

Rukhadze v Recovery Partners GP Ltd [2025] UKSC 10

Summary

The claimant in this case was the successor in title to a company called Salford Capital Partners Inc ('SCPI'). SCPI was hired by the family of a deceased and extremely wealthy Georgian businessman called 'Badri' to recover his assets from where they had been hidden around the world. The defendants were all initially involved, in one way or another, in that process of asset recovery. At some point, the defendants fell out with the owner of SCPI and approached Badri's family with a view to taking over the job of recovering Badri's assets from SCPI and Revoker, another company involved in the process of recovering those assets. The family agreed to the defendants' doing this (encouraged by the defendants' badmouthing SCPI, Revoker and the owner of SCPI) and the defendants formed a company called Hunnewell to carry out asset recovery services for Badri's family. They were very successful in doing so and made profits of \$179 million as a reward for their services.

The claimant sued the defendants for those profits, arguing that they had committed a breach of fiduciary duty in acting as they did. The claim was successful at first instance and in the Court of Appeal, though the defendants were given an equitable allowance, allowing them to retain 25% of the profits they had made by working for Badri's family to reflect the value of the work they had done for the family. The defendants appealed to the UK Supreme Court, arguing that they should be allowed to retain the profits that they would have made anyway, had they not committed a breach of fiduciary duty. In other words, they argued that they should only be held liable to the claimant to give up those profits that they would not have made but for their breach of fiduciary duty. The defendants argued that on this approach they should be allowed to keep 50% of the profits they made from working for Badri's family because it was likely that had they approached SCPI and asked for permission to work independently for Badri's family, SCPI would have agreed on the basis that any money they made from working for Badri's family should be shared with SCPI on a 50-50 basis. Had the defendants done this, they would not have committed a breach of fiduciary duty in working for Badri's family – so, the defendants argued, only 50% of the profits that they made from working for Badri's family were made as a result of their committing a breach of fiduciary duty in relation to SCPI.

Seven members of the UK Supreme Court heard the case, as it brought into question the correctness of the House of Lords' judgments in *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 and *Boardman v Phipps* [1967] 2 AC 46. All seven unanimously rejected the defendants' argument. The leading judgment was given by Lord Briggs, with whom Lords Reed, Hodge and Richards agreed. Lord Briggs held that the claimants were entitled to sue the defendants under the 'no profit' rule, under which a fiduciary is held liable 'for any profits which the fiduciary makes from that fiduciary relationship, unless the principal has given its fully informed consent to the fiduciary keeping them for himself' ([2]). Lord Briggs noted that application of the no profit rule had a 'causal test of some kind' already built into it in that a fiduciary would only be held liable to give up profits that arose "by reason of", "out of", "by virtue of", "owing to" or "resulting from" the fiduciary relationship they had with their principal ([34]). But that causal test did not 'require the erection of a "but for" type of counterfactual' (ibid), under which it had to be shown that the fiduciary would not have made those profits but for their breach of fiduciary duty:

'The question is not, would the profit have been made even if there had been no antecedent breach of fiduciary duty, but did the profit owe its existence to a significant extent to the application by the fiduciary of property, information or

some other advantage which he enjoyed as a result of his fiduciary position, or from some activity undertaken while he remained a fiduciary which [his duty not to put himself in a position where his interest and duty conflicted] required him to avoid altogether. For that purpose the courts look closely at the facts, ie what actually did happen, but does not concern itself with what might have happened in a hypothetical “but for” situation which did not in fact occur’ ([36]).

Lord Briggs held that were the law to accept the defendants’ argument, ‘the essence of the duty’ that a fiduciary owes their principal to account for profits made by reason of their position would be unacceptably watered down:

‘At present the inevitability of a duty to account for profits (subject only to a discretionary and uncertain equitable allowance, or an election by the claimant to take equitable compensation instead) is the principal disincentive...to fiduciaries from even entering into activities which involve a conflict between interest and duty. The proposed change would water down the simple duty not to go there at all without the principal’s informed consent into a duty only to avoid making and keeping profits from a conflict situation which you cannot show that you would not have been able to make anyway, eg by an earlier resignation, or by showing that the principal would have consented if asked’ ([47]).

