File No. CI 12-01-76323

THE QUEEN'S BENCH
Winnipeg Centre

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF WITH RESPECT TO ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL INC. and the ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO (collectively, the "APPLICANTS")

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

RESPONDING BRIEF OF THE APPLICANTS

DATE OF HEARING: MARCH 1, 2013 AT 10 A.M.
BEFORE THE HONOURABLE MADAM JUSTICE SPIVAK

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INDEX

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INDEX

PART I LIST OF DOCUMENTS TO BE RELIED UPON

1. Notice of Motion of the Applicants ("Sale Approval Motion") dated June 14, 2012, with appended proposed Sale Approval Order, returnable June 21, 2012
2. Affidavit of Keith McMahon sworn on June 13, 2012 ("McMahon Affidavit")
3. Affidavit of Service of Kelly Peters sworn June 20, 2012;
4. Affidavit of Service of Kelly Peters sworn June 29, 2012;
5. Fourth Report of the Monitor, Alvarez & Marsal Canada Inc. (the "Monitor") dated June 15, 2012;
6. Confidential Appendix to the Fourth Report of the Monitor dated June 18, 2012;
7. Motion Brief of the Applicants for hearing dated June 21, 2012;
8. Transcript of the proceedings (Sale Approval Motion) conducted June 21, 2012 before the Honourable Madam Justice Spivak;
9. Canadian Vesting and Approval Order dated June 21, 2012;
10. Assignment, Assumption and Amending Agreement dated July 26, 2012;
11. Affidavit of Bruce Robertson sworn October 31, 2012 ("Robertson Affidavit")
12. Document Brief of the Applicant, Volume 1 at Tabs 1, 5, and 26
13. Document Brief of the Applicant, Volume 2 at Tab 62
14. Undertakings Brief of the Applicant from Cross-Examination of Bruce Robertson;
15. Transcript of the cross-examination of Bruce Robertson conducted December 18, 2012, and exhibits thereto;
16. Affidavit of Brian McMullen sworn November 7, 2012 ("McMullen Affidavit")
17. Affidavit of McMullen sworn November 28, 2012
18. Transcript of Cross-Examination of Brian McMullen conducted February 5, 2013

and exhibits thereto;

19. Notice of Motion of Desert Mountain Ice, LLC “(Desert Mountain”) dated and filed October 15, 2012;

20. Affidavit of Robert Nagy sworn October 9, 2012;

21. Supplementary Affidavit of Robert Nagy sworn November 7, 2012;

22. Transcript of the cross-examination of Robert Nagy conducted December 19, 2012 and exhibits hereto;

23. Such further and other materials as counsel may advise and this Honourable Court may permit.

PART II STATUTORY PROVISIONS AND AUTHORITIES TO BE RELIED UPON

Tab

1 *Lindsay v. Transtec Canada Ltd.*, [1994] B.C.J. No. 2213, affirmed 31 C.B.R. (3d) 157 (BCCA)

2 (*Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257 (ON CA))

3 *Morrissette v. Performax Systems Ltd*, 1996 CarswellMan 200, appeal allowed on other grounds, 1997 CarswellMan 58 (CA)

4 *Regal Constellation Hotel Ltd., Re,* 2004 CarswellOnt 2653;

5 *Canadian Aero Services Ltd. v. O'Malley,* [1974], S.C.R. 952.

6 *Boardman v. Phipps* [1967] 2 A.C. 46 (House of Lords)

7 *Regal (Hastings) Ltd. v. Gulliver,* [1942] 1 All E.R. 378 (H.L.)

8 *Keech v. Sanford* 1726), 25 E.R. 223 *applied in *Canadian Aero Services Ltd. v. O'Malley*, [1974], S.C.R. 952)

9 Donavan Waters, *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Thomson Canada Limited, 2012)

10 *Pecore v. Pecore,*2007 SCC 17

11 *A.M.K. Investments Ltd. (Trustee) v. Kraus*, 1996 CarswellOnt 3434

12 *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended, ss. 11.3 and 36.

13 Queen's Bench Rule 59.06.

PART III LIST OF POINTS TO BE ARGUED

1. The Applicants in this CCAA proceeding will argue the following points:

(a) The evidence is clear that the moving parties, Desert Mountain LLC ("**Desert Mountain**") and Robert Nagy received notice of the motion by the Applicants for the approval of the sale and assignment of leases to H.I.G. Zamboni, LLC ("**HIG**" or the "**Purchaser**") heard on June 21, 2012 (the "**Sale Approval motion**");

(b) The disclosure made by the Applicants and the Monitor in the Sale Approval Motion was appropriate and fair;

(c) The moving party had two additional opportunities to attend Court and make any concerns known to the parties or to the Court both at the "comeback hearing" in this Court on July 12, 2012 and in the recognition hearing in the U.S. Bankruptcy Court on July 17, 2012 but did not do so and, instead, waited until August 30, 2012, more than a month after closing, to object to the treatment of the Lease and Option Agreement dated May 25, 2006, as amended (the "**Arizona Lease**") in the sale;

(d) The sale was beneficial to all of the stakeholders of the Applicants and was very fair to the moving party, particularly given the economics of the Arizona Lease and the statutory right available to the Applicants under the CCAA to seek to disclaim the Arizona Lease;

(e) The order of this Court made on June 21, 2012 (the "**Canadian Approval and Vesting Order**") which Desert Mountain and Robert Nagy now seek to set aside or amend was made on strong evidence and sound principles and the evidence that Desert Mountain and Robert Nagy has now submitted would not have altered this Court's decision if it had been submitted at the hearing of the Sale Approval motion;

(f) At no time, either before or after closing, has there been any monetary default under the Arizona Lease;

(g) The payment demanded and sought in this motion was not due at any time prior to the closing of the sale to HIG and is not due now;

(h) In any event, the Arizona Lease has been assigned to the Purchaser who, by virtue of the terms of the APA, the Canadian Approval and Vesting Order and s. 11.3 of the CCAA, is liable for all obligations under the Arizona Lease, including any obligation to purchase the Arizona Facility (as defined below) and the Applicants are not liable;

(i) In this motion, Mr. Nagy and Desert Mountain are seeking a windfall of $4 million (the difference between the mortgage balance of $8.5 million and the option price of $12.5 million) at the expense of the creditors and unit holders of the Fund to which they are not entitled;

(j) Mr. Nagy contributed nothing to the acquisition of Desert Mountain and with it, its sole asset, the Arizona facility – put no money down, all of the mortgage payments were made directly by the tenant, all taxes and other expenses, all refurbishment expenses and equipment installations were all made by and paid for by the tenant; and

(k) The acquisition of Desert Mountain and, with it, the Arizona facility was a corporate opportunity of the Applicants that was taken by Mr. Nagy when he was a fiduciary and, consequently, in equity, he is not entitled to the windfall profit that he would receive if he were granted the relief sought in this motion.

a) Approval of the Sale of the Applicants' business

2. On June 21, 2012, this Court heard the Applicants' motion for the approval of the sale of their North American wide business following a comprehensive, court supervised Sale and Investment Solicitation Process ("**SISP**"). On that day, the Court granted the Canadian Vesting and Approval Order to, among other things, approve the Asset Purchase Agreement dated June 7, 2012 (the "**APA**") between the Applicants (excluding Arctic Glacier Income Fund (the "**Fund**")) and Glacier Valley Ice Company, L.P. (California) (collectively, the "**Vendors**") and HIG. Of critical importance to the transaction were the provisions of the Canadian Vesting and Approval Order that assigned the Vendors' ***rights and obligations*** under certain contracts, including the Arizona Lease, to HIG (the "**Assigned Contracts**"), and vested in HIG the Vendors' right, title and interest in the and to the assets described in the APA.

(Exhibit F, Affidavit of Robertson sworn on October 31, 2012 ("Robertson Affidavit"))

3. As the culmination of the SISP, the APA represented both the highest and the best offer available to the Vendors, and provided many benefits to their stakeholders including the uninterrupted continuation of the business of the Vendors following closing of the transactions contemplated by the APA ("**Closing**") and the assumption and continued performance of the Assigned Contracts, including many leases of real property, such as

the Arizona Lease which relates to a facility known as 600 South 80th Avenue, Tolleson, Arizona owned by Desert Mountain (the "**Arizona Facility**").

(**Affidavit of Keith McMahon sworn on June 13, 2012 at para. 4 ("McMahon Affidavit")**)

4. Throughout the conduct of the SISP and the CCAA process, the Vendors sought to involve Desert Mountain and Robert Nagy in the process but were rebuffed. A chronology of opportunities given to Mr. Nagy to participate in the CCAA process follows.

(a) **February, 2012:** Desert Mountain served in the U.S Proceedings with among other things, the Initial Order and Notice of for the hearing seeking of the recognition of the U.S. Proceedings (the "**U.S. Recognition Proceeding**"). (Robertson Affidavit at para. 13)

(b) **May 1, 2012:** Phone call between Robert Nagy and Hugh Adams, corporate counsel of the Applicants**,** regarding Arizona Lease (Exhibit 11, Nagy Cross-Examination).

(c) **On or around May 1, 2012:** Robert Nagy meets with HIG in Miami. (Nagy Cross-Examination at p. 73-94 and p. 207).

(d) **May 8, 2012:** E-mail exchange between Robert Nagy and Hugh Adams regarding various options in CCAA proceeding for Arizona Lease. (Exhibit 12, Cross-Examination of Robert Nagy);

(e) **May 16, 2012:** Memorandum sent to Robert Nagy by Hugh Adams, corporate counsel for the Applicants, outlining potential risks to Mr. Nagy in respect of the Arizona Lease in CCAA proceeding, including disclaimer, unsecured liability, abandonment of property, foreclose by Roynat. (Exhibit B, Nagy Affidavit);

(f) **May, 2012:** E-mail from Robert Nagy to Henry Wolfe, associate of HIG, enclosing proposal for new leasing arrangement with respect the Arizona Facility. (Nagy Cross-Examination at p. 207).

(g) **May 25, 2012:** Telephone call with Robert Nagy, Kevin McElcheran and the Monitor regarding potential options for Arizona Lease in CCAA proceeding. (Exhibit 13, Nagy Cross-Examination)

(h) **Late May – Early June:** Breakfast meeting with Robert Nagy and Henry Wolfe, Brian Wiener and Brian McMullen of HIG. (Nagy Cross-Examination at p. 78-80).

(i) **June 8, 2012:** Press release announcing successful bid with HIG (Exhibit "C" of McMahon Affidavit)

(j) **June 14, 2012:** Desert Mountain served with Notice of Sale Approval Motion and draft Canadian Vesting and Approval Order. (Robertson Affidavit at para. 8).

(k) **June 19, 2012:** Phone call between Mr. Nagy and Brian McMullen from HIG where Mr. Nagy makes statements regarding specific content of the APA which was not available except as part of the motion materials for the Sale Approval motion (Cross-Examination of Brian McMullen at p. 108 (the "**McMullen Cross-Examination**"))

(l) **June 19, 2012:** E-mail from Brian McMullen to Mr. Nagy thanking him for conversation. (Exhibit 10, Nagy Cross-Examination).

(m) **June 20, 2012:** APA posted on SEDAR website. (Document Brief of the Applicant Tab 1)

(n) **June 21, 2012:** Sale Approval hearing to approve Canadian Vesting and Approval Order.

(o) **June 22, 2012:** Press release announcing approval of sale by Canadian Court. (Document Brief of the Applicants, Tab 26)

(p) **June 22, 2012:** E-mail from Robert Nagy to Brian McMullen of HIG attaching proposal for new lease arrangement (Exhibit 10, Nagy Cross-Examination).

(q) **June 26, 2012:** Desert Mountain served with notice of the motion in the U.S. Recognition Proceeding for an order recognizing and enforcing the Canadian Vesting and Approval Order (the "**U.S. Sale Approval Materials**"), which attached a copy of the Canadian Vesting and Approval Order. (Robertson Affidavit at para. 14).

(r) **June 28, 2012:** Press release by Vendors announcing expected Closing no later than July 31, 2012 (Document Brief of the Applicants, Tab 26).

(s) **July 17, 2012:** U.S. Sale Approval Hearing recognizing and enforcing the Canadian Vesting and Approval Order.

(t) **July 18, 2012:** Discussion between Robert Nagy and Brian McMullen of HIG regarding HIG not purchasing the Arizona Facility. (Nagy Cross-Examination at p. 210-211).

(u) **July 27, 2012:** Transaction closes.

(v) **August 30, 2012:** Letter sent from Canadian Counsel of Desert Mountain to the Monitor. (Exhibit 23, Nagy Cross-Examination)

b) Service of Notice

5. In addition to the efforts to engage Mr. Nagy and Desert Mountain in the CCAA process, the Vendors undertook significant efforts to notify all known creditors and counterparties to contracts of the Sale Approval motion. Over 4,000 copies of the Sale Approval materials (defined below) were served.

(Affidavit of Kelly Peters dated June 20, 2012 ("Peters Affidavit"))
(Transcript of Sale Approval Hearing dated June 21, 2012 p. 7-11)

6. To emphasize the importance of the hearing, the notice provided in bold letters the web address of the Monitor's website if they wished to obtain further evidence or documents that would be presented at the court hearing:

> SHOULD YOU WISH TO REVIEW THE EVIDENCE AND OTHER DOCUMENTS THAT WILL BE PRESENTED TO THE COURT AT THE HEARING OF THE MOTION SET OUT BELOW, YOU MAY ACCESS THEM AT THE FOLLOWING WEB ADDRESS.

(**Exhibit B, Robertson Affidavit**)

7. In addition to notice of the Sale Approval motion, interested parties were notified in many other ways of the sale and the Sale Approval motion. For example, a press release announcing the transaction was issued by the Vendors garnering national media attention. Notice of the Sale Approval motion and all supporting information, was posted on a website maintained by the Monitor. The APA was posted as a material document on SEDAR.

(Exhibit C, McMahon Affidavit)
(Undertakings Brief, Tab 3)
(Document Brief of the Applicant Tab 1)

8. After the Sale Approval Order was made, a "comeback hearing" was conducted to hear any requests of affected parties to set aside or amend the Canadian Sale Approval Order. Notice of the comeback hearing was posted on the Monitor's website and served on many creditors and counterparties.

(Robertson Affidavit at para. 11)

9. Following the comeback hearing, all affected parties, including Desert Mountain, were served 21 days in advance with a motion in the U.S. Bankruptcy Court seeking specific recognition and enforcement of the Canadian Approval and Vesting Order in the United States under Chapter 15 of the U.S. Bankruptcy Code. Again, notice of the U.S. Bankruptcy Court hearing was also posted on the Monitor's website.

(Robertson Affidavit at para. 15)

10. The evidence is clear that, Robert Nagy had advance notice of the Sale Approval motion. On June 19, 2012, before the filing time of the APA on SEDAR (June 20, 2012), Mr. Nagy specifically discussed provisions of the APA with Brian McMullen, a principal of HIG, as part of their on-going discussions of potential amendments of the Arizona Lease that HIG was seeking.

(McMullen Cross-Examination at p. 107-108)
(Exhibit 10, Nagy Cross-Examination)
(Document Brief of the Applicant Tab 1)

11. Mr. McMullen's evidence is supported by an e-mail sent by him on June 19, 2012 thanking Mr. Nagy for the conversation that morning. Mr. Nagy did not contradict any of Mr. McMullen's evidence.

(Exhibit 10, Robert Nagy Cross-Examination)
(McMullen Cross-Examination, at p. 107-108)
(Nagy Cross-Examination at p. 189)

12. The only conclusion that can be drawn from this uncontradicted evidence is that, prior to the call on June 19, 2012, Mr. Nagy had reviewed the court materials (the "**Sale Approval materials**") either on the Monitor's website or as a result of reading one of the several copies of the Sale Approval materials which had been served on him. Despite this knowledge of the terms of the APA and his review of the Sale Approval materials, Mr. Nagy chose not to attend the Sale Approval motion, the comeback hearing or the U.S. recognition hearing.

13. Further, it is telling that in Mr. Nagy's first affidavit, he admits to receiving a copy of the Sale Approval materials, but makes no mention of being served after the Sale Approval hearing:

> I did receive a copy of the Notice, returnable June 21, 2012, seeking a Sale Approval Order but assumed on my review that in absence of my agreement to amend the Lease and in the absence of my consent to an assignment of the Lease, the Purchase Option at $12,500,000, as adjusted thereunder pursuant to the terms of the Lease, would be fully recognized, with a purchase of the Arizona Facility as required therein. Given said assumption, I did not retain counsel to deal with the Purchase Option until after the default in payment, as herein provided. [emphasis added].

(Nagy Affidavit at para. 25)

14. It is respectfully submitted that Mr. Nagy's own statement, as quoted above, is the truth. Mr. Nagy had appropriate notice of the Sale Approval hearing, came to his own interpretation as to the meaning of the Sale Approval materials (without legal advice, again his own choice) and decided to take no action until after the time to appeal the Canadian Vesting and Approval Order had expired. Mr. Nagy's non-attendance at the Approval motion was advertent and voluntary and he should not be permitted to re-open the Canadian Approval and Vesting Order, particularly after the deal has closed in reliance on it.

15. In *Lindsay v. Transtec Canada Ltd.*, [1994] B.C.J. No. 2213, affirmed 31 C.B.R. (3d) 157 (BCCA) ("*Lindsay*"), the British Columbia Supreme Court was faced with a similar situation in the context of a CCAA Plan of Arrangement, where a former Senior Vice-President of a related debtor company did not participate in a CCAA proceeding and then sought leave to commence an action against the debtor company. After determining that the former executive was a "creditor" within the meaning of the Plan, the issue in the motion became whether he was not bound by the Plan because he had not been served with notice of the creditors meeting to vote on the Plan.

16. In dismissing the former executive's motion, the Court made the following comments regarding his conduct:

> It is repugnant to the spirit of the CCAA that persons with knowledge and understanding of the proceedings can avoid the effect of an arrangement by seizing upon a lack of delivery of the notice authorized for whatever advantage they may gain over other creditors.
> […]

> A CCAA proceeding is not a stage for an individual creditor to try to ensure the best possible position for him. Whatever it may have been in past years, it is now a stage where creditors are to participate in a collective enterprise of keeping a company going for the benefit of employees, customers, and the general community, as well as the creditors. As in bankruptcy proceedings, it is not unfair that a creditor who attempts to gain an advantage for himself should find himself disentitled to recover anything.

(Tab 1, *Lindsay* at paras. 56 and 75)

17. In the present case, Mr. Nagy had notice of the Sale Approval motion, but opted not to participate. As was found in *Lindsay*, he was a creditor with full knowledge of a CCAA proceeding and in keeping with the sound principles applied in *Lindsay*, this court should not permit Mr. Nagy to benefit from lying in the weeds.

c) Appropriate disclosure was made by the Applicants and the Monitor

18. Contrary to the assertions made in the brief filed by Desert Mountain, the evidence submitted to the Court in support of the Sale Approval motion included a specific discussion of elements of the Arizona Lease in the context of the outline of the APA and the transaction included in the Confidential Appendix of the Monitor dated June 18, 2012 (the "**Confidential Appendix**").

19. In the moving parties' brief, heavy reliance was placed on the alleged "kick back" (as it is described) referenced in HIG's bid letter. There are two important points to be made in respect to these allegations. First, the evidence is clear that although HIG offered the Applicants a share in any reduction of the Option Price (as defined below), the Applicants did not accept that offer and no such provision was included in the APA or

otherwise. Second, HIG's offer, including the proposed sharing, was expressly disclosed to the Court in the Confidential Appendix.

20. Additionally, and appropriately, the Sale Approval materials explained that the Purchaser had agreed to assume all of the obligations of the Vendors under all Assigned Contracts which included, by definition, the Arizona Lease.

(**McMahon Affidavit at para. 32-39)**
(Fourth Report of the Monitor dated June 15, 2012 at p. 18 ("the Fourth Report"))

d) The Sale was beneficial to all of the Vendors' stakeholders, including Desert Mountain and Robert Nagy

21. In this motion, Mr. Nagy and Desert Mountain ignore the benefits that they have received as a result of the successful culmination of the SISP and the Closing that resulted in the assumption of all of the obligations under the Arizona Lease by a prominent private equity investment fund as the new tenant, including the payment of annual rent to Desert Mountain of more than $1.3 million on a net net basis covering the entire cost of ownership and continued reductions of mortgage principal at the rate of $500,000 per year until May 24, 2015.

