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FIDUCIARIES THEN AND NOW

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ABSTRACT. *This article takes as its starting point three ground-breaking articles by Len Sealy in the 1960s, and examines their lasting impact on the modern law of fiduciaries. It includes a detailed consideration of the modern tendency to describe rather than define fiduciaries; it critiques the current readiness to merge fiduciaries with other power-holders, thus ignoring the significant differences between the duties of loyalty in issue in the two contexts; and finally it evaluates and defends the modern approach to fiduciary remedies, especially equitable compensation.*

KEYWORDS: *fiduciaries, fiduciary definition, fiduciary duty of loyalty, fiduciary powers, equitable compensation, fiduciary remedies.*

I. INTRODUCTION

From today's perspective it is difficult to conceive of the fiduciary landscape as was a little over 60 years ago when Len Sealy commenced his Cambridge PhD studies on the fiduciary duties of company directors and promoters. Cambridge did not then have an undergraduate equity course, nor a course on company law;[1] the newly published textbook by Gower contained almost nothing on directors' duties;[2] *Regal Hastings v Gulliver*[3] (on company directors as fiduciaries) had not been officially reported and *Boardman v Phipps*[4] (concerning a solicitor as a fiduciary) was yet to be decided.[5] It is not that there was no law on fiduciaries, of course, just that it lay hidden in a mass of cases, with no useful and reliable guide to the territory.

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[1] L.S. Sealy, "Fiduciary Obligations, Forty Years On" (1995) 5 Journal of Contract Law 37, note 8.

[2] L.C.B. Gower, *The Principles of Modern Company Law* (London 1954).

[3] *Regal (Hastings) Ltd. v Gulliver* [1967] 2 A.C. 134 (H.L.). It was reported, but in [1942] 1 All E.R. 378.

[4] *Boardman v Phipps* [1967] 2 A.C. 46 (H.L.).

[5] Similarly, the leading work of Commonwealth courts lay decades ahead: see especially *Hospital Products Ltd. v United States Surgical Corporation* [1984] HCA 64, (1984) 156 C.L.R. 41; *Chan v Zacharia* [1984] HCA 36, (1984) 154 C.L.R. 178; and *LAC Minerals Ltd. v International Corona Resources Ltd.* [1989] 2 SCR 574 (SCtCanada).

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In three pathbreaking articles in the 1960s, Sealy showed how such a task of map-making might be tackled, and delivered an early and extraordinarily perceptive account of the terrain. In contributing to this Centenary Edition, it is a privilege to look back at those three articles and reflect on their impact on current understandings of fiduciary law.[6] The three pieces are "Fiduciary Relationships" in 1962, "Some Principles of Fiduciary Obligation" in 1963, and "The Director as Trustee" in 1967.[7]

With the benefit of hindsight, it is easy to see how firmly Sealy set the path for the future. Nowadays the most cited description of a fiduciary is Millett L.J.'s observation in *Bristol and West Building Society v Mothew* (a case dealing with whether a solicitor's conduct amounted to breach of fiduciary duty):[8]

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of the fiduciary.

For reasons which emerge later,[9] I suspect Sealy would have preferred – perhaps with some refinements – Leggatt L.J.'s more recent variation, set out in *Al Nehayan v Kent*:[10]

> fiduciary duties typically arise where one person undertakes and is entrusted with authority to manage the property or affairs of another and to make discretionary decisions on behalf of that person …. The essential idea is that a person in such a position is not permitted to use their position for their own private advantage but is required to act unselfishly in what they perceive to be the best interests of their principal.

Yet, whatever the criticisms made of these and many other descriptions of fiduciaries, the territory under observation is in plain sight. The paradigm case of a fiduciary relationship is that between trustees and beneficiaries.[11] Other settled categories include partners, company directors and their companies, solicitors and their clients, and agents and their principals. Besides

[6] I declare my biases: I am a member of the Sealy fan club, an ex-student, and have been fascinated by fiduciaries since I encountered them as an undergraduate.

[7] L.S. Sealy, "Fiduciary Relationships" [1962] C.L.J. 69; L.S. Sealy, "Some Principles of Fiduciary Obligation" [1963] C.L.J. 119; L.S. Sealy, "The Director as Trustee" [1967] C.L.J. 83.

[8] *Bristol and West Building Society v Mothew* [1998] Ch. 1 (C.A.), 18.

[9] Sealy also noted the unhelpful circularity of defining the expressions "fiduciary", "trust" and "confidence" in terms of each other: Sealy, "Fiduciary Relationships", note 14.

[10] *Al Nehayan v Kent* [2018] EWHC 333 (Comm), [2018] 1 C.L.C. 216, at [159] (Q.B.). Also see *Lehtimäki v Cooper* [2020] UKSC 33, [2003] 3 W.L.R. 461, at [44]–[46] (Lady Arden), considered in more detail later. In the Australian context, see *Hospital Products Ltd. v United States Surgical Corporation* [1984] HCA 64, 96–97 (Mason J.).

[11] This usage is now too firmly embedded to change, although Sealy maintained a distinction between fiduciaries and trustees, seeing fiduciaries, defined precisely, as individuals who were *not* trustees, although their roles were similar in certain important respects: Sealy, "Fiduciary Relationships", 72. We are unlikely to ignore differences in the two roles when considering property, but the usual prescriptive duties imposed on trustees will not necessarily be replicated in individual fiduciary relationships.

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these status-based fiduciaries, other individuals, often joint-venture partners, may also be found on the facts to be in relationships that are fiduciary, and thus to owe fiduciary duties.[12]

All this matters not simply for the (seemingly elusive) satisfaction of a clear definition, but because remedies for breach of these fiduciary duties are generous, including both compensation for losses to the property under management and proprietary and personal disgorgement of any unauthorised profits made within the scope of the engagement.

In each of the sections which follow I endeavour to highlight a particular insight from Sealy's scholarship that continues to illuminate the modern fiduciary landscape. The first section reveals the outcomes of Sealy's early excavation work. He took the unsorted mass of cases in which courts had said they were dealing with "fiduciaries" and identified the legally significant facts which, he held, predictably delivered some distinctive form of equitable intervention. From this he worked backwards to identify the distinctive prohibitions that equity had effectively put in place in each of these classes of cases. For us, who are now used to starting with a clearly identified legal duty, and from that assessing whether the necessary legally relevant facts exist, out of which a predictable remedial conclusion can be expected, Sealy's approach looks like reverse-engineering of the highest order. But in truth it is the common law method in action. The relevant legal principles are built out of the mass of decisions in similar cases. The trick is to see precisely what makes the cases similar, and precisely what legal consequences – what rights and remedies – are impressed on those legally significant facts.

The next two sections turn to the modern cases to expose the relevance of Sealy's conclusions on the distinctive working mechanisms of the law relating to fiduciaries. Despite our routine insistence that the "distinguishing obligation of a fiduciary is the obligation of loyalty" (see the earlier quotation from *Mothew*), Sealy held that there is no positive or prescriptive obligation to act loyally, and indeed that such an obligation could not be legally enforced. Instead, specific and limited proscriptive obligations are imposed – the duty to avoid conflicts and not to take unauthorised profits. Further, the common translation of "the obligation of loyalty" into an obligation "to act in the interests of the counterparty" carries its own risks. Used loosely, as it so often is, it is apt to cover not only what is required of fiduciaries, but also what is required of all manner of power-holders, whether fiduciaries or not. With fiduciaries, the form of loyalty required is to act in the interests of the counterparty *and in denial of the self-interests of the fiduciary*. With power-holders, self-denial is not required; the loyalty required is merely good faith in pursuit of the

[12] *English v Dedham Vale Properties Ltd.* [1978] 1 W.L.R. 93, 110 (Slade J.).

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endeavour: the power is to be used for its proper purposes, *and not for the purpose* of advancing the power-holder's separate interests (note especially that selflessness is not necessary – it is the "purpose" that is in issue, and self-interest may well be advanced, incidentally, by good faith proper pursuit of the endeavour). Sealy spells all this out, testing the principles in the complex context of directors (as fiduciaries) and shareholders (as non-fiduciaries) both being required to act "in the interests of" their companies. Moreover, here too the much-asserted prescriptive version of what is required cannot bear the burden of defining a legally enforceable obligation, and the law again resorts to proscription.

Finally, Sealy engaged in significant work on remedies, both proprietary and personal. Much of his proprietary analysis has now been realised in the cases, although in some limited respects not in a way that he welcomed. But with personal remedies, he was decades ahead of the curve in recognising the significance of equitable compensation.[13] Even at that early stage, Sealy described it as compensation for loss, and loss assessed against the counterfactual of performance,[14] but performance in managing the principal's assets, and thus directed at remedying or repairing the loss to the *assets* under the fiduciary's control, not common law damages directed at repairing the harm to the *claimant herself*. Where there are no such assets under the fiduciary's control, the remedy is not available. The issue has become a hot topic, but many of the answers to modern questions lie here in plain sight.

In all of these undertakings, Sealy held unerringly to the findings in the cases; he sought out the basic principles that underpinned the different findings; and he tested those against hard cases. Not for him the paradigm fiduciary context of a trustee of a straightforward trust of chattels, cash and equities, with a handful of beneficiaries to care for. He resorted to directors' duties to their companies, companies with broad agendas and differing risk appetites, and a myriad of stakeholder interests to hold in the balance. In all of this, Sealy was both a true academic and a lawyer for the real world.

