The saga of *Grancy Property v Gihwala*: The no-conflict and no-profit rules and the fiduciary

SUMMARY

Directors, trustees, agents and other fiduciaries are bound by the well-entrenched duty to resist the temptation to prefer their own personal interests over the interests of those whom they are bound to protect. The duty to avoid a conflict of interests undoubtedly lies at the core of the fiduciary relationship. It applies not only to directors and senior managers of companies, but generally to all fiduciaries. The no-conflict rule and no-profit rule, which underpin the fiduciary's duty of undivided loyalty to his or her beneficiary, were recently revisited by the Supreme Court of Appeal in *Grancy Property Ltd v Gihwala* 2025 (2) SA 76 (SCA). The duty of directors to avoid a conflict of interest, which is one of the most complex fiduciary duties, forms the focus of this article. Section 2 discusses the foundational legal principles on the no-conflict rule and the no-profit rule, and includes important pronouncements made by the Supreme Court of Appeal in *Grancy*. A critical analysis of the *Grancy* judgment is contained in section 3, but only insofar as the duty to avoid a conflict of interests is concerned. The elusive concept of a fiduciary is dealt with in the fourth section. This is followed by a discussion in section 5 of the remedy to account for profits or the disgorgement remedy, with a particular focus on its complexities and practical difficulties. The vital issue of whether the no-conflict and no-profit principles are two self-standing rules or merely one fundamental rule, is addressed in the final section. This thorny debate could be reignited by the dicta of the Supreme Court of Appeal in *Grancy,* with far-reaching practical consequences for directors and the companies on whose boards they serve.

Keywords: Fiduciary duty; no-conflict rule; no-profit rule; rule against secret profits; duty to avoid a conflict of interests; corporate opportunity rule; South African Companies Act 71 of 2008; fiduciary.

> The only way to get rid of temptation is to yield to it ... I can resist everything except temptation.
>
> Oscar Wilde

1 Introduction

"[H]uman nature being what it is, there is danger … of the person holding the fiduciary position being swayed by interest rather than duty", as famously proclaimed by Lord Herschell in *Bray v Ford*.[1] The fiduciary doctrine provides the protection against such temptation. Directors, trustees, agents and other fiduciaries have long been bound by the duty to resist the temptation to prefer their own personal interests over the interests of those whom they are bound to protect. The duty to avoid a

1 *Bray v Ford* [1896] AC 44 (HL) 51.

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conflict of interests undoubtedly lies at the core of the fiduciary relationship. It applies not only to directors and senior managers of companies, but generally to all fiduciaries. The gist of this well-entrenched duty is that fiduciaries must display single-minded loyalty to their principals or beneficiaries ("beneficiaries").

The no-conflict rule and no-profit rule, which underpin the fiduciary's duty of undivided loyalty to his or her beneficiary, were recently revisited by the Supreme Court of Appeal (SCA) in *Grancy Property Ltd v Gihwala*[2] in a judgment handed down by Schippers JA. The duty of directors to avoid a conflict of interest, which is one of the most complex fiduciary duties, forms the focus of this article. The section below discusses the foundational legal principles on the no-conflict rule and the no-profit rule, and includes important pronouncements made by the SCA in *Grancy*. A critical analysis of the *Grancy* judgment is contained in section 3, but only insofar as the duty to avoid a conflict of interests is concerned. The elusive concept of a fiduciary is dealt with in the fourth section. This is followed by a discussion in section 5 of the remedy to account for profits or the disgorgement remedy, as it is informally referred to, with a particular focus on the complexities and practical difficulties surrounding this remedy. The vital issue of whether the no-conflict and no-profit principles are two self-standing rules or merely one fundamental rule, is addressed in the final section. This thorny debate could be reignited by the dicta of the SCA in *Grancy*, with far-reaching practical consequences for directors and the companies on whose boards they serve.

2 Foundational principles

2 1 The no-conflict rule and the no-profit rule

The principles in this area of company law stem from trust law principles in English law, particularly the leading trust case of *Keech v Sandford.*[3] It is trite that directors are not trustees.[4] Two strict and deep-rooted principles apply: first, the no-conflict rule and secondly, the no-profit rule. These two rules underpin the fiduciary's duty of undivided loyalty to his or her beneficiary,[5] and apply generally to all fiduciaries.

2 *Grancy Property Ltd v Gihwala* 2025 2 SA 76 (SCA).
3 *Keech v Sandford* 1762 Sel Cas Ch 61.
4 See further FHI Cassim, MF Cassim, R Cassim, Jooste, Shev and Yeats *Contemporary Company Law* 3ed (2021) 691-692; R*e City Equitable Fire Insurance Co* 1925 [Ch] 407.
5 *Grancy Property Ltd v Gihwala* 2025 2 SA 76 (SCA) para 201; FHI Cassim et al (2021) 723; *Bristol and West Building Society v Mothew* 1996 4 All ER 698, 712; *O'Donnell v Shanahan* 2009 2 BCLC 666 (CA).

The classic statement of the no-conflict rule, as laid down in *Aberdeen Railway Co v Blaikie Blaikie Bros,*[6] is that fiduciaries are precluded from placing themselves in a position where they have, or can have, a personal interest conflicting with, or which possibly may conflict with, the interests of the principal (or beneficiary). The test for the phrase "possibly may conflict" is that the reasonable person, looking at the relevant facts and circumstances of the particular case, would think that there was a real sensible possibility of conflict.[7] Conversely, the rule does not embrace theoretical or rhetorical conflicts.[8]

The no-conflict rule prohibits a director from acting where, in order to fulfil his duty to the company, he will or may have to prefer the company's interests at the expense of his own interests – merely by acting in such circumstances, the director breaches his fiduciary duty, regardless of whether he acts in the company's interests or whether he acts in good faith.[9] Significantly, the no-conflict principles encompass not only conflicts between interest and duty (that is, conflicts between the fiduciary's own interests and his or her duty to the beneficiary), but also conflicts between duties,[10] for instance, where a fiduciary acts for two principals who have potentially conflicting interests, or where a director holds two competing directorships, or has some other "outside" duty which clashes with his or her duty to the company.

Turning to the no-profit rule, albeit derived from the no-conflict rule, the no-profit rule is a separate principle.[11] It is an inflexible rule that, without consent, a person in a fiduciary position may not make a profit for him- or herself from that position.[12] Although the no-profit rule – or to express it more accurately, the no secret profit rule – originates at common law in the trust law case of *Keech v Sanford,* the leading application of the rule in the sphere of company law is the landmark case of *Regal (Hastings) Ltd v Gulliver.*[13] Specifically in the corporate context,

6 *Aberdeen Railway Co v Blaikie Blaikie Bros* 1854 1 Macq 461 at 471-2. See also *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177, quoted with approval in *Grancy Property Ltd v Gihwala* para 190; *Imperial Mercantile Credit Association v Coleman* 1873 LR 6 HL 189; *Bray v Ford*; Maleka Femida Cassim *Da Silva v CH Chemicals (Pty) Ltd:* Fiduciary Duties of Resigning Directors' 2009 126 *South African Law Journal* 61 at 68-69.