Three other judgments were given, all concurring in the result reached by Lord Briggs. In a lengthy judgment, Lord Leggatt agreed with Lord Briggs that the basis of the defendants’ liability in this case was the ‘profit rule’ under which a fiduciary has a duty ‘not to use property – or any information or opportunity which is to be treated as if it were property – of the principal for the fiduciary’s own benefit, or indeed for any purpose outside the scope of the fiduciary’s authority, unless the principal has given its informed consent’ ([95]). However, Lord Leggatt disagreed with Lord Briggs in that Lord Leggatt thought that when determining a fiduciary’s liability to give up profits under the ‘profit rule’ a ‘but for’ counterfactual *was* and *should be* employed by the courts under which a fiduciary who has used property of the principal for their own benefit and without the principal’s informed consent will be held liable to give up any profits that they would not have made but for their using the property of the principal for their own benefit ([152]-[176]). Where he agreed with Lord Briggs is that in employing that ‘but for’ counterfactual, it is never relevant to ask whether the principal would have consented to the fiduciary using the principal’s property for their own benefit had they been asked: the only question is whether the profits made by the fiduciary would not have been made but for the fiduciary’s using the principal’s property for the fiduciary’s own benefit ([177]-[182]). By that yardstick, the defendants in this case were appropriately held liable: they would not have made the profits they did had they not used the business opportunity that ‘belonged’ to SCPI for their own benefit ([201]-[208]).

Lord Burrows differed from Lords Briggs and Leggatt in that he preferred to base the defendants’ liability in this case not on a ‘no profit’ or ‘profit’ rule, but on the basis that the defendants had breached ‘the core duty’ owed by a fiduciary to their principal, which is a duty ‘of loyalty owed by the fiduciary to the beneficiary. The fiduciary must operate in the interests of the beneficiary and not in self-interest. The wrong [of breach of fiduciary duty] is committed where the fiduciary allows self-interest and duty to conflict’ ([264]). While Lord Burrows agreed with Lord Leggatt that a fiduciary who commits a breach of fiduciary duty would only be held liable to give up profits ‘that would not have been made “but for” the breach of fiduciary duty’, he went on to observe that ‘it is clear that there is to be no consideration of the profits which the defendant, counterfactually, might otherwise have lawfully obtained... In that sense,

the “but for” test is not being applied’ ([270]). Lord Burrows went on to ask ‘Why is it that, in respect of disgorgement for breach of fiduciary duty, one does not consider the counterfactual of the profits which the defendant might otherwise have lawfully obtained (for example, on these facts, under a profit-sharing agreement with the principal?)’ ([271]). His answer was that to do so would ‘directly undermine [the fiduciary’s] duty of loyalty for the fiduciary to be allowed to keep profit made from a breach of that duty’ ([283]). Not considering this counterfactual ‘maintains the disincentive to a cynical wrong and fully upholds the duty of loyalty for a fiduciary to be denied the possibility of arguing that the same profit could have been lawfully made’ ([287]).

Finally, Lady Rose considered whether the defendants had a case that the rules on when a fiduciary would be held liable to their principal and for how much should be reformulated to reflect the expansion of fiduciary duties to commercial contexts ‘where the fiduciary and the principal are both sophisticated operators, having access to the same information, who may also rely on less formality, and far less on trust, than in the traditional relationships’ ([312]) and where ‘The happenstance of whether, unbeknown to the parties, one or more fiduciary duties sprang into being from the arrangements that were put in place to ensure the tax efficient division of the spoils amongst them now threatens to allow one of their group opportunistically to assert that he is entitled to everything’ ([318]). Despite these considerations, Lady Rose thought that there were ‘insuperable obstacles’ in the way of the UK Supreme Court’s developing the law in the way the defendants wanted ([324]), principally that doing so would run counter to codifications of the law applying to company directors in the Companies Act 2006 ([325]-[330]) and to limited liability partnerships in the Limited Liability Partnership Regulations 2001 ([331]-[333]). It followed that ‘Whether the development and the continued prosperity of the business community in this jurisdiction is helped or hindered by the application of the rules discussed in this case is a broader question which must be tackled by the legislature, if any updating of the rules is needed’ ([335]).

Comments

(1) *Too long.* *Rukhadze* raised an elementary question that could have been dealt with in an equally elementary way. The question was whether a fiduciary who has made profits for themselves without their principal’s consent can retain them (or some proportion of those profits) on the ground that had they asked their principal, the principal would have consented to the fiduciary’s making those profits (or some proportion of those profits). The answer is ‘Obviously not – otherwise there would be no point in requiring the fiduciary to ask for their principal’s consent.’ As Lord Leggatt observed, if the defendants’ position were correct, ‘hypothetical consent would be as good as actual consent... this approach would effectively dispense with the need to obtain the informed consent of the principal where such consent is likely to be given. That is an unattractive conclusion’ ([178]). Indeed. So why did it take the UK Supreme Court 335 paragraphs to reject the defendants’ arguments? One wishes that Lord Reed, as President of the UK Supreme Court, had put his foot down and demanded that his six colleagues find a more succinct way of reaching such an obvious decision. Instead, Lords Briggs, Leggatt and Burrows ended up wasting a lot of words on two issues that were ultimately irrelevant to the outcome of the case: (i) the status of the ‘profit’ rule; and (ii) whether a fiduciary’s liability to disgorge profits to their principal rests on the fact that the fiduciary has committed a breach of duty.