II. "Fiduciaries" as Revealed by Sealy

Sealy's first task in his 1962 article was to identify his targets and what the law required of them: when cases referred to "fiduciaries", which individuals warranted the label and what consequences followed? The task was complicated by language. The early language in the cases was of "trust" and "confidence", merging only later into the language of "fiduciaries", and these terms all lacked a defined technical meaning. Generalising, C (our claimant beneficiary or principal) could be said to repose "confidence"

[13] His starting point was *Nocton v Lord Ashburton* [1914] A.C. 932 (H.L.). The next extended study was I.E. Davidson, "The Equitable Remedy of Compensation" (1982) 13 Melbourne University Law Review 349.

[14] As are losses in contract and tort – i.e. the relevant question is what position would the *claimant* have been in if the contract had been performed or the tort not committed?

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in D (the defendant "fiduciary") not only where D held property on trust for C in the technical sense in which we now understand a trust, but also when D undertook to exercise a power, to conduct a sale, to supervise an estate or business, or in some other way act as C's employee or agent. Confidence was also reposed where C was especially dependent on D's advice, perhaps because D was a professional adviser, or more familiar with the subject matter, or was a trusted servant or friend, or even simply a person of dominant character or position who was able to influence C's decisions. Confidence might also be induced where D, by words or conduct, represented that he would deal fairly with C, either in a transaction or in keeping information secret, or in some other way. In *all* these cases, a broad general principle applied: if a confidence was reposed, and that confidence was abused, a court of equity would give relief.[15]

In these descriptions of all the various scenarios in play, we can now see the early foundations of what later became the modern common law of negligence, negligent misstatements and employment law, and the equitable rules on actual and relational undue influence, breach of confidence and the constraints on the exercise of powers. In many of these arenas we still describe the situations as ones where trust and confidence are reposed, but that terminology is not part of defining the technical legal requirements and legal consequences of the rules in play. And certainly we do not find it essential, or even useful, to think of all these areas as a seamless part of some coherent body of law on "trust and confidence".

But there was something more in these early decisions, something not clearly captured in the scenarios just listed. This only became clearer with the adoption of technical meanings for "trust" and "trustee", and a corresponding need for another word which could be used where the context was "like a trust, although not technically a trust". This was where "fiduciary" came into its own, with "fiduciary relationships" and "fiduciaries" mapping onto "trusts" and "trustees". The crucial analogy was noted by Fry J. in *Ex parte Dale & Co.*:[16]

> What is a fiduciary relationship? It is one in respect of which if a wrong arise, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the *cestui que* trust.

But, as Sealy noted:[17]

> [This] is really not a definition at all: although it describes a common feature, it does not teach us to recognise a fiduciary relationship when we meet one. Still less does it assist us when we are faced with a particular relationship and asked the practical question: does a certain principle of the law of trust and trustee apply?

[15] Sealy, "Fiduciary Relationships", 69–70.
[16] (1879) 11 Ch.D. 772, 778. Although this decision was disapproved of in *Re Hallett's Estate* (1880) 13 Ch.D. 696 (C.A.), the cited passage was expressly approved by Jessel M.R. at 713.
[17] Sealy, "Fiduciary Relationships", 73.

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The problem, as Sealy recognised, was that trustees are subject to all manner of obligations, enabling beneficiaries to pursue different claims delivering different remedies in different contexts. What we needed to know, in the context of fiduciaries, is which particular aspects of the "trust-like" relationship were apt to deliver which particular "trust-like" consequences. This was the goal Sealy sought in his early excavation of the cases which dealt with "fiduciaries". It was his early scholarship which demonstrated that we must not trust verbal formulae: in these old cases, the label "fiduciary" meant quite different things in different contexts:[18]

> The word "fiduciary," we find, is *not* definitive of a single class of relationships to which a fixed set of rules and principles apply. Each equitable remedy is available only in a limited number of fiduciary situations; and the mere statement that John is in a fiduciary relationship towards me means no more than that in some respects his position is trustee-like; it does not warrant the inference that any particular fiduciary principle or remedy can be applied.

This conclusion was a surprising one for its time, much as we now take it for granted. The term "fiduciary", as used in these old cases, had to be examined and defined, class by class, to identify the rules which governed each class. Sealy identified five possible categories.[19]

Category I captured those cases where the fiduciary had "control" of property which, in the eyes of equity, was the property of another. This class differs from trusts, in that it sweeps up all manner of relationships where the property in issue remains legally (and beneficially) the principal's. Moreover, Sealy used the word "control" in the sense that the fiduciary had *power* to dispose of the property, whether or not he had *authority* to do so. This category thus captures company directors controlling the property of their companies, bailees controlling the property of their bailors, agents for sale controlling the goods which were to be sold, or those running errands with cash to purchase the requested goods. All these people have control over property, and thus the power to use it for authorised ends or for unauthorised ones. A fiduciary who falls within this category, so Sealy determined from the cases, must keep the property separate from his own, and is debarred from trading with it for his own benefit. If the fiduciary fails to adhere to this proscription, the consequences are the same as those that apply to trustees, including entitling the principal to trace, to assert proprietary remedies, and to recover equitable compensation for unauthorised losses the fiduciary has caused to the assets under his control.

[18] Ibid. To similar effect see the subsequent much-cited observations of P.D. Finn, *Fiduciary Obligations* (Sydney 1977), 2; now republished: *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (Sydney 2016).

[19] Sealy, "Fiduciary Relationships", 74ff.

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Sealy noted that some commentators would extend these Category I rules to cover conscious wrongdoers, such as thieves.[20] He disagreed. He suggests the better view is that although there is a continuing right of property sufficient to invoke the doctrine of tracing in these cases of wrongdoing, there is not, without more, a fiduciary relationship.[21] He did not elaborate, but the context suggests his possible reasoning. In all the "fiduciary" cases which Sealy examined, and from which he extracted his five categories, the material facts suggest the relationship cannot function effectively unless equity intervenes to offer protection to the fiduciary's counterparty. With thieves, such intervention is not essential to protect the victim's property rights: the victim has personal and proprietary claims against the thief, *and* against third-party transferees whether good faith purchasers or not, and to the extent that the thief uses the stolen assets to generate lucrative investment gains, these might be seen as more properly pursued by the state.[22]

Category II is loosely defined as covering agents, or all cases where "the plaintiff entrusts to the defendant a job to be performed".[23] Worded so broadly, the class clearly includes employees, Crown servants, solicitors, agents, partners, directors and promoters. All those in Category I are also likely to be in Category II, but not vice versa. However, this wide classification of "all those with a job to do" may mislead.[24] Sealy's description continues immediately with the nuance that this category covers only those cases where D has undertaken or is under an obligation "to act on another's behalf or for another's benefit" and, importantly, that this

[20] Ibid., at note 23. Whether a thief *has* this power to control is worth further thought. We often assume a positive answer, but the thief cannot transfer legal or beneficial title to any transferee, only possession, and not the best right to possession. The position is typically different for status-based fiduciaries, given the estoppel-basis of our agency rules.

[21] Ibid. Finn is of the same view, also without elaboration: P. Finn, "Fiduciary Reflections" (2014) 88 A.L.J. 127, 133, note 59. Also see *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669, 715–16 (H.L.) (Lord Browne-Wilkinson), although not spelling out the intended ramifications.

[22] Now see Proceeds of Crime Act 2002. To the contrary, *Foskett v McKeown* [2001] 1 A.C. 102 (H.L.) holds that the tracing rules are inherent rules of property. For counter-arguments to the approach in *Foskett*, see S. Worthington, "Justifying Claims to Secondary Profits" in E.J.H. Schrage (ed.), *Unjust Enrichment and the Law of Contract* (The Hague 2001), 451.

[23] *Reading v R* [1949] K.B. 232, 236.

[24] E.g. we see the tightening of the legal analysis now applied in the context of employee/employer relationships. Employees are not now regarded as status-based fiduciaries, despite earlier use of "fiduciary" language in that context. Instead, although their relationship may be described as one of mutual "trust and confidence", both employees and employers are seen as subject not to fiduciary selflessness, but rather to special obligations of good faith and fair dealing: see *Johnson v Unisys Ltd.* [2003] 1 A.C. 518, at [24] (Lord Steyn); and *Eastwood v Magnox Electric plc.* [2005] 1 A.C. 503, at [11] (Lord Nicholls); see too *Ranson v Customer Systems* [2012] EWCA Civ 841. This does not mean that employees *cannot* be fiduciaries if the facts support that conclusion: see the cogent analysis of Elias J. in *University of Nottingham v Fishel* [2001] RPC 22 (Q.B.), at [87]–[98], especially [92]–[93]. There appears to be no reason why this re-analysis would not cover Crown servants as employees. If so, the exclusion of such employees from the category of status-based fiduciaries may have pleased Sealy: see his critical comments in Sealy, "Fiduciary Obligations, Forty Years On", 50, on the outcomes in a trio of Crown servant cases, including *A-G for Hong Kong v Reid* [1994] 1 A.C. 324 (P.C.). His complaint was that an "ordinary employee" surely would not have been visited with the same consequences as these employees.