7 *Modise v Tladi Holdings (Pty) Ltd* 2020 4 All SA 670 (SCA) para 36 citing with approval FHI Cassim, MF Cassim, R Cassim, Jooste, Shev and Yeats *Contemporary Company Law* 2ed (2012) 535. See also FHI Cassim et al (2021) 725 as cited by the Supreme Court of Appeal in *Grancy Property Ltd v Gihwala* para 191; *Boardman v Phipps* 1966 3 All ER 721 at 756; *Bhullar v Bhullar* 2003 2 BCLC 241.

8 *Boulting v ACTAT* 1963 2 QB 606.

9 See MF Cassim 2009 *SALJ* 69 and the authorities cited therein.

10 *Transvaal Lands Co v New Belgium (Transvaal) Land and Development Co* 1914 2 Ch 488 (CA).

11 This issue is discussed further below in section 6.

12 *Robinson v Randfontein Estates Gold Mining Co Ltd* 177, quoted in *Grancy Property Ltd v Gihwala* para 190; *Regal (Hastings) Ltd v Gulliver* 1942 1 All ER 378 HL; *Parker v McKenna* 1874 10 Ch App 96; *Boardman v Phipps.*

13 *Regal (Hastings) Ltd v Gulliver.*

the classic expression of the no-profit rule is that profits made by a company director by reason of, and in the course of, his or her office as a director must be disgorged, unless the majority of the shareholders in general meeting have by resolution consented to the director making the profit.[14] A "profit" is widely defined to consist not only of financial profits or money, but also any other gain or advantage, as affirmed by the SCA in *Grancy Property Ltd v Gihwala.*[15]

The no-profit rule is justified as a prophylactic rule, which means that liability arises regardless of whether the company itself could have made the profit, or regardless of whether the profit was made at the expense of the company.[16] Good faith, or the absence of any fraud, on the part of the director is also no defence against liability under the no-profit rule. Liability arises from the mere fact of a profit having been made by the director.[17] *Grancy's* case affirmed that the rule against secret profits applies even if the company (or other beneficiary) has suffered no loss or damage, and even if the profit was not made at the expense of the company.[18] As so notably declared by Lord Wright in *Regal (Hastings) Ltd v Gulliver:*[19]

> "[I]f a person in a fiduciary relationship makes a secret profit out of the relationship, the court will not inquire whether the other person is damnified or has lost a profit which otherwise he would have got. The fact is in itself a fundamental breach of the fiduciary relationship."

It is worth emphasising that the no-profit rule does not apply to all profits, but bars only the making of "secret" profits – which are secret, not in the sense that the company or other beneficiary has no *knowledge* of them, but rather in the sense that they are not authorised by the company or are made without the company's *consent.* The judgment of the SCA in *Grancy Property Ltd v Gihwala* may, with respect, be criticised for its flawed grasp of the concept of a "secret" profit. The Court, in analysing one of the secret profit claims which had been made without the consent of the beneficiary, Grancy, made the telling (mis)statement that:[20]

> "there is nothing *secret* about the investment. It was a public transaction about which the appellants had *known* for many years" (my emphasis).

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14 *Regal (Hastings) Ltd v Gulliver;* FHI Cassim et al (2021) 723.
15 *Grancy Property Ltd v Gihwala* para 192; *Modise v Tladi Holdings (Pty) Ltd* para 36 referring with approval to FHI Cassim et al (2012) 536. See also FHI Cassim et al (2021) 723; *Robinson v Randfontein Estates Gold Mining Co Ltd* 159.
16 MF Cassim 2009 *SALJ* 61-62, 68; *Regal (Hastings) Ltd v Gulliver.*
17 *Regal (Hastings) Ltd v Gulliver.*
18 *Grancy Property Ltd v Gihwala* para 191; *Modise v Tladi Holdings (Pty) Ltd* para 36 citing with approval FHI Cassim et al (2012) 536; see further MF Cassim 2009 *SALJ* 61-62; 67-68; FHI Cassim et al (2021) 723-725; *Phillips v Fieldstone Africa (Pty) Ltd* 2014 3 SA 465 (SCA) para 31-32; *Regal (Hastings) Ltd v Gulliver.*
19 At para 392G.
20 *Grancy Property Ltd v Gihwala* para 204.

Yet this dictum clearly overlooks the fact that the question of a secret profit pivots on the absence of *consent* or authorisation by the beneficiary, not the absence of *knowledge.*

Together, the no-conflict rule and the no-profit rule jointly reflect the fiduciary's duty of undivided fidelity to his or her beneficiary. The two rules are separate and distinct, albeit closely related.[21] Each principle serves a different purpose. The objective of the no-conflict rule is to prevent the judgement of a person holding a fiduciary position from being swayed by personal self-interest rather than duty. In contrast, the no-profit rule is aimed at stripping the disloyal fiduciary of any profits, gains or advantages made in breach of duty.[22] Its underlying rationale is to prevent fiduciaries from misusing their positions for their own personal advantage. In many scenarios both rules will apply, for instance, in cases where directors make profits for themselves when their personal interests are at odds with those of the company which they serve. But in circumstances where only one of the rules is triggered, the debate as to whether there is one rule or two self-standing rules may loom. Significant dicta of the SCA in the *Grancy* judgment could reignite this debate in South African law, as discussed further in section 6 below.

The courts have traditionally applied the no-conflict and no-profit rules as strict and unyielding rules that allow little room for exception.[23] Referring with approval to *Contemporary Company Law,* the SCA in *Grancy's* case[24] reaffirmed this stringent approach. These rules are "exacting requirements, exactingly enforced", as crisply asserted in *Foster Bryant Surveying Ltd v Bryant.*[25] This strict approach to the fiduciary duty to avoid a conflict of interest is founded on the policy that companies are entitled to the undivided loyalty of their directors.[26] The strict ethic reflects the vulnerability of the beneficiary to the fiduciary, and the need to maintain the sanctity of fiduciary relationships of trust, confidence and loyalty. The rigorous application of these rules by the courts is designed to be prophylactic and deterrent – it deters persons in positions of trust from being tempted to place themselves in a position of conflict of interest.

21 FHI Cassim et al (2021) 722-723. See further section 6 below.
22 *Bray v Ford*; *Robinson v Randfontein Estates Gold Mining Co Ltd*; *Wilkinson v West Coast Capital* 2005 BCC 717 para 252; *Chan v Zacharia* 1984 154 CLR 178 at 198; *Don King Productions Inc v Warren* 2001 1 BCLC 607.
23 FHI Cassim et al (2021) 723-725; *Canadian Aero Service v O'Malley* 1974 41 DLR 371 (SCC); *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 2 SA 54 (T) at 66D; *Phillips v Fieldstone Africa (Pty) Ltd* para 479.
24 See *Grancy Property Ltd v Gihwala* para 191 referring with approval to FHI Cassim et al (2021) 725.
25 *Foster Bryant Surveying Ltd v Bryant* 2007 2 BCLC 239 para 76.
26 *Parker v McKenna* 1874 10 Ch App 96; *Premier Waste Management Ltd v Towers* 2012 1 BCLC 67.