(Nagy Cross-Examination at p. 87)
(Exhibit B, Nagy Affidavit)

22. The sale was the culmination of a lengthy and comprehensive solicitation process. The price was $70 million more than the next best offer. The buyer sought the assignment of all contracts and leases except a limited number of excluded assets and agreed to hire all employees of the Arctic companies. By way of contrast, the second

best bidder did not want to pay for the Arizona Facility or assume the Arizona Lease. If the second best offer had been accepted, the Arizona Lease would have been disclaimed.

(Fourth Report of the Monitor at 8-17)
(McMahon Affidavit at para. 9-31)
(Confidential Appendix, Schedule "1")

23. The Purchaser insisted on the transfer of Assigned Contracts only on the basis that options to purchase and forced sales triggered by the completion of the sale contemplated by the APA not be operative. The Court had the jurisdiction to make that order and did so in the proper exercise of its discretion under the CCAA.

24. Neither Mr. Nagy nor Desert Mountain were harmed by the Canadian Approval and Vesting Order as, at all times, the Arizona Lease has continued to be performed and has been assumed by the Purchaser in accordance with s. 11.3 of the CCAA, the APA and the Canadian Approval and Vesting Order. They can complain only that paragraph 4 of the Canadian Approval and Vesting Order deprived Mr. Nagy, possibly temporarily if there is a subsequent change of control, of a windfall profit of $4 million from a forced sale of the Arizona Facility.

25. On the Sale Approval motion, this Court considered the list of non-exhaustive factors set out in section 36(3) of the CCAA:

> 36(3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (*a*) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (*b*) whether the monitor approved the process leading to the proposed sale or disposition;

> (*c*) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (*d*) the extent to which the creditors were consulted;
>
> (*e*) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (*f*) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

26. The record of evidence demonstrates the above factors were met, warranting the granting of the Canadian Vesting and Approval Order. Specifically:

(a) the SISP was managed in accordance with its terms and in a fair and transparent manner and the Vendors, its financial advisor, and the Chief Process Supervisor had all discharged their responsibilities under the SISP in good faith and with due diligence. **(Fourth Report of the Monitor dated June 15, 2012)**;

(b) all interested parties had a reasonable opportunity to participate in the SISP and to submit a Final Bid **(Fourth Report of the Monitor dated June 15, 2012)**;

(c) it was the Monitor’s opinion that the transaction, which provides for a going concern sale of the business, was more beneficial to the Vendors’ creditors and other stakeholders than a sale or disposition under bankruptcy **(Fourth Report of the Monitor dated June 15, 2012)**

(d) the Vendors undertook significant efforts to raise awareness of the CCAA Proceeding to all of its known creditors. (**McMahon Affidavit, Peters Affidavit)**

(e) The transaction was beneficial to the Vendors' creditors as the Purchase Price was sufficient to satisfy the Lender Claims in full, any amounts that were owing under the Court-ordered charges, and the Company's known unsecured creditors in full with the potential for a distribution to the Vendors' unitholders after all creditor claims have been proven through a claims process and satisfied. In addition, the Vendors' business would be sold as going concern with a continued tenant for its landlords, continued employment for the Vendors' employees, a continued customer for the Vendors' suppliers, and a continued source of supply for the Vendors' customers. **(Fourth Report of the Monitor dated June 15, 2012)**

(f) The Purchase Price was fair and reasonable in light of the fact it resulted from a wide canvassing of the market pursuant to the court-approved SISP. **(Fourth Report of the Monitor dated June 15, 2012)**

27. The Sale Approval materials contained an almost 200-page affidavit (inclusive of exhibits) filed on behalf of the Vendors, which was served on Desert Mountain and the Monitor's Fourth Report was available to him in a variety of ways. If Mr. Nagy had questions regarding the treatment of the Arizona Lease, if he had submissions to make, having notice of the hearing, he or counsel on his behalf had the opportunity to ask them. He chose not to ask and he chose not to attend.

28. It is submitted that if Mr. Nagy and Desert Mountain had attended to oppose the making of the Canadian Approval and Vesting Order and made the submissions they are now making in this motion, the same order would have been made over their opposition.

29. All that being said Mr. Nagy and Desert Mountain had every opportunity to attend in court, submit their evidence and make their arguments and they simply failed to do so.

30. It is well-established that the court's discretion to vary or amend its own decision should be used sparingly.

(**Tab 2,** *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257 (ON CA))

31. On a motion pursuant to Queen's Bench Rule 59.06(2), it must be shown, by the party asserting that a judgment was procured by fraud, that there has been a new discovery of something material, in the sense that "fresh facts" by themselves or in combination with previously known facts, provides a reason for setting aside the judgment.

(Tab 3, *Morrissette v. Performax Systems Ltd*, 1996 CarswellMan 200, appeal allowed on other grounds, 1997 CarswellMan 58 (CA))

32. It is respectfully submitted that the discretion to amend or set aside a vesting order after the closing of a transaction should almost never be exercised and a motion to amend or set aside should be treated as moot. Here, there are no fresh facts which provide a reason to vary or a set aside the Canadian Vesting and Approval Order. This Court had a voluminous record of evidence before it and made the correct decision to approve the transaction given its wide ranging benefits to the Vendors' stakeholders. If there ever could be a case in which it would be appropriate to vary a vesting order after closing, this is definitely not the case.

(**Tab 4,** *Regal Constellation Hotel Ltd., Re,* 2004 CarswellOnt 2653)

e) No Monetary Default under the Arizona Lease – at Closing or ever

33. The claims of Mr. Nagy and Desert Mountain that there was a monetary default under the Arizona Lease do not bear scrutiny and are not supported by the terms of the Arizona Lease.

34. Desert Mountain seeks (i) payment in the amount of US$12,500,000 (the "**Option Price**"), plus interest at the mortgage rate charged by Roynat Business Capital Inc. ("**Roynat**") and/or (ii) amendments of the Canadian Vesting and Approval Order that would require either the Vendors or the Purchaser to pay the Option Price

(**Notice of Motion of Desert Mountain)**

35. What Mr. Nagy attempts to obscure in his motion is that the Option Price is not a rent or other payment due under the Arizona Lease. Rather, if the purchase option contained in the Arizona Lease were triggered, it would be the purchase price for a transfer, free and clear of all encumbrances, of the Arizona Facility to the tenant under the Arizona Lease. The Arizona Facility is subject to a mortgage in the approximate amount of $8.5 million which would have to be discharged on the closing of the sale of the Arizona Facility to the tenant (if the option were triggered). As a result of that closing, Mr. Nagy would realize a profit of US$4 million for which he has made no contribution, either financial or otherwise and for which he has taken no financial risk that was not covered by the Applicants.

(**Nagy Cross-Examination at p. 88**)

36. Mr. Nagy and Desert Mountain are not entitled to any of the relief sought in this motion because the purchase option has not been triggered and at no time has the Option Price become due.

37. In the motion and in their brief, Mr. Nagy and Desert Mountain assert that the purchase option was triggered by two events. First, they allege that because Mr. Nagy resigned as a trustee of the Fund in August, 2011, he was "disabled" within the meaning of the Arizona Lease and the purchase option was automatically triggered. Second, Mr. Nagy and Desert Mountain assert that, despite the terms of the Canadian Approval and Vesting Order, the Closing triggered the exercise of the purchase option.

38. It is clear from the evidence that Mr. Nagy was **able** to continue as a trustee, he simply chose not to do so and resigned. If his voluntary resignation was to trigger the purchase option, clear and simple words could have been used to that effect in the Arizona Lease. The language of the Arizona Lease simply does not bear the interpretation asserted in the motion and the brief.

(**Exhibit 1, Nagy Cross-Examination)**

39. The allegation that the purchase option was triggered by the Closing is contrary to the Canadian Sale and Approval Order which was made on notice to Desert Mountain and Mr. Nagy and cannot be set aside or amended without material prejudice to the Vendors, the unit holders of the Fund, for which Mr. Nagy was a fiduciary, and the Purchaser.

40. It is an important fact, that neither Mr. Nagy nor Desert Mountain have done anything to prepare for a closing of the sale of the Arizona Facility to the tenant. Mr.

Nagy did nothing following his resignation as a Trustee, and neither Desert Mountain nor Mr. Nagy have done anything since, to meet the obligations of the landlord/vendor under Exhibit C of the Arizona Lease which sets out the procedure for completing a sale of the Arizona Facility pursuant to the purchase option.

(**Nagy Cross-Examination at p. 125-128)**
(Exhibit A, Nagy Affidavit)

41. It is also important that no amount of the Option Price becomes due and payable until the closing of the sale of the Arizona Facility in accordance with the procedure set out in Exhibit C of the Arizona Lease. Even if the purchase option was triggered, no amount of the Option Price has become due and there has been no monetary default under the Arizona Lease as alleged by Mr. Nagy and Desert Mountain in their motion and brief.

(**Exhibit A, Nagy Affidavit)**

f) If anyone is liable, it is the Purchaser

42. If any amount became due and payable after Closing on account of the Arizona Lease, the obligation to pay that amount has been assigned to the Purchaser by virtue of the terms of the Canadian Approval and Vesting Order and it is not an obligation of the Vendors.

43. The Arizona Lease is an Assigned Contract as defined in the APA. If the purchase option was triggered by Mr. Nagy's resignation from the board of trustees and, despite being very late, Desert Mountain were to now tender documents sufficient to

convey the Arizona Facility free and clear of encumbrances pursuant to the Arizona Lease, the obligation to now pay the Option Price lies exclusively with the Purchaser.

44. Similarly, in the event that Canadian Approval and Vesting Order is amended, the obligation to complete the purchase of the Arizona Facility and pay the Option Price lies exclusively with the Purchaser. This would be true even if the Canadian Approval and Vesting Order had never contained the language of paragraph 4 that vested out the option as, pursuant to Exhibit C of the Arizona Lease, the closing of the sale of the Arizona Facility would occur and the Option Price would become due at a closing to occur 30 days ***after*** the purchase option is triggered. In all circumstances, the purchase option and the obligation to pay the Option Price lays with the Purchaser.

(Exhibit A, Nagy Affidavit)

g) Allowing the motion would give Mr. Nagy a windfall at the expense of creditors and unit holders

45. Finally, this Court must look back to 2006 and the events giving rise to Robert Nagy's acquisition of Desert Mountain and its only asset, the Arizona Facility in order to appreciate the true nature of the claims made in this motion.

46. In 2006, the Vendors acquired a group of six entities comprising the leading packaged ice manufacturers and distributors in California (the "**California Ice deal**").

(Nagy Affidavit sworn on October 9, 2012 ("Nagy Affidavit") at para. 9)

47. As President and CEO of the Vendors and Trustee of the Fund at the time, Mr. Nagy was intimately involved in the California Ice deal, and was aware of the potential

opportunities arising therefrom. With over 40 years of experience in the ice industry and being the leader of the acquisition and branding strategies of the Vendors, Mr. Nagy had the acute ability to assess potential business opportunities in the ice industry and the opportunities presented to Artic Glacier in the California Ice deal.

(Nagy Affidavit, at paras 2 and 10)
(Exhibit 1, Cross-Examination of Robert Nagy on December 19, 2012)

48. One of the assets owned by the California business, through Desert Mountain, was the Arizona Facility, which at the time had been mothballed.

(Nagy Affidavit, at para. 10)

49. Under the original structure of the California Ice deal, the Vendors would acquire title of the Arizona Facility. Internal office memorandums dated February 12, 2006 and April 3, 2006, respectively, were circulated to the Board of Trustees of the Fund (the "**Board**"), the latter expressly stating that the Vendors would acquire title of the Arizona Facility upon closing and that it would not form part of the real property lease arrangements in the California Ice deal.

(Exhibits 2 and 3, Nagy Cross-Examination)

50. Despite this original deal structure, Mr. Nagy, through a company owned and controlled by him, acquired Desert Mountain and its only asset, the Arizona facility. On cross-examination, Mr. Nagy was unable to recall why he had acquired the Arizona Facility instead of the Vendors.

(Exhibit 4, Cross-Examination of Robert Nagy)
(Cross-Examination of Robert Nagy at p. 24)

51. The opportunity to acquire Desert Mountain and with it, the Arctic Facility, was a business opportunity of the Vendors (the "**Opportunity**"). Mr. Nagy learned of Opportunity within the scope of his fiduciary relationship with the Vendors and was subject both to the law of fiduciary duty and the Code of Business Conduct and Ethics of Arctic Glacier in respect of the Opportunity.

52. The Code of Conduct and Ethics of Arctic Glacier expressly restricted trustees and officers from taking for themselves any opportunity of the company:

> Trustees, directors, and officers must advance the Company's legitimate interests when the opportunity to do so arises. You must not take for yourself personal opportunities that are discovered through your position with the Company or the use of information of the Company.

(**Document Brief of the Applicant Tab 5)**

53. Furthermore, the law of fiduciary duty prohibits Mr. Nagy from profiting from the acquisition of Desert Mountain and the Arctic Facility at the expense of Vendors and particularly at the expense of the beneficiaries of the Fund.

54. Accordingly, under the law of fiduciary duty, Mr. Nagy cannot profit from the acquisition of the Arizona Facility and therefore, this motion must be dismissed.

(**Tab 5,** *Canadian Aero Services Ltd. v. O'Malley, [1974], S.C.R. 952.***)**
(Tab 6, *Boardman v. Phipps* [1967] 2 A.C. 46 (House of Lords)
(**Tab 7**, *Regal (Hastings) Ltd. v. Gulliver, [1942] 1 All E.R. 378 (H.L.)*)

(**Tab 8,** *Keech v. Sanford* **1726), 25 E.R. 223 ***applied in *Canadian Aero Services Ltd. v. O'Malley*, [1974], S.C.R. 952)

The Vendors funded the Purchase of the Arizona Facility

55. At all material times, the Arizona Lease was structured such that the Vendors indirectly financed the acquisition of the Arizona Facility virtually eliminating any financial exposure to Mr. Nagy.

(Cross-Examination of Robert Nagy at p. 32-26, 65)

56. Under the Arizona Lease, the Vendors were required to pay:

(i) the monthly rent equivalent to the full cost of Desert Mountain's mortgage financing due to Roynat;

(ii) all real estate taxes;

(iii) all excise taxes, license fees, and charges for governmental licenses, permits, approvals, qualifications, and authorizations with respect to the Arizona Facility; and

(iv) for all repairs, improvements and/or modifications to the Arizona Facility during the term;

(Exhibit A, Nagy Affidavit)

57. The monthly rent at all times was designed to fully cover any payments required under the Roynat financing (not derived from market analysis or arm's length bargaining). When increased payments were due to Roynat, the Vendors provided additional rent to cover this increase. Mr. Nagy made no contributions. The increased

payments have resulted in the reduction of the principal amount of the mortgage from $10 million to $8.5 million.

(Cross-Examination of Robert Nagy at p. 32-26, 65)

58. Even Mr. Nagy appreciated that the terms of the Arizona Lease were not derived from market analysis. In his own negotiations with HIG to obtain a new arrangement (outside of the CCAA proceeding), he proposed a new annual rent of $864,000.00, a reduction of approximately 44% from the current rent paid by the Applicants of more than $1.3 million dollars.

(**Exhibit 10, Nagy Cross-Examination)**
(Nagy Cross-Examination at p. 87)

59. Beyond the rental payments, the Vendors have made significant capital expenditures (over 1.8 million dollars) to bring the Arizona Facility back into working condition. Mr. Nagy made no contribution for these million dollar upgrades.

(Cross-Examination of Robert Nagy at p. 57-58)
(Document Brief of the Applicant Tab 62)

60. While Mr. Nagy did provide a $500,000 guarantee to Roynat to obtain the financing with respect to the Arizona Lease facility, the Vendors reimbursed Mr. Nagy for the cost of a $1.5 million dollar life insurance policy to reduce his financial exposure on the guarantee. In any event, Mr. Nagy could not be liable under the guarantee unless the value of the Arizona facility is less than the balance owing under the Roynat mortgage.

(Cross-Examination of Robert Nagy at p. 36-37)

61. On cross-examination, Mr. Nagy admitted his involvement with the Arizona Property consisted of signing the paperwork on the original closing. In the almost 7 years since his purchase of the Arizona Facility, he has visited it four or five times. He now seeks $4 million dollars in profit for those visits at the expense of unitholders for which he was a fiduciary.

(Nagy Cross-Examination at p. 58, 60 and 88).

62. The equitable doctrine of resulting trust dictates that Mr. Nagy holds in trust for the Vendors an interest in the Arizona Property proportionate to their contributions to its acquisition. Traceable to *Dyer v. Dyer*, a modern resulting trust arises whenever legal or equitable title to property is in one party's name, but that party, because the party is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner, or to the person who did give value for it.

(**Tab 9,** Donavan Waters, *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson Canada Limited, 2012) at p. 401.
(**Tab 10,** *Pecore v. Pecore*,2007 SCC 17 at para. 20)

63. The evidence is clear that the Vendors financial contribution was for one purpose and one purpose only: to fund the purchase of the Arizona Facility. Accordingly, as a rule of equity, ownership of the Arizona Facility belongs to it.

(**Tab 11**, *A.M.K. Investments Ltd. (Trustee) v. Kraus*, 1996 CarswellOnt 3434)

CONCLUSION

64. In all of the circumstances, including as set out above, it is respectfully submitted that this Honourable Court should dismiss Desert Mountain's motion. This Court should

not permit Mr. Nagy to profit from the acquisition of Desert Mountain and the Arizona Facility, which was a business opportunity of the Vendors made while he was an officer and trustee to the Vendors and for which the Vendors paid. The evidentiary record demonstrates that Mr. Nagy had notice of the Sale Approval hearing and chose not to participate. He should not receive a benefit from lying in the weeds, particularly to give him a windfall at the prejudice of the Vendors, their other stakeholders and the Purchaser.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22 day of February, 2013.

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TAB 1

1994 CarswellBC 620, 28 C.B.R. (3d) 110, 99 B.C.L.R. (2d) 73, [1995] 2 W.W.R. 404, 5 C.C.P.B. 219

Lindsay v. Transtec Canada Ltd.

Re Company Act, R.S.B.C. 1979, c. 59; Re Business Corporations Act, R.S.A. 1981, c. B-15; Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re ALBERTA-PACIFIC TERMINALS LTD., FRASER SURREY DOCKS, PACIFIC TERMINALS LIMITED, JOHNSTON MARINE TERMINALS LTD. and JOHNSTON INTERNATIONAL SERVICE (HONG KONG) (petitioners)

Re intended action between T. BARRIE LINDSAY and TRANSTEC CANADA LIMITED, 302290 B.C. LTD., TROJAN EQUITIES LTD., COMPLEAT HOLDINGS LTD., ALBERTA-PACIFIC TERMINALS LTD. and TRANSTEC CAPITAL LTD.

British Columbia Supreme Court

Huddart J.

Heard: February 10, April 13, June 22 and September 7, 1994
Judgment: October 7, 1994
Docket: Doc. Vancouver A903661

Counsel: *G. Dickson*, for applicant.

R.A. Millar, for petitioners and 8808 Investments Ltd.

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings.

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Claims — Leave to commence action — Company inadvertently failing to give applicant notice of CCAA proceedings — Applicant's application for leave dismissed upon finding that applicant qualified as creditor, had knowledge and understanding of CCAA proceedings and chose not to participate in reorganization — Unfair to allow applicant to take advantage of company's inadvertence — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

The applicant retired from his position as senior vice-president of a company in 1988. He and the company executed a retirement agreement under which the applicant was to receive a monthly supplemental pension of $2,100 from June15, 1990 until his death. AP and other related companies guaranteed the pension benefits. In 1993, the company defaulted under the agreement by failing to make the January payment. The applicant demanded payment from the company and all of the guarantors, but received nothing.

In 1991, AP and four related companies had applied for and been granted protection under the *Companies' Creditors Arrangement Act* ("CCAA"). They had contacted what they believed to be all creditors and claimants. Through an oversight, the applicant was not notified. He did not participate in the re-organization process. His claim would have represented about one-third of the claims of the class of general creditors.

The evidence showed that, although the applicant had been aware of the CCAA proceedings and of the possibility that they would affect him, he took only one step before the date on which the court sanctioned the arrangement between AP and AP's group of companies and their creditors. He sent a registered letter to AP requesting copies of the application under the CCAA, of any court orders issued, and of any proposals submitted. His testimony was that, when he received no response, he believed that his future claim under the guarantee would not be affected by the CCAA arrangement. He did not file a proof of claim, although he was sent a copy of a court order, attached to which was the reorganization plan as approved by the court. He did not, however, receive a copy of a proof of claim form.

The applicant applied for leave to commence an action on the guarantee against AP. The issue was what effect a plan could have on an unsecured creditor who was not invited to participate in the process of compromise leading to the formation of the plan because of inadvertence, but who falls within a class for whom provision is made in the plan.

