Landmark Cases in Tracing

A Sample Chapter

Re Tilley's Will Trusts (1967) and *Turner v Jacob* (2006)

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1. Introduction

Many landmark cases have, if not grand facts, rather grand parties to them. This is a consequence of many of them having been decided a century or more ago, where, in practice, the services the courts provided were to mainly the wealthy and often grand. A case in point is seen in the first chapter of this (proposed) collection concerning *Kirk v Webb* (1698),[1] which features a cast of post-restoration senior clergy, aristocrats and of course Barbara Palmer, Countess of Castlemaine, perhaps the most notorious of Charles II's mistresses, and their son. The parties in *Re Tilley's Will Trusts* (1967)[2] and *Turner v Jacob* (2006)[3] are from a time where the middle class had sufficient wealth and opportunities to invest, and our interest in these cases arises because their protagonists did not structure their investments – at least legally – wisely. Moreover, in *Turner v Jacob* we see a remarkable and thoroughly modern woman in Dorothy Turner in the events leading up to the case, one whose acts and intentions, it seems, influenced a modern court of equity to apply the law very carefully in a manner sensitive to her position. That these decisions are controversial in recent times is another piece of evidence supporting the proposition that equity in general, and tracing in particular, are still searching for their fundamental principles even today. For this reason, we must also look to the rather less grand-looking cases and those lower down in the hierarchy of the courts.

The way the legal issues are presented in the judgments are themselves telling of the approach the courts have taken. The first instance judgments in *Re Tilley* and *Turner v Jacob* are far from the trenchant, top-down reasoning of Lord Millett in the leading case of *Foskett v McKeown*[4] or the less trenchant but equally top-down judgment of the Court of Appeal in *Re Diplock*,[5] led by Lord Greene MR, who also developed first principles. These first instance judges, hemmed in by authority, were feeling their way around the principles left behind by rather loftier precedent. They thus suffer the disadvantage of being somewhat difficult to analyse since they lack such definitive statements of where the law is going. They also, conversely, benefit from a greater sensitivity to any nuances in the facts and law. They illustrate clearly the risks of going too far in one's *obiter dicta* and laying down a general theory that seems perfectly fine on the present facts, but may result in unforeseen consequences when more difficult cases emerge.

The issue, which is the same in both cases, was presented in rather crude terms: could a beneficial interest under a trust be traced into substitute property after being mixed with non-trust money, but where the trustee had not set out to use trust money and had not used it? The

[1] (1698) 2 Freem Ch 229, 22 ER 1177; (1698) Fin Pr 84, 24 ER 41; see also *Duke of Southampton v Cranmer* (1685) 1 Vern 338, 23 ER 506; *Wood v Duke of Southampton* (1692) Show PC 83, 1 ER 58; *Wood v Webb* (1695) Show PC 87, 1 ER 60.

[2] [1967] Ch 1179 (Ch).

[3] [2006] EWHC 1317 (Ch), [2008] WTLR 307.

[4] [2001] 1 AC 102 (HL).

[5] [1948] 1 Ch 465 (CA). Note that the tracing issues were not appealed to the House of Lords, which considered only the so-called '*Diplock in personam* claim': *Ministry of Health v Simpson* [1951] AC 251 (HL).

far more fundamental questions were not expressly considered: what the basis of allowing access to substitute property is; what the basis of allowing access to any increase in value of that property is; what the basis of allowing priority in insolvency is; and does the underlying cause of action matter to the process of identifying claimable value, i.e. to what extent is tracing, the process, divisible from tracing, the claim. These matters are considered in this chapter when trying to rationalise these cases in accordance with some rather loftier general principles of trust law. The other matter not addressed in either case is whether the outcome is compatible with the House of Lords' decision in *Foskett v McKeown*.

This chapter has two purposes. The first is to give a neutral analysis of the cases in order to help the reader see the legal and factual issues in a wider context than was considered or available to be considered by the judges in the cases. The second is to advance a rationalisation of them, answering the aforementioned questions. They demonstrate that tracing, if it is to be fair in these circumstances, must be an instance of trust and fiduciary law and not a right of property. Here, a breach of the relevant obligation allows tracing into the substitute and – crucially – determines to what extent tracing is permitted. A mere breach of trust leads to priority in insolvency by way of a lien of charge, but a breach of fiduciary duty is required to justify taking any increase in value. This explains the outcome in these cases. While the trustees in breached trust obligations, they did not breach their fiduciary duties and accordingly their beneficiaries were denied access to the increases in value.

2. Facts and Decisions

2.1 *Re Tilley's Will Trusts*

The facts of *Re Tilley's Will Trusts* as set out in the judgment are tantalisingly brief. Ungoed-Thomas J recites that the testator, Henry Tilley, appointed one Mr Dinelli and Mrs Tilley, his wife, as executors of his will in 1927. He left Mrs Tilley only a life interest in his estate, with his two children Charles and Mabel (who were not Mrs Tilley's children) to share the remainder equally. Henry Tilley died in 1932 and his estate was valued for probate purposes at £2,150, a modest sum equivalent to some £151,000 today.[6] Mr Dinelli died in 1941, leaving Mrs Tilley the sole executrix and trustee of the will. Mrs Tilley was to die in 1959, but it is what she did with the trust property in the meantime that we are concerned with. She died a wealthy woman, leaving an estate worth some £94,000, or more than £2.2m in today's money.

How Mrs Tilley dealt with the trust money as well as her own was the subject of an accountant's report. She had conducted numerous property transactions which were the source of her personal wealth. Even in 1939 she had an overdraft facility of over £22,000. Mrs Tilley did not appear too concerned to treat her own money and the trust's separately. She paid the funeral expenses and estate duty out of her own private funds. She then redeemed the mortgage on two trust-held houses, 'Burley' and 'Ringwood', from her own funds in 1933. Consequently the trust, at that point, owed her some £513. Upon selling these houses, the result was that she had trust money amounting to some £179 of the £838 or so in her bank account. She then purchased 11 Church Street, Christchurch for £1,000, drawing a cheque for some £841 thus emptying the account and overdrawing. If one puts aside any issues arising from the use of the overdraft facility or backwards tracing, £179 of trust money must have been used in this purchase.

[6] The source of this and the other conversions is the Bank of England's *Inflation Calculator*, accessed 10/10/2020: https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator.

Mrs Tilley went on to redeem the mortgages on two more trust-held houses, 'Stamford' and 'Middleton', for £400 of her own money, selling them for some £482 in 1939. Adding this net £82 of trust money to the £179 meant she had a total of £261 or so of trust money 'in' her bank account. She was, however, £22,405 overdrawn. Thus, if one takes the view that one cannot trace through a debt such as an overdraft, Mrs Tilley had dissipated all of this trust money.

Later in 1939, Mrs Tilley subsequently drew out some £1,956 to complete the purchase, in her own name, of 17–17A High Street, Christchurch, for a total price of £2,050. In 1951 and 1952 further trust-held properties were sold realising some £2,237 to be added to the £261 to yield a total of £2,237 that Mrs Tilley was clearly liable to account for. Since at the time of these sales and at all material times thereafter Mrs Tilley's balance was in credit, it cannot, under any approach to mixing, be said that this £2,237 of trust money had been dissipated. Since there was still money at the bank greater than £2,237, the claimant could have pursued a lien to the same value, but since there was no insolvency, this 'priority remedy' would have gained the claimant nothing. The claimant, the successor in title to Henry Tilley's daughter Mabel, therefore sought to trace into the land bought with trust money.

The claim was to the proceeds of the sale of 11 Church Street *pro rata* (given £179 of the £1,000 purchase price was trust money) and the proceeds of the sale of 17–17A High Street *pro rata* (given £82 of the £2,050 purchase price was trust money). If these monies could have been traced into the new land, the claimant would have been able to claim her half share in the proportion of trust money in the present value of each piece of land: the 'profits remedy'. The judgment does not set out the sale value of these houses, but between 1933 and 1959 inflation alone meant that £261 in 1933 was worth £802 in 1959, or £18,800 in today's money. £9,400 might not be a large claim, but it must be remembered that Henry Tilley did not leave a large estate.

The accountants' report noted that 'Mrs. Tilley had thoroughly confused these [trust] moneys with her own private funds.'[7] It is hard to disagree. It also noted that 'with such large overdraft facilities, which were utilised right through the war years … it could also be said with some justification that the £ 82 … was hardly noticed by Mrs. Tilley and would certainly not have affected her property dealings at that time.'[8] As to the earlier purchase, the report similarly noted that her overdraft facility of at least £250 also exceeded the £179 of trust money she received.

It appears that this evidence was pivotal to Ungoed-Thomas J's decision. He noted that the trust money formed a small proportion of the purchase prices of the relevant land and that she had mixed trust moneys with her own throughout. He inferred that she had not deliberately taken trust money for the purpose of investing in her own name, and that, at most, she had avoided the use of her overdraft facilities and thus saved on interest – interest that she was entitled to in any event since she was life tenant. He concluded 'overwhelmingly'[9] that Mrs Tilley was not using trust money.

Ungoed-Thomas J's consideration of the law was fairly limited. He did not consider *Re Diplock*, perhaps because it concerned tracing into substitutes made by innocent recipients rather than trustees. *Re Diplock* grounded these claims on a basis of tracing in a right of property persisting as that property changed hands, and thus justifying a claim against an

[7] *Re Tilley* (n 2) 1190.
[8] ibid 1191.
[9] ibid 1192.

innocent recipient, whose conscience can hardly be said to have been affected.[10] He could hardly have considered *Foskett v McKeown*, since it was yet to be decided. *Dicta* in this case hold that the claim was one of property and fault was irrelevant.[11] If these principles had been applied here, Mrs Tilley's absence of fault and lack of intention to use trust money would have taken on a lesser, or no, role altogether, and the claimant would have got her profits remedy.

Ungoed-Thomas J did not consider *James Roscoe (Bolton), Ltd v Winder* either.[12] That case holds that it is not possible to trace into a debt or into a bank account to a value greater than the 'lowest intermediate balance' of trust money in it between deposit and claim. This tells us that tracing is at least a right *ad rem*,[13] requiring extant trust property to attach to.[14] It militates against the claim for the proceeds of that £82, since that sum was dissipated, and had, on this basis, no traceable proceeds. The fact that this was no obstacle suggests that Ungoed-Thomas J saw trust obligations as more important that any reified right of property in *Re Tilley*.