The defences open to a fiduciary who is in breach of trust are limited, as stated in *Contemporary Company Law* cited with approval by the SCA in *Grancy*.[27] The only solution to these conflicts is disclosure and consent. For fiduciaries to prevent a breach of the two strict rules, only the free and informed consent of the beneficiary, after full and frank disclosure of all the material facts, will suffice.[28] All too often in conflict situations, secrecy is "the badge of fraud".[29] In the director-company context, the principle of disclosure and consent entails that the director may retain the profit in such instances only with the consent of the majority of the shareholders in general meeting.[30] In practice, any agent or fiduciary who has doubts about his position should ideally make full disclosure to his principal, as the mere fact that he is doubtful is a "message from his conscience".[31]

The primary remedy for breach of the fiduciary duty to avoid a conflict of interests is to confiscate any profit made by the wrongdoing fiduciary and hand it over to the beneficiary – irrespective of whether the beneficiary has suffered any loss. In other words, the disloyal fiduciary must account for any profit he or she received in breach of this fiduciary duty.[32] As affirmed in *Grancy,*[33] the wrongdoer will be responsible for disgorgement of all profits made within the scope of that duty. Since the fiduciary is liable to account irrespective of whether the beneficiary could itself have made those profits, there may be a windfall facet to the recovery by the beneficiary. The classic illustration of a windfall recovery is the case of *Regal (Hastings) v Gulliver*. The case of *Grancy* serves as another illustrative example, as discussed further in sections 4 and 5 below. The remedy, too, is aligned with the underpinning policy of deterrence: the paramount purpose of the account of profits remedy is to deter breaches, rather to compensate for loss.

Before turning to a more detailed analysis of the *Grancy* ruling, a brief discussion of the corporate opportunity doctrine is apt. The corporate opportunity doctrine developed as a special application of the above rules in the corporate context.

2 2 The corporate opportunity rule

While conflict of interests (the no-conflict principle) and profiting from a fiduciary position (the no-profit principle) are two touchstones of liability, a third rule is the corporate opportunity doctrine. The SCA in *Grancy's*

27 FHI Cassim et al (2021) 725; *Grancy Property Ltd v Gihwala* para 191.

28 *Robinson v Randfontein*; *Regal (Hastings) v Gulliver*; *Furs Ltd v Tomkies* 1936 54 CLR 583, 592; *Gwembe Valley Development v Koshy (No 3)* 2004 1 BCLC 131 para 44.

29 *Agip (Africa) Ltd v Jackson* 1990 Ch 265, 294.

30 MF Cassim 2009 *SALJ* 67-68; *Robinson v Randfontein Estates Gold Mining Co Ltd*; *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 33.

31 See *Imageview Management Ltd v Jack* 2009 1 BCLC 724 (CA) para 7.

32 FHI Cassim et al (2021) 721.

33 *Grancy Property Ltd v Gihwala* para 192; see also *Phillips v Fieldstone Africa (Pty) Ltd* para 33.

case affirmed that the corporate opportunity rule is a separate and distinct rule, and is distinguishable from the no-profit rule or the secret profits rule. By way of obiter dicta, the court stated as follows:[34]

> "Neither was there a breach of the corporate opportunity rule: the appellants do not, and cannot, claim that the [...] investment was an economic opportunity that properly belonged to Grancy, which the respondents had usurped or diverted for themselves."

Until fairly recently, the South African courts viewed corporate opportunities through the lens of the no-conflict rule or the lens of the rule against secret profits, in a similar vein to the English and the Australian courts. This approach is rooted in the fact that the corporate opportunity rule historically springs from the fundamental duty of directors to avoid a conflict of interests.[35] The English courts at common law have analysed the usurpation of corporate opportunities by directors as a special application in the corporate context of the no-conflict rule, or the no-profit rule, or sometimes both.[36]

This may be contrasted with the USA where, instead of determining the issue through a conflicts framework as in English law, a dedicated and specially formulated corporate opportunity doctrine has been long-established and well-developed. The US judiciary has crafted a set of rules to determine whether the opportunity "belongs" to the company, as originally laid down in the leading case of *Guth v Loft Inc*.[37]

The first significant acknowledgement of the corporate opportunity doctrine by the South African judiciary was the decision of the SCA in *Da Silva v CH Chemicals (Pty) Ltd,*[38] in 2008, in which the court explicitly acknowledged this doctrine, rather than simply restricting itself to the term "secret profits". Subsequently in *Modise v Tladi Holdings (Pty) Ltd,* a matter involving the misappropriation of a corporate opportunity by a director, the SCA approved the dicta on the corporate opportunity rule in *Da Silva's* case, thus leaving no lingering doubts that the doctrine forms part of South African law.[39] The latest affirmation of the corporate opportunity rule in the *Grancy* decision is to be welcomed.

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34 *Grancy Property Ltd v Gihwala* para 206.

35 MF Cassim 2009 *SALJ* 2009 68-69; FHI Cassim et al (2021) 728.

36 See further FHI Cassim et al (2021) 727-728; *Ultraframe (UK) Ltd v Fielding* 2005 EWHC 1638.

37 See further FHI Cassim et al (2021) 727-728; *Guth v Loft* 5 (A) 2d 503 1939; see also *Broz v Cellular Information Systems Inc* 673 (A) 2d 148 1996.

38 *Da Silva v CH Chemicals (Pty) Ltd* 2008 6 620 (SA) para 18; see also *Phillips v Fieldstone Africa (Pty) Ltd* 482; MF Cassim 2009 *SALJ* 61-70; FHI Cassim et al (2021) 726. While the exposition of the legal principles on the corporate opportunity rule in the *Da Silva* case is uncontroversial, it is debatable, with respect, whether the SCA in that case applied the legal principles correctly – see further MF Cassim 2009 *SALJ* 61-70.

39 FHI Cassim et al (2021) 728-729; *Modise v Tladi Holdings (Pty) Ltd* para 37.

The corporate opportunity rule prohibits a director from appropriating for himself or for another any property, contract, information[40] or other opportunity that either belongs to the company or to which the company has some kind of claim, so that the acquisition of the opportunity by the director would take place *at the expense of the company*.[41] While a comprehensive definition is likely to be a fruitless task, a corporate opportunity, in broad terms, is one that the company was actively pursuing, or one that can be said to fall within the company's existing or prospective business activities, or that is related to the operations of the company within the scope of its business, or that falls within its line of business.[42] It is of no consequence that the opportunity would not, or could not, have been taken up by the company – the opportunity would remain a corporate opportunity.[43] It must also be added that to be a corporate opportunity, the company must have been justifiably relying on the director to acquire the opportunity for it.[44] In stark contrast is the no-profit rule, which applies where a director makes a profit by reason of, and in the course of, his office as a director, even though the acquisition by the director is *not at the expense of the company*.[45]

Directors must take care to avoid breaching both rules. Although the two rules are mutually reinforcing and occasionally overlap, the no-profit rule and the corporate opportunity rule are distinct rules, as declared by the SCA in *Modise v Tladi Holdings (Pty) Ltd* referring with approval to *Contemporary Company Law*.[46] The significance of the distinction between the corporate opportunity and the no-profit rules is that while the latter requires the consent of a majority of the company's shareholders for the director to sanitise the profit, the former requires unanimous shareholder approval for the director to take the opportunity.[47] Importantly, even where an opportunity is not a corporate opportunity because it is not taken at the expense of the company, the director is not automatically relieved of liability – the director must then overcome the hurdle of the no-profit rule.[48] This crucial principle was, with respect, overlooked in *Da Silva's* case, in which the SCA concluded its analysis after interrogating the corporate opportunity rule, but failed