Held:

The application was dismissed.

It was the intention of the company and of the court that the company's plan cover all creditors and potential creditors. The applicant qualified as a creditor under the plan. A beneficiary under a guarantee by a debtor company may be made subject to a plan as a creditor with a "claim" as that word is defined in s. 12 of the CCAA. However, because the applicant did nothing between the date the plan was sanctioned and the date it became effective, he gave up the opportunity to re-open the arrangement. Because he did not file a proof of claim, he gave up the opportunity to share in the fund for general creditors. He was bound by the stay of proceedings that protected the plan, but his claim was not extinguished by the plan.

An applicant may be granted leave to commence an action, even where the action will have the effect of varying the plan. Factors to be considered by the court in deciding whether to exercise its discretion to lift the stay include: the extent of the creditor's actual knowledge and understanding of the proceedings, the economic effect on the creditor and the debtor company, fairness to other creditors, the scheme and purpose of the CCAA, and the terms of the plan.

The applicant had knowledge of the CCAA proceedings. That he did not receive a proof of claim form did not remove him from consideration as a "creditor" under the plan. The applicant should not be allowed to take advantage of AP's inadvertence. His subjective belief that the lack of response to his letter meant that he was not affected by the CCAA proceedings was not reasonable in the circumstances. He understood the nature of the proceedings and was experienced in business; his failure to obtain more information was a deliberate decision to rely on his interpretation of the CCAA and the plan.

The applicant's claim would have a major effect on AP. Had he filed a proof of claim, AP would have paid him between $80,000 and $100,000. That payment would have affected AP's perceived benefit in purchasing a continuing re-organized business. There would, however, be no effect on other creditors who settled their claims. The effect of an order granting the applicant leave to bring his action would be to require AP to pay him from its post-arrangement revenue or to find additional money to satisfy his claim.

It was fair and just to deny the applicant leave. While AP failed to include him, the failure was a result of inadvertence. The applicant had more than enough information to decide whether he should participate in the CCAA proceedings. He chose to stay out of the proceedings until it was too late.

Cases considered:

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 1, 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303 (C.A.) [leave to appeal to S.C.C. refused (1992), 4 D.L.R. (4th) vii (note), 10 O.R. (3d) xv (note), (sub nom. *Royal Insurance Co. of Canada v. Kelsey-Hayes Canada Ltd.)* 145 N.R. 391 (note), 59 O.A.C. 326 (note)] — *considered*

Quebec (Sous-ministre du Revenu) c. Wynden Canada Inc. (1982), 47 C.B.R. (N.S.) 76, [1983] C.S. 194 (Qué.) — *considered*

Quebec Steel Products (Industries) Ltd. v. James United Steel Ltd., [1969] 2 O.R. 349, 5 D.L.R. (3d) 374 (H.C.) — *considered*

Quintette Coal Ltd., Re (1991), 7 C.B.R. (3d) 165, (sub nom. *Quintette Coal Ltd. v. Nippon Steel Corp.)* 56 B.C.L.R. (2d) 80 (S.C.) — *referred to*

Statutes considered:

Bankruptcy Act, R.S.C. 1952, c. 14 —

s. 71(5)

Bankruptcy Act, R.S.C. 1985, c. B-3.

Companies' Creditors Arrangement Act, R.S.C. 1952, c. 54 —

s. 3

s. 12

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 —

s. 4

s. 6

s. 11

s. 11(c)

s. 13

Application for leave to commence action against companies having protection of *Companies' Creditors Arrangement Act*.

***Huddart J.*:**

1 T. Barrie Lindsay asks leave to commence an action on a guarantee of his supplementary pension benefits against Alberta-Pacific Terminals Ltd ("Alberta-Pacific"). The court's permission is required because Alberta-Pacific and four related companies ("the Alberta-Pacific Group") obtained the protection of this court under the *Companies' Creditors Arrangement Act* (the "CCAA") in 1990. Those proceedings began with an order on November 22, 1990, staying all proceedings against the Alberta-Pacific Group, and culminated in an order on November 14, 1991, sanctioning an arrangement between those debtor companies and their creditors and continuing the stay of proceedings (at 5) as follows:

> This Court further orders that except as provided herein, the stay of proceedings in the Order of The Honourable Mr. Justice Skipp pronounced herein November 22, l990 and this Order be and is hereby confirmed and continued in accordance with the terms of the Plan as at the Closing Date;

Unfortunately, Alberta-Pacific did not invite Mr. Lindsay to participate in the meetings leading to the arrangement, although he was an ordinary creditor under the CCAA.

The facts

2 When Mr. Lindsay retired from Transtec Canada Limited ("Transtec") as its Senior Vice-President on December 15, 1988, he reached an agreement with it ("the Retirement Agreement"), under which he was to receive a monthly supplemental pension in the amount of $2,100 from June 15, 1990 until his death. The pension was indexed at 4% annually commencing June 15, 1991, and it contained an acceleration provision on default. All of this Alberta-Pacific guaranteed, as did other companies formerly in what counsel called "the Johnston Group."

3 Transtec defaulted on its agreement when it failed to make the payment due January 15, 1993. On that day Mr. Lindsay valued the obligation at $415,601.58, the cost of providing an annuity in the amount agreed. He has demanded payment from Transtec and all other guarantors. None of them have paid. Thus, Mr. Lindsay seeks to commence an action against Alberta-Pacific.

4 Alberta-Pacific cannot explain why it failed to include Mr. Lindsay among those invited to attend the meetings authorized by an order made June 24, 1991. Alberta-Pacific is a holding company whose only asset is shares in Fraser-Surrey Docks Ltd. ("FSD"). FSD operates the Fraser Surrey Terminal under a licensing agreement with the Fraser River Harbour Commission. Terrence Johnston, the chief operating officer of FSD who swore in the CCAA proceedings that all creditors and claimants of all the petitioners had been given notice, says that he believed that all of the creditors of all of the petitioners were disclosed. The obligation to Mr. Lindsay appears not to have been noted in the auditor's report on the financial statements of Alberta-Pacific.

5 The evidence persuades me that the failure to notify Mr. Lindsay was due to oversight on the part of Mr. Johnston, those advising him, and those keeping and reviewing the records of Alberta-Pacific. The oversight may be one of the results of the financial difficulties of the Alberta-Pacific Group and the demands being made on their limited staff during the reorganization process. The evidence does not support the view that Alberta-Pacific made a deliberate decision, either that contingent creditors could not be caught by the CCAA, or if they could, that they should not be included in the re-organization process. The reasons in *Re Quintette Coal Ltd.* (1991), (sub nom. *Quintette Coal Ltd. v. Nippon Steel Corp.)* 56 B.C.L.R. (2d) 80 (S.C.) affirming that contingent creditors were subject to the CCAA were released on April l2th and reported on July 29th.

6 It is absolutely clear that had Mr. Johnston become aware of Mr. Lindsay's claim before November 14, 1991, Mr. Lindsay would have been asked to participate in the reorganization process. His claim would have been valued for voting and participation purposes. He would have been invited to participate in the meeting of the General Creditors whose approximately 190 members were owed about $900,000. Under the arrangement members of that group received about 27% of the value of their debt. Without any discount for the contingency of payment by others, Mr.

Lindsay's claim would have represented about one-third of the class. For the purposes of these reasons I will assume that Mr. Lindsay lost the opportunity to settle his claim for $80,000, and certainly no more than $100,000.

7 Mr. Lindsay, although aware of the CCAA proceedings and of the possibility they would affect him, took only one step before November 14 to ensure that Alberta-Pacific was aware of his claim as a creditor. After receiving legal advice, he sent a double registered letter to the Corporate Secretary of Alberta-Pacific which it received on May 24, 1991. It was brief:

> Guarantee Agreement, Dated December 15, 1988, Pursuant to Retirement Agreement Between Transtec Canada Limited and *T. Barrie Lindsay, Dated December 15, 1988*.
>
> I understand that this company has made an application under the Company [sic] Creditors Arrangement Act and that a court order has been issued. As a beneficiary of this guarantee I am a creditor of this company and entitled to copies of the application, any court orders issued and any proposals submitted pursuant to court orders.
>
> Please arrange to forward copies of such application and court orders to me forthwith and to forward any proposals as they are submitted.
>
> Thank you for your immediate response.

8 When he did not receive a reply he concluded "that my possible future claim under the Guarantee would not be included in or affected by the CCAA application." He did not contact Alberta-Pacific or anyone on its behalf during the next 6 months, although he knew all of the senior executives of the Alberta-Pacific Group because FSD had operated as a division of Transtec during his tenure as senior vice- president of that company.

9 Nor did he contact Alberta-Pacific or anyone on its behalf after he read a newspaper article on October 31 saying that meetings of creditors had been adjourned because a Hong Kong investor was interested in purchasing the company. He did seek the advice of his lawyers, who obtained a copy of the Plan and advised him that he was probably not included. On the same day I made an order approving the Plan he instructed his solicitors to advise Alberta-Pacific about his claim. He wanted to take advantage of the moment to negotiate a settlement with the Hong Kong purchasers. His solicitors' delay until December 20 before contacting Alberta-Pacific is unexplained. On December 17 8808 Investments Ltd. ("8808") acquired the shares of Alberta-Pacific. His solicitors would have known of this closing because they acted for 8807 Investments Ltd., the unrelated company which acquired the Alberta-Pacific debt.

10 8808 came along as a white knight in August 1991 to make the reorganization arrangement possible. Without the investment of 8808, unsecured creditors of Alberta-Pacific would have received nothing. Coopers & Lybrand valued the assets on a liquidation basis at about $1.8 million. The secured creditors were owed over $13 million. The Fraser River Harbour Commission had reason to terminate the licence. Claims in negligence were outstanding for many more millions, although partially insured. 8808 provided $250,000 to satisfy the claims of all creditors in the category of General Creditors. Those funds were disbursed after January 4, 1992, in accordance with the terms of the arrangement on a pro rata basis to those General Creditors who filed Proofs of Claim.

11 Mr. Lindsay did not file a Proof of Claim although Russell and DuMoulin sent a copy of the Plan to his solicitors on December 31 as a result of John Fraser's conversation about Mr. Lindsay's claim with Mr. Wesik of that firm on December 20. The letter was terse. It read in its entirety:

> As you are aware we are solicitors for Alberta-Pacific. Your Mr. Fraser inquired of our Mr. Wesik as to the intentions of Alberta-Pacific with respect to the guarantee granted in favour of Barrie Lindsay. We advise that we have no instructions at this time as to the position of Alberta-Pacific.

> Enclosed is a copy of the Order of the Honourable Madam Justice Huddart made November 14, 1991 which Order attaches the Reorganization Plan of Alberta-Pacific as approved by the Court.

A Proof of Claim form was not enclosed.

12 Because Alberta-Pacific did not invite Mr. Lindsay to participate in the CCAA process and because Mr. Lindsay did not pursue his unanswered request for information before November14, 1991, Mr. Lindsay lost the opportunity to oppose the arrangement. Because he did nothing between November 14 and December 5, the effective date of the Plan, he gave up the opportunity to re-open the arrangement. Because he did not file a Proof of Claim he gave up the opportunity to share in the fund for General Creditors. Now he wants leave to commence an action on a guarantee that may result in a judgment for twice the amount other general creditors received. This seems a high price for Alberta-Pacific to pay for a simple management error and unfair to others in Mr. Lindsay's class of creditors.

13 Indeed, Alberta-Pacific argues that it is unjust and inequitable that it should be burdened with the defence of such a claim and, if judgment is granted, with execution proceedings. FSD is its only source of income. Its spokesperson, Vincent Cheung, says that, although FSD has become profitable because of the arrangement and a new licensing agreement with the Fraser River Harbour Commission, the secured creditors of Alberta-Pacific still hold security well in excess of the value of the FSD shares, which are the only asset of Alberta-Pacific. He fears the action and subsequent execution proceedings would affect the security and licensing agreements.

14 It is difficult for Mr. Cheung and for this court to understand how Mr. Lindsay could have failed to pursue a response to his letter of May 24. He was aware of the financial and business difficulties of the Alberta-Pacific Group. He understood the importance of the CCAA proceedings and that he might be affected by them.

15 He explains that he formed his belief that Alberta-Pacific did not intend to include him in the Plan on the basis of the legal advice he received. In April he learned from his solicitors that it was unlikely that the CCAA included contingent creditors. However, by October 31, the decision in *Quintette*, supra, would have been known to the Bar and I had considered it in a decision in this matter. His solicitors had a copy of the Plan before November 13, perhaps before the November 5th meeting of creditors. They advised him that the Plan probably did not include him. His own reading of the Plan then and later confirmed that advice because it did not include the word "contingent" with regard to creditors.

16 While he may have concluded that the Plan would not affect his contingent claim, his letter and note of November 14 to his solicitor demonstrate his understanding that they had the potential to do so and his understanding that he was a creditor under the CCAA.

17 It would have been a simple matter for Mr. Lindsay to enquire from any one of the senior executives of Alberta-Pacific if he was included, and equally simple for his solicitors to enquire of Fraser Beatty or Russell & DuMoulin if they were aware of Mr. Lindsay's claim. He could have gone to the meeting of General Creditors. But he did nothing until he instructed his solicitors on November 14 to advise Alberta-Pacific of his claim. Then they did nothing until December 20, 3 days after they knew the closing had taken place. The post-script to his note to his solicitors shows his thinking precisely:

> On reflection after our telcon, I assume that the possible likely defence of Alta Pacific et al to the guarantee which is brought to their attention is to go back to Court and attempt to get an order specifically wiping out the Guarantee — and that would be our time to defend our position? On balance, seems much better to possibly defend our position now if necessary rather than "X" months or years out — at least we know where we stand.

18 I must conclude that Mr. Lindsay (or his solicitors on his behalf) made considered deliberate decisions not to again notify Alberta-Pacific of his claim until after the approval order and then not until after the closing of the share

purchase agreement on December 17.

19 The only sensible conclusion I can reach on the basis of the evidence before me is that Mr. Lindsay preferred not to participate in the CCAA proceedings and to take his chances later based on his understanding of the CCAA and the Plan. I also accept that he would have pursued his claim more diligently if he had understood that contingent claims were included in the CCAA and that his claim was included in the Plan.

20 That conclusion is reinforced by the contents of a letter Mr. Mair wrote to Mr. Lindsay on January 7, 1992, after receiving the response of Russell & DuMoulin to the verbal notice given December 20. The second paragraph reads:

> I believe we agree that the Russell & DuMoulin letter accomplishes part of our purpose in having what we suspect to be the new owners of Alberta-Pacific be made aware of the existence of the guarantee. Some time in the future we may have to face the issue of whether or not the court order affects Alberta-Pacific's obligation. I will have some preliminary work done on this.

21 Mr. Lindsay accepts that his understanding of the CCAA was wrong. But he continues to take the position that he is not bound by the CCAA arrangement because he is not a "creditor" of Alberta-Pacific within the meaning of the Plan. If he is bound, then he seeks to be exempted from the continuing stay of proceedings because he did not receive notice of the meetings of the General Creditors and did not receive a Proof of Claim with the letter of December 31, 1991.

Is Mr. Lindsay a creditor under the plan?

22 His counsel concedes that the beneficiary of a guarantee by a debtor company may be subject to a plan as a creditor with a "claim" as defined in s. 12 of the CCAA, or, as she put it, that a plan can capture contingent liabilities. That concession is consistent with the view Thackray J. expressed in *Quintette Coal Ltd.*, supra, when he said (at p. 88): "'Claim' is visualized with a future prospect, i.e, 'would be a debt' and in my opinion clearly envisages giving potential creditors a role in the C.C.A.A. proceedings." However, she argues, the Alberta-Pacific plan does not do so.

23 I disagree. Alberta-Pacific told the court at the confirmation hearing that it intended all creditors and potential creditors to be included in the arrangements. I thought then and think now that the Plan captures creditors with contingent claims.

24 The relevant definitions from art. 2.01 of the Plan are these:

> "Claim" means a claim for an amount alleged by a person to be owed to it by, or any obligation or cause of action against, the Companies, or any of them, as at May 30, 1991, either:
>
> (a) as set forth in a Proof of Claim which has either:
>
> (i) been admitted by the Companies for all purposes, or
>
> (ii) been determined by a Court of competent jurisdiction to be a proper obligation of the Companies, or any of them;
>
> (b) which has been determined by the Companies to be a proper obligation of the Companies, or any of them;
>
> (c) for which a valid Proof of Claim could have been filed with the Companies, but which Proof of Claim was

not so filed;

together with all accrued and accruing interest which is expressly declared to be payable under this Plan.

"Class" means that group of persons constituting any of the following: Alberta Creditors, General Creditors, Spill Claimants, Fire Claimants, Bondholders and Related Creditors.

"Creditor" means a person having a Claim.

"General Creditor" means a Creditor not falling within any other Class, except the Commission, a Cargo Claimant and a Related Creditor, and includes a person who is Related to the Companies and who provided goods and services to the Companies, for the fair value of those goods and services supplied.

"Proof of Claim" means a proof of claim form as distributed by the Companies, properly completed and executed by a Creditor and delivered to the Companies within the time limits set out in this Plan or the Information Circular.

Article 3.03 dealt with the General Creditors. It included these provisions:

f) In the event that a General Creditor does not file a Proof of Claim with the Companies within the time provided for above, it shall have no further claim, cause or right of action against the Companies or any of them;

g) The stay of proceedings as set out in the November 22, 1990 order in the Proceeding shall remain in full force and effect as against General Creditors after the Final Order, subject only to Article IV hereof.

25 Mr. Lindsay is a person who could have filed a Proof of Claim within 30 days of the acceptance by the Registrar of companies of the order sanctioning the plan for filing. I understand that the Registrar accepted the order on or about December 5.

26 I cannot accept that the receipt of a Proof of Claim form as approved by the court on June 24, 1991, was a pre-condition to Mr. Lindsay having a "claim" under the Plan. The suggestion that the failure to deliver a Proof of Claim form to Mr. Lindsay precluded him from being included as a "creditor" under the Plan and thus from sharing as a "General Creditor" requires an unduly technical interpretation of the provisions of the Plan. In my view anyone reading the Plan would consider that it included among those entitled to share as a General Creditor someone with a contingent claim capable of being valued as it would be on a bankruptcy.

27 The real issue in this application is what effect, if any, a plan can have on an unsecured creditor who is not invited to participate in the process of arriving at a compromise because of inadvertence, yet appears to fall within a class for whom provision is made in the plan. That question does not appear to have been considered by any court.

How does the plan affect Mr. Lindsay?

28 The final order sanctioning the Alberta-Pacific Plan provided that it was "binding upon the Petitioners, the Creditors, Claimants of the Petitioners and any person having a Claim in accordance with its terms." That order also included a declaration that "all requisite notices have been given and Meetings held for the purpose of consideration of the Plan by the Creditors and Claimants of the Petitioners." The requisite notices were those authorized by the order of June 24, 1991, in the exercise of discretion given this court by s. 4 of the CCAA.

29 The failure to adhere rigidly to such an authorizing order was considered fatal to a claim to bind an unsecured

creditor in *Quebec Steel Products (Industries) Ltd. v. James United Steel Ltd.* (1969), 5 D.L.R. (3d) 374 (Ont. H.C.). In obiter (at p. 382) Parker J. held that "even if the plaintiff were an unsecured creditor, he would not be bound by the compromise because of the failure to give the notice required by statute." He appears to have read the requirements of the order made under s. 3 (now s. 4) of the CCAA as a "statutory requirement" requiring rigid adherence because there was no provision comparable to s. 71(5) of the *Bankruptcy Act*, that creditors without notice should be bound. He did not consider the purpose of the Act to be sufficient to import such a provision. Nor did he find sufficient protection for those inadvertently excluded from the process in the right under s. 13 (then s. 12), of "any person dissatisfied with an order or a decision made under this Act" to seek leave to appeal. There is no reference to the provisions of s. 11 of the CCAA which permit the court a continuing role in the supervision of the plan under which a debtor company, which has obtained the court's protection, is allowed to continue to operate although insolvent.

30 Section 11 provides:

> Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act*, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (*a*) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (*b*) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (*c*) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

31 Section 4 provides:

> Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

32 I have difficulty reading that provision as a "statutory requirement". A plain reading suggests simply the conferring on the court of a discretion to direct the manner in which a meeting may be called. Presumably a court is to exercise that discretion judicially, to take account of the purpose of the CCAA, to consider the variety of interests being served by the CCAA, and to arrive at a fair direction — one that will permit the debtor company and, inter alia, its unsecured creditors to meet to discuss its continuation, although insolvent, in their mutual best interests, but also in the interest of the broader community the CCAA was designed to serve. It cannot be fair to those who meet and reach a compromise that those who are inadvertently omitted from the process, but whose interests bring them within a class for which provision is made in the plan, can be allowed to make a claim that could endanger the continuing existence of the debtor company. It would be even more unfair if a creditor of whose existence the company might not be aware could make such a claim.