Instead, Ungoed-Thomas J focused on the most obvious issue at hand and the authorities pertinent to it: mixing trust money with non-trust money. He dismissed the authorities concerning physical mixtures where the portions belonging to each party could not be identified.[15] Here, the accountants' report meant it was clear where the money had gone. That left *Re Hallett*[16] and *Re Oatway*.[17] The principle of these cases is essentially that where there is wrongdoing by a trustee or fiduciary, the beneficiary or principal may 'cherry-pick' from the withdrawals and trace and follow into whichever she thinks is best.[18] So in *Re Hallett*, the beneficiary could trace into what was left in the bank account (presuming the trustee spent his own money), and in *Re Oatway*, the beneficiary could trace into an investment bought from a withdrawal (presuming the trustee spent trust money). On this basis, the claimant would have been able to trace into the land.

Ungoed-Thomas J quoted extensively from *Re Oatway*, including *dicta* stating that 'The order of priority in which the various withdrawals and investments may have been respectively made is wholly immaterial.'[19] *Re Oatway* predates *Roscoe v Winder*, which may explain the lack of care over whether the account balance dips below what the claimant would like to claim.

He also turned to *Re Hallett,* focusing on the then-restriction that the remedy for tracing into mixtures was limited to a lien and the beneficiary could not, in these circumstances, claim a beneficial interest and thus any concomitant increase in value. Somewhat ironically, he spent some time explaining this away.[20] It was an unpopular rule and, as he noted in his discussion,

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[10] (n 5) 524; see David Fox, 'Purchase for Value without Notice' in Paul S Davies, Simon Douglas and James Goudkamp (eds), *Defences in Equity* (Hart 2018) 77.

[11] (n 4) 109, 127.

[12] [1915] 1 Ch 62 (Ch). A secondary authority, *Bishopsgate Investment Management Ltd v Homan* [1995] Ch 211 (CA) is usually cited too, but *Homan* post-dates *Re Tilley*.

[13] A term popularised by R M Goode, 'The Right to Trace and its Impact in Commercial Transactions – I' (1976) 92 LQR 360; Roy Goode, 'Property and Unjust Enrichment' in Andrew Burrows (ed), *Essays on the Law of Restitution* (Clarendon 1991).

[14] *Re Diplock* (n 5) and *Foskett* (n 4).

[15] *Re Tilley* (n 2) 1182ff.

[16] (1880) 13 Ch D 696 (CA).

[17] [1903] 2 Ch 356 (Ch).

[18] *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 [144]; See the discussion in Lynton Tucker, Nicholas Le Poidevin and James Brightwell, *Lewin on Trusts* (20th edn, Thomson Reuters 2020) paras 44–082 to 44–083.

[19] *Re Tilley* (n 2) 1184 quoting *Re Oatway* (n 17) 359.

[20] This restriction originates in the 'notional charge theory' in *Re Hallett* (n 16) which was a step in solving the problem of tracing through mixtures. See the chapter on *Re Hallett's Estate*.

equity prevents the trustee from benefiting from her misconduct (this would later be regarded as a fiduciary, not trust, obligation). Clearly, this requires taking away any increase in value gained via the misconduct and not just the principal sum extracted. But he found an exception in *Re Oatway*, which bears reproducing here, since it was is pivotal to the outcome:

> *[The trustee] never was entitled to withdraw the [sum] from the account, or, at all events, that he could not be entitled to take that sum from the account and hold it or the investment made therewith, freed from the charge in favour of the trust,* unless or until the trust money paid into the account had been first restored*, and the trust fund reinstated by due investment of the money in the joint names of the proper trustees, which never was done.*[21]

He also quoted a passage from *Sinclair v Brougham* which is to similar effect: 'The trustee is precluded by his own misconduct from asserting any interest in the property until such amount has been refunded.'[22]

Thus Ungoed-Thomas J was prepared, as a matter of law, to award a 'full' proprietary remedy, taking in the relevant gains, but did not do so on the facts because, in his view, trust money had not been used in the purchases. If 'refunding' was sufficient to preclude a profits claim, then clearly not taking in the first place was too. Mrs Tilley's undeniable breach of trust by not keeping her own and trust money separate[23] 'halted at the mixing of the funds in her bank account'.[24] The remedy was thus limited to half of the £2,237 principal sum. While the judge would have granted a lien, this was not necessary because there was sufficient money to pay.[25]

Conversely, if a beneficiary had 'deliberately' used trust money, there would be 'no difficulty'[26] in a profits claim. Ungoed-Thomas J also said that he would have been prepared to award such as remedy if trust money had actually been used regardless of intention. To rationalise these propositions, one must reach the conclusion that intention matters when it is merely possible that trust money was used, and it does not when it is impossible that trust money was not used (and overdraft facilities may be taken into account).

2.2 *Turner v Jacob*

Unlike *Re Tilley*, the facts of *Turner v Jacob* are reported in considerable detail. This is in part due to that fact that the judge had to deal with many evidential issues and particularly the credibility of the witnesses. The task of summarising the facts for present purposes, therefore, is to transform Patten J's judgment into what a summary of facts would look like in a report of an appellate court, removing the rejected evidence and immaterial facts, but retaining enough detail to allow one to explore fully the competing legal principles and how the issues of motive and fault might be relevant, in addition to answering the question of where the trust money had gone.

Like *Re Tilley*, the trustee lacked any real culpability; like *Re Tilley* the legal issue at stake was tracing through mixed substitutions of both trust and non-trust money where the trustee did not intend to use trust property in her own investments; like *Re Tilley* the tensions are revealed through the combination of these things; and also like *Re Tilley*, the conclusion was

[21] *Re Tilley* (n 2) 1184–1185, quoting *Re Oatway* (n 17) 359–361 (emphasis added).
[22] *Re Tilley* (n 2) 1188 quoting *Sinclair v Brougham* [1914] AC 398 (HL) 442.
[23] *Massey v Banner* (1820) 1 Jac & W 241, 37 ER 367; *Pennell v Deffell* (1853) 4 De GM & G 372, 43 ER 551; *Re Gross* (1871) LR 6 Ch App 632 (CA Ch); *Henry v Hammond* [1913] 2 KB 515 (KB); *Foskett* (n 4) 110, 127.
[24] *Re Tilley* (n 2) 1193.
[25] ibid 1193.
[26] ibid 1193.

the same: the beneficiary was limited to the principal sum and not permitted access to profits. Again, the discussion of the authorities in *Turner v Jacob* was limited, in fact even more so than in *Re Tilley*. That neither *Foskett v McKeown* nor *Re Tilley* itself were cited is nothing short of astounding.

The claimant was a Mr Brian Turner, who had been left, *inter alia*, all of his wife Mrs Dorothy Turner's interest in 'Clarkfield', a modest house in Rickmansworth. Mrs Kim Jacob, the defendant and a child of Mrs Turner by her first husband, asserted a beneficial interest in Clarkfield on the grounds of either proprietary estoppel, a common intention constructive trust that arose upon the purchase of Clarkfield, or an earlier equitable interest that was traceable into Clarkfield. All ultimately failed, but it is the final claim that is relevant for present purposes. The additional claim over 'Glebe Avenue' and its proceeds is not relevant.

Patten J was sensitive to the underlying motivation in the case, that many of the witnesses believed that 'Mrs Turner ha[d] not properly accounted to Kim for the monies due to her from the sale of Fleetwood'[27] (a modest terraced house in Chalfont St Giles purchased by Mrs Turner for her to live in). He was also sensitive to the circumstances of both Mrs Turner and Mrs Jacob. Mrs Turner had died of cancer before the claim, but the witnesses were agreed about her character. It is worth quoting the judgment at length as it brings to bear relevant nuance.

> *[Mrs Turner] was a strong minded and outgoing person with a large circle of friends. She had a very successful career as a stunt artiste and appeared in eight James Bond films as well as the films of Batman, Superman and Robin Hood. She was by all accounts an expert horsewoman who obviously had little or no fear. Many of her stunts involved high falls, chases on horseback and spectacular car accidents. Mr Turner said that her job as a stunt woman made her very resolute and that she was able to compete and succeed in what was a very male dominated industry … Mr Turner described her in his evidence as forthright and as someone who did not suffer fools gladly.*[28]

Mrs Jacob, aged 43 at the time of the judgment, was Mrs Turner's only child. She suffered from severe learning difficulties. There was a 'close and protective relationship' between them; '[in] many ways she continued to treat her as a child'.[29] 'Although they were clearly very close, Mrs Turner was in many ways very tough in her approach to Kim'.[30] The evidence was that Mr Jacob had mistreated and taken advantage of her:

> *Mr Hutchison [Mrs Turner's second husband] described Mrs Jacob as very vulnerable in financial matters and personal relationships and as easily influenced by other people. Other witnesses spoke of her tendency to be a spendthrift with money and of her mother's concern about this.*[31]

As regards the tracing claim, the trail begins with the search for the original beneficial interest. The relevant facts begin in 1987 when Mrs Turner purchased Fleetwood for £75,000, in her own name, but in fact for Kim and her then-boyfriend, a Mr Pearce, to live in. The facts are complex, as most common intention constructive trust cases are, but it was ultimately accepted that Mr Hutchison had an interest in Fleetwood because he had paid off the mortgage where Mrs Turner's contributions had been the deposit and a few years' mortgage payments. Given divorce between Mr Hutchison and Mrs Turner was on the cards, discussions had taken place and a letter was found from Mrs Turner to the Inland Revenue stating that: 'He intended the

[27] *Turner v Jacob* (n 3) [85].
[28] ibid [12]–[13].
[29] ibid [15].
[30] ibid [60].
[31] ibid [15].

property to be our daughter's as part of my overall divorce settlement.'[32] Patten J applied the proviso in Lord Bridge's speech in *Lloyds Bank v Rosset* holding that, exceptionally, the CICT can arise at a time later than purchase.[33] This made Mrs Turner trustee and her daughter the beneficiary of at least some part of Fleetwood.