40 *Modise v Tladi Holdings (Pty) Ltd* para 36 referring with approval to FHI Cassim et al (2012) 539.
41 MF Cassim 2009 *SALJ* 61.
42 *Da Silva v Ch Chemicals (Pty) Ltd* para 19; *Modise v Tladi Holdings (Pty) Ltd* para 37.
43 FHI Cassim et al (2012) 538 cited with approval by the Supreme Court of Appeal in *Modise v Tladi Holdings (Pty) Ltd* para 36; *Da Silva v CH Chemicals (Pty) Ltd.*
44 MF Cassim 2009 *SALJ* 61; FHI Cassim et al (2021) 726-727.
45 See section 2 1 above.
46 *Modise v Tladi Holdings (Pty) Ltd* para 35 referring with approval to FHI Cassim et al (2012) 536, 547. See also FHI Cassim et al (2021) 726.
47 FHI Cassim et al (2021) 730; *Canada Safeway v Thompson* (1952) 2 DLR 591; *Cook v Deeks* 1916 1 AC 554 (PC).
48 See further MF Cassim 2009 *SALJ* 67, and particularly the criticism therein of the judgment of the Supreme Court of Appeal in *Da Silva v CH Chemicals (Pty) Ltd.*

to consider the no-profit rule, which on the facts of the case appears to have been breached.[49]

Although the corporate opportunity doctrine developed as a special application in the corporate context to regulate the behaviour of company directors and other corporate fiduciaries, an interesting question is whether the application of the corporate opportunity rule is confined to the corporate context only, or whether the rule applies more widely to fiduciary relationships in general. *Phillips v Fieldstone Africa (Pty) Ltd*[50] suggests that the corporate opportunity doctrine may be pertinent in the context of the employer-employee relationship, and indeed wherever there is a fiduciary relationship. *Grancy's* case likewise insinuates, by means of an obiter dictum, that the corporate opportunity rule applies equally to non-director fiduciaries. It must be borne in mind, in this regard, that though the respondents were fiduciaries of Grancy, their fiduciary relationship was not based on directorship of the company.[51]

3 The decision in *Grancy Property Ltd v Gihwala*

The salient facts of *Grancy Property Ltd v Gihwala* were as follows: The first appellant, Grancy Property Ltd ("Grancy") is an entity incorporated in the British Virgin Isles and used for investment purposes by Mr Mawji, a Kenyan national residing in the United Kingdom. Mr Mawji met Mr Gihwala, the first respondent, and an attorney and businessman, while playing golf in Portugal. Their acquaintance matured into a business venture in 2005 between Grancy, Mr Gihwala and Mr Manala, the second respondent and a friend and business associate of Mr Gihwala. The business venture went awry, provoking a deluge of litigation spanning over 16 years.[52] While several legal issues were raised before the SCA, this article focuses only on the vitally important pronouncements made by the court on the fiduciary duty to avoid a conflict of interest.

The issue of a conflict of interest arose in connection with the Spearhead investment, a Black Economic Empowerment (BEE) investment in linked units in Spearhead Property Holdings Ltd, a property loan stock company listed on the Johannesburg Stock Exchange. The parties undertook the Spearhead investment using as a corporate vehicle Seena Marena Investments (Pty) Ltd ("SMI"), in which a one-third shareholding was held by each of Grancy, Mr Manala and Mr Gihwala, through the Dines Gihwala Family Trust ("the Trust"). SMI, in turn, used the funds acquired from its shareholders to subscribe for 58 per cent of the shares in Ngatana Property Investments (Pty) Ltd

49 See further MF Cassim 2009 *SALJ* 65, 67 – 68, 70.
50 *Phillips v Fieldstone Africa (Pty) Ltd* para 27.
51 See further section 4 below.
52 *Grancy Property Ltd v Gihwala* paras 1-4.

("Ngatana"), the special purpose vehicle through which the Spearhead BEE transaction was to be implemented.[53]

In terms of the Spearhead investment agreement concluded between the parties, it was agreed that the investment would be managed by Messrs Gihwala and Manala, in their capacity as directors of SMI and SMI's nominees on the board of Ngatana. A material term of their agreement was that in managing the investment, Mr Gihwala, Mr Manala, the Trust and SMI owed to Grancy a duty to exercise good faith and a duty to account fully for their stewardship of its investment – their relationship with Grancy was quintessentially a fiduciary one. Messrs Gihwala and Manala and the Trust were consequently in a multifaceted fiduciary relationship with Grancy, and had owed Grancy duties of confidence, trust and good faith.[54]

The Spearhead investment agreement made it clear that SMI could not, without the consent of all its shareholders, make any investments other than the Spearhead investment. But in flagrant breach of the agreement, Messrs Gihwala and Manala made an unauthorised investment, through SMI, of R2 million in Strand Property Investments ("the Strand Property investment"), without informing or seeking the consent of Grancy.[55] This investment was made using the funds of Grancy. To elaborate, the money used for the Strand Property investment was, in fact, Grancy's R2 million in SMI; in violation of the principle of parity of treatment contained in the Spearhead agreement, Messrs Gihwala and Manala had arranged for the repayment of their shareholder loans to SMI, yet Grancy had received nothing. They deliberately failed to repay Grancy's shareholder loan; instead they used those funds to make an unauthorised investment, repayable within 18 – 24 months with a return of 50 per cent. Pursuant to this investment, the Trust and Mr Gihwala profited by receiving an amount of R3 million.[56] Grancy claimed for the disgorgement of the "secret profit" of R3 million which the Trust and Mr Gihwala had obtained from the unauthorised Strand Property investment.

Mr Gihwala denied that the R3 million received by the Trust was a secret profit that was subject to disgorgement. He argued that the Strand Property investment had required him to raise R6,4 million, of which he had raised R2 million through SMI and R4,4 million from other sources. The amount of R3 million, according to Mr Gihwala's argument, represented repayment of the capital plus his profit. Accepting Mr Gihwala's contentions and accepting that Grancy had been repaid the R2 million improperly used by Messrs Gihwala and Manala, the High Court had dismissed Grancy's claim for the disgorgement of a secret profit of R3 million.[57]

53 *Grancy Property Ltd v Gihwala* paras 3, 123(a)-(d).
54 *Grancy Property Ltd v Gihwala* paras 123(e) and (g), 187.
55 *Grancy Property Ltd v Gihwala* paras 123(f), 188.
56 *Grancy Property Ltd v Gihwala* paras 123(k), 189, 195-197.
57 *Grancy Property Ltd v Gihwala* para 200.