(2) *Profit rule.* Academics debate over whether there is a ‘profit’ (or ‘no profit’) rule that exists independently of the ‘no conflict’ rule that fiduciaries are not allowed to put themselves in a

position where their self-interest and duty conflict. Lord Leggatt was most outspoken in favour of the view that there is an independent ‘profit’ rule, arguing that ‘transactions in which a fiduciary exploits relevant information or a business opportunity for personal gain do not necessarily involve a conflict of interest’ ([117]), seeing the key authorities in this area (*Keetch v Sandford*, *Regal (Hastings)* and *Boardman v Phipps*) as all cases where a fiduciary had to give up a gain without being involved in a conflict of interests and therefore being cases where the only basis for the fiduciary’s liability was the ‘profit’ rule ([118]-[121]), and endorsing as ‘compelling’ Lionel Smith’s reasons for regarding the profit and no conflict rules as separate ([114]). As we have seen, Lord Burrows was more doubtful as to the independence of these two rules and saw the no conflict rule as more fundamental to the liability of a fiduciary in this area, with the profit rule simply saying that a fiduciary cannot make a profit from a situation where their self-interest and duty conflict. At first sight, Lord Briggs seems to be on Lord Leggatt’s side of this particular fence (see, for example, the already quoted para [36]), but when he comes to identify the ‘fundamental reason for the strictness of the profit rule’ he locates it in the need to ‘deter [fiduciaries] from undertaking...*conflicting* activity in the first place, or, if determined to do so for their own benefit, first to obtain their principal’s...consent or, if it is withheld, to terminate the relationship and allow sufficient time to pass before starting their own profitable activity’ ([52], emphasis added). This seems to indicate that in Lord Briggs’ eyes, the no conflict rule is more fundamental than the profit rule. (See also [18] where Lord Briggs says that the profit rule ‘is closely related to the’ no conflict rule.) But ultimately, none of this is relevant or matters to the outcome of *Rukhadze*: the facts of the case were such that both or either of the no conflict or profit rules could have been invoked as a ground for holding the defendants liable.

(3) *Primary or secondary*. Their Lordships also divided over the issue of whether a fiduciary’s liability to give up profits to their principal could be said to be based on the fact that the fiduciary has committed a breach of duty in relation to their principal. Lord Briggs took the view that the fiduciary’s liability is primary in the sense that it does not need to be characterised as arising out of a breach of duty: ‘An order for account of profits is an order for specific enforcement of a basic duty of...fiduciaries, to treat any profit arising out of their fiduciary role as belonging to their beneficiaries’ ([47]). Lords Leggatt and Burrows took a different view. Lord Leggatt saw the ‘profit rule’ as working in cases where a fiduciary commits a breach of fiduciary duty by using property of the principal’s for the fiduciary’s own benefit ([95]), and thought that Lord Briggs’ view ‘overcomplicates the law’ ([215]). ‘It is a mistake’ Lord Leggatt thought, ‘to equate a fiduciary who dutifully holds or receives money for the principal with a wrongdoer. Different rules apply when a breach of fiduciary duty is committed. At that point liabilities arise and there is no need or reason to posit the creation of any new fiduciary duty’ ([229]). Lord Burrows took the same view: ‘I prefer to adopt a “remedy for a wrong” analysis which views the account of profits in this case...as a remedy for the wrong of breach of fiduciary duty’ ([242]). However, none of this mattered either to the outcome of the case. As Lord Briggs observed, ‘While I respectfully prefer the enforcement of duty analysis... I agree with [Lord Burrows’] conclusion that, if the remedy for wrong approach were to be preferred, the [defendants’] submission fails nonetheless’ ([48]).