Fleetwood was sold for £86,500 and £75,000 of that was paid in the a 'Crown Reserve deposit account' – the amount Mr Hutchison said he had paid – and this was the sum the judge accepted as held on (constructive) trust for Mrs Jacob.[34] Mr Hutchison also said that since Mrs Jacob was unable to manage her affairs properly and would most likely has squandered the £75,000 he trusted Mrs Turner to hold it for her.

The purchase of Clarkfield arose because of the deteriorating relationship between Mr & Mrs Jacob. Mr Jacob had again threatened his wife with violence and was subject to an injunction preventing him from entering her home. Mrs Jacob was anxious to find somewhere else to live, and Mrs Turner subsequently purchased Clarkfield for £189,500. The argument that Clarkfield was purchased for Mrs Jacob was rejected on the evidence, which is too voluminous to recite here and not necessary for the argument. As noted, Mrs Turner took a 'tough love' approach to her daughter; 'she was in no sense an indulgent parent and her intention that Kim should pay her for Clarkfield would be consistent with that.'[35] Thus any proprietary claim over Clarkfield could only be a proprietary estoppel, which was rejected, or if any of the £75,000 could be traced into it.

Mrs Jacob sought a proprietary remedy through tracing for two reasons. First, this would have yielded an increase in value proportionate to her beneficial share. Second, a personal claim would simply have reduced her mother's residuary estate and therefore her own share of it. Since no personal claim was made, we lack the information as to was actually owed by Mrs Turner to her daughter. The judgment does not reveal the details of the will or what was ultimately passed to Mrs Jacob. This makes the matter of assessing in the round whether, given the outcome of the case, Mrs Turner ultimately did account to Mrs Jacob impossible. What we must go on is whether Mrs Turner's estate had properly accounted to Mrs Jacob on the basis of what she actually asked the court for.

The first part of the tracing exercise was when the trust property was in monetary form in various bank balances. Unlike in *Re Tilley*, the judge here expressly recognised that the lowest intermediate balance rule was in play. No overdraft facility was argued for and, in any event, the sums were far greater than any reasonable overdraft could support.[36] Any dissipation was thus final.

The destination of any surplus over the £75,000 could not be traced, putting an end to the inquiry whether the quantum of extant trust property was higher. Moreover, Mrs Turner had made regular withdrawals, and by 1993 only £63,000 at most of the trust money remained, which was placed in a 'Diamond Reserve' account. A further £47,800 was withdrawn from that account, leaving a balance of £10,339. These sums were either spent on personal

[32] ibid [33].
[33] [1991] 1 AC 107 (HL). This decision would be rather easier to make nowadays given *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776.
[34] *Turner v Jacob* (n 3) [75]ff.
[35] ibid [60].
[36] ibid [88].

expenditure or towards a £60,000 Mercedes motor car. Essentially, they were dissipated or were not worth tracing because of depreciation.

Additional money was later deposited and withdrawn from that account, but the balance never fell below the sum of £10,339. When this account was closed, £276,775 was transferred into Mrs Turner's current account and £250,000 was paid into a 'new Crown Reserve account' from that. That account was closed after a series of transactions leaving a closing balance of £38,000, of which £30,000 went into to a 'Reward Reserve' account. Another £200,000 was deposited in the Reward Reserve account, and £173,118 was withdrawn from it in order to buy Clarkfield, leaving a balance of £49,214. The lowest intermediate balance was thus £10,399, and absent any recourse to backwards tracing or intention to replenish the fund, this was the starting value of the proprietary claim.[37]

The second part of the tracing exercise was whether this £10,339 of the £173,118 in the Reward Reserve account that was used to purchase Clarkfield was considered trust money or not. To resolve this matter, Patten J, like Ungoed-Thomas J in *Re Tilley*, considered *Re Hallett* and *Re Oatway*. As noted, these authorities, on the face of it, permit a beneficiary to cherry-pick the most attractive output – here Clarkfield – and trace into it, since these tracing rules allow a beneficiary to presume against the wrongdoing trustee. Of course, like Mrs Tilley, Mrs Turner had committed a breach of trust by failing to keep separate her own money and the trust money.[38]

However, Patten J found the same way around this outcome. For him, the rationale of the cherry-picking rules was that 'the requirement that the trustee will preserve the fund and not utilise it for purposes unauthorised by the beneficiary.'[39] He relied on the same *dicta* in *Re Oatway* quoted by Ungoed-Thomas J, as reproduced above.[40] Since Mrs Turner had preserved the remaining £10,339 at all material times, Patten J held that Mrs Jacob's lien remained over the Reward Reserve Account and did not transfer into Clarkfield.[41] One may take exception to the use of 'lien'; on the authority of *Foskett v McKeown* a beneficiary can assert a proportionate share. But this slip does not matter since no interest transferred at all. This being enough to dispose of the case, Patten J did not consider the ramifications of *Re Diplock* and *Foskett v McKeown*.

We conclude this section with a brief further comparison between the cases. The relevance of the trustee's intention was not emphasised so much in *Turner v Jacob*, which focused on whether the trust monies were maintained factually; conversely in *Re Tilley* both matters were expressly dealt with. But intention must have been thought to be significant at least indirectly in *Turner v Jacob*:

> *[I]t is highly unlikely that Mrs Turner had any real grasp of the intricacies of the law of trusts or of the need to separate trust money. It seems more likely that she regarded herself as under an obligation to account to Kim for whatever was due to her when that time came.*[42]

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[37] Again, there are complications in the evidence. The contentions the judge rejected that are not reproduced here, and the reader is referred to the judgment for these matters.
[38] The judge rejected the contention that this amounted to a refutation of any agreement for a CICT: *Turner v Jacob* (n 3) [41]–[42].
[39] ibid [100].
[40] Text to n 21.
[41] *Turner v Jacob* (n 3) [102]. The judge's alternative is not reproduced here and makes no difference to the argument.
[42] ibid [42].

Patten J said this in the context of raising the trust in the first place, but his comments apply equally to maintaining it. The trustees in both *Re Tilley* and *Turner v Jacob* were amateurs who did the bare essentials and maintained the relevant trust funds, albeit in the wrong places. But they committed technical breaches of trust by not separating the trust money from their own. Bad faith was not pleaded let alone proven. The issue came down to whether such a technical breach engaged the cherry-picking rules that subordinated the trustee to the beneficiary, and these judges thought not.

3. Issues Raised

Most of the literature concerns only *Re Tilley*, which is unsurprising considering *Turner v Jacob* was essentially a re-run of the material issues, also at first instance (though the textbooks do tend to bring in *Turner v Jacob* into the discussion). The literature is extremely helpful in identifying the conflicts and issues, though less so in resolving them; many leading texts simply consider them to be wrongly decided.[43] It is convenient to summarise the issues in these cases in this section before tackling them *en banc* in the next section.

The central issue is the conflict between the general principle in *Re Hallett* (from which *Re Oatway* was derived) that wrongdoing trustees are to be subordinated to beneficiaries and the *dicta* detailing the exception. On the general principle, since the trustees in *Re Tilley* and *Turner v Jacob* were wrongdoers, the beneficiaries should have been able to trace, take the substitute property including any increase in value and thus these cases were wrongly decided.

The exception is seen in *Re Oatway*, quoted above, and was relied on by both Ungoed-Thomas J and Patten J.[44] It provides that in effect that if the trust fund were preserved or reconstituted, tracing would be denied. Since that exception is so vital to the present discussion, it is worth tracking it in the authorities. It was not discussed expressly in *Re Hallett*, but it is implicit in the remedy laid down in that case – at the time, only a lien was permitted – that the security would be discharged if the money were repaid. In this sense these *obiter dicta* in *Re Oatway* were simply making explicit that was previously implicit.

This exception was affirmed, again *obiter dicta*, in two later leading appellate cases. As noted, Ungoed-Thomas J quoted Lord Parker in *Sinclair v Brougham*.[45] That passage was quoted with approval by the Court of Appeal in *Re Diplock*.[46] Also in *Sinclair*, Lord Haldane said to the same effect that the beneficiary 'agent could not set up that any part of the money in the bank was his until he had made good his breach of duty, and in that sense there was a charge.'[47] Lord Dunedin was less specific; while he did not state the exception, he noted that

[43] Jamie Glister and James Lee, *Hanbury and Martin: Modern Equity* (21st edn, Sweet & Maxwell 2018) para 26–021; Ben McFarlane and Charles Mitchell, *Hayton and Mitchell: Text, Cases and Materials on the Law of Trusts and Equitable Remedies* (14th edn, Sweet & Maxwell 2015) para 12–022; see generally paras 12–017 to 12–023; C C J Mitchell, P Mitchell and S Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) para 7–53; see also David Hayton, 'Equity's Identification Rules' in Peter Birks (ed), *Laundering and Tracing* (Clarendon 1995) 11; A J Oakley, 'Proprietary Claims and Their Priority in Insolvency' (1995) 54 CLJ 377, 415.
[44] Above, text to n 21 and text to n 39.
[45] Above, text to n 22.
[46] (n 5) 534. This qualifies the passage in *Lewin* (n 18) para 44–042: 'A purchaser or volunteer with notice is treated as a wrongdoer like a trustee and so is subject to the same … remedies'.
[47] (n 22) 422.

there was no fiduciary relationship in that case.[48] Finally, Lord Sumner expressly stated that we was not giving a fully reasoned speech.[49]

Other authority takes a different position. Considering and affirming the general principle from *Re Hallett* in *Shalson v Russo*, Rimer J stated that '[t]he justice of this is that, if the beneficiary is not entitled to do this, the wrongdoing trustee may be left with all the cherries and the victim with nothing.'[50] Comparing the two positions, Hayton and Mitchell consider that:

> *We believe Patten J's statement [in* Turner v Jacob*] of the decision in* Re Oatway *to be closer than Rimer J's statement to what the case actually decided. However we prefer Rimer J's view of the merits. If the principle that underlies the law in this area is that presumptions should be made against trustees who wrongfully create evidential uncertainty by mixing trust property with their own property, we believe that this principle should extend to giving beneficiaries the right to choose whichever presumption produces the best result for them.*[51]