The SCA, however, ruled that the High Court had erred and that Grancy's appeal in respect of this claim must succeed. The SCA reasoned that it could not be denied that R2 million of the funding came from SMI, and that the return went directly to the Trust. The Trust therefore received an amount of R3 million from the unauthorised Strand Property investment by SMI. The Trust would not have received this amount but for the misuse of Grancy's funds by Messrs Gihwala and Manala and the Trust. The Trust had, consequently, made a secret profit of R3 million.[58] The SCA, moreover, declared that the High Court's conclusion was tantamount to a finding that Grancy was not entitled to disgorgement of the profit of R3 million on the ground that it had suffered no loss. But this ruling had disregarded the rationale behind the no-profit and no-conflict rules, which (as discussed in section 2 above) was to underpin the fiduciary's duty of undivided loyalty to the principal. An undisclosed profit which directors obtained as a result of the execution of their fiduciary duties belonged to the company.[59]

Consequently, Messrs Gihwala and Manala and the Trust were declared jointly and severally liable to pay to Grancy the sum of R3 million plus interest at a rate of 15,5 per cent per annum to date of payment. This appeal was the culmination of more than 15 years of continuous litigation on the Spearhead investment. The inescapable conclusion of the SCA was that Messrs Gihwala and Manala had treated the funds of Grancy and the entities housing the investment as their "personal piggy banks", and had committed the "most egregious" violations of the "principles of trust and good faith".[60]

4 The concept of a fiduciary

It is submitted that the SCA arrived at the correct conclusion in ruling that Grancy's claim for the disgorgement of the R3 million profit from the Strand Property investment must succeed, in light of the foundational legal principles on the no-conflict and the no-profit rules. As fiduciaries, Mr Gihwala, Mr Manala and the Trust had placed themselves in a position of conflict between their personal interests and their duties to Grancy, thereby flouting the no-conflict rule. Mr Gihwala and the Trust had made a secret profit or an unauthorised gain of R3 million out of the fiduciary relationship, in contravention of the no-profit rule. Since they had neither made disclosure nor obtained the consent of the beneficiary, Grancy, the profits were "secret". Once a breach of the no-profit rule had occurred, it was of no significance that Grancy had been repaid its amount of R2 million in SMI and had thus suffered no loss or damage; nor was it significant that the secret profit of R3 million had not been made at Grancy's expense. As opportunistic fiduciaries, they were liable to account for all the profits of their disloyal activities, even if this meant that there was a windfall aspect to the recovery by Grancy.

58 *Grancy Property Ltd v Gihwala* paras 193-194.
59 *Grancy Property Ltd v Gihwala* paras 201-202.
60 See *Gihwala v Grancy Property* 2017 2 SA 337 (SCA) paras 64 and 69.

However, a criticism of the judgment, with respect, is that the SCA erroneously analysed the factual scenario in Grancy's case to be a breach of the fiduciary duties *owed by directors to the company* on whose board they serve. This is evident from the following dictum:[61]

> "An undisclosed profit which *directors* obtain as a result of the execution of their fiduciary duties belongs to the *company*. It follows that *Grancy's* appeal…must succeed" (my emphasis).

Regrettably the SCA, with respect, lost sight of the fact that neither Mr Gihwala nor Mr Manala (and certainly not the Trust) had ever served as directors on the board of Grancy Property Ltd. Although they were in a fiduciary relationship with Grancy, that fiduciary relationship was based, *not on directorship,* but rather on the Spearhead investment agreement in terms of which they were in a multifaceted fiduciary relationship[62] with Grancy. They owed fiduciary duties to Grancy *in terms of their contractual relationship only.*

In an earlier judgment decided in 2016, *Gihwala v Grancy Properties Ltd,*[63] the court had characterised the Spearhead investment agreement as akin to a joint venture rather than partnership, but had cogently found that there was no need to fit the parties' relationship into the pigeonhole of either partnership or agency – fiduciary obligations and a relationship of mutual trust were imposed by the terms of the Spearhead investment agreement itself. In sharp contrast, it appears from the above-quoted dictum that the SCA in the present case mistakenly conflated Grancy with SMI (the company on whose board of directors the first and second respondents had in fact served). This is borne out by the fact that the SCA ordered disgorgement, not in favour of the *company* (i.e. SMI) of which the first and second respondents were *directors,* but rather in favour of the *beneficiary,* Grancy, to whom they owed fiduciary duties *in terms of their contractual relationship only.*

It is trite that the fiduciary duties of directors and corporate managers are owed only to the company as a whole, in the sense of the collective body of shareholders; but a director does not, simply by virtue of being a director, owe any fiduciary duties to the individual shareholders of the company.[64] In their capacity as directors of SMI, Messrs Gihwala and Manala owed fiduciary duties to SMI only, but not to Grancy in its capacity as a shareholder of SMI. Although in exceptional circumstances a fiduciary duty may arise between directors and a shareholder personally, this applies only where a "special relationship" exists

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61 *Grancy Property Ltd v Gihwala* para 202.
62 *Grancy Property Ltd v Gihwala* para 17.
63 *Gihwala v Grancy Properties Ltd* para 61.
64 FHI Cassim et al (2021) 693-694; *Percival v Wright* 1902 2 Ch 421; *Parke v Daily News Ltd* 1962 2 All ER 929 (ChD); *Greenhalgh v Arderne Cinemas Ltd* 1951 1950 2 All ER 1120, 1126E; *Ngurli Ltd v McCann* 1953 90 CLR 425; *Brady v Brady* 1988 BCLC 20 (CA); *Gaiman v National Association for Mental Health* 1970 2 All ER 362; *Miller v Bain Sub Nom Pantone 485 Ltd* 2002 BCLC 266 (ChD).

between the parties and depends entirely on the facts of the particular case.[65] On the facts of the case, the "special relationship" exception was not raised by Grancy.

The concept of a fiduciary is an elusive one, which has not been precisely defined by the courts. Whether or not a fiduciary relationship exists is a question of fact – it pivots on the nature of the relationship, as opposed to the class of persons.[66] The classes of fiduciary relationships are never closed.[67] A fiduciary may be described as one who acts for another person's interests, particularly in circumstances which give rise to a relationship of trust and confidence.[68] Trust and confidence are the hallmarks of a fiduciary relationship, while the obligation of loyalty is the kernel of the fiduciary duties. There are evidently three essential requirements for a fiduciary relationship:

(i) first, the fiduciary agrees to act for another person in the exercise of discretion or powers;

(ii) secondly, the fiduciary is able to unilaterally use that discretion or those powers to affect the beneficiary's interests in a legal or practical sense; and

(iii) thirdly, the beneficiary is vulnerable and at the mercy of the fiduciary.[69]

Different fiduciary relationships may have differences in the content of fiduciary duties.[70] Importantly in the context of *Grancy's* case, in circumstances where there is both a contractual relationship and a fiduciary relationship (such as agency, partnership or joint venture), the extent and nature of the fiduciary duties owed falls to be determined by the contract. Nevertheless a contractual relationship is not a mandatory feature of a fiduciary relationship.[71]

The no-conflict rule and the no-profit rule, as stated in section 2 above, have their genesis in trust law principles. These and other fiduciary duties apply not only to the relationship between companies and their directors and/or senior managers, but also apply to other fiduciary relationships such as the relationship of agent to principal, attorney to client and partners inter se, and, of course, trustee to beneficiary, which is the

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65 *Coleman v Myers* 1977 2 NZLR 225 (CA); *Peskin v Anderson* 2001 1 BCLC 372; *Brunninghausen v Galvanics* 1999 46 NSWLR 538 (NSW).

66 FHI Cassim et al (2021) 686.

67 *English v Dedham Vale Properties Ltd* 1978 WLR 93 (Ch) 110; *Volvo (Southern Africa) (Pty) Ltd v Yssel* 2009 6 SA 631 (SCA); FHI Cassim et al (2021) 690.

68 *Bristol and West Building Society v Mothew*; FHI Cassim et al (2021) 690.

69 FHI Cassim et al (2021) 691; *Frame v Smith* 1987 42 DLR 81 (Ont SCC) 98; *Robinson v Randfontein Estates Gold Mining Co Ltd*; *Phillips v Fieldstone Africa (Pty) Ltd* 482; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97.