33 In *Quebec Steel* the applicant was seeking to sue on a contract which the receiver of the debtor company had repudiated (wrongfully in the opinion of Parker J.) on March 25, 1965, before the court ordered the debtor company to give notice to all unsecured creditors as of January 17, 1965. The debtor company had not given notice of the meeting of creditors to any person having a contract with it, who might have a claim for damages for breach of contract.

34 It may be that the failure to give notice to an entire class of unsecured creditors merits the result Parker J. reached. However, I cannot accept that the inadvertent failure to give notice of a meeting of creditors to one unsecured creditor should be allowed to endanger the continuing existence of a debtor company when the CCAA allows fairer solutions.

35 It is unfortunate that the process proposed by the Alberta-Pacific Group did not provide for notice to all unknown creditors by advertisement. Such a direction is commonly given, supplementary to an order providing for notice by prepaid mail to the known creditors. The process did provide for such substitutional notice to those who were claiming in negligence. A creditor who failed to see such an advertisement would likely be considered bound by the Plan as would someone who did not receive a notice mailed to it. But could not such a creditor look to ss.11 and 13 to provide a vehicle for obtaining relief if the result was inequitable in all the circumstances? If such a creditor, why not an inadvertently uninvited creditor with knowledge of the proceedings?

36 As Mr. Justice Thackray reminded us in *Quintette*, the Western Canadian approach to interpretation of the CCAA is designed to arrive at an economically sensible result. In my view a strict application of the approach of Parker J. could lead to economically foolish results. The facts on this application provide an excellent example of how foolish.

37 The Ontario Court of Appeal is of the view that the supervising court has a broad discretion to make such exceptions to the order restraining proceedings against the debtor company as fairness demands, before and after an arrangement is sanctioned, although it also recognizes that a consensual agreement must be respected and not interfered with lightly. In *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11, 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, that court permitted a creditor with notice of the creditors' meetings, whose claim had been valued at $1, to commence proceedings against the debtor company, when its s. 12 (now s. 13) appeal of the valuation placed on its contingent claim failed. The court recognized that its order would affect a consensual plan that had been sanctioned by the court. It found in s. 11(*c*) the authority to do so when the reasons were compelling and an order could be structured that would not prejudice the interests of the company or the creditors. The effect of its order was to permit a tort claimant to access the debtor company's product liability insurance policy.

38 In reaching that conclusion, the court (C.B.R. at l8) considered a hypothetical situation suggested to it in argument and concluded:

> Suppose a visitor had become quadriplegic as a result of an injury on the premises of Algoma under circumstances in which Algoma as occupier might be liable and suppose Algoma's potential liability was insured against by an appropriate insurance policy. To restrict the injured person, a *known designated unsecured creditor* under the terms of the plan of arrangement, to his or her compromised claim valued, without a trial, in a summary proceeding, would, in our view, be unacceptable. The actual situation before the court is analogous.
>
> (emphasis added)

39 I suggest a similar result would have been reached had the hypothetical case concerned an unknown and unascertainable tort claimant.

40 The logical conclusion of the argument made for Mr. Lindsay is that any unknown or unascertainable creditor is not bound by any arrangement for the simple reason that such creditor did not receive notice. He considers that conclusion follows from the view taken of notice by Benoit J. in *Québec (Sous-ministre du Revenu) c. Wynden Canada Inc.* (1982), 47 C.B.R. (N.S.) 76 (Qué.) [hereinafter "*Wynden*"].

41 There, the provincial Crown, a preferred creditor whom Benoit J. found to be a secured creditor under the CCAA, was given leave to execute on a judgment it had obtained for unpaid deductions at source, and to initiate

proceedings with respect to additional deductions at source which had come due subsequent to that judgment. The judgment was obtained on March 15, 1982; an order staying proceedings until May 18 was made on March 30; and an order approving an arrangement with the hypothecary creditors was approved on July 15. On that same day the judge ordered a further stay of proceedings and ordered the calling of a meeting of ordinary creditors. On July 27 the court approved an amended arrangement among the secured creditors and an arrangement among unsecured creditors and continued the stay of proceedings.

42 Wynden invited only the class of secured creditors constituted by its hypothecary creditors to a meeting. It sent a notice of the meeting of ordinary creditors to be held on July 23, 1982 to the Deputy Minister, who received it on July 29. Benoit J. concluded that Wynden's failure to invite the Deputy Minister to the meeting of secured creditors implied that the amounts due him would be paid when due. He held that a debtor company which wants to re-organize under the CCAA is responsible for analyzing its situation, preparing a proposal, and submitting it to those classes of creditors who have the capacity to prevent its continuing in business. Thus, when it fails to submit its proposal to a class of creditors, it is saying that it intends to meet its obligations to the members of that class. In his view, the order sanctioning the arrangement with the hypothecary creditors did not apply to the Deputy Minister because he was not such a creditor. Because he was not an ordinary creditor, the order sanctioning the arrangement among ordinary creditors did not apply to him.

43 In these circumstances Benoit J. said that he did not need to consider whether the Deputy Minister's vote would have prevented the approval of the proposal submitted to the ordinary creditors in deciding whether or not to grant leave to execute the judgment and commence proceedings for the additional amounts owing. He authorized the Deputy Minister to make claims for specific amounts against Wynden because neither plan applied to the Deputy Minister as a non-hypothecary secured creditor.

44 The *Wynden* case does not stand for the proposition that unknown and unascertainable creditors cannot be bound by an arrangement if they come within a class of creditors to which the plan applies. Rather, it says that the failure to make a proposal to a class of secured creditors, whether deliberate or inadvertent, necessarily implies that the arrangement does not apply to members of that class. The judge's comment, that he need not consider whether the Deputy Minister's vote could have changed the result at the meeting of ordinary creditors, undoubtedly refers to a question he might have considered had he agreed with Wynden that the Deputy Minister was an ordinary creditor who had received late notice.

45 Thus, he did not need to consider the issue before me: whether a creditor, a member of a class clearly contemplated by the Plan, inadvertently not invited to a meeting of that class, is bound by the provision in the Plan that is intended to extinguish his claim. Alberta-Pacific relies on arts.3.03(f) and (g) of the Plan, supra.

46 If Mr. Lindsay had been given proper notice of the meeting of ordinary creditors he would have been bound by the Plan and the consequence of his failure to file a Proof of Claim would have been the extinguishment of his debt. That appears to be the result of s. 6 of the CCAA and the terms of the Plan. That result fits the rule by majority consensus which is the essence of the CCAA.

47 Section 6 of the CCAA provides that an arrangement, once sanctioned by the court, is binding on "all the creditors or the class of creditors, as the case may be" and on the company:

> Where a majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings ...

48 The section does not require that those not present be taken into account in determining either the majority in

number or the three-fourths in value. It does not prevent those who fall within a "class of creditors" contemplated by the Plan, but who do not attend the meeting of that class from sharing in any benefit members of that class may obtain from the Plan. This result is not unreasonable. The known claimants will have considered the possibility of such unknown claims in deciding whether to vote to approve the Plan. The unknown claimant will be accepting a benefit under the Plan in full satisfaction of its claim. However, it is not reasonable that a plan approved at a meeting of which such an unknown claimant has not been given notice can extinguish that claimant's debt.

49 There is nothing in the CCAA to suggest that result. Such a result cannot be implicit in a statute that relies on consensus among creditors.

50 Mr. Lindsay is bound by the stay of proceedings which protects the Plan but his claim is not extinguished by the Plan. That stay of proceedings was included in the order of November 14, 1991, in these words:

> ... No person who is a member of any class shall have any claim, right or cause of action against the companies or any of them for any claim, act or omission occurring on or before May 30, 1991 other than as provided for in the plan and any such claim, right or cause of action shall be permanently stayed, save and except as otherwise provided in the plan ...

51 It is evident from my earlier comments that I am of the view that the court may give Mr. Lindsay leave to commence an action even where such an action will have the effect of varying the Plan. The question is whether or not the stay should be lifted for Mr. Lindsay. It is also evident from my earlier comments that I do not think it is necessarily inequitable for a company seeking to reorganize itself under the CCAA to try to protect itself from unknown and unascertainable claims, or that every inadvertence should be allowed to defeat an arrangement which permits a company to continue to operate, while insolvent.

52 The question is whether the facts of this case are such that Mr. Lindsay should be exempted from the stay of proceedings that allows that continued operation, and if so, on what terms.

Should leave be granted under s. 11?

53 The interests of Alberta-Pacific, and therefore 8808, continue to be protected by the Plan and the order staying proceedings included in the sanction order. The authority for a court to stay the commencement of proceedings "on notice to any other person or without notice as it may see fit" comes with this proviso "except with the leave of the court and subject to such terms as the court imposes." Thus, a creditor will always be at liberty to seek leave of the court to commence an action against a debtor company in the face of a general stay of proceedings unless the debt has been satisfied by the Plan. Mr. Lindsay's debt has not been satisfied by the Plan.

54 Alberta-Pacific argues that any derogation from the stay of proceedings that affects the Plan must be governed by equitable principles, and that the equities that should be considered are those between the two innocent parties: 8808 and Mr. Lindsay. Mr. Lindsay says that only the position of Alberta-Pacific should be considered. In his view, the mistake of Alberta-Pacific should not be visited on him.

55 Counsel could not direct me to any authorities setting down the factors that should structure the exercise of my discretion. However, some can be discerned from those to which I have been directed for other purposes: the extent of the creditor's actual knowledge and understanding of the proceedings; the economic effect on the creditor and the debtor company; fairness to other creditors; the scheme and purpose of the CCAA; the terms of the Plan.

56 The first factor to be considered in this case is the actual knowledge and understanding Mr. Lindsay had of the proceedings under the CCAA. It is repugnant to the spirit of the CCAA that persons with knowledge and understanding of the proceedings can avoid the effect of an arrangement by seizing upon a lack of delivery of the notice

authorized for whatever advantage they may gain over other creditors.

57 In *Quebec Steel* the decision not to notify persons who might have breach of contract claims was deliberate. The uninvited creditors had no knowledge of the CCAA proceedings. In *Wynden* the court was satisfied that the plan was not directed at the class of creditors to which the plaintiff belonged.

58 Alberta-Pacific agrees that the court may infer from a debtor company's deliberate decision not to give notice of a meeting to a creditor that such a creditor is not bound by the Plan, but says that inadvertence does not permit that inference to the court or to a creditor. That may be. But a creditor cannot know the reason he was not invited to participate in an arrangement unless he has reason to believe that he is included in the Plan.

59 Alberta-Pacific considers that Mr. Lindsay had sufficient knowledge and understanding of the proceedings to permit him to participate in them, that he made a deliberate choice not to do so after receiving legal advice from solicitors who had considered the Plan, and that there is no unfairness in requiring him to take the consequences of that choice.

60 It reminds the court that neither the CCAA nor the order of June 24, 1991, says anything about the effect of a failure to give or receive notice of meetings, but that there are strong reasons for favouring the policy made explicit in the *Bankruptcy Act*, that those without notice are bound. Counsel for Mr. Lindsay replies that the *Bankruptcy Act* requires that notice of the bankruptcy be advertised and that a debtor company seeking the protection of the CCAA has the option of giving notice by advertising, if the court approves. Alberta-Pacific did not ask for such an order with regard to General Creditors.

61 At the root of the problem in this case is Mr. Lindsay's subjective belief that the failure to reply to his May 24 letter was deliberate, a subjective belief I consider to have been unreasonable in the circumstances I described earlier, and a belief upon which most experienced business people are unlikely to have risked reliance when information could have been obtained and he could have participated so easily. This is particularly so because Mr. Lindsay was not an ordinary trade creditor. His evidence about his relationship with the senior officers and directors of Alberta-Pacific is inconsistent, but it is clear that he knew them well.

62 But his knowledge and understanding of the proceedings is only one fact among all the facts relevant to the equities that must be balanced in reaching a decision as to how to exercise the discretion given by s. 11. The economic effect on the creditor and the company must also be considered.

63 It was seen as fair in *Algoma Steel* to permit a person who had participated in the CCAA proceedings to make a further claim that would not affect the company or its creditors, but the Ontario Court of Appeal was firm that such claims would be permitted only for "compelling reasons" and only when the effect on the arrangement is "minor".

64 Mr. Lindsay's claim as now put forward will have a major effect on Alberta-Pacific. If his claim were restricted to the amount he would have recovered if he had filed a Proof of Claim, Alberta-Pacific would be required to pay between $80,000 and $100,000 more for the benefit it perceived in purchasing a continuing reorganized business. His claim would be subordinate to that of the secured creditors (8807) and might trigger the assertion of their rights. Unlike the situation before the court in *Algoma Steel*, Mr. Lindsay did not participate in the proceedings and have his claim valued at $1; nor is there insurance available to indemnify Alberta-Pacific for whatever may be found owing to him.

65 Alberta-Pacific argues that modern CCAA reorganization plans contemplate the acquisition by third parties of the re-organized debtor company, frequently to the benefit of general creditors, employees, and the general community. I accept that courts should recognize this development. Tax losses are purchased. Liabilities are assumed. There is a need for certainty that all claims have been compromised.

66 This is an important factor in this case because it is absolutely clear that no general creditor would have received anything on a bankruptcy or liquidation by a receiver. 8808's offer, founded on the proposition that all creditors were included in the Plan, came just in time to avert such a result. An extension of the stay of proceedings had been granted only to protect those claiming in tort. All parties were aware that another extension of the stay was unlikely. In a sense 8808's offer gave value to Mr. Lindsay's contingent claim it would not otherwise have had, even as it gave value to the claims of other unsecured creditors.

67 In most situations this policy reason will not be as persuasive as considerations of fairness to creditors. Under the CCAA those who seek its protection have the responsibility of developing a process that gives their unknown creditors or those whom they have by inadvertence missed, an opportunity to consider a proposal that is directed at them. Notice by advertisement has been known to the insolvency bar for many years. It was used in this case with regard to the Spill Claimants.

68 In the circumstances of this case however this objective is of less importance. Had Mr. Lindsay been invited to participate in the process by advertisement he would have had no more information than that already in his possession. The only real difference is that he would not have been able to defend his position that he was not included in the Plan. Even Mr. Lindsay recognized on November 14 that the proposed purchasers would attempt to include him in the Plan if they became aware of his claim. Indeed, he seems to have weighed the possible consequences and opted to have his solicitors give that notice when his bargaining power was at its best, before the closing. However, what may have been in his mind at that time cannot be weighed with what happened. His solicitors waited until after the closing to tell the purchasers about this contingent claim.

69 Similarly, 8808 must accept the consequences and manner of its solicitors' delay in responding to the verbal information. Its solicitors could have responded that Mr. Lindsay's claim was included and enclosed a Proof of Claim. The letter of December 31 says that they have no instructions. It is somewhat surprising that instructions could not be obtained between December 20 and December 31 about a claim of such obvious importance to the Plan. At the very least one would have thought that a Proof of Claim form could have been enclosed. After all, the author of the letter was the very person who had appeared at the sanction hearing to ensure that the court understood that all unascertained claims were meant to be included. However, the letter was directed to lawyers, not to Mr. Lindsay. They would be aware that a Proof of Claim form could be obtained by simple request and they were in a position to form their own opinion as to the rights of Mr. Lindsay. Moreover, Mr. Mair's letter of January 7 is consistent with his not having drawn any conclusions from the December 31 letter.

70 In this case there will be no effect on other creditors who settled their claims. If Mr. Lindsay is granted leave to sue, the effect of the order will be to require Alberta-Pacific to pay from its post-arrangement revenue or to otherwise obtain additional money to satisfy Mr. Lindsay's claim and to deal with any problem that may arise with its secured creditors. This effect will be felt by the shareholders of Alberta-Pacific, the very persons who are responsible for any value Mr. Lindsay's claim may have.

71 The final factor to be considered is the amount of that claim. In the circumstances of this case, there is no justification for seeking the full amount of the claim. Had Mr. Lindsay's claim not been included in the Plan then leave might have been given to sue for the full amount. While I have found that Mr. Lindsay was included in the Plan, I have also concluded that he was not invited to participate in the proceedings by inadvertence, that he had full knowledge of the proceedings at the critical times, and that he made a deliberate decision to rely on his interpretation of the Plan at all material times. These facts indicate that I need consider only the amount he lost by failing to participate in arriving at my conclusion as to whether or not to grant leave. While that amount remains to be determined, it is unlikely to exceed $80,000 plus whatever interest may seem appropriate in all the circumstances.

72 The conclusion I have reached after weighing these factors is that the fair and just result in this case must be the

refusal to grant leave.

73 Those who participate in CCAA proceedings must be assured that there are not others waiting outside them for a mistake to be made of which they can take advantage. Those who purchase the reorganized companies must be assured of whatever certainty a court can ensure in its supervision of these voluntary proceedings.

74 While Alberta-Pacific can be criticized in some aspects of its behaviour in these proceedings, Mr. Lindsay had every bit of knowledge he needed to make a decision about whether or not to participate in them. He chose to remain outside the proceedings until December 20, 1991, and thereafter, until it was too late. I do not think it would be fair to Alberta-Pacific or to 8808 for him to be now allowed to participate beyond this application where he had the opportunity to defend the interpretation of the Plan on which he chose to rely in making his decisions. A CCAA proceeding is not a stage for an individual creditor to try to ensure the best possible position for himself. Whatever it may have been in past years, it is now a stage where creditors are to participate in the collective enterprise of keeping a company going for the benefit of employees, customers, and the general community, as well as the creditors. As in bankruptcy proceedings, it is not unfair that a creditor who attempts to gain an advantage for himself should find himself disentitled to recover anything.

75 Counsel may address the issue of costs at a mutually appropriate time.

Application dismissed.

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1995 CarswellBC 77, 31 C.B.R. (3d) 157, 2 B.C.L.R. (3d) 304, [1995] 4 W.W.R. 364

Lindsay v. Transtec Canada Ltd.

Alberta-Pacific Terminal Ltd., Fraser Surrey Docks, Pacific Terminals Ltd., Johnston Marine Terminals Ltd., Johnston International Service (Hong Kong) Ltd. (Petitioners) and T. Barrie Lindsay (Plaintiff / Appellant)

British Columbia Court of Appeal

Hollinrake J.A. [in Chambers]

Judgment: February 2, 1995
Docket: Doc. Vancouver CA019481

Counsel: *S. Schacter* and *K. Lu*, for appellant.

R.N. Millar, for respondent.

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Claims — Plaintiff creditor aware of, although not given proper notice of, reorganization proceedings — Plaintiff choosing not to participate in proceedings before court approving reorganization plan — Appeal court refusing leave to appeal decision of chambers judge refusing leave to sue — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations — Arrangements and compromises — Companies' Creditors Arrangment Act — Stay of proceedings — Effect of stay — Order approving plan under Companies' Creditors Arrangement Act staying all "claims" — Plan defining "claim" as including "any obligation" — Policy and purpose of legislation requiring court to interpret "claim" to include both present and future obligations — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36. "claim" to include both present and future obligations — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

A Co. guaranteed certain pension benefits to the plaintiff. A Co. and four related companies sought protection under the *Companies' Creditors Arrangement Act*. The plaintiff was not served with the documentation leading to the meeting which in turn led to a plan under the Act. The order approving the plan stayed all "claims," which was defined to mean a claim for an amount alleged to be owed or "any obligation." The plaintiff applied for leave to commence an action against A Co. The application was dismissed and the plaintiff applied for leave to appeal.

Held:

The application was dismissed.

When one considers the policy and purpose of the Act, the words "any obligation" had to be interpreted to accord with that policy and purpose. To interpret the words in the definition of "claim" in the plan to not refer to the future as well as present obligations would be contrary to the purpose of the Act. As for the lack of service upon the plaintiff, it was open to the chambers judge to conclude as she did that the plaintiff preferred not to participate in the proceedings under the Act.

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Application for leave to appeal judgment reported at (1994), 28 C.B.R. (3d) 110, 99 B.C.L.R. (2d) 73, [1995] 2 W.W.R. 404 (S.C.), dismissing application for leave to commence action against company granted protection under *Companies' Creditors Arrangement Act*.