A little earlier, Hayton compared the outcome of *Re Tilley* with the cases of trustee wrongdoing in *Boardman v Phipps*,[52] where innocent, broadly speaking, trustees had to give up the profit they had personally made in a transaction that enriched both the trust and themselves, and *A-G for Hong Kong v Reid* where a fiduciary had taken bribes and had to yield the profits he had made from them.[53] The former is the better comparator since *Reid* concerned outright dishonesty, but *Boardman* still points towards the disgorgement of her profits. He wrote that Mrs Tilley 'was fortunate in having Ungoed-Thomas J as the judge, renowned for his close concern for honesty and dishonesty and for his concentration upon the merits of individuals rather than upon lofty legal principles.'[54]

Birks wrote that *Re Tilley* was '[a] more extreme and exceptional departure from the ordinary rules … But it is not clear on what principle it should be decided whether the defendant did use the plaintiff's money'.[55] Moriarty, responding to Birks, said:

> *The point surely is, however, that it is inherently difficult to answer sensibly the question as posed, because it will usually be a wholly artificial enquiry which is quite divorced from the issue which is really at stake. As already noted, in* Re Tilley *itself the enquiry even appears to lead to the conclusion that the claimant's money both was, and was not, spent on the investment.*[56]

Moriarty gets closer to the point. The governing principle cannot simply be whether trust money was used or not, because when it is mixed with other money in a bank account it is impossible to say which parts of the mixture are which, and thus whether a withdrawal is of trust money or not. He goes on to argue for remedial consistency, taking in the factors of whether the mixer is a wrongdoer or not, whether the immediate trustee or a recipient with

[48] ibid 438.
[49] ibid 459: 'I agree, without recapitulating reasons, that the principle on which *Hallett's Case* is founded justifies an order …'
[50] (n 18) [144].
[51] *Goff & Jones* (n 43) para 7–53; also *Hayton & Mitchell* (n 43) paras 12–017 to 12–023.
[52] [1967] 2 AC 46 (HL).
[53] [1994] AC 324 (PC).
[54] Hayton (n 43) 11.
[55] Peter Birks, *An Introduction to the Law of Restitution* (Clarendon 1989) 367, 370.
[56] Stephen Moriarty, 'Tracing, Mixing and Laundering' in Peter Birks (ed), *Laundering and Tracing* (Clarendon 1995) 81.

notice, whether the remedy should be proportionate and who should bear any diminution. He concludes that:

> *In* Re Tilley*, for example, it is difficult avoiding the conclusion that the judge felt it inappropriate that the claimant should share in the profits earned on the recipient's own property ventures, when the mixing was done perfectly innocently (albeit in breach of trust), and when she would almost certainly have carried on those same ventures had mixing not occurred at all.*[57]

Rotherham, backing up a little, notes:

> *[a] difficulty with the view that tracing is about identifying the value of a particular asset surviving in another, is that the law seems to pay so little regard to issues of value. One instance of the irrelevancy of questions of value in tracing is provided by the fact that a substituted asset held by the defendant might be of considerably greater value than the asset that the plaintiff originally owned. This disparity in value might be due to luck, or to the investment skills of the defendant. Nonetheless, the plaintiff will be allowed to claim the substituted asset [on the general principle]. The disinclination to give any weight to this matter might be justified on the basis that the defendant should not be allowed to profit. But, again, this points to considerations of deterrence and moral desert – the same considerations that apply in respect of enrichment by wrongs; it does not indicate that the value of one asset can be found in another asset.*[58]

It is submitted that the question is not simply whether the trustee committed a wrong. The question is 'how wrong' or 'which wrong'. That means broadening the enquiry into trust and fiduciary law more generally to see if there exists, or could exist, principles that justify the outcomes in *Re Tilley* and *Turner v Jacob* given the particular wrongs the trustees in these cases committed. Most of the present literature on tracing is yet to distinguish breach of trust and breach of fiduciary duty and to distinguish between wrongdoing by fiduciaries and wrongdoing by non-fiduciaries on this matter, perhaps led by proposition that tracing, the claim, is merely a right of property.[59] But the presence of obligation, and particularly trust and fiduciary obligation, is clearly still a live one, as evidenced from the judicial *dicta* and the commentary quoted above. And the distinction between trust and fiduciary duties, and that they have different remedies, is fairly well-established. In *Bristol and West Building Society v Mothew*, Millett LJ insisted that the label *fiduciary* duties properly so called should be:

> *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.*[60]

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[57] ibid 81–82 in n 30. See also David Fox, 'Vindicating Property in Substituted Assets' [2001] LMCLQ 1, 3.

[58] Craig Rotherham, 'Restitution and Property Rites: Reason and Ritual in the Law of Proprietary Remedies' (2000) 1 Theo Inq L 205, 221. Rotherham is more concerned with Lionel Smith's view that tracing is a mere process and the claim is simply one of property, but his arguments apply to this narrower issue too. See Lionel D Smith, *The Law of Tracing* (Clarendon 1997); *Foskett* (n 4) 128ff. This is also a point well made by Tatiana Cutts, 'Tracing, Value and Transactions' (2016) 79 MLR 381.

[59] On the side of *Re Hallett* (n 16) subordination applying to both: J E Penner, 'The Difficult Doctrinal Basis for the Fiduciary's Proprietary Liability to Account for Bribes' (2012) 18 T&T 1000, 1007; *Goff & Jones* (n 43) para 7–49ff; Smith (n 58) 194ff; *Lewin* (n 18) para 44–069: 'trustee or other wrongdoer'. Cf Graham Virgo, *The Principles of Equity & Trusts* (4th edn, OUP 2020) 581 who says the rules apply to fiduciary mixers; Robert Pearce and Warren Barr, *Pearce & Stevens' Trusts and Equitable Obligations* (7th edn, OUP 2018) 777–778 referring to 'wrongdoing trustee[s]'; and John McGhee and Steven T Elliott, *Snell's Equity* (34th edn, Sweet & Maxwell 2020) para 30–057, which begins with 'other contributor at fault' but continues to deal with 'the wrongdoing trustee'. In *Hanbury & Martin* (n 43) para 26–021 the authors refer to 'wrongdoing', citing the Australian case of *Re French Caledonia Travel Service Pty Ltd* [2003] NSWSC 1008, (2003) 59 NSWLR 361 [64].

[60] [1998] Ch 1 (CA) 16. See *Permanent Building Society v Wheeler* (1994) 11 WAR 187 (SCWA) as regards Australian and *Girardet v Crease & Co* (1987) 11 BCLR (2d) 361 (SCBC) as regards Canadian law.

Indeed in that case Millett LJ distinguished contractual, trust and fiduciary duties sharply. We return to these points after considering how the development of the fiduciary obligation interacted with the development of the principles dealing with mixing. This further illustrates the danger of muddling trust and fiduciary breaches.

4. Keeping the Trust Fund Separate and Unmixed: The Developing Remedies for Breach

[For the purposes of review, this history is included here. In the final book, much of section 4 will probably find a more suitable home in the chapter on* Pennell v Deffell *(the first leading case of tracing through a mixture) and some of it will find a more suitable home in the chapter on Re Hallett's Estate. This chapter, in its final form, will then cross-reference those chapters.]

4.1 Personal Mixing Remedies

The underlying problem in these cases was clearly the mixing and the remedial response to it. A chapter such as this is not the place for a full exploration of the history of the development of the rules regulating trusteeship, but a brief sketch throws considerable light on the issue. Particularly, it allows one to juxtapose the development of trust and fiduciary law and the principles regarded important in the past with the law applied in *Re Tilley* and *Turner v Jacob*.

When Lord Nottingham, often called the father of the trust, and later Lord Hardwicke, settled the basic principles of trusteeship, they were doing just that. The trust needed to be developed from the old use which lacked proprietary characteristics. For instance, originally the trust property was considered the assets of the trustee and liability to execution by *his* creditors. This, and the selfsame situation for the beneficiary and her creditors, had to be reversed in order to make the trust truly a right of property. This is not to mention the many other reforms also needed.[61] Absent this, there could be no proprietary claim at all and only personal remedies against the trustee would be possible.

Other, finer matters were left for later. Regulation of the trust was light and focused squarely on preserving the fund rather than controlling the trustee's behaviour. Solvent administrators and executors of estates could speculate with the deceased's estate for their own benefit, but an insolvent representative could not. This was for the ostensibly logical reason that the former would be able to meet any losses but that latter would not.[62] A remarkable – for all the wrong reasons – extension of this principle to trustees occurred under the auspices of Lord Macclesfield.[63] We see from this sketch that the idea that trust money had to be separated from the trustee's own then scarcely existed. The regulation of trusts looked more to outcome than behaviour at this time. Since mixing did not matter to this goal there could be no strict rule against mixing at this time.

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[61] Lord Nottingham declared a trust to be assets in the hands on an heir (*Grey v Colvile* (1679) 2 Rep Ch 143, 21 ER 641), but his successor, Lord Guildford declared the opposite (*Creed v Colvile* (1683) 1 Vern 172, 23 ER 395, a rehearing); yet it was Nottingham's view that eventually prevailed: *Burgh v Francis* (1673) Fin 28, 23 ER 16; *Medley v Martin* (1673) Fin 63, 23 ER 33; also *Finch v Earl of Winchelsea* (1715) 1 P Wms 277, 24 ER 387; *Bennet v Davis* (1725) 2 P Wms 316, 24 ER 746. Statutory intervention was required to make the beneficial interest available to the beneficiary's creditors: Statute of Frauds 1677 (29 Car 2 c 3) s 10. Also reformed to give the trust more proprietary characteristics were the rules relating to curtesy (*Pawlett v A-G* (1667) Hard 465, 145 ER 550; *Noel v Jevon* (1678) 2 Freem Ch 43, 22 ER 1047), dower (Dower Act 1833 (3 & 4 Will 4 c 105)) and escheat (Intestates' Estates Act 1884 (47 & 48 Vict c 71); cf *Burgess v Wheate* (1759) 1 Eden 177, 28 ER 652).

[62] *Haslewood v Baldwin* (1678) Rep t Finch 457, 23 ER 248; *Ratcliffe v Graves* (1683) 1 Vern 196, 23 ER 409.

[63] *Bromfield v Wytherley* (1718) Prec Ch 505, 24 ER 227.