70 *Henderson v Merrett Syndicates Ltd* 1995 2 AC 145, 266; FHI Cassim et al (2021) 690.

71 *Hospital Products Ltd v United States Surgical Corporation* 97; *Henderson v Merrett Syndicates Ltd* 1995 2 AC 145, 206; *Volvo (Southern Africa) (Pty) Ltd v Yssel.*

archetypal fiduciary relationship. The no-profit rule has been applied outside the corporate context, for instance, to fiduciary agents to a trust in the well-known English case *Boardman v Phipps,* and to an employee in the leading South African case *Phillips v Fieldstone Africa (Pty) Ltd,* which concerned the liability of an employee to account for profits made from an opportunity arising in the course of his employment. In the locus classicus *Regal (Hastings) Ltd v Gulliver,* not only were the company's directors sued for breach of the no-profit rule, but also the company's solicitor who, like the directors, had subscribed for some of the relevant shares and had personally profited on their resale. Whilst the directors, though honest and in good faith, were held liable to account for those profits, the solicitor, unlike the directors, escaped liability. The solicitor could retain his profit in reliance on his disclosure to, and the consent of, the company acting through its board of directors.[72]

It is interesting that on the facts of *Grancy's* case, the unauthorised Strand Property investment had constituted not only a breach of Messrs Gihwala's and Manala's fiduciary duties to *Grancy* in terms of the investment contract, but arguably was also a breach of the fiduciary duties that they owed to *SMI* in their capacity as directors of SMI. Their misuse of Grancy's funds for the unauthorised investment had been effected *through SMI* – which seemingly was tantamount to a breach of their fiduciary duties to *both* parties. The question arises whether it was open to SMI to bring its own claim for recovery of the secret profit of R3 million and whether, in that event, SMI's claim to the secret profit would – on the authority of *Johnson v Gore, Wood & Co*[73] – trump that of Grancy's. Ironically, a recovery of the R3 million secret profit on the part of SMI (rather than Grancy) would have indirectly benefitted the wrongdoers (i.e. Messrs Manala and Gihwala, through the Trust), in their capacity as shareholders of SMI.

5 The account for profits remedy

The primary remedy for breach of the rule against secret profits is a requirement to account for profits or, as it is informally referred to, a disgorgement of profits. This remedy is neither compensatory nor restitutionary. Rather, it is designed to confiscate any unauthorised profits, gains or advantages made by the faithless fiduciary stemming from the breach, and to give it to the company or other beneficiary.[74] The disgorgement remedy applies even if the profit is not made at the expense of the company – as so vividly illustrated by *Regal (Hastings) v Gulliver,* where the directors were ordered to disgorge the profits made by them even though the company had suffered no loss and could not

72 The full facts of this well-known company law case will not be repeated herein – see further FHI Cassim et al (2021) 724-725.

73 *Johnson v Gore, Wood & Co* 2002 2 AC 1 (HL) 62; see further Maleka Femida Cassim *The New Derivative Action under the Companies Act: Guidelines for Judicial Discretion* (2016) 204; see also FHI Cassim et al (2021) 1134.

74 See section 2 1 above.

itself have made those profits, and ironically may have benefited from the actions of the well-intentioned directors.

An account of profits may be preferable to a claim for damages for breach of fiduciary duty, since in many cases the actual profit made by an opportunistic fiduciary is greater than the loss suffered by the beneficiary. A claim for disgorgement is not a damages claim, but an action *sui generis*.[75] Its purpose is not to compensate the beneficiary, but to strip the fiduciary of the profits of his or her disloyal actions.[76] Whereas a claim for damages for breach of fiduciary duty requires the beneficiary to prove loss, it is a distinct advantage of the account for profits remedy that there is no need for the beneficiary to establish loss.[77] The underpinning policy is that this remedy is aimed, not at compensation for loss, but at deterring breaches. The prospect of losing all the profits generated by their efforts, operates as a stringent deterrent against directors making secret profits without the fully-informed consent of the company.

It is no defence that the director could have made the profit without breaching his or her fiduciary duty. The courts are not inclined to consider hypothetical situations, as aptly exemplified by the case of *Murad v Al-Saraj* discussed below. It is also no defence to prove that the company would have consented to the director making the profit had he or she made disclosure; only the actual consent of the company suffices, as laid down in *Regal (Hastings)* and followed more recently by the English Court of Appeal in *Murad v Al-Saraj.* It is a well-entrenched principle that a fiduciary is liable to account for unauthorised profits regardless of whether the profit would or should otherwise have gone to the beneficiary.[78] The director's profit will be confiscated and handed over to the company even if the company could not have made the profit itself, or was unwilling or unlikely to do so – another principle exemplified by *Murad's* case. Moreover, the liability of a fiduciary to account applies regardless of whether the fiduciary acted honestly and reasonably.[79]

A fiduciary, who was not a company director, was held to account for secret profits in the English case of *Murad v Al-Saraj,* where Al-Saraj had entered into a joint venture with the two Murad sisters to purchase a hotel for £4.1million. It was agreed that the Murad sisters would

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75 FHI Cassim et al (2021) 785; *Symington v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd* 2005 5 SA 550 (SCA), rejecting the view to the contrary in *Canadian Aero Service Ltd v O'Malley* 1974 40 DLR 371 (SCC) 392; *Robinson v Randfontein Estates Gold Mining Co.*

76 *United Pan-Europe Communication NV v Deutsche Bank AG* 2000 2 BCLC 1; *Murad v al-Saraj.*

77 MF Cassim 2009 *SALJ* 61-62, 68; *Grancy Property v Gihwala* para 201; *Murad v Al-Saraj*; *Warman v Dwyer* 1995 182 CLR 544; *Foster Bryant Surveying Ltd v Bryant; Parker v McKenna*.

78 MF Cassim 2009 *SALJ* 61-62, 68; *Regal (Hastings) Ltd v Gulliver; Parker v McKenna;* Gwembe *Valley Development v Koshy (No 3).*

79 MF Cassim 2009 *SALJ* 61-62, 68; *Regal (Hastings) Ltd v Gulliver.*

contribute £1m and Al-Saraj would contribute £500,000 in cash, with the balance to be raised by way of loans. In breach of his fiduciary duty, Al-Saraj deliberately deceived the Murads by concealing the fact that his contribution was not made in cash, but was in fact made by offsetting debts owed to him by the seller of the hotel, including an amount of £131,000 in unenforceable business and moral debts and a secret commission of £369,000 for finding a buyer. When the hotel was later sold at a substantial profit, the English Court of Appeal held Al-Saraj liable to account for his capital profits. The pivotal issue before the court was the *extent* of his liability to account.

In terms of the joint venture agreement the Murad sisters, on the one hand, and Al-Saraj, on the other, were to receive equal shares of any profit made on the resale of the hotel. Had Al-Saraj not made the fraudulent misrepresentations to them, the Murads would still have proceeded with the joint venture but would have insisted on receiving a greater share of the capital profits for themselves. Al-Saraj thus contended that he should be stripped, not of *all* his capital profits, but only of any profits made by him over and above what the Murads would have agreed to had there been full disclosure by Al-Saraj. Applying the principles discussed immediately above, a majority of the English Court of Appeal, with respect correctly, rejected the argument of Al-Saraj and refused to cap his liability. His deliberate deceitful conduct notably was a factor taken into account by the court.