***Hollinrake J.A.* [In Chambers] (orally):**

1 This is an application for leave to appeal a decision of a chambers judge [(1994), 28 C.B.R. (3d) 110 (B.C.S.C.)] in which she refused leave to the appellant to commence an action against Alberta-Pacific Terminals Ltd. Leave was required because Alberta-Pacific and four related companies obtained the protection of the Court under the *Companies' Creditors Arrangement Act* ("C.C.A.A.") in 1990.

2 The first order made in this matter was made on November 22, 1990 and contained this clause:

> THIS COURT FURTHER ORDERS THAT all proceedings taken or which might be taken against the Petitioners, or any of them, under the *Bankruptcy Act* (Canada) or the *Winding-Up Act* (Canada) shall be stayed until further order of this Court upon two days notice to the Petitioners and that further proceedings in any action, suit or proceeding commenced by any person, firm or corporation against any of the Petitioners be stayed until further Order of this Court upon two days notice to the Petitioners, that no action, suit or other proceeding may be proceeded with or commenced against any of the Petitioners by any person, firm or corporation except with leave of the Court upon two days notice to the Petitioners and subject to such terms as this Court may impose and that the right of any firm, firm or corporation to realize upon or otherwise deal with any right or property of the Petitioners be and the same is postponed on such terms and conditions as this Court may deem proper.

3 The order approving the plan under the C.C.A.A. was made November 14, 1991, and contained these clauses:

> THIS COURT FURTHER ORDERS THAT except as provided herein, the stay of proceedings in the Order of the Honourable Mr. Justice Skipp pronounced herein November 22, 1990 and this Order be and is hereby confirmed and continued in accordance with the terms of the Plan as at the Closing Date;
>
> . . . . .
>
> THIS COURT FURTHER ORDERS THAT, subject to the terms of any agreement between the Petitioners and the Alberta Creditors, after the Closing Date, no person who is a member of any Class shall have any claim, right or cause of action against the Companies, or any of them, for any Claim, act or omission occurring on or before May 30, 1991, other than as provided for in the Plan, and any such claim, right or cause of action shall be permanently stayed save and except as otherwise provided in the Plan, however these provisions shall not apply to any such claim, right or cause of action of the Fraser River Harbour Commission except as a Spill Claimant under

the provisions of the Plan.

4 The definition of claim in the plan as approved by the Court is that it "means a claim for an amount alleged by a person to be owed to it by or any obligation ... (c) for which a valid proof of claim could have been filed ... but which proof of claim was not so filed."

5 In denying leave to Mr. Lindsay the chambers judge found that he was a creditor under the plan. That finding is attacked on this leave to appeal application as being wrong in law.

6 Mr. Lindsay says he is not now nor ever was a creditor under the plan and consequently cannot be bound by its terms. Thus, he says, he should be exempt from the blanket stay above referred to. What it comes down to on this issue is whether "any obligation" in the definition of "claim" in the plan encompasses future obligations. The fact is that when the plan was approved by the Court, Mr. Lindsay's principal debtor was not in default and his pension benefits were being paid to him. It was some months after the plan was approved that Mr. Lindsay's primary debtor defaulted on its payments to him at which time he looked to the guarantor, Alberta-Pacific Terminals Ltd. At no time did Mr. Lindsay file a proof of claim.

7 When one considers the policy and purpose of the C.C.A.A. I think the interpretation of the words "any obligation" must be such as to accord with that policy and purpose. I am satisfied that to interpret the words in the definition of "claim" in the plan to not refer to the future as well as present obligations would be contrary to the purpose of the C.C.A.A. and even more importantly would be contrary to the purpose of the plan itself as seen from the words in the plan. I conclude that the words "any obligation" in the definition of "claim" in the plan encompassed the claim Mr. Lindsay now asserts against Alberta-Pacific Terminals Ltd. as guarantor. I think the chambers judge was right in concluding that Mr. Lindsay was a creditor under the plan and bound by its terms.

8 A second ground of attack on the reasons of the chambers judge was her conclusion on the issue of the significance of Mr. Lindsay not being served — as he was not — with the documentation leading to the meetings which in turn led to the plan under the C.C.A.A. Mr. Lindsay says that not being served with the material that led to the plan he cannot as a matter of law be bound by it. The chambers judge approached this issue on the basis of the evidence leading her to conclude [p. 80] that "Mr. Lindsay preferred not to participate in the CCAA proceedings and to take his chances later based on his understanding of the CCAA and the Plan". The chambers judge approached this issue of service as one of notice and on the evidence I think it was open to her to do that and conclude as she did.

9 I can see nothing in the reasons of the chambers judge to conclude that there was any error in principle in the conclusion she reached and the reasons she gave for those conclusions. With respect to the submissions of the appellant I am unable to see any ground that would permit this Court to interfere with the discretion exercised by the chambers judge in refusing leave as she did. I can see no error in principle which could lead to a conclusion that her discretion was wrongly exercised.

10 As can be seen by the above I have concluded this application for leave to appeal must be dismissed.

Application dismissed.

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TAB 2

1998 CarswellOnt 3409, 27 C.P.C. (4th) 223, 41 O.R. (3d) 257, 165 D.L.R. (4th) 268, 112 O.A.C. 78, [1998] O.J. No. 3516

Tsaoussis (Litigation Guardian of) v. Baetz

Lorrie Tsaoussis, by her Litigation Guardian Carol Metcalf, Carol Metcalf personally, and Angela Tsaoussis, by her Litigation Guardian Carol Metcalf, Plaintiffs (Respondents) and Juanita M. Baetz, Defendant (Appellant)

Lorrie Tsaoussis, by her Litigation Guardian, Carol Metcalf, Applicant and Juanita M. Baetz, Respondent

Ontario Court of Appeal

Doherty, Abella, Charron JJ.A.

Heard: April 30, 1998
Judgment: September 2, 1998[FN*]
Docket: CA C27319

Proceedings: reversing (1997), 13 C.P.C. (4th) 136 (Ont. Gen. Div.)

Counsel: *Sheldon A. Gilbert, Q.C.*, for the appellant.

Andre I.G. Michael, for the respondents.

Subject: Civil Practice and Procedure; Torts

Practice --- Actions involving parties under disability — Infants — Settlement

Three-year-old child was injured when struck by motor vehicle — Settlement was reached and approved by court on basis that child had suffered only minor injuries — Mother brought motion to set aside settlement five years later, on basis that child subsequently showed residual physical and behavioural effects from injury — Motion granted — Motions judge held that, based on new evidence, original settlement was not in child's best interests — Motions judge stated that in reviewing motion, prejudice to driver was irrelevant — Appeal by driver allowed — Best interests of child did not govern decision whether to set aside settlement — Motions judge erred in applying test applied by appellate court when asked to admit evidence of events which occurred between judgment and appeal — Motion to set aside judgment approving settlement of minor's personal injury claim should be tested according to same criteria used on motions to set aside other final judgments — Finality is important feature of justice system, particularly in area of torts — Inaccuracy of award, standing alone, does not justify departure from finality principle — Injured party is entitled to full and fair compensation if party establishes personal injury claim — Parens patriae jurisdiction of court does not expand minor's entitlement or enable court to create different compensation regime for minors — It could not be shown that medical evidence developed after settlement could not have been available by exercise of reasonable diligence prior to obtaining judgment — Child's mother informed lawyer, prior to settlement, that child experiencing problems sleeping and walking.

Limitation of actions --- Family law proceedings — Miscellaneous proceedings

Three year old child was injured when struck by motor vehicle — Settlement was reached and approved by court on basis that child had suffered only minor injuries — Five years later, mother brought motion to set aside settlement and commenced derivative action — Motion to set aside settlement judgment granted — As settlement had been set aside and main action was allowed to proceed, mother's derivative action was allowed to proceed — Driver brought appeal — Appeal allowed — Order setting aside settlement judgment set aside, and new action dismissed.

Cases considered by *Doherty J.A.*:

Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229, 3 C.C.L.T. 225, 83 D.L.R. (3d) 452, 19 N.R. 50, [1978] 1 W.W.R. 577, 8 A.R. 182 (S.C.C.) — referred to

Braithwaite v. Haugh (1978), 19 O.R. (2d) 288, 84 D.L.R. (3d) 590 (Ont. Co. Ct.) — referred to

Carter v. Junkin, 47 O.R. (2d) 427, 7 C.C.L.I. 217, [1984] I.L.R. 1-1815, 11 D.L.R. (4th) 545, 6 O.A.C. 310 (Ont. Div. Ct.) — applied

Castlerigg Investments Inc. v. Lam (1991), 2 O.R. (3d) 216, 47 C.P.C. (2d) 270 (Ont. Gen. Div.) — considered

Doering v. Grandview (Town) (1975), (sub nom. *Grandview (Town) v. Doering)* [1976] 2 S.C.R. 621, (sub nom. *Grandview (Town) v. Doering)* [1976] 1 W.W.R. 388, (sub nom. *Grandview (Town) v. Doering)* 61 D.L.R. (3d) 455, 7 N.R. 299 (S.C.C.) — considered

Eve, Re, 13 C.P.C. (2d) 6, (sub nom. *E. v. Eve)* [1986] 2 S.C.R. 388, 31 D.L.R. (4th) 1, 71 N.R. 1, 61 Nfld. & P.E.I.R. 273, 185 A.P.R. 273, 8 C.H.R.R. D/3773 (S.C.C.) — referred to

Glatt v. Glatt (1935), [1936] O.R. 75, 17 C.B.R. 219, [1936] 1 D.L.R. 387 (Ont. C.A.) — referred to

Glatt v. Glatt, [1937] S.C.R. 347, 19 C.B.R. 14, [1937] 1 D.L.R. 794 (S.C.C.) — considered

Hennig v. Northern Heights (Sault) Ltd. (1980), 30 O.R. (2d) 346, 116 D.L.R. (3d) 496, 17 C.P.C. 173 (Ont. C.A.) — referred to

Kendall (Litigation Guardian of) v. Kindl Estate (1992), 10 C.P.C. (3d) 24 (Ont. Gen. Div.) — applied

L.M. Rosen Realty Ltd. v. D'Amore (1988), 29 C.P.C. (2d) 106 (Ont. H.C.) — applied

Makowka v. Anderson (1990), 45 B.C.L.R. (2d) 136, 67 D.L.R. (4th) 751 (B.C. C.A.) — distinguished

McCann v. Sheppard, [1973] 2 All E.R. 881, [1973] 1 W.L.R. 540, 117 Sol. Jo. 323 (Eng. C.A.) — considered

McGuire v. Haugh (1933), [1934] O.R. 9 (Ont. C.A.) — referred to

Mercer v. Sijan (1976), 14 O.R. (2d) 12, 72 D.L.R. (3d) 464, 1 C.P.C. 281 (Ont. C.A.) — referred to

Phosphate Sewage Co. v. Molleson (1879), 4 App. Cas. 801 (Scotland H.L.) — considered

Poulin v. Nadon, [1950] O.R. 219, [1950] O.W.N. 163, [1950] 2 D.L.R. 303 (Ont. C.A.) — applied

R. v. Sarson, 197 N.R. 125, 107 C.C.C. (3d) 21, 135 D.L.R. (4th) 402, 36 C.R.R. (2d) 1, 91 O.A.C. 124, 49 C.R. (4th) 75, [1996] 2 S.C.R. 223 (S.C.C.) — considered

R. v. Thomas, 75 C.R. (3d) 352, [1990] 1 S.C.R. 713, 108 N.R. 147 (S.C.C.) — considered

Reference re Language Rights Under s. 23 of Manitoba Act, 1870 and s. 133 of Constitution Act, 1867, [1985] 1 S.C.R. 721, [1985] 4 W.W.R. 385, 19 D.L.R. (4th) 1, 59 N.R. 321, 35 Man. R. (2d) 83 (S.C.C.) — considered

Russell v. Brown, [1948] O.R. 835 (Ont. C.A.) — referred to

Sengmueller v. Sengmueller (1994), 17 O.R. (3d) 208, 69 O.A.C. 312, 111 D.L.R. (4th) 19, 25 C.P.C. (3d) 61, 2 R.F.L. (4th) 232 (Ont. C.A.) — referred to

Steeves v. Fitzsimmons (1975), 11 O.R. (2d) 387, 66 D.L.R. (3d) 203 (Ont. H.C.) — referred to

Tepperman v. Rosenberg (1985), 48 C.P.C. 317 (Ont. H.C.) — referred to

Tiwana v. Popove (1987), 23 B.C.L.R. (2d) 392 (B.C. S.C.) — considered

Toronto General Trusts Corp. v. Roman, 41 D.L.R. (2d) 290, [1963] S.C.R. vi (S.C.C.) — referred to

Toronto General Trusts Corp. v. Roman, [1963] 1 O.R. 312, 37 D.L.R. (2d) 16 (Ont. C.A.) — applied

Watkins v. Olafson, 50 C.C.L.T. 101, [1989] 2 S.C.R. 750, [1989] 6 W.W.R. 481, 61 D.L.R. (4th) 577, 100 N.R. 161, 39 B.C.L.R. (2d) 294, 61 Man. R. (2d) 81 (S.C.C.) — applied

Whitehall Development Corp. v. Walker (1977), 17 O.R. (2d) 241, 4 C.P.C. 97 (Ont. C.A.) — referred to

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 116 — referred to

Family Law Act, R.S.O. 1990, c. F.3

Generally — referred to

Insurance Act, R.S.O. 1990, c. I.8

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 7 — referred to

R. 7.03-7.06 — considered

R. 7.08 — considered

R. 7.08(4) — considered

R. 7.09 — considered

R. 59.06 — considered

R. 59.06(2) — referred to

R. 59.06(2)(a) — considered

APPEAL by driver from judgment reported at (1997), 13 C.P.C. (4th) 136, 33 O.R. (3d) 679 (Ont. Gen. Div.), granting mother's motion to set aside settlement of child's personal injury action.

The judgment of the court was delivered by *Doherty J.A.*:

The Issue

1 Should a judgment approving a settlement made on behalf of a minor plaintiff in a personal injury case be set aside some 4 $^{1}/_{2}$ years later if, based on medical assessments done after the settlement, it appears that the minor was significantly under-compensated by the terms of the settlement?

I.

2 In April, 1990, the respondent, Lorrie Tsaoussis (Lorrie), aged three, was struck by a car driven by the appellant, Juanita Baetz. Lorrie was hospitalized for three days and subsequently seen by her family doctor and paediatrician. Her mother, Carol Metcalf, retained counsel who, within a month of the accident, notified the appellant of Lorrie's claim against her. After negotiations between Lorrie's former counsel and counsel for the appellant's insurer, the parties reached a settlement. As the settlement involved a minor plaintiff, it had to be approved by the court.

3 Early in 1992, former counsel for Lorrie brought an application under rule 7.08 seeking court approval of the settlement of Lorrie's claim against the appellant arising out of the accident. In compliance with rule 7.08(4), counsel filed his affidavit and the affidavit of Carol Metcalf, Lorrie's mother and litigation guardian. Counsel also attached the hospital records and reports from Lorrie's family doctor and here paediatrician to his affidavit. According to that material, Lorrie had suffered a skull fracture in the accident. Although she had some medical problems in the weeks following the accident, they seemed relatively minor. Assessments done in the six months following the accident indicated that Lorrie was essentially "normal." Nearly a year after the accident her family doctor said:

> It is my impression that she should have a complete recovery without any significant sequela anticipated.

4 In Ms. Metcalf's affidavit, she indicated that the information supplied on the medical records was correct, and that based on counsel's advice, she had accepted the terms of the settlement on behalf of Lorrie.

5 On February 7, 1992, Scott J. of the Ontario Court (Gen. Div.) approved the settlement and granted judgment (the 1992 judgment). Under the terms of the settlement and judgment, $5,420.00 was paid into court for the benefit of Lorrie and $1,250.00 was paid by the appellant in full satisfaction of costs. After the funds were paid into court, counsel for Ms. Baetz wrote to Lorrie's counsel confirming that "this resolves all claims arising out of this accident."

6 Ms. Metcalf remained concerned about her daughter's health. Lorrie had headaches, did not sleep through the night, seemed easily distracted and had become increasingly clumsy. With the help of a social worker, Lorrie's mother arranged to have Lorrie seen by a paediatric neurologist at Children's Hospital in London, Ontario. Assessments done between the summer of 1992 and the fall of 1994 revealed that Lorrie had numerous ongoing medical and developmental problems, some of which were attributed to the head injury she had suffered in the car accident in 1990. By February, 1996, Lorrie's doctor opined that Lorrie's "attention and concentration problems are attributable to the motor vehicle accident." Her doctor also felt that the full extent of those problems could not be determined for another year or two.

7 At some point, Lorrie's mother retained new counsel on behalf of Lorrie. In the fall of 1994, that counsel commenced a new action (the 1994 action) claiming that the appellant's negligence had caused injuries to Lorrie resulting in damages of some $2.2 million. Counsel also claimed damages under the *Family Law Act*, R.S.O. 1990, c. F.3 on behalf of Lorrie's mother and sister. In her defence, Ms. Baetz pleaded that the claim had been settled by the 1992 judgment leaving Lorrie with no cause for action against her. Ms. Baetz also denied any liability for the accident.

8 In the fall of 1996, counsel brought a motion in the 1994 action to set aside the 1992 judgment.[FN1] Although counsel argued that Scott J. should not have approved the settlement in 1992, the affidavits filed on the motion make it clear that medical evidence developed after the 1992 judgment provided the sole basis for setting aside that judgment. The final paragraph of counsel's affidavit filed on the motion summarizes his position:

> There is no doubt in my mind that the present medical evidence now clearly establishes that the court approved settlement was not in the best interests of either Lorrie or her mother. The medical tests and assessments which have been performed since the time of the court approval have clearly provided new evidence of the extent and effect of the brain damage sustained by Lorrie which was not available to Madam Justice Scott. It is my opinion that the interests of justice require that the judgment of Madam Justice Scott be set aside. ...

9 Leitch J., for reasons reported at (1997), 33 O.R. (3d) 679 (Ont. Gen. Div.) [13 C.P.C. (4th) 136], granted the motion, set aside the 1992 judgment and directed that the 1994 action should proceed.[FN2] In doing so, she did not purport to review the correctness of the judgment as of the date it was made. Instead, Leitch J. held that she was obliged to consider the medical evidence developed after the 1992 judgment and decide whether in the light of that evidence the 1992 judgment could be said to be in the best interests of Lorrie. She said, at p. 688:

> I find it necessary to consider evidence that was not before the judge who approved the settlement in 1992 not to show that the assessment of the previously existing evidence was incorrect but to allow this court to assess whether Lorrie's best interests have been met.

10 After a careful review of the new medical evidence, Leitch J. concluded that as the 1992 judgment had been premised on medical information indicating that Lorrie's injury was relatively minor and would cause no long-term effects, it could not be said to meet Lorrie's best interests in the face of medical evidence indicating a much more serious injury with significant long-term effects. Leitch J. made it clear that in setting aside the 1992 judgment she had considered only the best interests of Lorrie. In her view, the criteria generally applied on a motion to set aside a final judgment did not apply on a motion to set aside a judgment approving an infant settlement. She specifically held that prejudice to the appellant was irrelevant.

11 I think Leitch J. properly characterized her function on the motion to set aside the 1992 judgment. She was not, and indeed could not, sit on appeal from the decision of Scott J. Arguments as to whether Scott J. should have approved the settlement based on the information placed before her could only be properly made by way of a direct appeal from that judgment and no such appeal was ever taken.

12 Leitch J. also properly avoided any consideration of the adequacy of former counsel's representation of Lorrie in making her determination that the 1992 judgment should be set aside. Former counsel is not a party to these proceedings, and it would be inappropriate to take anything said by Leitch J. or by me as a comment on the adequacy of his representation. If Lorrie wishes to take issue with that representation, she can do so in separate proceedings instituted against the former counsel for that express purposes.[FN3]

II.

13 If, as Leitch J. held, the best interests of Lorrie is the only factor to consider in deciding whether to set aside the 1992 judgment, her decision is unassailable. The medical evidence gathered after the 1992 judgment strongly suggests that if the appellant is responsible for Lorrie's injuries, Lorrie was significantly under-compensated by the terms of the 1992 judgment. I cannot agree, however, that the best interests of Lorrie govern the decision whether the 1992 judgment should be set aside. In my view, a judgment approving the settlement of a minor's personal injury claim that has been signed, entered and not appealed is final, and must be given the same force and effect as any other final judgment. A motion to set aside that judgment should be tested according to the same criteria used on motions to set aside other final judgments. Applying those criteria, I would hold that the 1992 judgment should not have been set aside.

III.

