claim against the asset. This is the analysis for a single-beneficiary trust, but there is no reason why it should not apply where more than one beneficiary from more than one trust is interested in the fund from which the trustee makes the transfer. In such a case, the notional charge arises in favour of *all* those interested in the fund from which the transfer was made. The rights of the various contributors to that fund do not need to be calculated precisely until the beneficiaries make their election at trial.

Where there is more than one contributor to the fund from which the transfer was made, their claims *inter se* are determined using the normal default rule for division of property among rival equitable claimants: if the equities are equal, they share rateably. However, as Campbell J. explained, the equities are not always equal: at [176]–[185]. As a simple example, if one of the contributors was the trustee, his claim must wait until the other innocent contributors' claims have been met (*In re Hallett's Estate* (1880) 13 Ch.D. 696; *In re Oatway* [1903] 2 Ch. 356). More importantly in the present context, where money is withdrawn from a fund comprising contributions from two persons, A and B, and, after that withdrawal, money from a third contributor, C, is then added to the fund, the equities between A, B and C are not equal as regards the resultant fund, and are best reflected using the "rolling charge" solution discussed in *Barlow Clowes* [1992] 4 All E.R. 22, 27, 35. If the equities cannot be calculated with sufficient certainty to allow that sort of analysis, a simple *pari passu* sharing can be adopted.

The supposedly "convenient rule" in *Clayton's Case* (so described in *Hallett's Estate* (1880) 13 Ch.D. 696, 728) is simply redundant here. If there is sufficient information to conduct the analysis required by *Clayton's Case,* there should be sufficient information to perform a rolling charge analysis or, at the very least, a simple *pari passu* sharing. The choice between methods of allocation should depend upon the cost and practicability of applying each one in the circumstances, rather than on the false assumption that *Clayton's Case* has any logic or convenience about it in the context of tracing.

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DIRECTORIAL DISCLOSURE

WHEN Item Software was seeking to renegotiate an important contract with a client, its duplicitous sales director, Fassihi, sought

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to take the contract for himself. In conduct deserving of a "Janus award", Fassihi disparaged the negotiating parties to each other, and encouraged the company to raise its price even as he made his own advances to the client. Ultimately, neither the company nor Fassihi got the contract. *Item Software (UK) Ltd.* v. *Fassihi* [2004] EWCA Civ 1244 concerns the company's claim, having dismissed Fassihi, for compensation for lost profits in relation to the contract.

Compensation, whether in the form of damages or equitable compensation, is only available where the loss is causally linked to the breach of duty: *Target Holdings Ltd.* v. *Redferns* [1996] A.C. 421, 432, 434. The trial judge found that Fassihi's misconduct had not caused any loss: the client had never taken Fassihi's offer seriously and the company's managing director would have negotiated no more cautiously had Fassihi not been pressing him ([2003] EWHC 3116 (Ch), [2003] 2 B.C.L.C. 1). However, it was also found that the managing director would have accepted the client's (lower) offer, had he been aware of Fassihi's behaviour. The judge held Fassihi in breach of an independent duty to disclose his own misconduct, and awarded compensation to the company.

On appeal, Fassihi argued that a director owes his company no duty to disclose his own misconduct, relying on *Bell* v. *Lever Brothers Ltd.* [1932] A.C. 161. The Court of Appeal distinguished *Bell:* that case had not decided that a director could not owe such a duty of disclosure, nor, moreover, had it decided that an employee could never owe any such duty. More interestingly, the court held that fiduciaries owe no special duty of disclosure, but rather that non-disclosure under such circumstances amounted to a breach of a director's fundamental duty of loyalty. Three issues arise for comment.

First, authorities concerning "corporate opportunities" suggest that a director who comes upon information or an opportunity proximate to the company's business must disclose it to the company (*e.g., Industrial Developments Consultants Ltd.* v. *Cooley* [1972] 1 W.L.R. 443, 451, 453; *Bhullar* v. *Bhullar* [2003] EWCA Civ 424, [2003] 2 B.C.L.C. 241 at [41]). This seems to imply that non-disclosure would render the director liable for equitable compensation, even if he did not take up the opportunity himself. However, these cases need to be understood in their context, namely as claims to strip profits made by directors who had acted with a "real sensible possibility" of conflict between their duty and their personal interests. As Arden L.J. explained in *Fassihi,* the duty breached in these cases was not a fiduciary "duty to disclose", but rather the fiduciary duty to avoid such conflicts.