It is argued by Yale and by Getzler that the South Sea Bubble, which no doubt caused widespread crashing losses, put paid to this lackadaisical attitude.[64] Lord Macclesfield was successfully impeached for corruption and was replaced by Lord King in 1725 who, one year later, would decide *Keech v Sandford*,[65] thus inaugurating the fiduciary duty of loyalty in the context of the no-profit rule. A trustee who even innocently profited from his office as trustee had to give up his profits. Lord Eldon was to develop the duty of loyalty in earnest from the 1800s in the context of conflicts of duty and interest when trustees and assignees in bankruptcy bought trust property for themselves ('fair-dealing', an instance of the no-conflict rule).[66] However, he apparently went no further than this. It was immediately subsequent to Lord Eldon's retirement in 1827 that we saw a resurgence of the no-profit rule in the authorities. The difference appears to be that these later no-profit rule cases are of fiduciaries positively intending to act against their principals.[67]

It is therefore in accordance with this direction of travel that rules to keep the trust and one's personal property, particularly money, separate were developed. They took a peculiar path. Up until the nineteenth century, money was particularly hard to identify and trace. This was originally put down to the principle that 'money had no earmark', and thus once mixed, it was impossible to identify its provenance and thus there could be no proprietary claim over it; proprietary trust remedies were rights at least *ad rem* and the *res* had been lost. The basic issue is inescapable: It is impossible, after mixing in a bank account, to distinguish trust money from non-trust money.[68] This is one reason why the courts were initially reluctant to trace into land, since the intermediate step was tracing money.[69] Upon mixing, tracing was stopped dead, and the claimant was left to a personal remedy for breach of trust. If there was a concurrent contractual relation, the claimant would be left to his remedy at law.[70] These personal claims were a poor second when the trustee was insolvent.

Therefore, the remedy against a trustee who mixed, despite these problems, initially needed to be a personal one. We see this remedy emerging in tandem with the more general personal remedies against a trustee who lost trust money. These remedies ranged from somewhat arbitrary to brutal. The context of the cases was usually bank failures. The Court of Chancery applied the basic principle that if the trustee was not at fault (for instance if he had kept his

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[64] D E C Yale, *Introduction to Lord Nottingham's Chancery Cases vol II* (79 Selden Society 1961) 143ff; Joshua Getzler, 'Rumford Market and the Genesis of Fiduciary Obligations' in Andrew Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006).

[65] (1726) Ca t King 61, 25 ER 223.

[66] *Ex p Lacey* (1802) 6 Ves Jun 625, 31 ER 1228; *Ex p James* (1803) 8 Ves Jun 337, 32 ER 385; *Ex p Bennett* (1805) 10 Ves Jun 381, 32 ER 893. *York Buildings Co v Mackenzie* (1795) 7 Bro PC 42, 3 ER 432 (HL) is a notable antecedent. See now *Tito v Waddell (No 2)* [1977] Ch 106 (Ch) 225.

[67] *Hichens v Congreve* (1828) 1 Russ & M 132, 150; 39 ER 51, 58 affd *Hichens v Congreve* (1831) 4 Sim 420, 58 ER 157; *Fawcett v Whitehouse* (1829) 1 Russ & M 132, 39 ER 51; *Lees v Nuttall* (1829) 1 Russ & M 53, 39 ER 21 affd *Lees v Nuttall* (1834) 2 My & K 819, 39 ER 1157; *Carter v Palmer* (1842) 8 Cl & F 657, 8 ER 256; *Bagnall v Carlton* (1877) 6 Ch D 371 (CA). Why Lord Eldon did not develop this remedy is, to put it mildly, curious. There is the case of *A-G v Lindegren* (1819) 6 Price 287, 146 ER 811, decided during Lord Eldon's tenure, but it was decided in Court of Exchequer under that court's equity jurisdiction by Coram Richards B. There is also the case of *Taylor v Plumer* (1815) 3 M & S 562, 105 ER 721, decided in the common law courts but clearly upon equitable fiduciary principles.

[68] The matter of *bona fide* purchase of money was reformed an no longer relied on the principle that money has no earmark: *Miller v Race* (1758) 1 Burr 452, 97 ER 398; see David Fox, 'Bona Fide Purchase and the Currency of Money' (1996) 55 CLJ 547.

[69] *Kirk v Webb* (n 1); *Cox v Bateman* (1715) 2 Ves Sen 19, 28 ER 13; cf *Ryall v Ryall* (1739) 1 Atk 59, 26 ER 39; *Lane v Dighton* (1762) Amb 409, 27 ER 274.

[70] *Scott v Surman* (1742) Willes 400, 125 ER 1235; *Whitecomb v Jacob* (1710) 1 Salk 160, 91 ER 149.

money as he would his own and was robbed), he would not be liable.[71] However, both the standard of care and liability were made increasingly severe from the early nineteenth century. The outcomes of many cases plainly were justifiable. For instance, when a trustee allowed a co-trustee to get in the trust property by himself and thus abscond with it, the court permitted recovery against the trustee.[72] As befits a compensatory remedy based on fault, causation was originally required between breach and loss.[73] But later the Court began to permit complete recovery of the missing trust moneys even if the loss would have occurred in any event; all that was necessary was that the trustee had breached a trust obligation.[74]

The specific rule for keeping trust money separate was settled by Lord Eldon at around the same time. In the cases of *Wren v Kirton*[75] and *Fletcher v Walker*,[76] trustees had used trust money for their own benefit. They were ordered to make good the trust's losses even though the cause of the loss was the failure of a bank. The case of *Macdonnell v Harding*, where the trustee has placed £1,500 of trust money in his account for a short period while winding up the trust, was brutal. The trustee was held liable for the shortfall even in the absence of any self-enriching behaviour or carelessness over its custody. He had simply put it in the 'wrong' account in the same bank, which was, through no fault of his, to fail.[77] This technical breach had no causal connection, in the 'but for' sense, to the loss, which would have occurred in any event.

In *Massey v Banner*, Lord Eldon justified this on the grounds it was to prevent the trustee from using the trust property for his own benefit.[78] He saw them as essentially no-profit rule cases. The defaulting trustees who had mixed trust property, at least in the earlier cases, had benefited from their wrongs in what would now be called a breach of fiduciary duty. The standard response would be an account of profits – a prophylactic or deterrent remedy that undoes the wrongdoing by taking away the gain. However, as noted, this remedy was somewhat neglected during Lord Eldon's Chancellorship. Moreover, we see other cases in that era and later where the remedy awarded for making an unauthorised profit from one's trust was actually the return of the principal sum with interest, often compound interest. This remedy was, in some cases, said to be a proxy for an account of profits because that profit was too difficult to calculate.[79]

The connection with tracing is not yet wholly clear, since we have not yet seen how unmixing was later effected in tracing cases, though I have asserted that the distinction between trust and fiduciary obligations is key. But what is clear and what has been seen in these earlier cases was a muddling of trust and fiduciary principles. The wrong remedy – that for a breach of fiduciary duty – was being applied to cases of a mere breach of trust. Normal principles of

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[71] *Morley v Morley* (1678) 2 Chan Cas 2, 22 ER 817.
[72] *Gibbins v Taylor* (1856) 22 Beav 344, 52 ER 1140.
[73] *Lord Shipbrook v Lord Hinchinbrook* (1805) 11 Ves Jun 252, 32 ER 1085.
[74] The case of *Salway v Salway* (1831) 2 Russ & M 215, 219; 39 ER 376, 378 affd *White v Baugh* (1835) 3 Cl & F 44, 6 ER 1354 is a particularly stark example. See also *Knight v Lord Plymouth* (1747) 3 Atk 480, 26 ER 1076; *Knight v Earl of Plymouth* (1747) Dick 120, 21 ER 214; *Clough v Bond* (1838) 3 My & Cr 490, 494; 40 ER 1016, 1017; *Cocker v Quayle* (1830) 1 Russ & M 353, 538; 39 ER 206, 207.
[75] (1805) 11 Ves Jun 377, 32 ER 1133.
[76] (1818) 3 Madd 73, 56 ER 436.
[77] (1834) 7 Sim 178, 58 ER 805; cf *Jones v Lewis* (1751) 2 Ves Sen 240, 28 ER 155 whose *dicta* indicate ordinarily a bank failure would sufficient to excuse the trustee.
[78] (n 23) decided the same way as the foregoing cases.
[79] *Docker v Somes* (1834) 2 My & K 655, 39 ER 1095; *Raphael v Boehm* (1807) 13 Ves Jun 407, 33 ER 347; as regards 'annual rests' (compound interest) see *Raphael v Boehm* and *A-G v Alford* (1854) 4 De GM & G 843, 43 ER 737; *Vyse v Foster* (1872) 9 LR Ch App 309 (CA Ch); *Walker v Woodward* (1826) 1 Russ 107, 38 ER 42.

compensation such as the need for causation were bypassed. Crucially, the consequences of doing so are wholly clear. The personal remedy for such breaches was highly unsatisfactory, often being arbitrary. It could be over-inclusive against a defaulting trustee, and it could also be under-inclusive from the point of view of the beneficiary, who needed an effective and therefore proprietary remedy over the trust property in the event of the trustee's insolvency (which would often follow from a bank collapse). Put simply, it lacked remedial consistency. We must bear these problems in mind when considering the proprietary unmixing remedies.

4.2 Proprietary Mixing Remedies

Two things changed later in the nineteenth century. Most notably, the remedies for unmixing improved dramatically. We see the emergence of the even-handed presumptions as to which parts of the mixture were trust money and which parts were not.[80] In *Pennell v Deffell* (1853), the Court of Appeal in Chancery adopted the rule in *Clayton's Case*[81] or 'first in, first out'.[82] This means that, given a series of deposits and withdrawals, the withdrawals are deemed to represent the deposits in the order they are put in, seeing the account as a virtual pipeline – an almost wholly arbitrary rule. Perhaps more reasonable is simply splitting the fund equally, *pari passu*, seen in *Sinclair v Brougham*.[83] These were cases of parties of equal status and fault – beneficiaries competing with beneficiaries, which explains the lack of impetus to subordinate one party to the other in these cases. While crude, the approach reflects the context in which it was developed. It was the beginning of the end for the unsatisfactory personal remedy against a trustee who mixes, as the developing proprietary alternative became more attractive and a better remedial fit to the cause of action.