14 A person who is injured as a result of the negligence of another is entitled to full but fair compensation for those injuries: *Watkins v. Olafson* (1989), 61 D.L.R. (4th) 577 (S.C.C.), at 581. Under our system of adjudication of personal injury cases, full but fair compensation is determined at a specific point in time on a once and for all basis, and awarded in the form, of a single lump sum payment. Absent statutory authority, a court cannot provide for periodic payments to a plaintiff in a personal injury case, or periodically review damages based on developments subsequent to the initial assessment: *Watkins v. Olafson* supra, at pp. 580-86. Because we assess damages on a once and for all basis and award a single lump sum amount, judges must determine what constitutes full but fair compensation on the basis of information available at the time the adjudication is made. Judges must also factor future costs and future losses into that assessment in many personal injury cases. It is almost inevitable, particularly where future damages are involved, that the amount awarded will in time prove to provide over or under compensation. Despite the likelihood of inaccuracy which has spawned strong judicial and academic criticism of one time lump sum awards,[FN4] this province maintains that approach in personal injury cases in all but very limited circumstances.[FN5] One time lump sum awards are seen as having sufficient advantages over other proposed forms of compensation to justify the inaccuracy inherent in those words.[FN6]

15 Paramount among those advantages is finality. Finality is an important feature of our justice system, both to the parties involved in any specific litigation and on an institutional level to the community at large. For the parties, it is an economic and psychological necessity. For the community, it places some limitation on the economic burden each legal dispute imposes on the system and it gives decisions produced by the system an authority which they could not hope to have if they were subject to constant reassessment and variation: J.I. Jacob, *The Fabric of English Civil Justice*, Hamlyn Lectures 1987, at pp. 23-24.

16 The parties and the community require that there be a definite and discernable end to legal disputes. There must be a point at which the parties can proceed on the basis that the matter has been decided and their respective rights and

obligations have been finally determined. Without a discernable end point, the parties cannot get on with the rest of their lives secure in the knowledge that the issue has finally been determined, but must suffer the considerable economic and psychological burden of indeterminate proceedings in which their respective rights and obligations are revisited and reviewed as circumstances change. Under our system for the adjudication of personal injury claims, that and point occurs when a final judgment has been entered and has either not been appealed, or all appeals have been exhausted.

17 Finality is important in all areas of the law, but is stressed more in some than in others. Its significance in tort law was highlighted by McLachlin J. in *Watkins v. Olafson*, *supra*, at p. 585, where in the course of discussing problems associated with a scheme of compensation based on reviewable periodic payments, she said:

> Yet another factor meriting examination is the lack of finality of periodic payments and the effect this might have on the lives of plaintiff and defendant. Unlike persons who join voluntarily in marriage or contract - areas where the law recognizes periodic payments - the tortfeasor and his or her victim are brought together by a momentary lapse of attention. A scheme of reviewable periodic payments would bind them in any uneasy and unterminated relationship for as long as the plaintiff lives.

18 The importance attached to finality is reflected in the doctrine of *res judicata*. That doctrine prohibits the re-litigation of matters that have been decided and requires that parties put forward their entire case in a single action. Litigation by instalment is not tolerated: *Toronto General Trusts Corp. v. Roman*, [1963] 1 O.R. 312 (Ont. C.A.); aff'd. [1963] S.C.R. vi (S.C.C.). Finality is so highly valued that it can be given priority over the justice of an individual case even where fundamental liberty interests and other constitutional values are involved: *R. v. Thomas*, [1990] 1 S.C.R. 713 (S.C.C.); *R. v. Sarson* (1996), 107 C.C.C. (3d) 21 (S.C.C.); *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 and s. 133 of Constitution Act, 1867*, [1985] 1 S.C.R. 721 (S.C.C.), at 757.

19 That is not to say that finality interests always win out over other interests once final judgment is signed and entered. Sometimes the rigor of the *res judicata* doctrine will be relaxed: *Doering v. Grandview (Town)* (1975), [1976] 2 S.C.R. 621 (S.C.C.), at 638; *Hennig v. Northern Heights (Sault) Ltd.* (1980), 30 O.R. (2d) 346 (Ont. C.A.). The court also has the power to set aside final judgments: *Glatt v. Glatt*, [1937] S.C.R. 347 (S.C.C.); aff'd. (1935), [1936] O.R. 75 (Ont. C.A.); *Whitehall Development Corp. v. Walker* (1977), 4 C.P.C. 97 (Ont. C.A.). The limitations on the *res judicata* doctrine and the power to set aside previous judgments are, however, exceptions to the general rule that final judgments mark the end of litigation. Those exceptions recognize that despite the value placed on finality, there will be situations in which other legitimate interests clearly outweigh finality concerns. The power to set aside a final judgment obtained by fraud is the most obvious example. As important as finality is, it must give way when the preservation of the very integrity of the judgment process is at stake.

20 Attempts, whatever their form, to reopen matters which are the subject of a final judgment must be carefully scrutinized. It cannot be enough in personal injury litigation to simply say that something has occurred or has been discovered after the judgment became final which shows that the judgment awards too much or too little. On that approach, finality would become an illusion. The applicant must demonstrate circumstances which warrant deviation from the fundamental principle that a final judgment, unless appealed, marks the end of the litigation line. I think Anderson J. struck the proper judicial tone on applications to reopen final judgments in *L.M. Rosen Realty Ltd. v. D'Amore* (1988), 29 C.P.C. (2d) 106 (Ont. H.C.). He was asked to set aside a judgment and vary the rate of post-judgment interest granted because subsequent events showed that the rate was much too high. He said, at p. 109:

> ...Even if I thought I had the discretion, I would be reluctant to intervene because I feel it would be offensive to the basic proposition that there should be finality in litigation. Adjusting the result after judgment, save in response to unusual circumstances, would be a conspicuous and dangerous meddling with that proposition.

21 I am not aware of any personal injury case in which a final judgment has been set aside, other than on appeal,

because evidence developed after the judgment indicated that the award was much too high or much too low.[FN7] I would be surprised to find such a case as it would be entirely inconsistent with our system of one time lump sum awards for personal injuries. As assessments which ultimately prove to be inaccurate are inherent in that scheme, I do not see how the demonstration of that inaccuracy in a particular case could, standing alone, justify departure from the finality principle.

IV.

22 The approach taken by Leitch J. constitutes a departure from the traditional approach taken to final judgments in personal injury litigation. She discounts finality concerns entirely. If she is correct, no judgment approving an infant settlement is final. Instead, all carry the unwritten *caveat* - subject to being set aside if subsequent events reveal that the plaintiff may have been under-compensated.[FN8] Nor, in my view, would it be an unusual case in which this *caveat* would come into play. Medical assessments change, unanticipated losses arise and estimates of anticipated costs prove inaccurate. In all such situations where the change was significant, minor plaintiffs would be entitled to set aside a judgment approving a settlement and re-litigate their claim based on the latest information available as to the extent of the damage suffered by them.

23 In addition to discounting finality concerns, Leitch J. has, in effect, introduced a scheme of compensation by reviewable periodic payments in personal injury cases involving minor plaintiffs. Amounts awarded pursuant to settlements approved by the court would become periodic payments if, before the minor reached majority, circumstances revealed that the amount awarded did not provided full compensation. This is the sort of drastic innovation in our tort compensation scheme which the Court in *Watkins v. Olafson* supra, instructed should be left to the legislature.

24 The respondent contends that the court's obligation to ensure that the best interests of Lorrie were met trumped all other concerns. There can be no doubt that a court is obliged to look to and protect the best interests of minors who are parties to legal proceedings.[FN9] This obligation, sometimes referred to as the court's *parens patriae* jurisdiction, requires that the court abandon its normal umpire-like role and assume a more interventionist mode. For example, the court must decide who will act on behalf of the minor (Rule 7.03-7.06) and the court must take control of any proceeds paid to the benefit of the minor (Rule 7.09). The supervisory powers of the court are most clearly evinced by the requirement that the court approve any consent judgment to which a minor is a party and the closely aligned requirement that the court approve any settlement of a minor's claim before that settlement will bind the minor (Rule 7.08). The duty on the court when a motion for approval of a settlement is made was authoritatively described by Robertson C.J.O. in *Poulin v. Nadon*, [1950] O.R. 219 (Ont. C.A.), at 225:

> ...If, upon proper inquiry, the judge shall be of the opinion that the settlement is one that, in the interests of the infant, should be approved, he may give the required approval. If, on the other hand, the judge, is not of the opinion that the settlement is one that should be approved, he may give such direction as to the trial of the action as may be proper....

25 The inquiry described by Robertson C.J.O. requires that the court make its own determination whether the proposed settlement is in the minor's best interests. Rule 7.08(4) demands that the parties place sufficient material before the court to allow it to make that determination.

26 As important and far reaching as the *parens patriae* jurisdiction is, it does not exist in a vacuum, but must be exercised in the context of the substantive and adjectival law governing the proceedings. The *parens patriae* jurisdiction is essentially protective. It neither creates substantive rights nor changes the means by which claims are determined.

27 The proper limits of the *parens patriae* jurisdiction were drawn in *Carter v. Junkin* (1984), 47 O.R. (2d) 427 (Ont. Div. Ct.). The defendant insurance company proposed to make an advance payment to a minor under the pro-

visions of the *Insurance Act*. The defendant applied for an order approving the advance payment, but the motion judge refused to make that order unless the insures agreed to a term which would protect the minor's claim to pre-judgment interest. The defendant refused to make the payment on that term and appealed. The Divisional Court, held at p. 430:

> The court has no jurisdiction to compel an insurer to pay money into court under s. 224 [The *Insurance Act*] and to make good the interest differential. But that is not what was done here. The learned motions court judge did not require the insurer to pay money into court. He simply granted leave to the insurer to do so, if the insurer was willing to agree to give the undertaking as to the interest differential. The insurer can still decline to make the payment, in which event the infant plaintiff will recover at trial the full amount of pre-judgment interest to which he is entitled.

28 The court properly drew a distinction between a court imposed term on a voluntary payment as a condition to court approval of that payment and the court requiring that the defendant make a payment. The former protected the minor's best interests under the scheme of voluntary payments established under the *Insurance Act* and was a proper exercise of the *parens patriae* jurisdiction. A forced payment would, however, have gone beyond the limits of the statute and given the minor rights which he did not have under that statute. While a forced advance payment may have been in the minor's best interests, it was not within the scope of the *parens patriae* jurisdiction as it was not contemplated under the statutory scheme.

29 A minor plaintiff, like any other plaintiff, is entitled to full but fair compensation if the minor establishes a personal injury claim. The *parens patriae* jurisdiction does not expand that entitlement. For example, a minor plaintiff who cannot establish that the defendant's negligence caused the injury, cannot succeed on the basis that, despite that failure, compensation is in the minor's best interests. Similarly, a minor, like any other plaintiff, is entitled to have the compensation assessment made on a once and for all basis and to be paid that compensation in a single lump sum. The *parens patriae* jurisdiction does not enable the court to create a different compensation regime for minor plaintiffs involving periodic reviews of the adequacy of the compensation provided to the minor. The court must protect the minor's best interests, but it must do so within the established structure for the compensation of personal injury claims: *Kendall (Litigation Guardian of) v. Kindl Estate* (1992), 10 C.P.C. (3d) 24 (Ont. Gen. Div.), at 27-28

30 Finality, is as important in cases involving minor plaintiffs as it is in cases involving adult plaintiffs. The need for finality must temper the goal of meeting the minor's best interests just as it must temper the desire to provide every plaintiff with full but fair compensation. Proposed settlements of minor's personal injury claims, especially those involving very young children with head injuries, raise real concerns about the adequacy of compensation provided by those settlements. The risk of under-compensation in those cases is very real.[FN10] That risk demands that the court vigorously exercise its *parens patriae* jurisdiction when asked to approve a settlement. Once the settlement is approved, however, and the judgment is final and not appealed, the *parens patriae* jurisdiction is spent. It can only be reasserted if there is a valid basis for setting aside the final judgment.

31 In arriving at the conclusion that the best interests of the minor justified setting aside the previous final judgment, Leitch J. relied exclusively on the decision of the British Columbia Court of Appeal in *Makowka v. Anderson* (1990), 67 D.L.R. (4th) 751 (B.C. C.A.). In *Makowka*, a motion judge was asked to approve an infant settlement. He did so over the objections of the Public Trustee acting on behalf of the infant. The Public Trustee argued that more time was needed to assess the extent of the minor's head injury and the cause of her various medical problems. The Public Trustee appealed the judgment approving the settlement and sought to introduce evidence on appeal of medical assessments done between the judgment approving the settlement and the hearing of the appeal. Those assessments confirmed the Public Trustee's concerns and indicated that the minor's injuries were serious and that in all likelihood she would suffer significant long-term disabilities.

32 On a motion to admit the fresh evidence heard before the actual appeal, Lambert J.A., for the court, while accepting the importance of finality, even in litigation involving minors, acknowledged that the appeal court could receive evidence of matters arising after the judgment appealed from. He stressed that the evidence proffered by the

Public Trustee was not directed to a purely factual question, but rather to the assessment of the minor's best interests. The reasons of Lambert J.A. admitting the evidence are referred to in the reasons disposing of the appeal. He said, at p. 758:

> ...So the purpose of the introduction of fresh evidence in this appeal is not to show that a factual assessment of the previously existing evidence was incorrect, but it is to show that the best interests of the infant may not in fact have been carried through in the way that the chambers judge thought he was carrying them through.
>
> Accordingly, the factors are quite different in this case. Having regard to the crucial ones, which are the best interests of the child and the good administration of justice, it would, in my opinion, in the words of the cases, be an affront to justice to insist on imposing this settlement on this infant if it was, when it was agreed upon, an unjust settlement.

33 The court hearing the appeal described its task in words that were adopted by Leitch J.

> So we are entitled to look at the new evidence, which includes subsequent medical reports, for the purpose of determining whether the settlement originally placed before the court seems a just one today. We are not limited to considering the strengths and weaknesses of Meghan's [the minor] case as they appeared from the material placed before the judge below. [p. 758].

34 Not surprisingly, the court went on to conclude that the amount provided for in the settlement was totally inadequate and set aside the order approving the settlement.

35 The facts in *Makowka* are quite similar to out facts. The proceedings were, however, fundamentally different. *Makowka* was a direct appeal from the judgment approving the settlement. When the fresh evidence was tendered the matter was still in the litigation system and the rights and obligations of the parties were subject to appellate review, the purpose and of which was to determine the correctness of the order approving the settlement. The defendant in *Makowka* had not reason to think the end of the litigation line had been reached. The Public Trustee continued to maintain that the settlement should not have been approved and the new evidence went directly to the central issue both on the motion and on the appeal.

36 On this motion, Leitch J. was not asked to, and could not, review the correctness of the order of Scott J. Instead, she was asked to allow Lorrie to begin her claim afresh and to re-litigate a claim which, in the eyes of the law and the mind of Ms. Baetz, had ceased to exist when it became the subject of final judgment in 1992. In my opinion, there is an important difference between allowing a party to supplement a record at the appellate stage of an ongoing proceeding and allowing a party to resurrect a claim which is the subject of a final judgment. That distinction has been recognized by appellate courts faced with applications to admit fresh evidence concerning events which occurred between the judgment and the appeal. In *McCann v. Sheppard*, [1973] 2 All E.R. 881 (Eng. C.A.), Lord Denning M.R., said:

> ...The general rule in accident cases is that the sum of damages falls to be assessed once and for all at the time of the hearing; and this court will be slow to admit evidence of subsequent events to vary it. It will not normally do so after the time for appeal had expired without an appeal being entered - because the proceedings are then at an end. They have reached finality. But if notice of appeal has been entered in time - and pending the appeal, a supervening event occurs such as to falsify the previous assessment - then the court will be more ready to admit fresh evidence because until the appeal is heard and determined, the proceedings are still pending. Finality has not been reached....

37 Admitting fresh evidence on appeal of events which occurred between the judgment and the appeal raises finality concerns for the reasons set out by Lord Denning, however, these concerns are moderated, first by the fact that the proceeding is still underway and second because the parties know that their rights remain undetermined until

appellate remedies have been exhausted. Even in those circumstances, evidence is only admitted where it would be "an affront to common sense" to refuse to admit the evidence on appeal: *Mercer v. Sijan* (1976), 14 O.R. (2d) 12 (Ont. C.A.), at 17; *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (Ont. C.A.), at 211. This was the test applied in *Makowka*.

38 Leitch J. erred in the equating her position on a motion to set aside a final judgment with that of an appellant court asked to admit evidence of events which occurred between the judgment and the appeal.[FN11] while finality concerns are relevant in both situations, they must carry a great deal more weigh where the judgment is final and the proceedings which culminated in that judgment have long since ended. The court in *Makowka* did not have to address the threshold issue raised on this motion - should a litigant, based on evidence developed after final judgment and after proceedings have ended, be allowed to start the litigation process all over again? That issue could not be resolved by reliance on the *parens patriae* jurisdiction.

V.

39 A party who would otherwise be bound by a previous judgment can bring an action to set aside that judgment. Fraud in the obtaining of the initial judgment is the most common ground relied on in such actions: *McGuire v. Haugh* (1933), [1934] O.R. 9 (Ont. C.A.), at 11-13; *Russell v. Brown*, [1948] O.R. 835 (Ont. C.A.) per Hogg J.A. (concurring) at pp. 846-48; *Glatt v. Glatt* supra, at p. 79. Rule 59.06 allows that kind of relief to be claimed by way of a motion in the original proceedings. The rule does not, however, confer the power to set aside a previous judgment, nor does it articulate a test to be applied in deciding whether a previous judgment should be set aside. The rule merely provides a more expeditious procedure for seeking that remedy: *Glatt v. Glatt* supra; *Braithwaite v. Haugh* (1978), 19 O.R. (2d) 288 (Ont. Co. Ct.), at 289. The language of Rule 59.06 does, however, provide insight into the varied factual circumstances which may give rise to motions to set aside a judgment.

40 For present purposes, I am concerned with Rule 59.06(2)(a) and particularly, the part of the rule which refers to motions to set aside orders "on the ground ... of facts arising or discovered after it [the order] was made." The rule draws a distinction between facts which come into existence after the judgment was made and facts which, while existing when the judgment was made, were discovered after judgment. In this case, the facts relief on to set aside the previous judgment concerned the exact nature of Lorrie's head injury and, more importantly, its potential impact on her physical, intellectual and cognitive development. The injury and those potential effects existed at the time of the judgment.

41 In deciding whether to set aside a judgment based on evidence said to be discovered after judgment, the court must first decide whether that evidence could have been tendered before judgment. Evidence which could reasonably have been tendered prior to judgment cannot be used to afford a party a second opportunity to re-litigate the same issue. In *Glatt v. Glatt* supra, the appellant moved a set aside a judgment partly on the basis of evidence discovered after the judgment. Duff C.J., for a unanimous court, rejected the claim stating, at p. 350:

> It is well established law that a judgment cannot be set aside on such a ground unless it is proved that the evidence relied upon could not have been discovered by the party complaining by the exercise of due diligence. The importance of this rule is obvious and it is equally obvious that the finality of judgments generally would be gravely imperilled unless the rule were applied with the utmost strictness.

42 That same view prevailed in the majority judgment in *Doering v. Grandview (Town)* supra, some 40 years later. Mr. Doering sued the Town of Grandview alleging that it was responsible for the flooding of his land. The suit was dismissed. A few months later he commenced a second action, again claiming damages for the flooding of his land. The second claim referred to different years than the first claim and alleged a different means by which the flooding occurred. An expert consulted by Mr. Doering after the first trial had developed a new theory explaining how the flooding had occurred. The Town moved to have the second action stayed on the basis that it was *res judicata*. A

closely divided Supreme Court of Canada sided with the Town and stayed Mr. Doering's claim. The minority were of the view that the two actions did not raise the same issue. The majority took the position that the two actions were sufficiently similar to warrant the application of *res judicata*. Ritchie J., for the majority, went on to consider whether the new theory as to the cause of the flooding could provide a basis for re-litigating the Town's liability. He cited with approval, at p. 636, the judgment of Lord Cairns in *Phosphate Sewage Co. v. Molleson* (1879), 4 App. Cas. 801 (Scotland H.L.), at 814-15, where his Lordship said:

> As I understand the law with regard to *res judicata*, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to reopen that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before.... [Emphasis added.]

43 Ritchie J., at 638, observed that Mr. Doering had not alleged, much less proved, that the expert evidence advancing the new theory concerning the flooding could not have been available by the exercise of reasonable diligence at the first trial. Consequently, Mr. Doering had not cleared the first hurdle required to allow him to re-litigate a claim which was *res judicata*.