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undertaking must also be one which carries with it "the assumption that [the fiduciary] *will not act in his own interest*" (emphasis added).[25] It follows naturally from that prohibition that, in this category, the fiduciary is barred from engaging in acts where his interest conflicts with his duty: in particular, there is a prohibition on self-dealing, taking fiduciary opportunities (i.e. the fiduciary taking for himself the benefit of something which *might* have been done for C), and taking bribes or secret profits.[26]

Category III captures "*Keech v Sandford*[27] situations" (this being a case where the trustee was held unable to renew a lease for his own benefit even though it was impossible to renew it for his beneficiary). Sealy regarded this situation as within Category II if the real concern was with the propriety of the fiduciary's exercise of an option or discretion to renew the lease. Alternatively, he considered it might merit a distinct category if the renewal of benefits could be regarded as an accretion to the original property. Viewed anew, however, it might be more accurate to say that the latter circumstances would put the case in Category I: if the original property under a fiduciary's "control" was shares or a debt or an apple tree, we would not create a distinct category to cover the fiduciary's dealings with dividends, bonus shares, debt proceeds or apples: these would all be accretions to and properly part of the entitlements inherent in the original property. But this only serves to reinforce Sealy's instinct that "accretion" is not apt as a justification for the outcome, at least on the facts in *Keech v Sandford*, and his Category II allocation may be preferable. More importantly, it emphasises that we do a disservice to the law by hiding difficult analytical issues behind easy but uninformative invocations such as "the rule in *Keech v Sandford*".[28]

Category IV, which captures cases of undue influence,[29] and Sealy's "possible" *Category V*, which captures cases of breach of confidence,[30]

[25] Sealy, "Fiduciary Relationships", 76, note 7. See e.g. *Rossetti Marketing Ltd. v Diamond Sofa Company Ltd.* [2012] EWCA Civ 1021, [2013] Bus.L.R. 543, at [20]–[27] (C.A.).

[26] Now see *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] A.C. 250, at [5].

[27] *Keech v Sandford* (1726) 25 E.R. 223.

[28] See Sealy, "Fiduciary Obligations, Forty Years On", 45. More generally, consider how often we label legal principles by a case name when the principles themselves are difficult to explain.

[29] Relations where undue influence is rebuttably presumed include parent and child, guardian and ward, religious, medical and other advisers and those who consult them, and solicitor and client. We might legitimately broaden this category to include those cases where the flaws in the principal's proper consent to a transaction are not induced by potential undue influence in the relationship, but by potential unfair use of information obtained in a confidential advisory relationship. These are the "fair-dealing" cases, which should be distinguished in both ambit and applicable legal rules from the fiduciary "self-dealing" rules. See *Tito v Waddell (No 2)* [1977] Ch. 106, 241 (Megarry V.C.). For a discussion of the fair-dealing and self-dealing rules, see S. Worthington, "Fiduciaries: Following Finn" in T. Bonyhady (ed.), *Finn's Law: An Australian Justice* (Sydney 2016), 51–53; but contrast M. Conaglen, "A Re-appraisal of the Fiduciary Self-dealing and Fair-dealing Rules" [2006] C.L.J. 366.

[30] Using the term as we would now define it: i.e. an unauthorised use of information that is confidential and has been received in circumstances importing an obligation of confidence. Duties of confidence are commonly found to be owed by bankers, doctors and solicitors, as well as by trustees, company directors, partners and agents.

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can be dealt with more briefly. This is not because they are unimportant – far from it – but because they are now routinely regarded as self-standing categories, with their own well-developed core principles and doctrinal learning that is not, at least in its important detail, enhanced by remaining in the "fiduciary" fold.[31] After noting Category V as a category where fiduciary language was used, Sealy himself dismissed it from his own core four-category "fiduciary" fold for just this reason, and in his further writings he did not pursue Category IV examples as illustrating core fiduciary law. But dismissing undue influence and breach of confidence from the fiduciary fold is not the same as dismissing them from sight. "Fiduciaries", especially those in Categories I and II, may still find themselves in situations where claims of undue influence, breaches of the fair-dealing rule, or breaches of confidence can be advanced against them. The elements of the claim and the remedies which then follow are not the same as those which follow from infringements of the rules of the Categories to which those fiduciaries belong. This is important. We rarely forget that Category I and II fiduciaries are individuals against whom claims in contract, tort and unjust enrichment might be brought, but claims relating to undue influence, breach of the fair-dealing rules and breach of confidence are often ignored, or pushed into the Category I and II rules. Some of the modern problems with "duties of disclosure" in the fiduciary context can be sourced to this failure.[32]

Clearly one key lesson to be learnt from Sealy's breakdown of the cases into different categories is "the danger of trusting verbal formulae":[33] the label "fiduciary", at least as used in these older cases, can mean quite different things in different contexts. Each category comes with its own rules, and an individual labelled as a "fiduciary" in one of Sealy's identified categories

[31] To the contrary, see Finn, "Fiduciary Reflections", amplified below in note 43.

[32] Space prohibits discussion, but Sealy advised a clear focus on the purpose being served by disclosure, and decried the idea there might be a *duty* to disclose: Sealy, "Some Principles of Fiduciary Obligation", 125–35; Sealy, "Fiduciary Obligations, Forty Years On", 51–52. Similarly critical of a prescriptive approach, see P.D. Finn, "The Fiduciary Principle" in T.G. Youdan (ed.), *Equity, Fiduciaries and Trusts* (Toronto 1989), especially 10, 16–24; P. Birks, "The Content of Fiduciary Obligation" (2000) 34 Israel Law Review 3, note 48; R.C. Nolan and M. Conaglen, "Good Faith: What Does It Mean for Fiduciaries, and What Does It Tell Us about Them?" in M. Harding and E. Bant (eds.), *Exploring Private Law* (Cambridge 2010), 325–27; R. Derrington, "Commentary on Professor Lionel D Smith's Paper, 'Prescriptive Fiduciary Duties'" (2018) 37 University of Queensland Law Journal 289; A. Black, "Fiduciary Duties in a Commercial Context: Comparing English and Australian Approaches" [2020] L.M.C.L.Q. 401; P.L. Davies, S. Worthington and C. Hare, *Gower's Principles of Modern Company Law*, 11th ed. (London 2021), paras. [10-033]–[10-034]. But contrast the very different analysis in L.D. Smith, "Prescriptive Fiduciary Duties" (2018) 37 University of Queensland Law Journal 261. Even in the much cited *Item Software (UK) Ltd. v Fassihi* [2004] EWCA Civ 1244, [2004] B.C.C. 994, Arden L.J. did not regard the duty to disclose as a self-standing prescriptive duty. See too her comments, now as Lady Arden, in a quite different but nevertheless informative context in *Halliburton Co. v Chubb Bermuda Insurance Ltd.* [2020] UKSC 48, [2020] 3 W.L.R. 1474, at [160]. Also see Etherton J. in *Shepherds Investments Ltd. v Walters* [2006] EWHC 836 (Ch), [2007] 2 B.C.L.C. 202, at [132].

[33] *Re Coomber* [1911] 1 Ch. 723, 728.

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does not automatically owe the duties described in any of the other categories.

More helpfully, having pushed to one side Categories IV and V, and wondered if Category III really deserves its own separate space, we are left with Categories I and II as the "core" fiduciary categories. *These are the categories where the fiduciary has control of another's property or has undertaken to act on another's behalf and for that other's benefit and not the fiduciary's own benefit.* Especially where these categories overlap, we have individuals – fiduciaries – who are in a position to manage at least some aspects of the property or the affairs of another, and must do so for that other's benefit and not the fiduciary's. This takes us full circle, in that this description does indeed capture obvious similarities between fiduciaries and trustees.

As indicated earlier, Sealy did not find this similarity with trustees useful as a definition of fiduciaries, nor useful as an indicator of what was required of fiduciaries and when. What Sealy sought to uncover were the *legally significant facts*, and the *very particular obligations* imposed by equity which arose from those facts. As lawyers, we do this routinely: if facts A, B and C, then there is a trust and certain legal obligations follow, with legal consequences if those obligations are breached; if facts X, Y and Z, then there is a legal duty to take care, and legal consequences follow for failure to do so.

In the context of fiduciaries in the core Categories I and II, the legally significant fact is not that a relationship is one of trust and confidence.[34] That might loosely be said of many relationships, including many contractual relationships, or relationships where we rely on others to take care, or to act appropriately in exercising their powers. It is not even that the relationships are "something like trusts, but not trusts" which is, if anything, even less informative as a description. Sealy was much more specific. He identified the legally significant facts as being those italicised earlier: namely, that the individual *has control of another's property or has undertaken to act on another's behalf and for that other's benefit and not the fiduciary's own benefit.* When *those* facts describe the situation in play, then certain special legal consequences follow.[35] Sealy identified those consequences as the imposition of various legal prohibitions on the fiduciary taking personal benefits, and there then followed remedies for breach which removed those benefits from the fiduciary.[36] These, in his view,

[34] Many modern cases support this. See e.g. *Al Nehayan v Kent* [2018] EWHC 333 (Comm), at [163]; *Secretariat Consulting Pte Ltd. v A Company* [2021] EWCA Civ 6, [2021] 4 W.L.R. 20, at [41] (C.A.).

[35] This explains why I suspect Sealy may have preferred the definition of a fiduciary given in *Al Nehayan v Kent* [2018] EWHC 333 (Comm) (see the text at note 10 above) to the definition so often cited from *Mothew* (see the text at note 8 above). However, as we shall see, Millett L.J. had more to say on fiduciaries in *Mothew*, and much of that sits very comfortably with Sealy's analysis.

[36] I use "imposition" deliberately. Sealy was clearly of the view that the courts imposed these rules on parties in the given relationships. See too Finn, "The Fiduciary Principle", 54: "A fiduciary

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were the key equitable duties and remedial interventions that matched the use of fiduciary language in all the cases within the factual scenarios in issue.