A more targeted approach came next, culminating in the cases of *Re Hallett* and *Re Oatway*. The effects of these cases have already been noted.[84] What remains to be seen is how Jessel MR got to the subordinating rules: he applied the fiduciary no-profit rule in his reasoning. The trustee would be subordinated to the beneficiary because he had profited from this office and thus was subject to a disgorgement remedy: '[t]he guiding principle is, that a trustee cannot assert a title of his own to trust property'.[85] He further quoted the case of *Frith v Cartland*, another case asserting that the court would subordinate the fiduciary to the beneficiary if there is what would now be called a breach of fiduciary duty:

> *If a man has £1000 of his own in a box on one side, and £1000 of trust property in the same box on the other side, and then takes out £500 and applies it for his own purposes, the Court will not allow him to say that that money was taken from the trust fund.*[86]

In other words, the basis of the subordinating, cherry-picking rules in *Re Hallett* and *Re Oatway*[87] was an account of profits; disgorgement for a breach of fiduciary duty where the trustee's intention was to make a profit for himself. The fiduciary rules then, irrebuttably deem that intention to be to further the trust. On the facts of a mixing case, they become the cherry-

[80] One should note that strictly *Pinkett v Wright* (1842) 2 Hare 120, 67 ER 50 affd *Murray v Pinkett* (1846) 12 Cl & F 784, 8 ER 1612 came earlier. This case was a prototype of *Re Hallett* (n 16) with a rebuttable rather than irrebuttable presumption against the trustee.
[81] (1816) 1 Mer 572, 35 ER 781.
[82] (n 23). Note that *Clayton's Case* (n 81) was not a case of tracing, but of the appropriaton of credits and debits in an account in an insolvency. This was a fair analogy in *Pennell v Deffell*, even though it involved a trust, because those interested in the fund were all beneficiaries and therefore of equal standing.
[83] (n 22) (admittedly in the next century); *Barlow Clowes International Ltd v Vaughan* [1992] 4 All ER 22 (CA).
[84] Above, text near n 18.
[85] *Re Hallett* (n 16) 719.
[86] ibid 720; *Frith v Cartland* (1865) 2 Hem & M 417, 422; 71 ER 525, 527.
[87] See Derek Whayman, 'Obligation and Property in Tracing Claims' (2018) 82 Conv 157 for closer analysis.

picking rules – where the trustee's intention is subordinated to the beneficiary's and thus the beneficiary can trace into whichever output she intends to, taking any increase in value with it.

Shortly after *Re Hallett*, it had become painfully apparent that the trustee's duty of care had become so severe that it needed attending to, resulting in the case of *Speight v Gaunt* (1883) which held that the trustee would not be liable if he had conducted himself as a prudent man would have.[88] It is therefore tolerably clear that the cases in the *Macdonnell v Harding* line of authority have been impliedly overruled. First, they can be traced through their citations to a comment antecedent, and second, they operate on the same principles as the line of authority of more general breaches of trust considered in *Speight v Gaunt*:[89] fault. The need for fault in an action for breach of trust was reasserted.

The reinstatement of the causation requirement is somewhat controversial. Untangling its history would take many thousands of words, but suffice it to say that the high authorities of *Target Holdings v Redferns*[90] and *AIB Group (UK) Plc v Mark Redler & Co Solicitors*[91] hold that a causal link between breach and loss is required when claiming for the restoration of trust money paid away without authorisation once the trust is no longer on foot and hence the remedy is compensatory.[92] In the case of tracing, it is clear that the beneficiary has decided not to ratify the purchase of the substitute property for the trust and now claims it directly for herself, so the trust is indeed at an end.[93] For failure to bring money in, the cases are remarkably few and far between, but it is tolerably clear that causation is required here too. Ultimately, the remedy is compensatory.[94]

We may draw three conclusions from this sketch that shine a light on *Re Tilley* and *Turner v Jacob* and the issues raised in the literature. First, the old remedies for unmixing trust money were crude because the legal principles available to deal with it were crude. Moreover, we saw some muddling of trust and fiduciary remedies which, on the authority of *Mothew*, ought to be kept separate. Failure to do so results in arbitrary, unfair and ineffective remedies – including in cases of mixing.

Second, when the cherry-picking remedies were originally crafted, they were actually well-attuned to the requisite degree of fault. *Re Hallett* and *Re Oatway* referred to what was to be later called a *fiduciary* breach in order for the subordinating, unmixing rules to apply because they were cases of trustees at least positively benefiting from the use of trust money and perhaps intentionally doing so. These factors justify a deterrent or prophylactic remedy, namely

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[88] (1883) 9 App Cas 1 (HL); see also *Learoyd v Whiteley* (1887) 12 App Cas 727 (HL) and now Trustee Act 2000, s 1.

[89] That antecedent is *Ex p Belchier* (1745) Amb 218, 27 ER 144, which refers to *Knight v Lord Plymouth* (n 74) which is relied on in *Wren v Kirton* (n 75) and *Massey v Banner* (n 23). The editor of the English Reports amplified this connection in the headnote of *Knight v Lord Plymouth* (n 74).

[90] [1996] 1 AC 421 (HL).

[91] [2014] UKSC 58, [2015] AC 1503.

[92] *Target Holdings* (n 90) 439; *AIB v Mark Redler* (n 91) [73], [90]–[94], [134].

[93] David Fox, 'Overreaching' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart 2002).

[94] *Mothew* (n 60) 16ff contains perhaps the most famous *obiter dictum* stating this. It was an issue in the case of *Nestle v National Westminster Bank plc* [1993] 1 WLR 1260 (CA) but again technically is *obiter* since, while actually in point in this case, the claim was denied on the basis there was no breach. The closest we have to it being *ratio decidendi* is *Bartlett v Barclays Bank Trust Co Ltd (Nos 1 & 2)* [1980] Ch 515 (Ch) since it was implicit in how Brightman J came to his conclusion on set-off. These matters were scarcely discussed in the nineteenth century cases and earlier, since in the absence of appreciable inflation and a severely restricted range of approved trust instruments (all limited to a return of few percent a year) it simply was not necessary to work this out. One just took the capital value and added interest. See *Watson v Kea Investments Ltd* [2019] EWCA Civ 1759, [2019] 4 WLR 145 and the discussion in *Lewin* (n 18) paras 41–019, 41–059ff.

subordination and disgorgement. Hence if there is a mere breach of trust absent a breach of fiduciary duty, on this basis only actual losses would be recoverable.

Furthermore, the old cases such as *Macdonnell v Harding*, awarding a supercompensatory remedy, have been impliedly overruled. The remedy is now compensation (though a lien would be appropriate). This answers the issues raised above. Rimer J's and Hayton and Mitchell's point is met: the wrongdoer is subordinated when the wrongdoing is sufficiently bad, i.e. a breach of *fiduciary* duty. Hayton's point about Ungoed-Thomas J is met too; it was correct for the judge to focus on honesty, since dishonesty would have meant there was a bad faith fiduciary breach, leading to an application of the subordination rules. And Moriarty's and Rotherham's points are met by the conclusion that it is a specified degree of fault that triggers a specified solution to the problem of mixing and then there is no need to resort to the impossible matter of tracing the value.

Third, the decisions in *Re Tilley* and *Turner v Jacob*, at first blush, fit this landscape remarkably well. The breaches in those cases, it is submitted, did not attract disgorgement or subordinating remedies since there was no fiduciary wrongdoing. Indeed, it would be inapposite to apply a deterrent disgorging remedy against trustees who never had the intention to act against their trusts. Instead, these cases only attracted genuinely compensatory remedies – supported, if necessary, by a lien – since there was only non-fiduciary wrongdoing.

5. Tracing Remedies as Trust and Fiduciary Remedies

The purpose of this section is to advance a positive case for a model of tracing based on trust and fiduciary obligations, sensitive to the trustee's fault, rather than a model based on a continuing right of property, insensitive to fault, that persists through substitutions. Nonetheless, it is worth mentioning the matter of the authority and the extent to which is stands against tracing as trust law. That authority comes from the *dicta* in *Foskett v McKeown*,[95] discussed further in chapter 10, and is for two propositions of law. First, if the claimant is never limited to a lien after mixing, then this may go as far as impliedly overruling the exception in *Re Oatway* that if the fund is preserved or refunded there is no claim over any gain. Second, tracing is a mere process that identifies what is to be claimed, and the underlying claim, a right of continuing property, fixes over the substitute and it, and any increases in its value, may be claimed.

This makes it extremely difficult to explain the mixing rules in *Re Hallett* and *Re Oatway*, since they arise when the mixer is at fault. It is the granularity of the post-*Mothew* view of trust and fiduciary obligations that allows us to distinguish between breach of trust and breach of fiduciary duty. This must be absent in a property-based view of tracing where the rules in *Re Hallett* and *Re Oatway* are seen as mere rules of evidence where wrongdoers are always subordinated. Thus the most likely explanation is that any wrongdoing would engage these rules.[96] If so, the merely slightly bad will be treated the same as the very bad. This would mean that the claimants in *Re Tilley* and *Turner v Jacob* should have succeeded and the cases were wrongly decided.

Yet allowing profits claims against Mrs Tilley and Mrs Turner would have been very hard. Fiduciary law is sometimes justified by the argument that sometime trustees have to be made

[95] (n 4).
[96] See Whayman (n 87) 169 for discussion.

an example of *pour encourages les autres*.[97] I agree with Lionel Smith that this, rather than being a good reason, is an admission of failure and injustice.[98] The instances of it being said in anger in the English judgments are where the fiduciary or accessory had been fraudulent.[99] In the context of mixing, it seems to bring back the *Macdonnell v Harding* line of authority with all its conceptual and practical injustices.

It is here that the proposition the claim is one of property provides a more palatable justification against the innocent or merely negligent: These trustees used other people's money and thus all the benefits belong to the true owner. Ownership is absolute and fault is not relevant. But the intuitive appeal of this argument is lost when it comes to handing over gains in the value of the trustee's private investments, especially when there is no acquisitive intent, and even more so when the trustee is charged with managing the relevant property, and did just that. This is an illustration of the danger of making wide, sweeping statements of what the law is trying to do – as in *Foskett v McKeown* – without considering more nuanced facts that might challenge that characterisation.

5.1 Basic Principles

With that, we move on to the positive case. Two things support the rationalisation of *Re Tilley* and *Turner v Jacob* as instances of the application of trust and fiduciary law. The first is a principled explanation of tracing as such, and the second is the support to be seen in the authorities for those principles. *Foskett v McKeown* does not offer the only *dicta* on this matter.

