assistant and the assisted fiduciary instead ought to be – and are – jointly and severally liable for some capital items at least: *Eaves v Hickson* (1861) 30 Beav. 136, 141–22; *Bowstead & Reynolds on Agency*, by P.G. Watts, 21st ed. (London 2017), Article 96. The ordinary notion of profit is the proper notion in such a case.

Thirdly, accounting parties' responsibilities are discharged only where, for example, such parties rebut a presumption that they remain responsible for items of account, or displace a burden requiring them to show that they ceased to be responsible for some item of account. Thus fiduciaries and knowing assistants are kept to exacting standards of conduct. However, in *Lifeplan* that principle was subordinated to an asserted discretion empowering the court to decide on a fitting causal criterion for the accounting of profits. Such a wide judicial discretion does not exist in relation to fiduciaries (*Boardman v Phipps* [1967] 2 A.C. 46) or to knowing assistants and knowing recipients (*Ultraframe (UK) Ltd. v Fielding* [2005] EWHC 1638 (Ch), at [1579]), though discretion exists, such as to grant relief on terms. The court ordered Foresters to account for less, and for a shorter period, than the authorities allow. *Akita* and the English authorities discussed in *Warman International Ltd. v Dwyer* held fiduciaries and knowing assistants liable for all the net profits they derived by reason of their defalcation. In *Lifeplan*, Foresters should have been ordered to account for as long as that causal criterion required, subject only to any allowance for costs, expenses and the like to which Foresters should have proved itself justly entitled (which was not done in e.g. *Warman International*).

The breeze that will shift the mist surrounding what equitable relief can be obtained from third parties will come from giving uninterrupted attention to the accounting obligations that fiduciaries assume, and the rule that such third parties are liable as if they assumed such obligations.

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FINALITY VERSUS FATHERS: UNDOING ADOPTION TO RECOGNISE BIOLOGICAL TIES

Re J (Adoption: Appeal) [2018] EWFC 8, [2018] 4 W.L.R 38, is a striking judgment in which Cobb J. was willing to set aside an adoption order made without the involvement of the relevant child's biological father. J was born when his mother (M) and father (F) were still teenagers, and M was living with her own parents. M and F had a relationship lasting a few months. Initially F visited J, but his level of engagement varied due to periodic depression. When J was five years old, M married SF and gave birth to J's step-brother. In 2012, SF gave the local authority notice of his intention

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to adopt J. In the course of local authority enquiries, both M and SF falsely claimed that they did not know F's identity, whereabouts or contact details. M claimed that she had met F at a party and had a sexual encounter with him, and that she did not know whether he lived locally or further afield. It was "[i]ndisputably" true, Cobb J. held, that "M, SF and M's family misled the local authority social worker, the Cafcass reporting officer, and ultimately the magistrates considering the adoption application", and the parties accepted that they did (at [16]). The lies were described as "particularly egregious" (at [16]), and the conduct of M and SF as "disgraceful" (at [34]).

F did not have parental responsibility for J, such that his consent to the adoption was not therefore even prima facie required (Adoption and Children Act 2002, s. 52(6); references to sections below also refer to this Act) and he was not a party to the proceedings. While he had not seen the original adoption application, Cobb J. assumed that it would have declared F's consent to be unavailable because he could not be found (s. 52(1)(a)). The adoption order, made by Great Grimsby Magistrates in 2013, was unopposed but "predicated on incomplete and essentially false information" (at [18]).

By 2016, F had recovered from his depression and wanted to resume his relationship with J. He was shocked and upset to discover that J had been adopted, but following mediation F met J, and M and SF (whose marriage was breaking down) agreed that F could see J regularly. In 2017, F appealed against the adoption order, and was granted permission to do so out of time.

When considering the substantive appeal in 2018 when J was 11, Cobb J. noted that "[a]doption orders which have been lawfully and properly made will only be set aside in highly exceptional and very particular circumstances" (at [26], applying *Webster v Norfolk County Council* [2009] EWCA Civ 59, [2009] 2 All E.R. 1156, noted Bainham [2009] C.L.J 283). He was satisfied, however, that the circumstances of J's adoption were far from proper, and that there was a breach of natural justice justifying the allowing of the appeal. In doing so, he took account of Sir Thomas Bingham M.R.'s assertion in *Re B (Adoption: Jurisdiction to Set Aside)* [1995] Fam. 239, 252, that "where there has been a failure of natural justice, and a party with a right to be heard on the application for the adoption order has not been notified of the hearing or has not for some other reason been heard, the court has jurisdiction to set aside the order", and Butler-Sloss L.J.'s dictum in *Re K (Adoption and Wardship)* [1997] 2 F.L.R 221, 228, that some such failures would *require* the order to be set aside. In the case at hand, F had been denied the chance to "contribute to, influence, inform, and/or challenge, the making of an adoption order concerning his son" (at [27]). Cobb J. cited several other cases in support of his approach on a failure of natural justice, among them *Re F (R) (An*

