching a difficult issue. While the law recognises the need to protect a fiduciary’s undivided loyalty to his principal, it might be possible to secure this in a nuanced manner that fairly balances all the relevant interests.

IV. The lessons for us

53. I come to the last part of my discussion, where I will discuss the lessons that we can learn from the development of the law in this area. I will first discuss what it reveals about our national character before turning to the practical lessons that it holds for fiduciaries.

A. *Our national character*

54. It is well documented that corruption inevitably diminishes the business climate.⁸⁷ When a business is revealed to be corrupt, clients lose

⁸⁶ *ibid* [583].

⁸⁷ Linda Ray, ‘The Effects of Corruption on Business’ (Houston Chronicle) <<https://smallbusiness.chron.com/effects-corruption-business-52808.html>> accessed 1 September 2018; Marguerite Rigoglioso, ‘Research: Corruption Causes Business Inefficiency’ (Stanford Graduate School of Business, 1 December 2007) <<https://www.gsb.stanford.edu/insights/research-corruption-causes-business-inefficiency>> accessed 1 September 2018.

trust, and costs are incurred to manage the fallout. This will often extend to public resources that must be applied to the work of law enforcement.

55. As implausible as this might seem today, corruption was a way of life in Singapore for much of our colonial history. This changed only with the election of a new government in 1959, which campaigned on a promise to make the fight against corruption a national priority.⁸⁸ The result was the passage of the Prevention of Corruption Ordinance 1960⁸⁹ which, in many ways, was a watershed in the history of our nation, for it inaugurated a sustained campaign to root out the scourge of corruption, in all its forms, from all levels of our society. The result of this, as I have said elsewhere, is that in the 58 years “since then, our national character has come to be defined, among other things, by an utter intolerance for corruption”.⁹⁰

56. I raise this point because I think it goes a long way in explaining why we would lead the way for the Commonwealth in this area of the law. In explaining his reasons for not following *Lister*, Lai J said that “a court in Singapore when exercising its equitable jurisdiction must reflect the mores

⁸⁸ Public Service Division, ‘Upholding the Rule of Law’ <<https://www.psd.gov.sg/heartofpublicservice/our-institutions/upholding-the-rule-of-law>>, accessed 14 September 2018.

⁸⁹ Ordinance 39 of 1960.

⁹⁰ *Public Prosecutor v Syed Mostofa Romel* [2015] 3 SLR 1166 [13] (Sundaresh Menon CJ).

and sense of justice of the society which it serves”.⁹¹ The excesses of General Thahir, as Lai J noted, far surpassed those committed by the defendants in all of the previous cases, and it was in large part because of the opprobrium which his acts attracted that the law moved as it did.⁹² In no other case before, did our courts have to consider venality and larceny on such a grand scale, and it might well be that without the conscious decision that we took as a nation to set our face against corruption in 1960, and the egregiousness of General Thahir’s actions, which offended every fibre of our national sensibility, the law might not have progressed.

57. Of course, tackling corruption extends beyond allowing injured principals to assert a proprietary claim in the bribes that their fiduciaries had disloyally accepted. In terms of technology, for example, the World Economic Forum recently expressed optimism about how big data may now be used to detect patterns of suspicious transactions in areas including taxation and healthcare, in order to expose corruption and fraud.⁹³ And, with the growing, albeit cautious, acceptance of digital currencies around the world, it has also been suggested that the underlying “blockchain” technology may make

⁹¹ *Thahir* (n 20) [241].

⁹² *ibid* [242].

⁹³ Lauren Silveira, ‘4 technologies helping us to fight corruption’ (World Economic Forum, 18 April 2016) <<https://www.weforum.org/agenda/2016/04/4-technologies-helping-us-to-fight-corruption/>> accessed 3 October 2018.

corruption more difficult because it essentially employs a distributed ledger that can certify records and transactions in a way that cannot be erased, altered or tampered with.⁹⁴ It seems from this that much can be achieved on this front through the judicious use of fintech. But symbols matter too, and the fact that our law takes such a stringent view against bribery is a sign of our national resolve. It is no doubt an impression that any city which aims to be a serious financial and business centre ought assiduously to establish and maintain.