44 These and numerous other authorities (e.g. *Whitehall Development Corp. v. Walker* supra, at p. 98) recognize that the finality principle must not yield unless the moving party can show that the new evidence could not have been put forward by the exercise of reasonable diligence at the proceedings which led to the judgment the moving party seeks to set aside. If that hurdle is cleared, the court will go on to evaluate other factors such as the cogency of the new evidence, any delay in moving to set aside the previous judgment, any difficulty in re-litigating the issues and any prejudice to other parties or persons who may have acted in reliance on the judgment. The onus will be on the moving party to show that all of the circumstances are such as to justify making an exception to the fundamental rule that final judgments are exactly that, final. In a personal injury case, new evidence demonstrating that the plaintiff was inadequately compensated cannot, standing alone, meet that onus.

45 Lorrie cannot show that the evidence developed after the 1992 judgment could not have been available by the exercise of reasonable diligence prior to obtaining that judgment. Ms. Metcalf testified that she told Lorrie's former lawyer that Lorrie was having problems sleeping and walking before the 1992 judgment. According to Ms. Metcalf, the former counsel was aware that arrangements had already been made to have Lorrie seen at the Brain Injury Clinic in London when the settlement was made in February, 1992. Documentation produced by Lorrie's present counsel in response to undertakings given during Ms. Metcalf's cross-examination indicates that the arrangements were actually made shortly after the 1992 judgment. The fact remains, however, that according to Ms. Metcalf, she and Lorrie's former counsel were aware of Lorrie's ongoing problems and Ms. Metcalf's desire to have a further medical assessment done. Ms. Metcalf testified that Lorrie's former counsel did not suggest that the settlement be delayed pending further assessment and Ms. Metcalf did not request that the settlement be delayed for that purpose.

46 The reasons no further assessments were made prior to proceeding with the settlement and judgment are irrelevant in this proceeding. Certainly, there is no suggestion that Ms. Baetz or her insurers were aware that further assessments were needed or even contemplated. Those acting on behalf of Lorrie chose to proceed with the settlement without further medical assessments. It cannot now be said that the evidence eventually generated by further assessments could not have been available by the exercise of reasonable diligence prior to the judgment approving the settlement.

47 I would allow the appeal, set aside the order of Leitch J., and in its place make an order dismissing the 1994

action. Ms. Baetz is entitled to her costs both here and in the court below.

Appeal allowed.

FN* Leave to appeal refused (1999), (sub nom. *Tsaoussis v. Baetz*) 236 N.R. 189 (note) (S.C.C.).

FN1 Under the terms of Rule 59.06(2), the motion should have been brought in the 1992 proceedings, but it would appear that nothing turns on this procedural irregularity.

FN2 Justice Leitch also directed that the payment pursuant to the 1992 judgment should be treated as an advance payment to Lorrie under the terms of the *Insurance Act*. She further dismissed a motion brought by Ms. Baetz for summary judgment on the derivative action brought by Lorrie's mother, Carol Metcalf under the *Family Law Act*. Given my disposition of the appeal from the order setting aside the 1992 judgment, I need not consider the correctness of either of these orders.

FN3 In the cross-examination of Ms. Metcalf on her affidavit, counsel for Lorrie indicated that the former solicitor had been put on notice of a possible claim against him based on the 1992 settlement. That lawsuit is being held in abeyance pending the result of this appeal.

FN4 E.g. see the comments of Dickson J. in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 (S.C.C.), at 236.

FN5 Section 116 of the *Courts of Justice Act*, R.S.O. 1990, c. [C.]43 provides for periodic payment and review of damages on consent of the parties and in one other very limited circumstances.

FN6 The arguments for and against one time lump sum payments are set out in Waddams, *The Law of Damages* (loose leaf edition) 3.10-3.260; and in *The Report on Compensation for Personal Injuries and Death, Ontario Law Reform Commission* (1987) chap. 5. The majority of the Commission did not favour a periodic payment scheme.

FN7 In *Tiwana v. Popove* (1987), 23 B.C.L.R. (2d) 392 (B.C. S.C.), the court reopened the trial after it had delivered its reasons for judgment, set aside its reasons and allowed the plaintiff to call further evidence concerning certain medical evidence which had developed after the trial had ended. In that case, however, formal judgment had not been entered when the plaintiff moved to set aside the reasons and call further evidence. A trial judge has a wide discretion to permit the reopening of a case prior to the entering of judgment: *Castlerigg Investments Inc. v. Lam* (1991), 2 O.R. (3d) 216 (Ont. Gen. Div.).

FN8 Leitch J. was concerned with a judgment approving a settlement, however, if she is correct in holding that the best interests of the child are paramount, I see no reason why a judgment following a trial could not also be set aside if subsequent events showed that the child had been under-compensated by the amount awarded at trial.

FN9 The *parens patriae* jurisdiction over minors extends beyond claims to which minors are a party. It also protects others who are under a legal disability: See *Eve, Re* (1986), 31 D.L.R. (4th) 1 (S.C.C.), at 13-28; Rule 7. I refer only to minors, and only to the exercise of the *parens patriae* jurisdiction in the context of proceedings in which a minor is a party because those are the circumstances which operate in this case.

FN10 *Steeves v. Fitzsimmons* (1975), 11 O.R. (2d) 387 (Ont. H.C.) provides an interesting approach to this problem. The settlement approved by the court provided that the minor could apply to vary the judgment at any time before his seventh birthday.

FN11 *Tepperman v. Rosenberg* (1985), 48 C.P.C. 317 (Ont. H.C.) is more on point than *Makowka*. In that case an infant plaintiff moved before O'Leary J. to set aside an order of Craig J. approving a settlement. The infant relied on evidence that was not before Craig J. O'Leary considered the fresh evidence so that he could decide whether the settlement was in the infant's best interests. He held that it was and dismissed the motion. As the fresh evidence did not affect the result, O'Leary did not have to decide whether he could have set aside the judgment of Craig J. solely on the basis that the new evidence suggested that the child's best interests were not served. The concluding paragraphs of his reasons (p. 320) suggest he would have set the judgment aside if he throught the fresh evidence supported the conclusion that it was not in the child's best interests. In my view, it would have been wrong to do so without first considering the other relevant factors.

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TAB 3

1996 CarswellMan 200, 109 Man. R. (2d) 298

Morrissette v. Performax Systems Ltd.

Susan Morrissette (Plaintiff) and Performax Systems Ltd., Pat Phillips, Clifford Phillips, and Gordon Phillips (Defendants)

Manitoba Court of Queen's Bench

DeGraves J.

Judgment: May 8, 1996
Docket: Winnipeg Centre CI 95-01-88333

Counsel: *Chris P. Besko*, for plaintiff.

Anthony H. Dalmyn, for Pat Phillips.

Gordon Phillips in person.

No one for Performax Systems and Clifford Phillips.

Subject: Civil Practice and Procedure

Practice --- Judgments and orders — Setting aside — Grounds for setting aside — Fraud, perjury or collusion.

Practice — Judgments and orders — Setting aside — Grounds for setting aside — Fraud, perjury or collusion — Plaintiff suing defendants in Quebec — Defendants not responding and plaintiff obtaining judgment — Plaintiff suing to enforce judgment in Manitoba — Plaintiff obtaining summary judgment in Manitoba — Court refusing to set aside summary judgment based on allegations of fraud — Defendants failing to prove fraud.

Practice --- Judgments and orders — Setting aside — Grounds for setting aside — Irregularity — Insufficient notice or service.

Practice — Judgments and orders — Setting aside — Grounds for setting aside — Irregularity — Insufficient notice or service — Plaintiff suing defendants in Quebec — Defendants not responding and plaintiff obtaining judgment — Plaintiff suing to enforce judgment in Manitoba — Plaintiff obtaining summary judgment in Manitoba — Court not believing defendants' allegation they received no notice of claim — Court refusing to set aside summary judgment.

The plaintiff sued the defendants by writ for damages in the Superior Court of Quebec. Pursuant to an order, the defendants were served the writ by registered mail sent to the corporate defendant's office in Manitoba. The defendants did not respond. The plaintiff filed an affidavit outlining her claim, and obtained judgment for $26,075 plus costs. The plaintiff's solicitor wrote to the defendants, advised them of the judgment and demanded immediate payment. The defendants wrote back and alleged that the judgment obtained in Quebec was not enforceable in Manitoba. The plaintiff sued the defendants in Manitoba on the

Quebec judgment. The defendants alleged that Quebec court did not have jurisdiction, the claim should have been personally served and that the individual defendants were not personally liable. The plaintiff obtained an order for summary judgment. Two of the individual defendants alleged the plaintiff obtained the Quebec judgment by fraud and that they had received no notice of the proceedings commenced in Quebec. The defendants applied to set aside the order granting summary judgment and for a stay of execution.

Held:

Applications dismissed.

Trial courts will not set aside a judgment after it has been perfected by signing and formal entry unless there has been fraud in obtaining the judgment, it was obtained without notice or there was an accidental error or omission on the face of the document. The affidavit sworn by the plaintiff in support of her application for judgment was carefully and precisely drawn. The plaintiff made complete disclosure. There was no misrepresentation or fraud on the part of the plaintiff in obtaining judgment in Quebec or in Manitoba. The allegation of fraud was belated and unfounded. Further, the defendants had notice of the Quebec proceedings. It would require a "suspension of disbelief" to accept the defendants' evidence in respect to fraud, want of notice or new facts arising or discovered after the order was made. Therefore the application should be dismissed.

Cases considered:

Billinkoff's Ltd. v. Mid West Construction (1969) Ltd. (1973), [1974] 2 W.W.R. 100 (Man. Co. Ct.) — *referred to*

International Corona Resources Ltd. v. LAC Minerals Ltd. (1988), 66 O.R. (2d) 610, 54 D.L.R. (4th) 647 (H.C.) [additional reasons at (1988), 66 O.R. (2d) 610 at 630, 54 D.L.R. (4th) 647 at 666 (H.C.)] — *applied*

Lemmon v. Gusola (1991), 5 C.C.L.I. (2d) 13, 50 C.P.C. (2d) 154 (B.C. S.C.) — *referred to*

Lucky Venture Holdings Ltd. v. Dorge (1993), 86 Man. R. (2d) 81 (Q.B.) [additional reasons at (1993), 87 Man. R. (2d) 308 (Q.B.) — *referred to*

Robin Electric Co. v. Lequire, [1979] 5 W.W.R. 754 (Man. Co. Ct.) — *referred to*

Rules considered:

Manitoba, Queen's Bench Rules (1988)

R. 20*referred to*

r. 59.06(1)*considered*

r. 59.06(2)*considered*

Applications by defendant for orders setting aside summary judgment and granting stay of execution.

***De Graves J.*:**

1 The defendants, Pat Phillips and Gordon Phillips (the applicants) apply to have my order pronounced on October 12, 1995 and signed and entered on October 25, 1995 (my order) set aside pursuant to Queen's Bench Rule 59.06(1) and (2) and the

inherent jurisdiction of the Court.

2 Queen's Bench Rule 59.06(1) and (2) are as follows:

Amending

59.06(1) An order that,

(a) contains an error arising from an accidental slip or omission; or

(b) requires amendment in any particular on which the court did not adjudicate;

may be amended on a motion in the proceeding.

Setting aside or varying

59.06(2) A party who seeks to,

(a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;

(b) suspend the operation of an order;

(c) carry an order into operation; or

(d) obtain relief other than that originally awarded;

may make a motion in the proceeding for the relief claimed.

Issue and Criteria

3 Should the Court exercise its discretion on the basis of the applicants' allegations of the plaintiff's fraud or of facts arising or discovered after my order was made.

4 Trial courts will not set aside a judgment after it has been perfected by signing and formal entry unless there has been fraud in obtaining the judgment, it was obtained without notice or there was an accidental error or omission on the face of the document. (*Billinkoff's Ltd. v. Mid West Construction (1969) Ltd.* (1973), [1974] 2 W.W.R. 100 (Man. Co. Ct.), *Lemmon v. Gusola* (1991), 50 C.P.C. (2d) 154 (B.C. S.C.) , *Lucky Venture Holdings Ltd. v. Dorge* (1993), 86 Man. R. (2d) 81 (Q.B., Jewers, J.), *Robin Electric Co. v. Lequire*, [1979] 5 W.W.R. 754 (Man. Co. Ct.), and *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1988), 66 O.R. (2d) 610 (Ont. H.C., Osborne, J.))

5 In *International Corona Resources Ltd. v. LAC Minerals Ltd. supra* the several principles appropriate to applications of this nature where fraud is alleged are summarized at pp. 622 and 623 as follows:

(1) The fraud alleged must be proved on a reasonable balance of probability. The more serious the fraud alleged, the more cogent the evidence going to establish it will have to be to meet the civil onus of proof. The reasonable balance of probabilities is not an inflexible standard of proof.

(2) The proved fraud must be material, that is, it must go to the foundation of the case.

> (3) The evidence of fraud must not have been known at the time of trial to the party seeking to rely upon it on a motion to set aside a trial judgment.
>
> (4) The unsuccessful party is exposed to a test of due or reasonable diligence. ... In my view, the onus is on the moving party to establish due diligence. Evidence cannot be stockpiled during the litigation process to be taken from inventory after an unsuccessful trial or appeal:....
>
> (5) If the fraud alleged is that of a non-party, and if the successful party at trial is not connected with the fraud alleged, the tests to which I have referred must be more stringent than for the fraud of a party. ...
>
> (6) The test imposed upon the unsuccessful party to obtain relevant evidence ... with due diligence, is objective. The questions to be asked are: what did the moving party know, and what ought the moving party to have known?
>
> (7) Delay will defeat a motion to set aside a trial judgment under rule 59.06. ...
>
> (8) Relief under rule 59.06 is discretionary. The conduct of the moving party is relevant.
>
> (9) At the end of the day, the central question to be answered is as stated in *Wentworth v. Rogers* (No. 5) (1986), 6 N.S.W.L.R. 534 at 538:
>
>> ... it must be shown, by the party asserting that a judgment was procured by fraud, that there has been a new discovery of something material, in the sense that fresh facts have been found which, by themselves or in combination with previously known facts, would provide a reason for setting aside the judgment.

History of Proceedings

6 This application has proceeded in a somewhat curious way. For this reason the prior proceedings and events leading to my order must be revisited in order to give some coherence to the subsequent proceedings leading to this application.

Quebec Proceedings

7 On December 17, 1992 the plaintiff sued by writ for damages the defendants in the Superior Court of Quebec in Montreal alleging the defendants' misrepresentation and breach of contract arising out of a written "master distribution agreement" made between the defendant, Performax Systems Ltd. (hereinafter referred to sometimes as Performax) and the plaintiff in Montreal on June 5, 1992.

8 The plaintiff on December 17, 1992 obtained, pursuant to the Quebec Rules of Court, an order for service by registered mail on the defendants of the writ and served by registered mail the writ on or about December 21, 1992 by mailing the writ to all of the defendants to the corporate defendant's office at 4-360 Keewatin Street, Winnipeg, Manitoba, R2X 2Y3. The writ was accompanied by a letter from the plaintiff's solicitor, Irving M. Handelman, notifying the defendants of the claim and the procedure including the warning that judgment could be obtained without further notice if the defendants did not enter an appearance in the Quebec court. The defendants did not respond or in any way "attorn" to the Quebec jurisdiction.

9 The plaintiff applied for and obtained judgment on or about August 7, 1993 for $26,075.00 plus costs and interest against all of the defendants. In support of the application the plaintiff deposed compendiously in a lengthy affidavit dated February 8, 1993 to the facts and circumstances of the negotiations leading to the agreement, of the breach of the agreement, the role of all the defendants and the consequential damages and loss suffered by the plaintiff. The applicants submit that this affidavit was false and constituted fraud entitling the applicants to the relief claimed.

10 On September 27, 1993 the plaintiff's solicitor wrote to all of the defendants at the corporate defendant's address advising of the judgment in these terms:

HANDELMAN, HANDELMAN & SCHILLER

September 27, 1993

WITHOUR PREJUDICE

Performax Systems Ltd.