Sealy elaborated further on these prohibitions on taking personal benefits, identifying them as specific prohibitions on using the property under the fiduciary's control for the fiduciary's own benefit, prohibitions on self-dealing (though he did not use this term),[37] prohibitions on taking fiduciary opportunities (i.e. D taking for himself the benefit of something which *might* have been done for C), and prohibitions on taking bribes or secret profits. These were the distinctive equitable constraints imposed on individuals the courts had identified as "fiduciaries" in Categories I and II.[38]

Any other duties owed by these fiduciaries, like the many other duties owed by trustees, were not *distinctively* "fiduciary": not only were these other types of duties commonly owed by non-fiduciaries; they were also duties which, even when owed by fiduciaries, were not distinctively different from the duties owed by non-fiduciaries. For example, a fiduciary must comply with his contractual undertakings or with the terms of the engagement, or must exercise due care and skill,[39] in just the same way as a non-fiduciary.[40] The context may be different, and that matters of course, but no

responsibility, ultimately, is an *imposed* not an accepted one. If one needs an analogy here, one is closer to tort law than to contract; one is concerned with an imposed standard of behaviour. The factors which lead to that imposition doubtless involve recognition of what the alleged fiduciary has agreed to do. But equally public policy considerations can ordain what he must do, whether this be agreed to or not" (emphasis added). The justifications for these rules and their associated remedies have been described in various ways: see e.g. *Bray v Ford* [1896] A.C. 44, 51 (Lord Herschell); *Murad v Al-Saraj* [2005] EWCA Civ 959, [2005] W.T.L.R. 1573, at [74] (Arden L.J.); L. Smith, "Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on Behalf of Another" (2014) 130 L.Q.R. 608, 613–15; I. Samet, *Equity: Conscience Goes to Market* (Oxford 2019), 148.

37 As Sealy recognised, what we now call the self-dealing rule is wholly concerned with fiduciaries acting on *both* sides of a sale and purchase *in relation to the assets held in a fiduciary capacity*. Moreover, it is the practicalities of this conflict which are important, not the identity of the formal parties to the deal. Sometimes the fiduciary will indeed be on both sides (as with a trust with a sole trustee selling trust property to himself), but often the counterparty, technically, is a third-party principal (as with a fiduciary selling to his company). The fact that the principal is the counterparty does not convert the deal into a fair-dealing transaction, nor remove it from the remit of the self-dealing rule. In all its emanations, the self-dealing rule is directed at the moral hazard of a fiduciary being in a position to favour the fiduciary's personal interest (in obtaining the best deal for the fiduciary) over the fiduciary's duty to act selflessly in engagements made for the principal with the principal's property. Contrast the undue influence and fair dealing rules: see note 29 above, and *Daly v Sydney Stock Exchange Ltd.* (1986) 160 C.L.R. 371 (H.C.A.) (especially the judgment of Brennan J.); and *Swindle v Harrison* [1997] P.N.L.R. 641 (C.A.). In neither of these cases was the fiduciary acting *for* the principal, or doing a job *for* the principal; rather, the solicitor was advising, and, if the solicitor was then to be a counterparty, the relevant (and rather onerous) disclosure rules applied with full force.

38 This work on Categories I and II is further amplified and explained in Sealy, "Some Principles of Fiduciary Obligation'.

39 Although this was less clear when Sealy was first writing: *Donoghue v Stevenson* [1932] A.C. 562 (H.L.) had been decided, but not *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* [1964] A.C. 465 (H.L.). Nevertheless, see the perceptive discussion of *Nocton v Lord Ashburton*, in Sealy, "Some Principles of Fiduciary Obligation", 136–40.

40 Notice, however, that some breaches of contract or acts of negligence may *also* be breaches of fiduciary duty when they deliver unauthorised benefits to the fiduciary himself. See e.g. *Foskett v McKeown* [2001] 1 A.C. 102 (H.L.) (a breach of contract with the investors as well as a fiduciary taking trust property for his own personal benefit); *Daniels v Daniels* [1978] Ch. 406 (a negligent sale of company

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more than it matters in all cases: the various contractual and tortious duties owed by a surgeon, or a factory-manager or a school-teacher are different, but not so different that the general contract and tort rules become inapplicable.[41]

The significance of all of this should not be underestimated. In *Al Nehayan v Kent*, Leggatt L.J. observed that:[42]

> While it is clear that fiduciary duties may exist outside [the established categories of trustees, partners, company directors, solicitors and agents], the task of determining when they do is not straightforward, as there is no generally accepted definition of a fiduciary. Indeed, it has been said that a fiduciary "is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary": see Finn, *Fiduciary Obligations* (1977), p2 ... If this is right, it simply begs the question of how to determine when a person is subject to fiduciary obligations *if not by analysing the nature of their relationship with the person to whom the obligations are owed.* (Emphasis added)

What Sealy's analysis does is provide for us, in remarkably clear and incisive form, the legally significant facts within any relationship which determine whether fiduciary obligations will be imposed.

So the real innovation in this early work done by Sealy lies in addressing the lawyer's need to know which facts are legally relevant, and precisely which obligations are then imposed, and, finally, what legal consequences will then follow if these obligations are breached by the individuals we call "fiduciaries". Sealy provided exceptionally precise and practically useful answers to each of these questions.

III. "Fiduciaries" as Revealed in the Modern Cases: Proscriptive and Prescriptive Tensions

In large measure, the modern fiduciary cases reflect precisely the analytical distinctions set out by Sealy. We do not label as "fiduciaries" those who exercise undue influence, or who breach confidences;[43] we regularly say

property at a gross undervalue, as well as being a self-serving sale of that property to the fiduciary). There are then alternative claims, and alternative remedies.

41 See *Henderson v Merrett Syndicates Ltd.* [1995] 2 A.C. 145, 205–06 (Lord Browne-Wilkinson) on this issue in the context of the duty of care. More generally, see S. Worthington, "Four Questions on Fiduciaries" (2016) 2 Canadian Journal of Comparative and Contemporary Law 723, 743, republished in (2018) 32 Trusts Law International 22.

42 *Al Nehayan v Kent* [2018] EWHC 333 (Comm), at [157]. See too *Secretariat Consulting Pte Ltd. v A Company* [2021] EWCA Civ 6, at [40].

43 Although contrast Finn's current preference for a return to using fiduciary language as an umbrella term, including not only all the categories considered by Sealy in his early studies, but adding to those all the rules constraining the exercise of powers, whether in public or private law contexts: see Finn, "Fiduciary Reflections". See too *Grimaldi v Chameleon Mining NL (No 2)* [2012] F.C.A.F.C. 6, at [174]. However, this did not come with any relaxation or merging of the legal characteristics of each individual class, and Finn maintained his early commitments to the strictly prescriptive operation of the conflicts and profits rules in that branch of his extended fiduciary landscape: Finn, "Fiduciary Reflections", 136. Contrast Finn, "The Fiduciary Principle", where Finn advocated the word "fiduciary" be used only in the narrow

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that not every breach of duty by a fiduciary is a breach of fiduciary duty; and, further, that those breaches labelled as "fiduciary" are confined to breaches of the conflicts and profits rules, with the relevant remedies then requiring the fiduciary to disgorge the unauthorised benefits acquired from the breach.

But it took over 30 years before this was articulated forcefully in the cases, most famously by Millett L.J. in *Bristol and West Building Society v Mothew*:[44]

> The expression "fiduciary duty" is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility. In this sense it is obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty. . . .
>
> . . . A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. . . . Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.

This has been emphatically reiterated by Lady Arden in the Supreme Court in *Lehtimäki v Cooper*:[45]

> There has been considerable debate as to how to define a fiduciary, but it is generally accepted today that the key principle is that a fiduciary acts for and only for another. He owes essentially the duty of single-minded loyalty to his beneficiary, *meaning that* he cannot exercise any power so as to benefit himself . . .. So "the distinguishing obligation" of a fiduciary is that he must act only for the benefit of another in matters covered by his fiduciary duty. *That means* that he cannot at the same time act for himself. If a person is a fiduciary then, as part of his core responsibility, he must not put himself into a position where his interest and that of the beneficiary conflict ("the no-conflict principle") and he must not make a profit out of his trust ("the no-profit principle"). The fiduciary is likely to owe other fiduciary duties as well, such as the duty to act in the best interests of the person to whom the duty is owed. Section 178(2) of the 2006 Act expressly makes this a fiduciary

sense. For an outline of this trajectory in Finn's thinking, see Worthington, "Fiduciaries: Following Finn".

[44] *Bristol and West Building Society v Mothew* [1998] Ch. 1, 16, 18 (C.A.) (Millett L.J.). See too *Chan v Zacharia* (1984) 154 C.L.R. 178. The following commentators also adopt a restricted use of the term "fiduciary" (including Finn in earlier times): Finn, "The Fiduciary Principle", 28; R.P. Austin, "Moulding the Content of Fiduciary Duties" in A.J. Oakley (ed.), *Trends in Contemporary Trust Law* (Oxford 1996), ch. 7, 156; S. Worthington, "Fiduciaries: When Is Self-denial Obligatory?" [1999] CL.J. 500; Birks, "The Content of Fiduciary Obligation", 5, and all the cases cited in these commentaries.

[45] *Lehtimäki v Cooper* [2020] UKSC 33, at [44]–[46] (Lady Arden). These basic principles do not appear to have been in dispute in the Court, even though the majority and minority differed in their application of these principles to justify their conclusions.