B. *Lessons in loyalty*

58. I move finally to some practical lessons that we might glean from this discussion. The first is a lesson about human weakness. Although the central duty of a fiduciary is that of undivided loyalty, it finds expression in many subsidiary rules, of which the two most famous are the no-conflict and the no-profit rules. These rules are based on a pessimistic but ultimately realistic appraisal of human nature, and are directed to the avoidance of temptation.⁹⁵ They operate to insulate the fiduciary from distracting influences and ensure that the fiduciary resists the temptation to serve himself rather than the

⁹⁴ Carlos Santiso, 'Can blockchain help in the fight against corruption?' (World Economic Forum, 12 March 2018) <<https://www.weforum.org/agenda/2018/03/will-blockchain-curb-corruption/>> accessed 3 October 2018.

⁹⁵ Peter Millett, 'Bribes and Secret Commissions Again' (2012) 71 CLJ 583, 590.

principal.⁹⁶ The lesson for us is that everyone, no matter how upright in character, will be tempted to err, and it is far better to stay away from temptation, than to have to make reparations after things go wrong.

59. The second lesson, which follows from the first, is that loyalty is not just a matter of adherence to specific rules, but an attitude and state of mind. The law has set many technical rules that guide a fiduciary's conduct, but loyalty is much more than a matter of following rules. As I have suggested, it involves taking someone's side. It demands, as one writer puts it, a "specific emotional and intellectual orientation towards one's principal".⁹⁷ The cultivation of values like empathy and kindness will be part of the process of developing that kind of orientation, because these values help the fiduciary to be truly sensitive to his principal's best interests. And a fiduciary who develops and employs these values out of a desire to nurture a sense of loyalty to his principal will naturally be better positioned to resist the temptation to act out of self-interest.

60. Those of us who are fiduciaries of an institution for the public good – whether it be a charity, a welfare organisation, a university, a social enterprise or the government – are perhaps the most well positioned to do this. The

⁹⁶ Graham Virgo, *Principles of Equity and Trusts* (Oxford University Press 2012) 492.

⁹⁷ Iris Samet, 'Fiduciary Loyalty as Kantian Virtue' in *Philosophical Foundations of Fiduciary Law* (n 55) 139.

ideals of our organisation should be our own ideals, and the needs of those whom it serves ought to burden our own shoulders. But even for those of us involved mainly in investment and wealth management, we should make every effort to understand the objectives and idiosyncrasies of our clients, in order that we may exercise our discretionary powers with the confidence that we are doing so responsibly and in their best interests.

61. Finally, the third lesson, which applies in at least some cases, such as corporate opportunities and perhaps secret commissions, though not cases involving criminal acts such as bribes, is this: when in doubt, consult one's principal. Most "innocent" fiduciary cases like *Boardman*, could easily have been resolved if only the fiduciaries thought to communicate with their principals. If Cedar had disclosed to FHR the possibility of obtaining a €10m commission, and FHR had approved their accepting that fee, all would have been well. Or if the Phipps trust had endorsed Mr Boardman's plan to use his own funds to gain control of the company and revive its business, his actions would have been beyond reproach. A useful practical tip is to set out protocols that fiduciaries must comply with, if they ever intend to employ a particular strategy which might also involve their benefitting personally from it. These may be likened to codes of conduct or guides to best practice which shape, even if they do not precisely dictate, what is to be done in specific scenarios.

V. Conclusion

62. In a sense, the story of the development of the modern rule is perhaps nothing more than a history of divided loyalties getting the better of fiduciaries. Sometimes, this is a matter of greed; sometimes, it is just a matter of poor judgment. If there is one lesson we can learn from this, it is that loyalty, which is the first obligation of every fiduciary, simply does not lend itself to being divided. All of us should flee from temptation and avoid placing ourselves in positions where we have to choose between competing loyalties. If we did this, the way forward would be clear, and the credibility of our office would be assured. If the example of Brutus teaches us anything, it is surely that, in the end, no one can serve two masters.