As such, the account of profits remedy enables companies and other beneficiaries to, effectively, claim windfall profits. The windfall facet of the recovery is strikingly illustrated by *Grancy's* case, in which the court ordered that the secret profit of R3 million had to be disgorged to Grancy in full, notwithstanding the fact that those profits had been made from the investment of, not only the funds of R2 million belonging to Grancy, but also the additional sum of R4,4 million raised by Mr Gihwala from other sources.

Difficulties arise in practice in applying the disgorgement remedy. Serious challenges are created by the extent of the fiduciary's liability to account. The director's liability to account for profits is neither intended to be a punitive remedy, nor is it intended to unjustly enrich the company. In the words of the Australian High Court, it should not be "transformed into a vehicle for the unjust enrichment"[80] of the company. The salient legal principle is that a director is not liable to account for all his or her profits, but only those which relate to the breach.[81] The profits that must be disgorged or accounted for have been defined as profits made as a result of the breach of the duty, or profits from a transaction which involved a breach of duty.[82] But by the same token, a director is

80 *Warman v Dwyer* 561; see also *Ultraframe (UK) Ltd v Fielding.*
81 *Warman v Dwyer; Murad v al-Saraj.*
82 *Gwembe Valley Development Company Ltd v Koshy (No 3)*; *Murad v al-Saraj.*

not liable to account for profits which are attributable, not to the breach, but to other sources.

This may precipitate a conundrum in certain circumstances. For instance, where a disloyal director has usurped a business opportunity for himself, how does the court gauge what proportion (if not all) of the profits of the director’s own business is attributable to the usurped opportunity? Interestingly, the Australian High Court in *Warman v Dwyer* limited the account of profits to the first two years of operation of the usurped business opportunity that a senior executive of a company had diverted to companies of his own in breach of his fiduciary duty, on the basis that the fiduciary had succeeded in showing the court that some of the profits had been earned by means of his own skill and his own efforts.

Once a breach of fiduciary duty has been shown, the onus rests on the fiduciary to establish that certain profits made by him are not for him to account. The fiduciary must prove that it is inequitable for the court to order an account of the entire profits. Should the fiduciary fail to do so, he must bear the consequences of mingling the secret profits (i.e. the profits of his disloyal activities) with the profits attributable to his own efforts and investment; in other words, the fiduciary bears the onus of distinguishing what is his own.[83] It is not mathematical exactness that will be required on the enquiry, but merely a reasonable approximation[84] of the measure of the benefit obtained by the fiduciary from his faithless actions.

The court may in special cases allow fiduciaries a reasonable allowance or reasonable compensation for their work and skill in generating the profits for which they are being held accountable, but only where their honesty or good faith is not in question. This occurred, for instance, in *Boardman v Phipps*[85] in the context of trust law. But where there has been dishonesty or a fraudulent intent, an allowance is likely to be withheld. It must be emphasised, however, that where the fiduciary in question is a company director, the English courts, including the House of Lords,[86] are reluctant to exercise their discretion to grant an allowance. This approach is instructive to South African courts, in light of the strong persuasive influence that English law has exerted, and continues to exert, on the South African company law regime in general and the fiduciary duties in particular. This hard line on allowances in the corporate sphere is in keeping with the strict approach taken to breach of the fiduciary duty to avoid a conflict of interests. It disincentivises directors from taking their chances, and discourages directors from putting themselves in situations where their own interests conflict with

83 *Regal (Hastings) v Gulliver*; *Furs Ltd v Tomkies; IDC v Cooley* 1972 1 WLR 443; *Murad v al-Saraj*; *Warman v Dwyer.*
84 *My Kinda Town Ltd v Soll* 1982 FSR 147.
85 *Boardman v Phipps* 1967 2 AC 46; see also see also *Robinson v Randfontein Estates Gold Mining Co Ltd*; *Transvaal Cold Storage Co Ltd v Palmer.*
86 *Guinness plc v Saunders* 1990 1 All ER 652; *Quarter Master UK Ltd v Pyke.*

those of the company, in the hope of receiving an allowance. The prospect of receiving a payment through an allowance would serve only to dilute the deterrent effect of the no-conflict rule and the no-profit rule.

A final principle, pertinent to the case of *Grancy,* is that disgorgement may be withheld if the conduct of the company makes it inequitable to order an account. In dismissing one of the secret profit claims made by Grancy,[87] the SCA erroneously declared that the profit in question did not amount to a "secret" profit on the basis that Grancy had *known* about it for many years.[88] In so doing, the court unfortunately overlooked the elementary principle that the concept of a secret profit depends, not on the *knowledge,* but on the *consent* of the beneficiary, as submitted above. Assuming that the relevant investment did, in fact, constitute a breach of the rule against secret profits, an arguably better basis for the court's dismissal of Grancy's claim for disgorgement is founded on the legal principle that an account of profits may be withheld where the beneficiary's conduct makes it inequitable. On the authority of *Re Jarvis (deed) and Aquaculture Corp (No 3)* a beneficiary, such as Grancy, is not entitled to stand by, aware of the breach of fiduciary duty, and then claim entitlement to those profits.[89]

6 One rule or two?

In South African law, it is well-entrenched that the no-conflict and the no-profit principles, although closely related, are two separate and independent rules.[90] The two rules were treated as distinct principles as long ago as 1904 in *Transvaal Cold Storage Co Ltd v Palmer*[91] where the court declared the no-profit and no-conflict principles to be "two rules or corollaries". Likewise, Innes CJ in *Robinson v Randfontein Estates Gold Mining Co Ltd*[92] proclaimed that:

> "[w]here one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense *or* place himself in a position where his interests conflict with his duty" (my emphasis).

However, the settled status of the no-conflict and no-profit principles as two separate rules in South African law is at risk of being unsettled by the recent decision of the SCA in the case of *Grancy.* Without providing any reasons or any justification for its view, the court stated as follows:[93]

87 *Grancy Property v Gihwala* paras 203-207.
88 *Grancy Property v Gihwala* para 204.
89 *Re Jarvis (deed)* 1958 1 WLR 815; *Aquaculture Corp (No 3)* 1986 1 NZIPR 677.
90 FHI Cassim et al (2021) 722-723; Blackman, Jooste, Yeats, FHI Cassim and De la Harpe *Commentary on the Companies Act* volume 2 (2008) 8-147.
91 *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 33.
92 *Robinson v Randfontein Estates Gold Mining Co Ltd* 177.
93 *Grancy Property v Gihwala* paras 203.

> "a claim for a *secret profit* arises where the fiduciary's duty in *acquiring the profit* amounts to a *conflict of interest* between their own interests and those to whom they owe duties of trust."

It is clear from this dictum that, in the view of the court, the no-profit and no-conflict principles are not two independent rules, but are merely one rule. On this novel approach, the no-profit rule is effectively treated as a sub-rule of the no-conflict principle, so that it applies *only* where there is a conflict or a possibility of conflict of interests. In practical terms, it means that if a fiduciary makes a profit from his or her office or position, he or she is liable to account for that profit only if the situation gives rise to a conflict or a possibility of conflict between the interests of the fiduciary and those of the beneficiary. No explanation was provided by the SCA for its proposed change in approach to the no-profit rule in South African law. Fortunately, as an obiter dictum, it is not binding on future courts.