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> duty in the case of company directors. It is not necessary to consider whether these duties are fiduciary duties in all cases. It is not enough that a person has agreed to perform certain duties by agreement. As the Privy Council held in *In re Goldcorp Exchange Ltd.* [1995] 1 AC 74, 98 "The essence of a fiduciary relationship is that it creates obligations of a different character from those deriving from the contract itself". (Emphasis added)

The "fiduciary" label is thus reserved for individuals who – in Sealy's version, as in *Lehtimäki* and *Mothew*[46] – are obliged to put their counterparty's interests *ahead* of their own. This demand is rarely made by law. When it is, those made subject to it are described as fiduciaries. But the narrow label is correspondingly more informative: it is shorthand for a great deal of detailed law. The language then means something. Further, this narrowing does not limit the obligational landscape, just its labelling: for example, a trustee will owe fiduciary duties (of self-denial), but also duties in contract and tort, statutory duties and duties constraining the exercise of discretionary powers. So too, in different contexts, fiduciaries will owe a range of duties beyond the ones described, restrictively, as "fiduciary duties".[47] Why it took so long to reach this point is not entirely clear.

However, in one other respect the transition has not been entirely successful. We have paid far less attention to defining the legally material facts that give rise to these tightly defined duties and their unusual defendant-focused remedies. This matters. Indeed, it matters a great deal. If we have not clearly settled on the legally significant facts, then we may be under- or over-inclusive in identifying the situations where the law imposes fiduciary obligations and affords disgorgement remedies. We do not make this mistake in other areas of the law: consider the consequences if we adopted rather loose and flexible rules around when a contract had been made, or when a trust arises, or when a duty of care is owed. Sealy's tightly circumscribed legally material facts capture only individuals who have control of another's property or have undertaken a role to act on another's behalf and for that other's benefit *and not the fiduciary's own benefit*.

By contrast, assertions in some judgments can be taken out of context and then read – or mis-read – as suggesting that the legally material facts are far looser. Consider Millett L.J. in *Mothew*:[48]

[46] See too P.J. Millett, "Equity's Place in the Law of Commerce" (1998) 114 L.Q.R. 214, 222, and more generally see 219–21.

[47] It is possible to be far more precise if the legal labelling is of relevant facts and legal duties, rather than "people" and "relationships": see Worthington, "Fiduciaries: Following Finn", 48–49. Similarly, see *De Sena v Notaro* [2020] EWHC 1031 (Ch), at [191] (HHJ Matthews), suggesting we speak only of "fiduciary obligations", not "fiduciaries", to avoid just this slippage.

[48] *Bristol and West Building Society v Mothew* [1998] Ch. 1, 18 (C.A.). See too *Attorney General v Blake* [1998] Ch 439, 454 (C.A.) (Lord Woolf M.R.): "[The most important] category of fiduciary relationship *. . . is the relationship of trust and confidence, which arises whenever one party undertakes to act in the interests of another or places himself in a position where he is obliged to act in the interests of another*" (emphasis added).

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> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. [Millett L.J. then continued with the conflicts and profits rules cited earlier.]

Similarly see Leggatt L.J. in *Al Nehayan v Kent*:[49]

> Thus, fiduciary duties typically arise where one person undertakes and is entrusted with authority to manage the property or affairs of another and to make discretionary decisions on behalf of that person. (Such duties may also arise where the responsibility undertaken does not directly involve making decisions but involves the giving of advice in a context, for example that of solicitor and client, where the adviser has a substantial degree of power over the other party's decision-making.[[50]])

Such broad statements of the legally material facts giving rise to fiduciary obligations, read without context, might seem to support, first, an expanding fiduciary terrain to cover any situation where the "fiduciary" has a job to do for another or a discretion to exercise for another; and, second, pushed still further, as imposing *prescriptive* obligations on the "fiduciary" to act loyally in the interests of the other.

Whatever the superficial emphasis on a wider fiduciary context or a positive obligation of loyalty in *Mothew* and *Al Nehayan v Kent*, the other paragraphs in those judgments are all firmly rooted in the closely confined and exclusively proscriptive approach advocated by Sealy.[51] This is the general approach in the English authorities.

But if the judges have made little of these potentially looser statements of the legally significant facts and the possibility of reworking the obligations so as to impose prescriptive duties, commentators have not been so reticent. True, most commentators still hold to the orthodox restrictive context/

[49] *Al Nehayan v Kent* [2018] EWHC 333 (Comm), at [159]. Again, Leggatt L.J. went on, especially at [165] cited earlier, to emphasise the narrower proscriptive demands.

[50] Then citing Smith, "Fiduciary Relationships". However, it is suggested that these cases on advice, such as advice from solicitors, are better treated either as straightforward fiduciary self-interest cases or as cases of negligence, depending on the particular problem needing to be addressed. In the negligence cases, where the solicitor's negligent advice has caused loss to the client, it will be material in any assessment of damages to decide whether the role of the solicitor was merely to provide careful advice on the issue, with the client then deciding for herself which action to pursue, or whether the solicitor was to make the choice for the client: see the analysis in Sealy, "Some Principles of Fiduciary Obligation", 136–40; see too *Bristol and West Building Society v Mothew* [1998] Ch. 1 (C.A.); and *Swindle v Harrison* [1997] P.N.L.R. 641 (C.A.). If the solicitor was to make the choice for the client, then not only would the solicitor need to be careful, but, as a fiduciary, the solicitor would be barred from making choices on behalf of the client that involved conflicted decisions leading to unauthorised gains in the solicitor's hands. These prohibitions do not emerge only when the solicitor has "a substantial degree of power over" the client: the relevant rule is simply the unadorned proscriptive fiduciary rule.

[51] See the paragraphs from these cases cited earlier. See too the extended discussion of proscriptive and prescriptive readings of English and Australian authorities in Black, "Fiduciary Duties in a Commercial Context".

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proscriptive duties view,[52] but the fiduciary powers theory of the fiduciary relationship has now become a persistent theme in the modern literature. As Paul Miller puts it:[53]

> fiduciary duties are premised on the formation of a fiduciary relationship, which in turn arises upon the authorization of one person or a group of persons to exercise discretionary legal powers for another person or group in pursuit of other-regarding purposes.

This puts agents at the core of the whole fiduciary story. This in itself is unexceptional; it is entirely consistent with Sealy's vision. But, going further, it suggests that control of the discretionary or delimited power held by the agent lies at the heart of fiduciary regulation. That works a radical redefinition of the fiduciary terrain. This definition would not include the solicitors in *Target Holdings Ltd. v Redferns*[54] or *AIB Group (UK) Plc. v Mark Redler & Co. Solicitors*,[55] who simply had specific duties to perform, not discretions to exercise, yet were undoubtedly fiduciaries. By contrast, it *would* include large numbers of individuals who have discretions to exercise, and must exercise them in good faith and for proper purposes, but who are not traditionally regarded as fiduciaries, and are certainly not subject to the no-conflict and no-profit rules.[56] Consider the cases on contractual discretions,[57] discretions exercised by shareholders[58] and bondholders.[59] and mortgagees exercising a power of sale.[60]

[52] Sealy, "Fiduciary Relationships"; Finn, *Fiduciary Obligations*; Finn, "The Fiduciary Principle"; Worthington, "Fiduciaries: When Is Self-denial Obligatory?"; M. Conaglen, "The Nature and Function of Fiduciary Loyalty" (2005) 121 L.Q.R. 452; M. Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-fiduciary Duties* (Oxford and Portland 2010), especially ch. 3; Nolan and Conaglen, "Good Faith"; Derrington, "Commentary on Professor Lionel D Smith's Paper"; Black, "Fiduciary Duties in a Commercial Context"; J.E. Penner, "Trustees and Agents Behaving Badly: When and How Is 'Bad Faith' Relevant?" in P.B. Miller and M. Harding (eds.), *Fiduciaries and Trust: Ethics, Politics, Economics and Law* (Cambridge 2020).

[53] P.B. Miller and M. Harding, "Introduction" in Miller and Harding (eds.), *Fiduciaries and Trust*, chs. 1, 2. The detail is in P.B. Miller, "The Fiduciary Relationship" in A.S. Gold and P.B. Miller (eds.), *Philosophical Foundations of Fiduciary Law* (Oxford 2014), ch. 3 (and more generally on loyalty, with differing approaches, see chs. 5–8 by I. Samet, L. Smith, J. Penner and A.S. Gold, respectively). See too L.D. Smith, "Can We Be Obliged to Be Selfless?" in Gold and Miller (eds.), *Philosophical Foundations of Fiduciary Law*, 145; Smith, "Fiduciary Relationships"; Smith, "Prescriptive Fiduciary Duties"; L.D. Smith, "Conflict, Profit, Bias, Misuse of Power: Dimensions of Governance" in Miller and Harding (eds.), *Fiduciaries and Trust*. Perhaps because Smith has put the arguments so persistently and clearly, his work has been subject to the most detailed analysis: see especially Derrington, "Commentary on Professor Lionel D Smith's Paper"; and Black, "Fiduciary Duties in a Commercial Context".

[54] *Target Holdings Ltd. v Redferns* [1996] A.C. 421 (H.L.).

[55] *AIB Group (UK) Plc. v Mark Redler & Co. Solicitors* [2014] UKSC 58, [2015] A.C. 150.

[56] Sealy, "The Director as Trustee"; Finn, "The Fiduciary Principle", 11–13.

[57] *Braganza v BP Shipping Limited* [2015] UKSC 17, [2015] 1 W.L.R. 1661.

[58] *Allen v Gold Reefs of West Africa Ltd.* [1900] 1 Ch. 656 (C.A.).

[59] *Assenagon Asset Management SA v Irish Bank Resolution Corp Ltd. (formerly Anglo Irish Bank Corp Ltd.)* [2012] EWHC 2090 (Ch), [2013] Bus.L.R. 266; *Azevedo v Imcopa Importação, Exportação E Indústria De Olèos Ltda, IMCOPA International SA, IMCOPA International Cayman Ltd.* [2013] EWCA Civ 364, [2015] Q.B. 1.