Consider first the principled explanation. Rather than seeing the rights in the substitute as a transmissible right of property (or perhaps a response to unjust enrichment), one may see it as an expression of the proprietary constructive trust remedy for breach of fiduciary duty – where access to the profits is permitted – or a proprietary lien for breach of trust – where access to the profits is not. Thus the substitute is subject to a constructive trust *de novo* rather than the original property right. The remedy may then vary depending on the obligation breached, something not possible if the claim is a continuing right of property expressed in the substitute irrespective of any obligation. While seeing tracing as obligation may feel alien nowadays, it would not have been so one hundred years ago, before the cases of *Re Diplock* and *Foskett v McKeown*. It was pointed out in *Story's Commentaries on Equity Jurisprudence* that tracing resembled an account of profits claim against a defaulting trustee.[100] The present edition of *Lewin on Trusts* identifies the differences between tracing trust property and claiming an account of profits for breach of fiduciary duty and then narrows them considerably.[101]

It works as follows. If there is an authorised substitution, there is no breach of trust or fiduciary duty and it is the overreaching mechanism that allows the claim over the substitute

[97] E.g. Sir Peter Millett, 'Bribes and Secret Commissions' [1993] RLR 7, 17; See also *Harris v Digital Pulse* [2003] NSWCA 10, (2003) 197 ALR 626 [407]–[408] (Heydon J).
[98] Lionel Smith, 'Deterrence, Prophylaxis and Punishment in Fiduciary Obligations' (2013) 7 J Eq 87, 93–94; *Gibb v Maidstone and Tunbridge Wells NHS Trust* [2010] EWCA Civ 678, [2010] IRLR 786 [42]; *Walsh v Shanahan* [2013] EWCA Civ 411, [2013] 2 P&CR DG7 [73] doubting the rationale.
[99] *Murad v Al-Saraj* [2005] EWCA Civ 959, [2005] WTLR 1573 [74]; *Novoship (UK) Ltd v Mikhaylyuk* [2012] EWHC 3586 (Comm) [516].
[100] Joseph Story, *Commentaries on Equity Jurisprudence* (A E Randall ed, 3rd English edn, Sweet & Maxwell 1920) 529 § 1261. More recent support can be found in Whayman (n 87); T R S Cutts, 'The Role of Tracing in Claiming' (DPhil, University of Oxford 2015).
[101] *Lewin* (n 18) paras 44–053 to 44–055.

property.[102] If the substitution is unauthorised, the beneficiary may elect to reject it and sue the trustee personally. If she does not, there appear to be two distinct alternative routes. Full ratification of the unauthorised transaction engages the overreaching mechanism, and then there is little difference to an authorised transaction, though personal remedies for any loss are available.[103] The other route is tracing or following. Following then relies on a continuing right of property in the original property (though there are complications when a recipient substitutes the property). But if the beneficiary elects to trace, then that is the account of profits remedy through the vehicle of a constructive trust. However, an account of profits it just that, and one must give credit for what was put in to make that profit,[104] namely the claim over the original.

Now consider the degree of fault and the particular obligation breached. A breach of fiduciary duty – making a profit from one's trust or entering into a conflict of interest – demands the benefit of that transaction be stripped away in order to deter and take away any benefit from the wrongdoing. As a matter of remedial consistency, the remedy should therefore be a full profits remedy (*pro rata* if a mixed substitution) over the substitute. Conversely, for a mere breach of trust, the gravamen of that breach is a failure, albeit one made in good faith, to hold the entrusted property for the beneficiary properly, not its intentional misuse or the derivation of a benefit from it. Remedial consistency here demands instead a priority remedy over it, since if the trustee or recipient become bankrupt the beneficiary can rightly say that the substitute is in fact 'hers' (at least in part) and thus she should take in priority to the general creditors. It then follows that if the property is substituted, the remedy should be a lien up to the value of the original.

5.2 Authorities

Those are the principles, and now here are the authorities. They are difficult to interpret for two reasons. First, the definitions of and distinctions between breach of trust and breach of fiduciary duty had not yet been settled. Second, recipients were said to be 'constructive trustees' and treated as though true trustees, but the courts now accept there are significant differences.[105] Nonetheless, with the new, clearer terminology in mind the underlying principles enunciated can be stripped of their baggage and clarified.

In *Scott v Scott*, trust money was misused to contribute to the purchase of land. The trust money was repaid, but the land increased in value and some of this profit was sought by the claimant. The majority of the High Court of Australia said that:

> *[The] liability [is] to make good a breach of trust and also upon his liability to account for a profit which accrued to him, or to his estate, as the result of his misuse of trust funds. These are two different and distinct notions. A trustee's liability to account for profits accruing to him may arise without any positive breach of trust; on the other hand, a trustee may become liable to make good a misapplication of trust moneys with interest even though he has made*

[102] Following is then unavailable: *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072 (PC) which was the issue in the case. *Space Investments* is better known for its *obiter dicta*.

[103] Fox, 'Overreaching' (n 93) 106ff.

[104] Often described as 'indemnity'. See, e.g., David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton: Law of Trusts and Trustees* (19th edn, LexisNexis 2016) para 81.1; Matthew Harding, 'Justifying Fiduciary Allowances' in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart 2009); Andrew D Hicks, 'Proprietary Relief in Boardman v Phipps' (2014) 65 NILQ 1; *Hardoon v Belilios* [1901] AC 118 (PC) 123; *Re Kidd* (1894) 70 LT 648 (Ch); and by analogy with the account of administration: *Libertarian Investments Ltd v Hall* [2013] HKCFA 93, (2013) 16 HKCFAR 681, [2014] 1 HKC 368 [166]ff; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) [1513].

[105] *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189; *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] QB 499.

no profit by the misapplication. But where the expenditure of moneys constitutes a breach of trust the remedies may overlap for the beneficiaries may have both a proprietary and personal remedy and, of course, if they choose to pursue the former this will be the full measure of the relief available to them.[106]

The High Court speaks of breach of fiduciary duty and breach of trust respectively; the former would give rise to a profits remedy and the latter a priority remedy.[107] We see a similar sentient in Lord Parker's speech in *Sinclair v Brougham*, which was quoted with approval in *Re Diplock*, regarding recipients of trust property:

Suppose, again, that the fiduciary agent parts with the money to a third party who cannot plead purchase for value without notice, and that the third party invests it with money of his own in the purchase of property. If the third party had notice that the money was held in a fiduciary capacity, he would be in exactly the same position as the fiduciary agent, and could not, therefore, assert any interest in the property until the money misapplied had been refunded. But if he had no such notice this would not be the case. There would on his part be no misconduct at all. On the other hand, I cannot at present see why he should have any priority as against the property over the owner of the money which had, in fact, been misapplied.[108]

Again, a lesser fault gives rise to a priority remedy, namely the mere holding of trust property. The greater fault – notice in the case of a recipient, or, presumably breach of fiduciary duty in the case of a trustee – gives rise to a profits remedy. These principles are remedially consistent and consistent with what was proposed above.

5.3 Fine-Tuning

The next task is to see if this characterisation of tracing works at the lower level of concrete facts, particularly those of *Re Tilley* and *Turner and Jacob*, without bending it out of shape. There are three main issues. The first to be absolutely sure that the breaches in those cases were of trust only. The second is if equity is willing to split these remedies rather than insisting that only a constructive trust encapsulating both together is possible. The third is the matter of the overdraft in *Re Tilley*.

The obstacle to overcoming the first issue is that a very broad view of the no-conflict rule has been adopted, only requiring, according to Lord Upjohn in *Boardman v Phipps*, 'a real sensible possibility of conflict'.[109] On the face of it, these trustees' private investments had the potential to endanger the trust property and favour the trustees' own affairs. One would therefore expect a fiduciary response to such actions.

The first answer to this is simply to take the *dicta* in *Re Oatway*, *Re Diplock* and *Sinclair v Brougham* literally: if the trustee replaces the trust property or it is not lost in the first place, then there is no proprietary claim. The difficulty with this is that while it is a way of avoiding the problem of over-recovery, it conflicts with the underlying purpose of the fiduciary obligation: to control the fiduciary's behaviour, and if that behaviour is out of bounds, then it

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[106] (1963) 109 CLR 649 (HCA) 660; see also Elise Bant and Michael Bryan, 'Constructive Trusts and Equitable Proprietary Relief: Rethinking the Essentials' (2011) 5 J Eq 171, 172; Sarah Worthington, 'Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae' (2013) 72 CLJ 720, 729 n 57. Graham Virgo, 'The Genetically Modified Trust' (2016) 2 CJCCL 579 also identifies these as separate justifications for the constructive trust. He also identifies a third – the *in specie* claim over specific property.

[107] *Scott v Scott* (n 106) 660; see below on the same page as the quotation.

[108] *Sinclair v Brougham* (n 22) 442; *Re Diplock* (n 5) 534. While it is no longer good law that a resulting trust arises after a void transaction (*Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL)), if there is a trust for other reasons, the discussion as to recipient liability is still relevant.

[109] (n 52) 124.

does not matter if the trust has not suffered a loss. A fiduciary remedy, namely account of profits, is appropriate in this situation. *Boardman v Phipps* itself is the obvious authority for this proposition.[110]

Any solution must find a way to reach the outcome that Mrs Tilley's and Mrs Turner's breaches were not breaches of fiduciary duty at all, while being in accordance with authority on fiduciary and potentially fiduciary breaches. A short sketch of the history of the fiduciary obligation as well as the recent cases is illuminating.

These strict fiduciary rules were developed in the context of professional trustees and fiduciaries, such as in *Boardman v Phipps*. Tracking the antecedent cases cited there, we see company directors in *Regal (Hastings) Ltd v Gulliver*,[111] trustees in bankruptcy in *Ex p James*[112] and an express trustee in *Keech v Sandford*.[113] When these judges were solidifying the fiduciary obligation, they were dealing with expressly appointed professionals who were knowingly profiting themselves. In such cases it is only natural that the court is more astute to any conflicts of interest such that merely theoretical conflicts matter.