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There will be a "real sensible possibility" of conflict if a director takes up a proximate opportunity without first determining whether the company is agreeable to his doing so. Until the company is made aware of the opportunity, the location of its *actual* interests will often be unclear. Yet the fact that the information is proximate to its business suffices to establish that the company might *possibly* be interested. Thus, taking the opportunity without first obtaining authorisation is a breach of the director's fiduciary duty to avoid possible conflicts.

What, though, is the underlying duty that is possibly in conflict with the director's personal interest? *Fassihi* clearly identifies this duty not as a particular "duty to disclose", but rather as the director's duty to act in what he (subjectively) believes to be the best interests of the company. Non-disclosure of an opportunity in which the company might be interested would constitute a breach of that underlying duty (as distinct from the fiduciary conflict principle, which supplements it) only where the director in fact believed that the company's interests would be served by receiving the information. It seems the court inferred such a belief on Fassihi's part, on the basis that no reasonable director could possibly have believed it was not in the company's interests to know of his misdeeds (at [44]).

For company directors, this is a helpful rationalisation of *Bhullar* and *Cooley*. If a director discovers an opportunity that is proximate to his company's business, but he neither takes it up himself nor discloses it to the company, he will not be liable unless he (subjectively) believed it was in the company's interests to know of it. This is much harder to establish than the (objective) "possibility" of conflict that would fix him with liability were he to exploit the opportunity himself.

A second point raised obliquely by *Fassihi* is the proper characterisation of this underlying duty to act in good faith in the best interests of the company. Arden L.J. described it as a "duty of loyalty", and also as a "fiduciary principle" (at [41], [44]). It is clear that the "distinguishing obligation of a fiduciary is the obligation of loyalty" (*Bristol and West B.S.* v. *Mothew* [1998] Ch. 1, 18), but the fiduciary descriptor loses all analytical value unless it is "confined to those duties which are peculiar to fiduciaries" (*Mothew*, at p. 16). Arden L.J. did not need to decide, and did not decide, whether the duty she identified Fassihi as having breached was fiduciary in the sense of being peculiar to fiduciaries. Indeed, she seemed to accept (at [55], [60]) that it was possible for an employee to owe an equivalent duty, which suggests the duty may not be peculiarly fiduciary, given that employees are not normally

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regarded as fiduciaries (*e.g., Imperial Group Pension Trust Ltd.* v. *Imperial Tobacco Ltd.* [1991] 1 W.L.R. 589 at pp. 596–597).

Finally, *Fassihi* is noteworthy for Arden L.J.'s employment of economic analysis. She referred to the economic theory of "agency costs", concluding that it would be economically efficient for a director to be bound to disclose in this case, notwithstanding the vanishing likelihood of compliance. This is surely so. A director's duty of loyalty is subjective because the director, rather than the court, is normally better placed to determine where the company's interests lie. The fact that directors will rarely be shown to have breached this duty is no basis for not applying it; such cases will, by definition, be the most egregious examples of misconduct and should carry liability.

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FROM RIO TO MECA: ANOTHER STEP ON THE WINDING ROAD OF COMPETITION LAW AND SPORT

ON 19 December 2003, a Football Association ("FA") disciplinary hearing found Rio Ferdinand, the Manchester United and England defender, guilty of failing to submit to drug testing, and imposed a fine of £50,000 and an eight-month playing ban. Alex Ferguson publicly attributed United's failure to win the 2003/04 Premiership title in part to the loss of his key defender. However, United's loss was not merely sporting: reports suggest that the cost of the club's decision to continue paying Ferdinand's wages in full during his eight months of inactivity was more than £2.4 million. Chelsea was far less supportive in October 2004 when its Romanian striker Adrian Mutu tested positive for cocaine: in addition to receiving a £20,000 fine and a seven-month playing ban from the FA, Mutu had his contract terminated by the club on the ground of gross misconduct. Doping rules of the type applied to Ferdinand and Mutu are common in professional and amateur sports. In Case T-313/02 *Meca-Medina* v. *Commission*, the Court of First Instance ("CFI") considered the compatibility with the competition rules of the EC Treaty of the doping control rules of the International Olympic Committee ("IOC"). In doing so, the CFI set out its approach to the vexed issue of how competition law, and in particular Article 81, should be applied to the rules of sporting organizations and agreements in the sporting sector more generally.

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