[60] *Cuckmere Brick Co. v Mutual Finance* [1971] Ch. 949.

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Adding all these additional people to the fiduciary mix seems to confuse the different issues in the sightlines. If the fiduciaries in Sealy's Categories I and II have discretions to exercise, as they frequently will – and indeed this may be the most important part of their role – then the necessary (fiduciary) constraint identified by Sealy is one which requires the fiduciary, if he acts at all, to act in accordance with the undertaking he is seen to have given *not to act in his own interests*. This is the legal constraint which addresses the moral hazard of having agents (fiduciaries) in control of the principal's property or in control of acting for and on behalf of the principal. In addition, however, these fiduciaries, and the many other individuals who have discretions to exercise but who have not undertaken to act selflessly, will be subject to additional *different* legal constraints imposed to address the different risks that arise in the exercise of any discretion. These are not constraints directed at "selfless loyalty". They are instead constraints designed to ensure the power is used only to achieve the ends for which it was given: the power must be exercised in good faith and for proper purposes. These are constraints which equity applies to the exercise of *all* discretions.[61] To the extent that the discretions exercised by the fiduciary are also subject to such constraints (as invariably they will be), these will operate in *addition* to the proscriptive ban on unauthorised personal gains.[62] Sealy clearly understood these different types of constraints on the exercise of discretions.[63]

Returning to the concerns that are specifically fiduciary, Sealy also clearly understood that the necessary equitable intervention in the fiduciary context was not an intervention concerned to enforce the fiduciary's undertaking to act "in the interests of the principal", and see to it that this undertaking *was* performed; but it *was* concerned to see that, if the fiduciary acted at all, he acted in accordance with the undertaking he had given

[61] See *Vatcher v Paull* [1915] A.C. 372, 378 (H.L.) (Lord Parker); and *Allen v Gold Reefs of West Africa Ltd.* [1900] 1 Ch. 656, 671 (C.A.) (Lord Lindley M.R.). This is becoming increasingly contested territory, especially since the Supreme Court decision in *Braganza* [2015] UKSC 17 (a case on contractual discretion) and its reliance on public law concepts. But this modern concern is not to expand the fiduciary domain; it is to define the source of the rules that constrain discretions generally: see S. Worthington, "Powers" in W. Day and S. Worthington (eds.), *Challenging Private Law: Lord Sumption on the Supreme Court* (Oxford and Portland 2020).

[62] See e.g. *Pitt v Holt* [2013] UKSC 26, [2013] 2 A.C. 108; *Futter v Futter* [2013] UKSC 26, [2013] 2 A.C. 108. The issues in these two cases did not involve unauthorised profits, but all the other forms of constraints on the exercise of discretionary powers by fiduciaries. Similarly, see *Eclairs Group Ltd. v JKX Oil & Gas plc.* [2015] UKSC 71, [2015] Bus.L.R. 1395. The two sources of constraint are similarly distinguished in C. Mitchell, "Good Faith, Self-denial and Mandatory Trustee Duties" (2018) 32 Trust Law International 92. Although Finn would sweep *all* these exercises of power (i.e. whether subject to fiduciary *and* general constraints, or only subject to general constraints) under the umbrella of a broad "fiduciary principle", he would not lose any of the learning that indicates their different contexts, different rules and different consequences: see Finn, "The Fiduciary Principle"; and Finn, "Fiduciary Reflections".

[63] See the illuminating detail explored in the context of directors and shareholders in Sealy, "The Director as Trustee". See too his later writing in L.S. Sealy, "Directors' 'Wider' Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U.L.Rev. 164; and L.S. Sealy, "'Bona Fides' and 'Proper Purposes' in Corporate Decisions" (1989) 15 Monash U.L.Rev. 265.

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not to act in his own interests.[64] Finn went even further in explaining the significance of this, and the necessity for this approach:[65]

> If a fiduciary's liability was to be determined by reference to whether or not the beneficiary's interests had in fact been served, an often impossible inquiry,[[66]] more than curious consequences would follow. Much of the law of trusts, of agency and of companies would, for example, be rendered superfluous. The law of torts and of contract would be displaced from their now accepted roles in many relationships.

The crucial lesson to be taken from the modern cases is thus clear. It is not enough to have cases which set out clearly the legal obligations in issue for fiduciaries, and the consequences which follow from a breach of those obligations, essential though that is. It is also necessary to have cases which set out clearly the legally material facts which give rise to the imposition of those obligations. Without this, the obligations and their remedies are too easily applied inappropriately.

Further, once this is done by the judges, the lesson for academic commentators – as we mostly are – is that we must not then jumble up the different contexts which give rise to the different types of obligations and their distinctive remedies, thereby ignoring all the work of the courts in clarifying the necessary distinctions.

IV. Where Do Powers and Discretions Fit in the Fiduciary Map?

Because the powers and discretions exercised by fiduciaries are such a dominant feature of a fiduciary's role, it is worth expanding a little on what has been said in the previous section.[67] The label "fiduciary power" is not a term of art. It is sometimes used to indicate that the power *must* be exercised (a conclusion based on construction of the grant of power), but usually and more generally it is used simply to mean that the power is held by a fiduciary, and thus cannot be exercised for personal benefit. In addition, however, and as noted earlier, all discretionary powers must also be exercised in good faith (a subjective test)[68] and for proper purposes (an objective test).[69] These good faith and proper purposes constraints on

[64] Sealy, "Some Principles of Fiduciary Obligation", 122, 124.

[65] Finn, "The Fiduciary Principle", 28.

[66] Note that Smith too does not suggest a positive duty to *act* "in the interests of the principal", merely that the fiduciary rules tell the fiduciary *how* he is to address that task – he is bound by a subjective duty of loyalty to act unselfishly as he thinks best for the principal: see Smith, "Fiduciary Relationships"; and Smith, "Prescriptive Fiduciary Duties". But "unselfishly" and "selflessly" import different standards: the former merely requires good faith commitment to the purposes of the endeavour, and is a standard imposed on all those exercising discretions, whether classed as fiduciaries (in the narrow sense) or not: see below, Section IV.

[67] See the detailed analysis in Sealy, "The Director as Trustee"; further expanded in Sealy, "Directors' 'Wider' Responsibilities"; and Sealy, "'Bona Fides' and 'Proper Purposes' in Corporate Decisions".

[68] And is an expression with its own ambiguities: see Sealy, "'Bona Fides' and 'Proper Purposes' in Corporate Decisions", 269.

[69] *Howard Smith Ltd. v Ampol Petroleum Ltd.* [1974] A.C. 821 (P.C.); *Eclairs* [2015] UKSC 71.

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the exercise of all powers (whether by fiduciaries or by others) are proscriptive, not prescriptive: the court's task is "an essentially negative enquiry";[70] it is not to say which acts *are* for proper purposes, merely which acts are *not*.[71] Breach of these good faith and proper purposes restrictions *is* a breach of duty by a fiduciary, but is not a breach of some distinctively different *fiduciary* duty.[72]

What the fiduciary context adds to this general law on judicial review of powers is the special context of "fiduciary loyalty" and the requirement that the fiduciary act in the interests of the principal and not in his own. This is significant. It makes one aspect of the court's task of judicial review easier, in that the fiduciary context and the no-conflict/no-profit rules identify certain ends (i.e. self-serving ends) which, if sought by the fiduciary, would indicate improper purposes.[73] This may be useful if the purpose of the enquiry is to impugn the exercise of power rather than simply pursue the fiduciary for disgorgement of the unauthorised gains.

But this does not help if the exercise of power is not self-serving. Then it is far harder to decide whether the fiduciary has exercised the power *for improper purposes*.[74] Simply noting that the power must be exercised "in the interests of the principal" (or for the purposes of advancing the interests of the principal) is not especially helpful. It is likely that all manner of ends might be properly pursued, but much harder to say which ends would be *improperly* pursued, and especially which ends other than those which are self-serving would be improper. At least in the trusts context there is the helpful guidance that powers must be exercised for the purpose of advancing the financial interests of the beneficiaries and not otherwise.[75] But there are exceptions to that bar, and further complications as to which ends are proper if the financial interests of the beneficiaries are not aligned (as when some beneficiaries have life interests and others have interests in remainder). If even this scenario is difficult, then the landscape outside the world of trusts is considerably more difficult. Sealy was well ahead of his time in considering the problems inherent in any exhortation to directors to "act in the interests of the company" when exercising their powers.[76] He suggested that the then current law which equated "the

[70] Finn, *Fiduciary Obligations*, 16.

[71] E.g. *Cowan v Scargill* [1985] Ch. 270 (the power of investment is not to be used for the purpose of advancing interests other than the beneficiaries' financial interests); *Howard Smith v Ampol* [1974] A.C. 821 (P.C.) (the power to issue shares is not to be used for the purpose of altering voting majorities).

[72] Unless we are going to adopt Finn's "fiduciary umbrella" approach, and that will not, at least for Finn, change the law in play, only the labelling of what is in issue.

[73] Finn, *Fiduciary Obligations*, 39.

[74] On whether the test for that should be the "but for" test (as advocated by Lord Sumption in *Eclairs* [2015] UKSC 71) or the "substantial purpose" test (as in *Howard Smith v Ampol* [1974] A.C. 821 (P.C.)), see Worthington, "Powers".

[75] *Cowan v Scargill* [1985] Ch. 270.

[76] Sealy, "The Director as Trustee".