Perhaps this dictum of the SCA is merely another instance of a court failing to decisively observe the distinction between the two rules. Due to the overlap between the no-profit rule and the no-conflict rule, the distinction between the two rules is not always easily identified, which has resulted in the courts occasionally conflating or blurring them.[94] An oft-cited example is the following statement of Lord Herschell in *Bray v Ford*:[95]

> "It is an inflexible rule of a Court of Equity that a person in a fiduciary position […] is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict".

Given that the no-conflict rule and the no-profit rule to some degree overlap with one another, both rules will apply in many practical scenarios, for instance, where fiduciaries make profits for themselves when their personal interests are in conflict with their duty to the beneficiary. But since the two rules are different in concept, occasionally one of them will apply where the other does not. It is in these situations that the debate as to whether there is one fundamental rule or two self-standing rules comes to the fore. The *Grancy* dictum supports the position that the no-profit rule functions within the parameters of the wider no-conflict rule. As such, it is parallel to the dicta of Lord Upjohn in the English case *Boardman v Phipps,*[96] which regarded the no-conflict principle as the fundamental rule of law, with the no-profit rule being subject to it.

It is submitted that the better approach is that each rule is a free-standing rule; and, as such, each rule must be considered separately and independently. The consequence is that the no-profit rule may apply

94 See e.g. O'Donell v Shanahan para 176; FHI Cassim et al (2021) 722-723.
95 *Bray v Ford* 51-52.
96 See also *Towers v Premier Waste Management Ltd* 2011 EWCA Civ 923.

even if the no-conflict rule does not. In other words, in the sphere of the no-profit rule, the question whether the fiduciary's interests conflicted with his or her duty should not arise – the only question should be whether a profit was made from the fiduciary's office or position. It is arguable, in this regard, that the classic case of *Regal (Hastings) Ltd v Gulliver* was based on a no-profit rationale, but not a conflict of interests. There are three reasons for preferring the "two-rule" approach.

First, each rule plays a different role. The function of the no-conflict rule is to set aside potentially tarnished exercises of judgment, while in contrast, the no-profit rule embodies the beneficiary's entitlement to the profit, by stripping fiduciaries of the benefits of their disloyal activities.

Secondly, there exist circumstances where one rule will impose liability, while the other will not.[97] A formulation of the principle as a "one rule" approach would be incomplete; in contrast the "two rule" approach is more wide-ranging and all-inclusive. For instance, if in response to a government tender which is called for by public advertisement and is open to anyone to respond to, a corporate manager tenders for a government contract when he knows his company will also tender, the corporate manager may be in breach of the no-conflict rule, but he arguably does not violate the no-profit rule – since his profit as successful tenderer does not arise by reason of his fiduciary office.[98] Conversely, if in a situation where there is no possibility of a conflict of interest, a fiduciary makes a profit by using his or her office or position, the no-profit rule is breached without a violation of the no-conflict rule. A "one rule" approach would consequently enable faithless fiduciaries and opportunistic directors to evade the net of liability in certain scenarios, thereby undermining the deterrent effect of the strict fiduciary doctrine. In light of the current South African corporate environment, which is rife with corruption and mismanagement, tightening up the deterrents to directorial disloyalty, misconduct and opportunism is patently in the public interest.

Thirdly, the weight of judicial authority, not only in South African law but also in other leading common law jurisdictions, supports the "two rule" position, in terms of which the no-profit rule is an independent self-standing rule.[99] The English case of *Ultraframe (UK) Ltd v Fielding,*[100] for instance, referred to the two rules as "two strands of fiduciary duty" which must be considered separately. In a similar vein, the Australian case *Chan v Zacharia*[101] declared that the no-conflict principle and the no-profit rule are separate themes which are embodied in the "one

97 FHI Cassim et al (2021) 723.
98 See e.g. *Green v Betstobell Industries Pty Ltd* 1981 1 ACLC 1.
99 See *Quarter Master (UK) Ltd v Pyke*, *Don King Productions Inc v Warren, Gencor ACP Ltd v Dalby* 2000 2 BCLC 734; *John Taylors v Masons* 2001 EWCA 2106; O'*Donnell v Shanahan*; *Hospital Products Ltd v United States Surgical Corporation*; *Wilkinson v West Coast Capital.*
100 *Ultraframe (UK) Ltd v Fielding* para 1318.
101 *Chan v Zacharia* 198-199.

fundamental rule" and that "the two themes, while overlapping, are distinct".

Finally, it is notable that in English law the debate as to whether there is one rule or two rules has now become irrelevant, since the enactment of the statutory statement of directors' duties in the English Companies Act of 2006. The statutory codification of the core duties of directors encapsulates the wider no-conflict rule as the core principle, with the no-profit rule as a sub-rule of that wider duty.[102] The English codification thus treats the no-profit rule as part of the no-conflict rule, with the consequence that the no-profit duty is not infringed unless the profit made by the director involves a conflict of interest.[103] In sharp contrast, the South African legislature has wisely refrained from adopting an analogous approach to the duty to avoid a conflict of interests under the South African Companies Act 71 of 2008 ("the Act"). The legislative trend or policy is instead to strengthen the statutory provisions on directorial behaviour and accountability in South African law. Flowing from the Zondo Commission of Enquiry into State Capture, two vital amendments have recently been made to the Act by means of the Companies Second Amendment Act 17 of 2024, which are aimed at bolstering directorial accountability for misconduct and wrongdoing.[104]

7 Conclusion

The fiduciary duties of company directors and other fiduciaries are never static. These fiduciary duties have been created and developed by the courts, primarily in English law, stemming from the nineteenth century or earlier.[105] They are dynamic and ever-evolving in response to changing circumstances. The SCA in *Grancy Property Ltd v Gihwala* affirmed the strict ethic that applies to the no-conflict rule and no-profit rule. The adoption by the South African courts of the traditional strict and inflexible approach, not only to the no-conflict and no-profit rules themselves, but also to the liability to account for secret profits is the proper approach.

A judicial shift to a more flexible or softer approach could tempt directors to favour their own personal interests, thereby subverting the fiduciary doctrine and subverting its prophylactic purpose. If the liability to account for secret profits is stripped of its strict ethic, fiduciaries may be tempted to take profits or benefits without following the proper route of seeking the informed consent of the beneficiary, in the hope of not being caught; and in the assurance of knowing that, if caught, a court may be persuaded to allow the fiduciary to share in the profit, or may otherwise be convinced to compensate the fiduciary's efforts. This, in

102 S 175 of the English Companies Act of 2006.
103 See s 175(4)(a) and 176(4)(a)) of the English Companies Act of 2006
104 In this regard, see further MF Cassim *Juta's Pocket Companions: Understanding the Companies Amendment Acts* (2024) vi-x; 73-79.
105 FHI Cassim et al (2021) 684, 686.

general, would tempt fiduciaries to act with conflicts and to extract unauthorised benefits, which would weaken the loyalty and fidelity of fiduciaries across the board. In short, a fiduciary who has made a secret profit in breach of duty cannot be permitted to argue, when truth comes to light, to keep a share of those gains.

Sadly, however, the decision of the SCA in *Grancy* may be criticised to the extent that it has unsettled the formerly settled status of the no-conflict and no-profit principles as two stand-alone rules, which must be considered separately by the courts.

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