Infant) [1970] 1 Q.B. 385, where an adoption order was set aside because it had been made on the basis that the child's mother (who *would* have had the equivalent of parental responsibility) could not be found whereas her contact details would have been available on reasonable enquiry. Cobb J. was particularly conscious of the far-reaching consequences of an adoption order, terminating the relationship of legal parenthood in respect of one adult (on these facts) and creating one in respect of another (ss. 46, 67). He was concerned that the professionals involved in the case could not properly perform their obligations to consider the various aspects of the welfare checklist (s. 1) that were designed to emphasise J's relationships with his birth family and require consideration of the effect throughout J's life of their termination. On Cobb J.'s analysis, M and SF had also "knowingly concealed" from the court F's "actual or at least potential" rights to respect for family life with J under Article 8 of the ECHR (at [34]). The adoption order had been wrongly made and was set aside.

Cobb J. was adamant that "should any person contemplate such deception of the authorities or the court in these circumstances, they should understand that generally such dishonesty would be punished" via committal to prison (at [36]). On the facts of the case, however, he chose not to punish M and SF for reasons including F's lack of desire to see this happen, a generous decision likely to advance J's welfare. By consent, he was "pleased" to make a child arrangements order for regular weekend staying contact between J and F, which he regarded as something that "entirely accord[ed] with [J's] best interests" (at [38]). He also made a parental responsibility order in favour of F by consent.

Several factors arguably reduce the significance of *Re J*. First, it involved step-parent adoption, and was not a more usual modern adoption case where one or more parents are deemed unfit and the child is non-consensually removed from the original family altogether. Secondly, the result reached by Cobb J. was ultimately achieved with the consent of all parties and, moreover, it would make little difference to the reality of J's everyday life and accorded with that reality. Nevertheless, the case can usefully be broadly contrasted with *Re C (A Child) (Adoption: Duty of Local Authority)* [2007] EWCA Civ 1206, [2008] Fam. 54 (noted [2008] C.L.J 33), which was not cited by Cobb J. In that case, the Court of Appeal was entirely content for the adoption of a child conceived during a one-night stand to proceed without the knowledge or involvement of her natural father (lacking parental responsibility), on the basis of what the child's birth mother had said about his likely parenting abilities. While there is no suggestion that the mother was being deceptive in *Re C*, the Court of Appeal actively prevented the verification of her claims by forbidding the relevant local authority from identifying the father or assessing him as a potential carer. As Claire Fenton-Glynn's "imagined" dissenting judgment in *Re C* (in H. Stalford, K. Hollingsworth and S. Gilmore (eds.), *Rewriting*

Children's Rights Judgments: From Academic Vision to New Practice (Oxford 2017), ch. 6) highlights, that was not obviously a child-centred decision that gave due regard to the child's rights, inter alia, to know and be cared for by her family as far as possible, protected by Article 7 of the UN Convention on the Rights of the Child. That UNCRC right was given prominence by Lord Neuberger in *Re B (Care Proceedings: Appeal)* [2013] UKSC 33, [2013] 1 W.L.R 1911, noted [2014] C.L.J 28 (with reference to B. Sloan, "Conflicting Rights: English Adoption Law and the Implementation of the UN Convention on the Rights of the Child" [2013] C.F.L.Q 40), and Cobb J.'s decision is consistent with Article 7 even though he did not mention it.

By way of another contrast, *Webster v Norfolk CC* itself demonstrates that an adoption order will not necessarily be set aside where it is shown to be underpinned by a flawed factual analysis, while *Re J* suggests that this will sometimes occur. In *Webster*, the appeal was dismissed even though the three children concerned had originally been removed from their parents on the basis that one child had been injured culpably, but it later transpired that the injuries had in fact been caused by scurvy (consequent on adherence to medical advice). There are limits, then, to the law's concern for procedure and truth in this area, such that seemingly incorrect decisions can still be upheld for reasons of perceived child welfare and public policy. F was fortunate (as was J, by extension) both that Cobb J. took a generous approach to the requirements of natural justice (since earlier case law suggested that he would not have an absolute right to participate in the adoption proceedings) and (not least for Art. 8 purposes; see [2011] C.L.J. 314) that M and SF had allowed him into J's life before he attempted to appeal against the adoption order.

In short, *Re J* is to be welcomed as a decision that did not allow the "peculiar finality" of adoption (*Re B (Adoption: Jurisdiction to Set Aside)*, p. 251, per Sir Thomas Bingham M.R.) to prevail over a child's rights and interests relating to his origins, in circumstances consistent with the reality of his life. What is less clear is whether it can be seen as setting any sort of wider precedent.

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MUSCULAR LIBERALISM AND THE BEST INTERESTS OF THE CHILD

SOMETIMES it is the cases with the most unusual facts that reveal most acutely tensions between laws and their underlying principles. *Re M (Children)* [2017] EWCA Civ 2164, [2018] All E.R. (D) 16, is just

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