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interests of the company" with the economic interests of its shareholders was ripe for review, since it put directors in the impossible position of being expected as a matter of business to consider the claims of the many competing stakeholder interests, while being legally answerable to only one.[77] Thanks to statutory intervention,[78] we now have the legal breadth he desired, but whether this helps is unclear. With such a broad spectrum of interests which directors must now consider, and which it might be "proper" to support, it will rarely be possible to show that directors have exercised their management discretions for improper purposes.[79] The same is true of the powers exercised by shareholders.[80] Instead, the principal illustrations of directors' improper purposes typically concern exercises of power which affect some constitutional balance or shareholder governance role, not general management of the company's business.[81] In short, although there are legal constraints on the exercise of discretions, they are not aggressively interventionist; moreover, they address process only – good faith and proper purposes – not the merits of the decision.[82]

The crucial lesson in all of this is that it is essential to distinguish between situations where the defaulting fiduciary's self-interested gain is in the sightlines and the remedy sought is disgorgement,[83] and situations where improper use of discretionary powers is in the sightlines.[84] When the focus is the latter, on abuse of power and not fiduciary gains, the goal is typically to set aside the exercise of power, and, if necessary, either

[77] Ibid., at 90. Twenty years later he repeated the call for review: Sealy, "Directors' 'Wider' Responsibilities", 170. In short, nearly forty years before its enactment he set out a manifesto for what is now the Companies Act 2006, s. 172.

[78] Companies Act 2006, s. 172.

[79] The exception is the exercise of powers by directors or shareholders in pursuit of their own gain when the company is on the brink of insolvency and its assets ought to be preserved for the creditors: see the common law rule in *West Mercia Safetyware v Dodd* [1988] B.C.L.C. 250 (C.A.), adopting the reasoning in *Walker v Wimborne* (1976) 137 C.L.R. 1 (H.C.A.); and the statutory rule on wrongful trading in Insolvency Act 1986, s. 214.

[80] *Allen v Gold Reefs* [1900] 1 Ch. 656; *Peters' American Delicacy Co. v Heath* [1939] HCA 2, (1939) 61 C.L.R. 457.

[81] *Howard Smith v Ampol* [1974] A.C. 821 (P.C.); *Eclairs* [2015] UKSC 71.

[82] If that is in issue, then some other breach of duty will have to be found to support the necessary claim. Negligence and breach of the contractual undertaking are obvious options.

[83] The typical examples are the "hand in the till" cases, such as *Foskett v McKeown* [2001] 1 A.C. 102 (H.L.); the self-dealing cases such as *Aberdeen Rwy Co. v Blaikie Bros* (1854) Macq 461, [1843-60] All E.R. 249 (H.L.); the "opportunity" cases such as *Boardman v Phipps* [1967] 2 A.C. 46 (H.L.) and *Regal (Hastings) Ltd. v Gulliver* [1967] 2 A.C. 134 (H.L.); and the bribe cases such as *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45.

[84] For illuminating accounts which put these duties along a spectrum of obligations requiring us to abstain from causing injury and damage to another (as with the majority of legal rules), then obligations requiring us to take positive action in the interests of another (with good faith and proper purposes falling here), and then obligations requiring not only positive action in the interest of another but also disinterestedness, or altruism, or self-denial (with the fiduciary constraints falling here), see Finn, "The Fiduciary Principle"; Birks "The Content of Fiduciary Obligation"; G. Leggatt, "Contractual Duties of Good Faith" (2016) Lecture to the Commercial Bar Association, available at https://www.judiciary.uk/wp-content/uploads/2016/10/mr-justice-leggatt-lecture-contractual-duties-of-faith.pdf (last accessed 9 May 2021), at [142]. See too *Yam Seng Pte Ltd. v International Trade Corp.* [2013] EWHC 111 (Q.B.), [2013] 1 All E.R. (Comm.) 1321, at [142]; and *Al Nehayan v Kent* [2018] EWHC 333 (Comm), at [167].

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recover from the third party any assets that had been improperly transferred or, more likely, seek compensation from the power-holder for their unauthorised loss.[85] These remedies apply not only where powers are exercised in bad faith or for improper purposes, but also where the power is exercised beyond its scope (i.e. where the power-holder has no authority to exercise the power, rather than merely acts within authority but improperly).[86]

V. Remedies: Disgorgement and Equitable Compensation

Remedies define the value of rights, and in all three of his CLJ articles, Sealy devoted serious attention to the remedies available for the different breaches of duty a fiduciary might commit. He examined both proprietary and personal remedies for the disgorgement of the fiduciary's unauthorised gains, and was an early adopter – perhaps *the* early adopter – of the remedy of equitable compensation for any losses caused to the property under the control of Category I fiduciaries. Notice that the two remedies are directed at quite different ends, the first to breach of the fiduciary's proscriptive duties, the second to breach of the fiduciary's prescriptive duties.[87]

Take disgorgement first, and the line between personal and proprietary disgorgement of a fiduciary's disloyal profits. Sealy expressly favoured the *Lister v Stubbs*[88] approach (a personal remedy for disgorgement of a bribe), and indicated in his later writing that he thought *AG v Reid*[89] (delivering a proprietary remedy in respect of a bribe) involved a wrong turning.[90] That might seem to put him out of step with the modern law and its comprehensive proprietary approach to fiduciary disgorgement as set out in *FHR*.[91] However, and perhaps surprisingly, this is not true. Sealy was clear right from the outset that proprietary disgorgement was the appropriate remedy if the fiduciary had generated his unauthorised profits by diverting to himself property which was under his "control" as a Category I fiduciary, and was therefore, in equity, the principal's property.[92] But he

85 *Howard Smith v Ampol* [1974] A.C. 821 (P.C.); *Bamford v Bamford* (1970) 1 Ch. 212 (C.A.); *Pitt v Holt* [2013] UKSC 26. See Worthington, "Powers"; Nolan and Conaglen, "Good Faith".

86 *Target Holdings Ltd. v Redferns* [1996] A.C. 421 (H.L.); *AIB Group (UK) Plc. v Mark Redler & Co. Solicitors* [2014] UKSC 58.

87 Note carefully the two very different aspects of the fiduciary's duty of care: a fiduciary may be liable for breach of a duty of care either in the management of the property under the fiduciary's control (where the remedy is then designed to compensate for losses caused to the *property* being managed – i.e. equitable compensation) or alternatively in the provision of careful advice to the principal (where the remedy is designed to compensate for the harm suffered by the *principal* – i.e. common law damages): see, e.g, *Bartlett v Barclays Bank Trust Co. Ltd.* [1980] 1 Ch. 515 and *Swindle v Harrison* [1997] P.N.L.R. 641 (C.A.), respectively.

88 *Lister & Co. v Stubbs* (1890) LR 45 Ch.D. 1 (C.A.).

89 *A-G for Hong Kong v Reid* [1994] 1 A.C. 324 (P.C.).

90 Sealy, "Fiduciary Obligations, Forty Years On", 50.

91 *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45.

92 But see *Tang Ying Loi v Tang Ying Ip* [2017] HKCFA 3. I am not sure Sealy would have agreed with Lord Millett N.P.J.'s comments at [15]: "the present case is concerned with a fiduciary who made a profit by applying his principal's money for his own benefit. D1 did not take advantage of the fiduciary relationship or put himself in a position where his interest conflicted with his duty. He simply helped

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was also equally clear that it was the appropriate remedy if a Category II fiduciary had taken an opportunity which, if it was exploited at all, could in conscience only be exploited for the principal, since the fiduciary was obliged to act in the principal's interest and not in his own.[93] He was thus perfectly content with proprietary disgorgement in *Cook v Deeks*[94] and *Boardman v Phipps*,[95] and thought it should have been ordered in *Regal Hastings*.[96] But not in *AG v Reid*.[97] Some of that resistance is roundly based in his analytical work on Category II fiduciaries and his obligation-related view of the particular form of intervention that equity meted out in such circumstances: the bribes in the Crown servant cases he focused on were not "profits" taken from an opportunity which, if it was exploited at all, could only in conscience be exploited for the principal. In his view, it followed that although the bribe had to be disgorged, the principal had no claim to ownership in equity of the bribe, and the disgorgement remedy for self-interested misuse of position should thus be personal only, not proprietary.[98] In addition, some of his dislike of these Crown servant bribe cases may have been based on the potential reach of such a wide application of the proprietary rule to too many Category II fiduciaries "with a job to do": see his later questioning of the appropriateness of applying the approach in *Reid* to all employees.[99] All this predated but thoroughly anticipated the reams of academic commentary written on this issue in the lead up to the Supreme Court decision in *FHR*.

However, Sealy's far more innovative work on remedies – at least to modern eyes – came in the form of his detailed consideration of equitable compensation.[100] Sealy was an early adopter of equitable compensation,[101]

himself to money belonging to the estate and applied it for his own benefit. It is a straightforward case where a trustee or person in an analogous position has committed a breach of trust. As will appear, not only is the factual context different, so is the underlying policy which drives equity's response." Lord Millett N.P.J. is undoubtedly right when he goes on to say that profiting from use of the principal's property involves no difficult issues of causation, but it remains important to distinguish between disgorgement claims against a fiduciary who has made unauthorised profits, and compensation claims against a fiduciary who has wrongfully disposed of the principal's property (whether to the fiduciary himself or to some third party). Where the disposition is to the fiduciary, and thus disgorgement and compensation claims are both open to the principal, the choice of which claim to pursue will depend on whether the fiduciary's self-interested use of the assets has generated a greater profit than would properly have been in the fund if managed appropriately, without unauthorised dispersals. Now also see, especially on causation, M. Conaglen, "Identifying the Profits for Which a Fiduciary Must Account" [2020] C.L.J. 38, 57–62.