(4) *Deterrence*. Much more relevant to the outcome of the case, at least so far as Lord Briggs’ and Burrows’ judgments were concerned, was their endorsement of the idea that a fiduciary’s liability to give up profits to their principal is designed to *deter* the fiduciary from breaching the duties that they owe their principal. So Lord Briggs said that ‘The essential purpose of the rule that a fiduciary must not without his principal’s consent keep for himself a profit from his position as such, and the related rule that a fiduciary must avoid placing himself in a position

where his interest and his duty may conflict...is to protect or deter those who have undertaken an obligation of single-minded loyalty to someone else from being tempted by human frailty to fall short of that obligation' ([16]) and 'The [defendants] acknowledge that the no profit rule in its current form properly plays a deterrent role, *pour encourager les autres*, in maintaining the high standard of single-minded loyalty required of a fiduciary by buttressing the no conflict rule' ([46]). It was in order to maintain the deterrent effect of the profit rule that Lord Briggs was unwilling to weaken it by adopting the defendants' arguments ([47]): 'the deterrent effect of the profit rule is all the more effective if the fiduciary tempted to stray into a conflict situations knows, or is advised, that an account of all his profits is a virtual certainty' ([58]). Lord Burrows took much the same view: 'Although deterrence would normally only make sense in the context of deliberate or cynical wrongdoing, in the context of a fiduciary duty, deterrence can be seen to operate, even on a strict liability basis. By imposing a strict rule, the fiduciary is not tempted to put himself or herself in a position where self-interest and duty conflict...' ([284]).

This reasoning is unfortunate because one thing we can know for certain about the law is that making someone give up the profits from engaging in an activity *cannot* deter them from engaging in that activity. This is because under such a rule they will have nothing to lose, and potentially much to gain, from engaging in that activity. Here Lord Leggatt is much better, criticising the view that 'depriving a fiduciary of a profit which the fiduciary would have made anyway, absent the breach...[is] necessary "pour encourager les autres"' ([198]) on the ground that if deterrence were the goal of the law in this area 'why not require the fiduciary to pay over, say, three times the amount of the profit that he received?' ([199]). The truth is that the temptation that fiduciary liabilities are designed to guard against is not the temptation to venality – the temptation to use your position to rip off your principal – but the temptation to self-deception – the temptation to think that that what you are proposing to do will *not* harm your principal just because acting in that way is in your self-interest. Their Lordships seem to have been presented with this view, to judge from Lord Burrows at para [284] (adverting to the claimants' counsel's 'forcefully submitt[ing] [that] human nature being what it is, the fiduciary may deceive himself or herself as to whether he or she is acting honestly'), and it may be that they took refuge in the language of 'deterrence' to explain the functioning of fiduciary liabilities because they lacked a good word for what those liabilities are actually trying to do in terms of affecting the way fiduciaries think and evaluate options for how to behave. They are not trying to deter the fiduciary from acting at the expense of their principal, but to help the fiduciary to think clearly about what is the right thing to do, freed from the tendency to rationalise and identify what is in their self-interest with what is in the principal's best interests. Perhaps the best word for what fiduciary liabilities are trying to do is that they are *therapeutic*. But good luck with convincing the UK Supreme Court to adopt that kind of language!

(5) *No change*. As was noted above, a seven member UK Supreme Court was convened in this case because ruling in favour of the defendants would have been in tension with the House of Lords' decisions in *Regal (Hastings)* and *Boardman v Phipps* in that the UK Supreme Court would have ruled that something that was not considered in those cases – whether the defendants in those cases could have made the same profit without committing a breach of fiduciary duty – should have been considered before an account of profits was made in those cases. However, no head-on challenge to those cases was made in *Rukhadze*. It was not argued in *Rukhadze* that a defendant fiduciary should not be held liable to give up their gains where (adapting para [139] of Lord Leggatt's judgment): (i) the defendant acted honestly and in the best interests of their principal; (ii) the defendant's conduct had positively benefited their principals by generating profits for them which they would and could not otherwise have made; and (iii) the only way of obtaining that benefit for the principal was by the defendant investing

their own money alongside that of the principal. Lord Leggatt observed that had these ‘features...all been present here, and had it been argued on such facts the Supreme Court should not depart from *Regal (Hastings)* and *Boardman v Phipps*, that argument would in my opinion have deserved serious consideration’ ([142]). However, given the tenor of the other judgments in *Rukhadze*, it would be surprising if such an argument were to succeed. Lady Rose’s position would be that such a change could only be made by the legislature, and not the courts. And it is hard to imagine that having cavilled at a relatively minor weakening of the law on when a fiduciary will be held liable to give up profits to their principal, Lord Briggs or Lord Burrows would be happy with making a far greater inroad into this area of law. So whatever else it may have done, *Rukhadze* has made *Regal (Hastings)* and *Boardman v Phipps* safe for another generation. And if it is true – and the 2008 economic crisis showed that it *is* true – that ‘the safety of mankind’ depends on the rules on fiduciary liabilities being strictly applied (per James LJ in *Parker v McKenna* (1874) LR 10 Ch App 96), we can at least be very happy about that even if so much else about *Rukhadze* is unsatisfactory.

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