Nowadays we have a contextual approach to fiduciary duties. Lord Sales has described the duty of loyalty as a 'modulated' duty.[114] It is readily scoped in the correct circumstances. In partnerships it is limited to the activities in the scope of the partnership so, for example, a partner in a shipbroking firm was permitted to undertake external shipbuilding activities.[115] The scope of the fiduciary duty can even be circumscribed by necessary implication.[116] Particularly, we see the relevance of good faith and intention in the cases. For instance, if there is a transaction between fiduciary and principal (or trustee and beneficiary), even inadvertent non-disclosure of a material fact is a breach of the no-conflict rule.[117] This is because the principal is entitled to receive disinterested advice concerning a transaction between her and the one she is vulnerable to, and to know for sure if the fiduciary is gaining a personal advantage. However, in the case where the fiduciary is not a party to the transaction, non-disclosure is not a conflict *per se*. The fiduciary does not stand to gain and thus non-disclosure does not demonstrate 'want of fidelity'.[118] It is merely negligence, as in *Mothew* itself. On the other hand, intentional non-disclosure is to act in bad faith and thus is a breach of fiduciary duty.

Mrs Tilley and Mrs Turner, even if one considers they put their own interests ahead of their beneficiaries', acted unaware of their duties. Mrs Tilley was the surviving co-executor and Mrs Turner was the trustee of an informally created trust. They had set out to preserve the trust property and had done so merely in a technically unacceptable way. Here, intention matters. It is submitted that it was not the strict liability no-conflict rule that was potentially engaged, but

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[110] ibid.
[111] [1967] AC 134, [1942] 1 All ER 378 (HL).
[112] (n 66). See also *Ex p Lacey* (n 66); *Ex p Bennett* (n 66).
[113] (n 65).
[114] Lord Sales, 'The Interface between Contract and Equity' (Lehane Memorial Lecture, Sydney, 28 August 2019) 18ff. Lord Sales also spoke of other modulated equitable duties.
[115] *Aas v Benham* [1891] 2 Ch 244 (CA). See also *University of Nottingham v Fishel* [2000] ICR 1462 (QB); *Helmet Systems Ltd v Tunnard* [2006] EWCA Civ 1735, [2007] FSR 16.
[116] *Kelly v Cooper* [1993] AC 205 (PC); *Global Container Lines Ltd v Bonyad Shipping Co (No 1)* [1998] 1 Lloyd's Rep 528 (QB). See generally David Gibbs-Kneller and Derek Whayman, 'How Contractual Terms Determine Fiduciary Duties: A Two-Stage Process' (2019) 70 NILQ 241.
[117] *Swindle v Harrison* [1997] 4 All ER 705 (CA); *Nocton v Lord Ashburton* [1914] AC 932 (HL); *Lewis v Hillman* (1852) 3 HLC 607, 10 ER 239 (HL).
[118] *Mothew* (n 60) 21.

the bad faith rule.[119] Since they acted in good faith and had not actually endangered the trust money, these potential conflicts were not enough to amount to a breach of fiduciary duty.

Had these trustees actually diminished their trust funds or used them deliberately, tracing would have been permitted, both according to the judges in these cases and as a matter of the foregoing principles.[120] Respectively, this would be an actual conflict through actually using trust money, and acting in bad faith. This is in accordance with Ungoed-Thomas J's remarks.[121] Bad faith justifies taking away the profit on the usual fiduciary rationales of deterrence and prophylaxis. Absent bad faith, actually using trust money would be where the balance of the account had fallen below what was required to pay back the beneficiary in full (taking into account any overdraft facility). Then, trust money *must* have been used in the trustee's own investments and the trustee would undeniably have benefited from the trust. This then engages the strict fiduciary no-profit and no-conflict rules and so there must be disgorgement. The value of the disgorgement would be calculated as follows, under a variant of the lowest intermediate balance rule. The beneficiary will be able to trace the value of the monies withdrawn between the value of the trust fund and the lowest intermediate balance of the account. This is because this value *had* to have come from trust money.

All this means is that only where there is a breach of fiduciary duty, with its contours defined above, can the subordinating rules of tracing be applied. Absent this, as Millett LJ said in *Mothew*, '[a] servant who loyally does his incompetent best … is not unfaithful and is not guilty of a breach of fiduciary duty.'[122] It follows that a deterrent or prophylactic remedy, account of profits through tracing, is not justifiable here. That is not to say no remedy is appropriate; a remedy to make good any losses clearly is, as is a lien to yield a priority remedy.

One might object to a significant tension. On this scheme, the (relatively) innocent trustee who, by chance and perhaps by way of having the right overdraft facility thereby not dipping into the trust fund would not be (partially) disgorged of profits. But one with the same fault who actually uses trust money would be, even if she replenished the fund later. This is a harsh distinction, but it is consistent with the principle in *Boardman v Phipps* that even gains made innocently are disgorged if there is a breach of fiduciary duty. This disparity supports the argument that this rule should be relaxed where the trustee has acted in the beneficiary's best interests.[123] But for now, that is not the law.

The second matter is whether a priority-only remedy is available. A lien was not sought in these cases, presumably because the defendants were solvent and it was unnecessary. However, it seems likely the claimants would have been awarded one if they had asked and it was required.[124] Such a remedy was once the standard remedy for tracing after mixing, and the existence of equitable liens such as the unpaid vendor's lien is uncontroversial. It does not seem beyond the wit of equity to reinstate the remedy for mixing in breach of trust.

[119] The distinction between the strict liability and the fault-based aspect of duty of loyalty gained defintion in *Armitage v Nurse* [1998] Ch 241 (CA) where it was stated that it would be acting in bad faith to intentionally rely on an exclusion clause; and in *Barnsley v Noble* [2016] EWCA Civ 799, [2017] Ch 191, where such clauses were said to cover only inadvertent, unintentional breaches of the no-conflict rule.
[120] *Re Tilley* (n 2) 1193 (deliberately or actually); *Turner v Jacob* (n 3) [100]–[102] (actually).
[121] Above, text from n 25.
[122] (n 60) 18.
[123] See John H Langbein, 'Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?' (2005) 114 Yale LJ 929.
[124] *Re Tilley* (n 2) 1193–4: the sum of money to be awarded 'is readily available, which makes the existence of any charge for its security immaterial.'

Finally, consider the matter of tracing though an overdraft. *In Federal Republic of Brazil v Durant International Corporation*, the Privy Council set out the conditions that should apply for this to be possible, under the general heading of 'backwards tracing'. While this is not the right chapter for a full consideration of this issue, the facts of *Re Tilley* would have to pass that hurdle in order for this approach to tracing to accommodate its result. What is required is:

> *[A] coordination between the depletion of the trust fund and the acquisition of the asset which is the subject of the tracing claim, looking at the whole transaction, such as to warrant the court attributing the value of the interest acquired to the misuse of the trust fund.*[125]

In the case of an overdraft which is treated as money at the bank, it seems straightforward to find a factual coordination between inputs and outputs such that the withdrawals can be attributed to the deposits. It is appropriate, it is submitted, to treat the account as if there were a positive balance, as Ungoed-Thomas J did. It is important to note the limits of this principle, though. There can be no 'swollen assets tracing' where there is no reasonable transactional connection between original and substitute property; one needs more than the conclusion that the substitute was obtained by reason of the original receipt.[126] This aside, the outcome of *Re Tilley* appears quite compatible with the rule in *Durant*.

Thus *Re Tilley* and *Turner v Jacob* fit well into the *Mothew* schema of trust and fiduciary law. The most that would need to change is the refashioning of the exception in *Re Oatway* into a more focused rule that excuses the trustee from the profits remedy and only imposes a lien if there has not been a breach of fiduciary duty. This is hardly bending the law out of shape; instead it is aligning it more closely with the objectives of fiduciary law: deterrence and prophylaxis. Then, the outcomes of these cases are reached with a tolerable degree of certainty and clarity on rules of tracing rooted in trust and fiduciary obligations.

6. Conclusion

Re Tilley and *Turner v Jacob* were difficult cases that expose the problems in oversimplifying the law and treating tracing, the process, as value-free exercise in attributing what is claimable in the substitute. As shown in this chapter, the principled justification for a remedy taking away a personal profit is the breach of fiduciary duty either through deliberate acquisitive behaviour or unintentional taking advantage of the trust fund. A merely technical breach of trust does go further than justifying a lien. Moreover, there is clear authority behind these propositions.

But the trustees in these cases were not in breach of fiduciary duty. Mrs Turner particularly strikes one as a conscientious and responsible mother who did her best to look after and provide for her disabled daughter. She simply had no idea of the niceties of running a trust. She was far more preoccupied with running her personal and professional life, which cannot have been without many challenges. To condemn her as a faithless fiduciary or as disloyal to her daughter would go beyond absurdity and into the realm of fantasy. This is why judges such as Cardozo J made statements to the effect of: 'A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.'[127] It is submitted that this is not a mere rhetorical flourish. Such *dicta* indicate the need for a disloyalty standard keeping an eye on its lay meaning as well as its technical one, so that the law does not descend into technical absurdities.

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[125] *Federal Republic of Brazil v Durant International Corporation* [2015] UKPC 35, [2016] AC 297 [40].
[126] *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC).
[127] *Meinhard v Salmon* 164 NE 545 (NY 1928) (New York Court of Appeals).

Recasting the claims against these trustees as the exercise of a right of property would avoid this absurdity, but would still result in an over-inclusive, punitive and undeserved remedy on many facts, including those of these cases. The tracing claim, as demonstrated in the first chapters of this book, grew out of the trust. As shown in the sketch of the history of the remedies for mixing, it grew in sophistication because of the trust and fiduciary obligations it took on board and adapted to. The cases of *Re Tilley* and *Turner v Jacob* how show starkly how recasting tracing as a right of property would undo much of this development and return us to the crude, inflexible and simultaneously over- and under-inclusive remedies of the early nineteenth century, utterly lacking in remedial consistency and justice.

Thus, if one accepts the structure of trust and fiduciary law as exemplified by *Mothew* and the need for a more contextual approach to tracing that awards a lesser remedy against those with more limited fault, these is a remarkable conclusion. In the circumstances of *Re Tilley* and *Turner v Jacob*, only a model of tracing based in obligation will do. This may not be true in other circumstances, particularly those of recipient liability where unjust enrichment brings unique advantages. But that is matter for another chapter.[128]

[128] See the chapter on *Re Diplock*.