[93] See especially Sealy, "The Director as Trustee", 97; and Sealy, "Some Principles of Fiduciary Obligation", 134–35.

[94] *Cook v Deeks* [1916] 1 A.C. 554 (P.C.).

[95] *Boardman v Phipps* [1967] 2 A.C. 46 (H.L.).

[96] *Regal (Hastings) Ltd. v Gulliver* [1967] 2 A.C. 134 (H.L.).

[97] *A-G for Hong Kong v Reid* [1994] 1 A.C. 324 (P.C.). See too W. Swadling, "The Fiction of the Constructive Trust" (2011) 64 Current Legal Problems 399.

[98] To the same ends, see S. Worthington, "Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae" [2013] C.L.J. 720, especially 730–36, 744–49.

[99] See note 24 above and associated text.

[100] Sealy, "Some Principles of Fiduciary Obligation", especially 137–40, and also 120–21.

[101] The next serious study was decades later in Davidson, "The Equitable Remedy of Compensation".

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undertaking a careful analysis of *Nocton v Lord Ashburton*[102] and its possibilities and limits. Notice that this remedy seeks to repair loss caused because the fiduciary has not complied with his *prescriptive* obligations; it has nothing to say on cases where the fiduciary has breached his proscriptive obligations of self-denial.

Even at this early stage, Sealy described the remedy as compensation for loss, but loss assessed against the counterfactual of proper performance, where the detail of the particular prescriptive performance duty required of the fiduciary is therefore crucial, and the remedy is then directed at repairing the loss to the *assets* under the fiduciary's control; it is not common law damages directed at repairing any harm to the *claimant* herself and any consequential loss she may have suffered.[103] Where there are no such assets under the fiduciary's control – ie when the fiduciary is not a Category I fiduciary – the remedy of equitable compensation is not available.[104] In all of this, Sealy's thinking aligns perfectly with the approach in *AIB v Redler*[105] and *Target Holdings*,[106] and indeed his analysis perhaps uses language that might have quieted the modern detractors.

As it is, ever since *Target Holdings*, and perhaps even more so since *AIB v Redler*, the remedy of equitable compensation has been controversial.[107] For modern purposes, the first issue – the easier one – is the counterfactual of proper performance in assessing what losses the principal has suffered.[108] The cases indicate that the loss is assessed by examining, at the date of trial, the actual state of the "managed fund" under the control of the fiduciary[109] and comparing it with the state the fund ought to have been in if the fiduciary had performed his duties to the letter. This is exactly the counterfactual used in all the modern cases. In *AIB v Redler* and in *Target Holdings* this counterfactual indicated that, had all gone well and had the solicitors done exactly what their duty required them to do, the principal would still have owned property that would have suffered the slump in the property market. Similarly, the counterfactual of perfect proper

[102] *Nocton v Lord Ashburton* [1914] A.C. 932 (H.L.).

[103] Sealy noted that a Category I fiduciary would have to "account", as trustees did, for what he had done with the property under his control, but he discussed the relevant remedy in terms of compensation. Given the way Sealy assessed the required compensation, there is nothing in this which is at odds with the views of Lord Millett N.P.J. in *Libertarian Investments Ltd. v Hall* (2013) 16 HKCFAR 681, at [166]–[172]. Indeed, all seems entirely consistent with Lord Millett's approach. On the other hand, it might be inferred that Sealy did not approach the issues by dwelling on "account" because that does not identify what assets *should* be in the trust pot. Similarly, see Worthington, "Four Questions on Fiduciaries", 743–44, 750, 763.

[104] Although common law damages may be, whether for breach of contract or in tort.

[105] *AIB Group (UK) Plc. v Mark Redler & Co. Solicitors* [2014] UKSC 58.

[106] *Target Holdings Ltd. v Redferns* [1996] A.C. 421 (H.L.).

[107] For a discussion of the area, see Worthington, "Four Questions on Fiduciaries", 754–64, with many of the commentators listed at note 108.

[108] See the analysis in Worthington, "Four Questions on Fiduciaries"; similarly see L. Ho and R.C. Nolan, "The Performance Interest in the Law of Trusts" (2020) 136 L.Q.R. 402.

[109] Even if the fiduciary has now paid the fund over to the principal or the principal's nominated third party, as in *Target Holdings v Redferns* [1996] A.C. 421 (H.L.) and *AIB v Redler* [2014] UKSC 58.

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performance was applied in *Main v Giambrone & Law*,[110] but there the required "perfect performance" was that the fiduciary should *hold* the principal's deposits until a third party had provided compliant guarantees, which never happened: this meant that the fiduciary should still have had the deposits in hand, and was required to pay compensation when he did not.[111] Finally, in *Auden McKenzie v Patel*,[112] and unlike the previous cases, the fiduciary had no *specific* performance obligation, merely a discretion to exercise in managing the property under his control, and in these circumstances – although the judgment is more ambivalent – surely a court would not allow the defaulting fiduciary to insist that he might lawfully have exercised the discretion so as to deliver to himself, lawfully, exactly what he had unlawfully taken, and thus, on this view of "perfect performance", he should escape any obligation to pay compensation.

The second issue is more difficult. Charles Mitchell is one of the more articulate critics of the approach taken in *AIB v Redler* and *Target Holdings*.[113] He suggests that these cases focused on the prescriptive duties of fiduciaries and ignored the remedies that might have been delivered in response to their proscriptive duties:[114] in particular, these cases ignored 19th century learning that regarded fiduciaries as "incapable" of entering into legally binding self-dealing contracts with their principals, holding that they could not do so because they were subject to an "equitable disability". This *disability* means that fiduciary relationships are governed by a set of proscriptive rules that disable fiduciaries from acting in certain ways, rather than (or as well as) a set of prescriptive rules requiring them to perform certain duties, breaches of which trigger secondary obligations to pay compensation. On this analysis, the alternative remedy that should have been available to the claimant principals in *Target Holdings* and *AIB* was simply that the fiduciary was disabled from paying out the relevant funds in an unauthorised fashion, and so must replace them. But those five closing words may indicate the flaw in the logic. Of course we can describe fiduciaries as "disabled" from acting in a way that is unauthorised or self-interested,[115] but the truth is that that the fiduciary is all *too* able to act in these ways. This is precisely why the law imposes *duties* on the fiduciary

[110] *Main v Giambrone & Law* [2017] EWCA Civ 1193, [2018] P.N.L.R. 2, at [59]–[60] (Jackson L.J., with Underhill and Moylan L.JJ. agreeing on this issue).
[111] Similarly, although in a simpler context, see *Dawson (dec'd), Re* (1966) 2 NSWR 211 (NSW SCt).
[112] *Auden McKenzie (Pharma Division) Ltd. v Patel* [2019] EWCA Civ 2291, [2020] B.C.C. 316; noted in S. Worthington, "More Disquiet with Equitable Compensation" [2020] C.L.J. 220; and in P.G. Turner and L. Ho, "Misapplication of Company Assets - A Moving Target" [2020] L.M.C.L.Q. 354.
[113] See especially C. Mitchell, "Equitable Compensation for Breach of Fiduciary Duty" (2013) 66 Current Legal Problems 307; and C. Mitchell, "Stewardship of Property and Liability to Account" (2014) 78 Conv. 215.
[114] Mitchell, "Equitable Compensation for Breach of Fiduciary Duty", 315–16.
[115] This harks back to the "good man" theory of fiduciaries promoted by Lord Millett (see the references cited ibid at n 33), but see A. Mackley, "A Challenge to the Utility and Distinctiveness of the Good Man Theory of Equity" (2021) 27 Trusts & Trustees (forthcoming).

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not to act in those ways, and then affords remedies for breach. By contrast, describing someone as "disabled" from doing something is more naturally appropriate, and certainly analytically only appropriate, when the claimant is immune from the defendant's powers to so act. For example, we might properly say that a defendant is disabled from imposing contractual obligations on a non-contracting party. If the defendant attempts to do that, the claimant need do nothing in response; she is simply unaffected by the defendant's acts. By contrast, when a fiduciary acts in ways that he should not, a *real* change is effected: the funds are physically depleted, and the principal must actively enforce her rights to remedy the situation. Moreover, when the claimant asserts her rights, we come full circle to asking what the performance *duties* of the fiduciary were, and what shortfall to the claimant's assets has been caused by the fiduciary's shortcomings in performance.

In short, in his discussions of both proprietary disgorgement and equitable compensation, Sealy's careful analysis of the cases led him to conclusions that anticipated by some decades the position we now find ourselves in.

VI. Conclusion

My conclusions can be brief. Some lessons from Sealy's 1960s pieces are vital lessons of substance. I need not repeat those here – they are summarised in my introduction. Some lessons are lessons in method: rigorous analysis set out in a clear, simple and intelligent fashion always provides an opportunity for serious learning; to that end, it is crucial to read carefully and ask "Why?" and "So what?" at every step. Some lessons are lessons in our own discipline: the law must work in practice, and deliver ends we want to live with. And, finally, all these are lessons that require our constant attention: the law is not fixed; it has to move with the times. Sealy ended his 1995 reflections on his own early work with the lines:[116]

> Neither the ossification of principle endemic in the English [judicial] approach nor the seeming abandonment of principle seen in the rulings of the courts elsewhere appears to be an ideal starting point for the development that the twenty-first century will need.

That seems as good a place as any to end. It captures beautifully Sealy's own scholarly characteristics of using robust and principled doctrinal analysis to serve modern needs. It also tells us to get on with the job. The task is not done.

[116] Sealy, "Fiduciary Obligations, Forty Years On", 53.

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