Marvin Diamond, Pat Phillips

Clifford Phillips & Gordon Phillips

4-360 Keewatin Street

Winnipeg, Manitoba

R2X 2Y3

Dear Sirs:

```
Re: Susan Morrissette
   vs. Yourselves
---------------------
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This is to advise you that on August 17, 1993 judgment was pronounced against each and all of you, corporately and individually and jointly and severally (meaning the each one of you is responsible for the full amount) for $26,075.00 with interest and costs. Interest runs from December 30, 1992. Costs have been taxed in the sum of $503.80.

We enclose a copy of the judgment and the bill of costs.

Unless you immediately contact us with a view to the settlement of this judgment, proceedings will be commenced against you in Manitoba.

Yours very truly,

HANDELMAN, HANDELMAN & SCHILLER

Per: Irving Handelman

11 The defendants responded on September 30, 1993 in these terms:

PERFORMAX SYSTEMS LTD.

September 30, 1993

Handelman, Handelman & Schiller

Advocates

1255 Rue Universite St.

Suite 1610

Montreal, Quebec

H3B 3X3

Attn: *Mr. Irving Handelman*:

Re: *Susan Morrissette*

We acknowledge receipt of your letter dated September 27, 1993 indicating a judgment on behalf of Susan Morrissette within the Province of Quebec.

Under legal advisement, we have no legal obligation to refund any monies to your client. In fact, because of the lack of diligence on your client's part to sell our product, we feel that we have lost substantial profit that would have been generated supplying your client with additional Floor/Bathtub Slip Resistant products.

In addition, we have established that the particular judgment established within the Province of Quebec is not enforceable in the Province of Manitoba; including the fact that it flies in the face of a written agreement between the parties whereby the parties agreed that in the event of any dispute, that the laws of Manitoba and not the Quebec Civil Code would be applicable.

Consequently, should your firm commence any proceedings on behalf of your client, we will defend same vigorously and will request both $5,000.00 in security for costs and legal costs on a solicitor and client basis. In addition, we will commence a Counterclaim for lost profits caused by your client's lack of due diligence.

Please convey our firm position to your client forthwith since you and your associate advocates are now on notice that the Quebec judgment is clearly unenforceable in the Province of Manitoba.

Govern yourself accordingly.

Yours truly,

Performax Systems Ltd.

'Clifford R. Phillips'

Chief Executive Officer

c.c. G. Hook

The Manitoba Proceedings

12 On March 22, 1995 the plaintiff sued the defendants in Manitoba on the Quebec judgment. The statement of claim was served personally on all of the defendants on March 24, 1995.

13 On March 19, 1995 the defendants defended pleading:

1. that the personal defendants were not personally liable as they were only acting as officers of the corporate defendant, and if there was any liability, it would be that of the corporate defendant,

2. that the Quebec judgment was invalid in that the Quebec court has no jurisdiction over the claim,

3. that the claim "...was not personally served on the defendants pursuant to the laws of the Province of Manitoba",

4. that the plaintiff agreed by virtue of the agreement that only the Manitoba court would have jurisdiction,

5. that the defendants did not attorn to the jurisdiction of the Quebec courts, and

6. that the defendants have a good and valid defense to the plaintiff's action on the agreement.

14 The statement of defence did not aver that the plaintiff committed fraud in obtaining the judgment or that the defendants had no notice of the Quebec action.

15 On April 7, 1995 the plaintiff, pursuant to Queen's Bench Rule 20, moved for summary judgment before the Master.

16 The defendants on June 5, 1995 applied, pursuant to Queen's Bench Rule 20, to the learned Master for summary judgment dismissing the plaintiff's claim. The defendant, Clifford Phillips, deposed to an affidavit on June 5, 1995 in support of the defendants' motion and in opposition to the plaintiff's motion averring essentially to what was pleaded in the statement of defence.

17 The learned Master on June 7, 1995 dismissed both applications and gave on July 19, 1995 written reasons in respect to the dismissal of the plaintiff's motion. An order of the dismissals was formally taken out on July 26, 1995.

18 The plaintiff appealed (the time for appeal was enlarged by order). On October 12, 1995 I heard the appeal, the plaintiff being represented by counsel and the defendants being represented by one counsel. I allowed the appeal, granting summary judgment to the plaintiff. I gave oral reasons on October 12, 1995, which I subsequently revised.

19 I said in my revised reasons respecting service and notice:

> The defendants also object to the manner of service ex juris on the defendant. The service was directed to be made by registered mail. The Quebec rules of court permit service ex juris by registered mail as this is clearly a procedural matter. I would refer counsel to the top of page 259 of the *Morguard* decision where the Supreme Court considered and favourably commented on service as being within the jurisdiction of the lex fori.
>
> Accordingly, I find that service by registered mail is not contrary to natural justice. There is no suggestion in the material before me, in any event, that the defendants at the material times were not aware of the Quebec action.

20 My order was signed and entered on October 25, 1995. Shortly after, the plaintiff took execution proceedings including

garnishing the defendant, Pat Phillips' honorarium as a City of Winnipeg councillor.

21 On November 17, 1995 the defendants filed a notice of appeal from my order setting forth essentially the same grounds as argued before me on the Queen's Bench Rule 20 motion.

22 On December 11, 1995 the defendant, Pat Phillips, now through her own and different counsel and on December 13, 1995 the defendant, Gordon Phillips, in person filed this application asserting that the plaintiff obtained the Quebec judgment by fraud and that they had "no knowledge" that the plaintiff had commenced proceedings in Quebec and they had no opportunity to defend on these grounds.

23 The applicants requested a stay of execution pending the appeal which I granted on terms.

24 In support of their application the applicants, Pat Phillips and Gordon Phillips, filed affidavits deposing that the defendant, Clifford Phillips, was the husband to the defendant, Pat Phillips, and the father to the defendant, Gordon Phillips: Clifford Phillips was in charge of the business of the defendant, Performax and Pat Phillips and Gordon Phillips had "limited involvement" in the business and at the material time they had no notice of the Quebec proceedings. They deposed that:

1. They relied on Clifford Phillips' management and assurances as he was the founder, manager and prime mover of the business and he did not advise them of these proceedings.

2. They were not aware of the implication of the Quebec suit and Clifford Phillips assured them that the law suit was being attended to and was in the hands of counsel.

3. It was only after my order that they became aware of the serious consequences of the Quebec action and they should dissociate themselves from the corporate defendant or the defendant, Clifford Phillips.

25 This then accounts in part for their present independent applications to set aside my order.

Credibility and Weight

26 To give any weight to Pat Phillips' and Gordon Phillips' explanation one has to accept that they totally relied on Clifford Phillips and he kept them in the dark about these Quebec proceedings and the Manitoba law suit and that neither he nor the then defendants' counsel communicated with them.

27 The evidence discloses that the defendant, Pat Phillips, is a sophisticated, intelligent and experienced person who has been involved in business, including the corporate defendant's business, in commercial and community enterprises and in the political life of her community and province. She was listed in Performax records as president (cf. affidavit of plaintiff dated March 11, 1996 and Exhibit C, letter dated June 8, 1992 signed by Patricia Phillips, as president of Performax to the plaintiff welcoming "Susan" to the company operation and Performax's 1993 Annual Company Return indicating Patricia Phillips as president and sole shareholder).

28 Gordon Phillips is a businessman, married with dependents, was and is an officer of the defendant, Performax, and has had over time and a close association with or knowledge of Performax and his father's business.

29 Both applicants say that at the material times the defendant, Clifford Phillips, was ill and that Performax was having difficulty with an employee, one Danny Hammond, and it was suggested that he was the one responsible for the present difficulties of Performax.

30 They ask the Court to accept several oversights or lapses in communication. These are *in seriatem*:

1. The defendant, Clifford Phillips, receives the Quebec writ and Handelman's letter and does not advise his wife or son.

2. The defendant, Clifford Phillips, receives Handelman's letter advising of the Quebec judgment and does not advise his wife or son.

3. The defendant, Clifford Phillips, writes to Handelman advising *inter alia* that the Quebec judgment is invalid and does not advise his wife and son.

4. The defendants are sued in Manitoba and all are personally served. Clifford Phillips engages one counsel and all the defendants join in one statement of defence. It is worth repeating that there are no allegations of fraud or that they were not aware of the Quebec proceeding: the only plea in respect to notice is that they were not personally served.

5. The defendants join in "as one" the Queen's Bench Rule 20 proceedings.

6. The defendants filed a notice of appeal on November 2, 1995 from my order urging the same grounds as they did on the summary judgment application before the learned Master or me significantly omitting reference to fraud or absence of notice.

7. The defendant, Gordon Phillips, says in respect to the plaintiff's allegation that the plaintiff, prior to the suit and during the attempted performance of the agreement, had a telephone conversation with him in respect to the French language brochure and that he has "... no recollection of any such conversation." However, he does not deny the conversation. (cf. para. 16 and 17 of affidavit of Gordon Phillips sworn December 13, 1995)

The Plaintiff's Fraud Allegation

31 Both applicants in deposing to their "minimal involvement" in Performax's operations swear that:

> The plaintiff acted with wilful blindness to the facts and the law in naming me as a defendant and in signing judgment against me. She acted fraudulently, and the judgment against me was obtained by fraud. (cf. para. 17 of affidavit of Patricia Phillips and para. 19 of affidavit of Gordon Phillips)

32 The plaintiff in response in her affidavits of February 12, 1996 and March 28, 1996 produces documents establishing and confirming *inter alia* the fact that:

1. Patricia Phillips and Gordon Phillips were respectively president of and officer in charge of administrative services for Performax.

2. Patricia Phillips was in 1992 the sole shareholder and president of Performax.

3. Generally Patricia Phillips was very much involved with Performax and its operations including promotion and researching of product.

Decision

33 The plaintiff's affidavit dated February 8, 1992 in support of her application for judgment is carefully and precisely drawn. She deposes that she believes and maintains that the personal defendants, by virtue of their association with the corporate defendant and with each other and with the corporate defendant's representatives in Quebec are personally and vicariously liable for the acts of each other and the acts of the corporation and produces documents which support her claim. The

plaintiff has made complete disclosure. There was no misrepresentation or fraud on the part of the plaintiff obtaining judgment in Quebec or in Manitoba.

34 I find the allegation of fraud is belated and unfounded. I will consider this aspect further in assessing costs.

35 I am satisfied the applicants, Pat Phillips and Gordon Phillips, had notice of the Quebec proceedings and they decided to proceed with their co-defendant on the basis as set forth in Performax's letter of September 30, 1995 to Mr. Handelman, namely the Quebec courts had no jurisdiction, the Quebec judgment was unenforceable in Manitoba and the defendants would defend and counterclaim on the merits in Manitoba. When these plans did not turn out the applicants took this application.

36 It would require from me a "suspension of disbelief" to accept the defendants, Pat Phillips' and Gordon Phillips', evidence in respect to fraud, want of notice or new facts arising or discovered after my order was made and entered.

37 Of the several criteria enunciated at pp. 2, 3 and 4 supra, I find that the defendants, Pat Phillips and Gordon Phillips, have not proved or cannot rely on fraud because they have not satisfied criteria 1, 3, 4, 6, 7 and 9 as set forth in *International Corona* supra.

38 The applications are dismissed with costs in favour of the plaintiff in accordance with a Class IV proceeding, and if they cannot be agreed to, I will fix them.

Applications dismissed.

END OF DOCUMENT

TAB 4

2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

Regal Constellation Hotel Ltd., Re

In the Matter of the Receivership of Regal Constellation Hotel Limited, of the City of Toronto, in the Province of Ontario

And In the Matter of s. 41 of the Mortgages Act, R.S.O. 1990 c. M.40

HSBC Bank of Canada (Applicant) and Deloitte & Touche Inc. (Receiver / Respondent in Appeal) and Regal Pacific (Holdings) Limited (Respondent / Appellant) and 2031903 Ontario Inc. (Purchaser / Respondent in Appeal) and Aareal Bank A.G. (Intervenor)

Ontario Court of Appeal

Laskin, Feldman, Blair JJ.A.

Heard: May 13, 14, 2004
Judgment: June 28, 2004
Docket: CA C41258, C41257

Proceedings: affirming *Regal Constellation Hotel Ltd., Re* (2004), 2004 CarswellOnt 428 (Ont. S.C.J. [Commercial List])

Counsel: J. Brian Casey, John J. Pirie for Deloitte & Touche Inc.

Robert Rueter, A. Chan for Regal Pacific (Holdings) Limited

Tim Gilbert, Sandra Barton for 2031903 Ontario Inc.

James P. Dube for Aareal Bank A.G.

Subject: Contracts; Property; Corporate and Commercial; Insolvency

Sale of land --- Judicial sale — Vesting order

Vesting order is court order allowing court to effect change of title directly — Vesting order is also conveyance of title vesting interest in real or personal property in party entitled thereto under order — In its capacity as order, vesting order is in ordinary course subject to appeal — In Ontario, filing of notice of appeal does not automatically stay order and, in absence of stay, it remains effective and may be registered on title under the land titles system — Once vesting order that has not been stayed is registered on title, it is effective as registered instrument and it cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under land titles system.

Cases considered by *Blair J.A.*:

Boucher v. Public Accountants Council (Ontario) (2004), 2004 CarswellOnt 2521 (Ont. C.A.) — referred to

Chippewas of Sarnia Band v. Canada (Attorney General) (2000), 2000 CarswellOnt 4836, 51 O.R. (3d) 641, 195 D.L.R. (4th) 135, 139 O.A.C. 201, 41 R.P.R. (3d) 1, [2001] 1 C.N.L.R. 56 (Ont. C.A.) — considered

Durrani v. Augier (2000), 2000 CarswellOnt 2807, 190 D.L.R. (4th) 183, 50 O.R. (3d) 353, 36 R.P.R. (3d) 261 (Ont. S.C.J.) — considered

Foulis v. Robinson (1978), 21 O.R. (2d) 769, 92 D.L.R. (3d) 134, 8 C.P.C. 198, 1978 CarswellOnt 466 (Ont. C.A.) — referred to

National Life Assurance Co. of Canada v. Brucefield Manor Ltd. (February 23, 1999), Doc. C24863, M20859 (Ont. C.A.) — followed

R.A. & J. Family Investment Corp. v. Orzech (1999), 121 O.A.C. 312, 1999 CarswellOnt 1829, 44 O.R. (3d) 385, 27 R.P.R. (3d) 230 (Ont. C.A.) — referred to

Regal Constellation Hotel Ltd., Re (July 4, 2003), Cumming J. (Ont. S.C.J.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — considered

Royal Trust Corp. of Canada v. Karenmax Investments Inc. (1998), 1998 CarswellAlta 959, 231 A.R. 101, 71 Alta. L.R. (3d) 307 (Alta. Q.B. [In Chambers]) — referred to

Toronto Dominion Bank v. Usarco Ltd. (2001), 2001 CarswellOnt 525, 196 D.L.R. (4th) 448, 17 M.P.L.R. (3d) 57, 142 O.A.C. 70, 24 C.B.R. (4th) 303 (Ont. C.A.) — considered

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 100 — considered

Land Titles Act, R.S.A. 2000, c. L-4

s. 191 — referred to

Land Titles Act, R.S.O. 1990, c. L.5

Generally — referred to

Pt. IX — referred to

Pt. X — referred to

s. 25 — referred to

s. 57 — referred to

s. 57(13) — referred to

s. 69 — referred to

s. 69(1) — considered

s. 78 — referred to

s. 78(4) — considered

ss. 155-157 — referred to

Regulations considered:

Land Titles Act, R.S.O. 1990, c. L.5

General, O. Reg. 26/99

Generally

s. 4

APPEAL by company from judgment reported at *Regal Constellation Hotel Ltd., Re* (2004), 2004 CarswellOnt 428, 50 C.B.R. (4th) 253 (Ont. S.C.J. [Commercial List]), approving conduct of receiver.

***Blair J.A.*:**

1 Regal Pacific (Holdings) Limited is the 100% shareholder of Regal Constellation Hotel Limited, the company that operated the Regal Constellation Hotel near Pearson Airport in Toronto. The hotel is bankrupt and in receivership.[FN1]

2 Deloitte & Touche Inc., the receiver, has agreed to sell the assets of the hotel to 2031903 Ontario Inc. ("203"). The sale was approved, and a vesting order issued, by Sachs J. on December 19, 2003. Following a hearing on January 15, 2004, Farley J. approved the payment of $23,500,000 from the sale proceeds to the hotel's secured creditor, HSBC Bank of Canada ("HSBC"), and as well approved the conduct of the receiver in the receivership and passed its accounts.

3 This appeal involves an attempt by Regal Pacific, in its capacity as shareholder of the bankrupt hotel, to set aside the orders of Sachs J. and Farley J., and thus to set aside the sale transaction between the receiver and 203. It is based upon the argument that the receiver failed to disclose to Regal Pacific and to Sachs J. the name of one of the members of the consortium lying behind the purchaser, 203, and that this failure to disclose tainted the fairness and integrity of the receivership process to such an extent that it must be set aside. Farley J. was made aware of the information. However, his failure to grant an adjournment of the hearing respecting approval of the receiver's conduct in the face of

Regal Pacific's fresh discovery of the information, and his conclusion that the information was irrelevant to the receiver's duties with respect to the sale process, are said to constitute reversible error.

4 In a separate motion 203 also seeks to quash the appeal on the ground it is moot.

5 For the reasons that follow, I would quash the appeal from the vesting order and I would otherwise dismiss the appeals.

Facts

6 The hotel has been in financial difficulties for some time. It is old and in need of repair and renovation. Because the premises no longer comply with the requisite fire code regulations, and because liability insurance is difficult to obtain, they have been closed for some time. In addition, the hotel has suffered from the decrease in air passenger traffic following the events of September 11, 2001, and the aftermath of the SARS outbreak in Toronto in early 2003. It is thus an asset of declining value.

7 At the time of the appointment of the receiver, the hotel was in default in its payments to HSBC, which was owed $33,850,000. In fact, HSBC had made demand for repayment in November 2001 and as a result Regal Pacific and the hotel had commenced searching for a purchaser. They retained Colliers International Hotels ("Colliers") to market the hotel.

8 Several bids were received, and in the fall of 2002 a share-purchase transaction was entered into between Regal Pacific and a company controlled by the Orenstein Group. The purchase price was $45 million and included the purchase of Regal Pacific's shares in the hotel together with other assets. The transaction was not completed, however, and Regal Pacific and the Orenstein Group are presently in litigation as a result. The existence of this litigation is not without significance in these proceedings.

9 When the foregoing transaction failed to close, in June 2003, the bank commenced its application for the appointment of a receiver. On July 4, 2003, Cumming J. granted the receivership order [*Regal Constellation Hotel Ltd., Re* (July 4, 2003), Cumming J. (Ont. S.C.J.)].

10 The receiver and Colliers continued the efforts to market the hotel. The receiver's supplemental report indicates that "an investment profile of the hotel was distributed to more than five hundred potential investors, a Confidential Information Memorandum was distributed to eighty potential purchasers, tours of the Hotel were conducted for twenty-three parties, and a Standard Offer to Purchase Form was provided to 42 purchasers". As of August 28, 2003, the deadline for the submission of binding offers, 13 offers had been received. After reviewing these offers with HSBC, the receiver accepted an offer from 203 to purchase the assets of the hotel for $25 million, subject to court approval (the "First 203 Offer").

11 A summary of the thirteen bids setting out their proposed purchase prices, the deposits made with them, and their conditions, is set out in Appendix 1 of the receiver's supplemental report. Five of the bids were not accompanied by a deposit, as required by the terms of the sale process approved by the court. The receiver went back to each of the bidders who had not provided a deposit and gave them a few more days to submit the deposit. None of them did so.

12 The First 203 Offer was for the fourth highest purchase price. It was accompanied by a $1 million deposit, as required, and it was unconditional. The second and third highest bids were not accompanied by the requisite deposit. The highest bid, by Hospitality Investors Group LLC ("HIG") was for $31 million. While the HIG bid was accompanied by a $1 million non-certified deposit cheque, however, the receiver was advised that the deposit cheque submitted could not be honoured if presented for payment, and the offer was withdrawn by HIG.

13 HIG is a company controlled by the Orenstein Group. The withdrawal of its $31 million offer is the subject of some controversy in the proceedings, and I shall return to that turn of events in a moment.

14 Of the remaining bids, one was rejected as inordinately low. Three of the remaining six were for the same $25 million purchase price as that offered by 203. They were rejected because they were subject to conditions and the First 203 Offer was not. The rest were rejected because their proposed purchase price was lower.

15 On September 9, 2003, Cameron J. approved the sale to 203. At this hearing Regal Pacific expressed a concern that 203 might be connected to the Orenstein Group. Counsel for Regal Pacific states that Cameron J. was advised by counsel for the receiver that there was no such connection. It is not clear on the record whether this statement was accurate in fact, but there is no suggestion that counsel for the receiver was at that time aware of any Orenstein Group connection to 203. Mr. Orenstein's personal involvement did not seem to come until sometime later in October, following the failure of the First 203 Offer to close.

16 At the receiver's request Cameron J. also granted an order sealing the receiver's supplemental report respecting the sale process in order to protect the confidential information regarding the pricing and terms of the other bids outlined above, in case the First 203 Offer did not close and it proved necessary for the receiver to renegotiate with the other offerors. This meant that Regal Pacific was not privy to the information contained in it.

17 The First 203 Offer did not close, as scheduled, on October 10. This led to proceedings by the receiver to terminate the agreement and for the return of the $2 million in deposit funds that had been submitted by 203. These proceedings were settled, with the commercial list assistance of Farley J. But the settled transaction did not close either. As a result of the minutes of settlement, the First 203 Offer was terminated and 203 forfeited a $2.5 million deposit plus $500,000 in carrying costs.

18 The receiver renewed its efforts to find a purchaser for the hotel. In what was intended to be a second round of bidding, it instructed Colliers to continue its search. Between Colliers and the receiver all thirteen of the original bidders referred to above, including 203, were canvassed again in an effort to generate new offers. Except for a second proposal from 203 ("the Second 203 Offer"), none was forthcoming.

19 The Second 203 Offer was for $24 million. It was again unconditional and this time was buttressed by a $20 million credit facility provided by the intervenor, Aareal Bank A.G. It was also accompanied by a certified and non-refundable deposit cheque for $2 million. The receiver was concerned that the market for the hotel was in a state of steady decline and that the creditors' positions would only worsen if a sale could not be completed expeditiously. With a purchase price of $24 million, HSBC would be suffering a shortfall on its secured debt of approximately $9 million; in addition there are unsecured creditors of the hotel with claims exceeding $2 million. As the receiver had not been able to generate any other new offers at a price comparable to the $24 million, and Colliers had not been able to identify any new purchasers, the receiver accepted the Second 203 Offer and entered into a new agreement with 203 on December 9, 2003, with a projected closing date of January 5, 2004. Given the $3 million in deposits that 203 had previously forfeited, the receiver views the purchase price as being the equivalent of $27 million.

20 On December 19, 2003, Sachs J. approved the sale of the hotel to 203. She also granted a vesting order pursuant to which title to the hotel would be conveyed to 203 on closing. The transaction closed on January 6, 2004. 203 paid the receiver $24 million and registered the vesting order on title. Aareal Bank's $20 million advance is secured on title based on that vesting order. The hotel's indebtedness to HSBC Bank of Canada has been paid down by $20.5 million from the sale proceeds.

21 A few days later Regal Pacific learned from an article in the Toronto Star newspaper that the hotel had been sold "to the Orenstein Group". A motion was pending before Farley J. on January 15, 2004, for approval of the receiver's conduct and related relief. Regal sought an adjournment of that motion on the basis of the prior non-disclosure

of the Orenstein Group's involvement in the 203 offers. When the adjournment request was taken under advisement, Regal Pacific opposed approval of the receiver's conduct on the basis that the failure to advise it and Sachs J. of the Orenstein Group's involvement tainted the fairness and integrity of the process. Farley J. refused the adjournment request, and approved the receiver's conduct and accounts. He concluded that the identity of the principals behind the purchaser was not material. In this regard he said:

> While Mr. Rueter alludes to "the sales process was manipulated", I do not see that anything that the Receiver did was in aid of, or assisted such (as alleged). The identity of who the principals were was not in issue so long as a deal could be closed without a vendor take back mortgage.
>
> . . . . .
>
> It seems to me that the Receiver acted properly and within the mandate given it from time to time by the court. It fulfilled its prime purpose of obtaining as high a value [as] it could for the hotel after an approved marketing campaign. Vis-à-vis the Receiver and that duty, it does not appear to me that the identity of the principals, but more importantly that there was an overlap regarding the aborted purchaser from Holdings prior to the receivership, HIG and 203, is of any moment.

Standard of Review

22 The orders appealed from are discretionary in nature. An appeal court will only interfere with such an order where the judge has erred in law, seriously misapprehended the evidence, or exercised his or her discretion based upon irrelevant or erroneous considerations or failed to give any or sufficient weight to relevant considerations.

23 Underlying these considerations are the principles the courts apply when reviewing a sale by a court-appointed receiver. They exercise considerable caution when doing so, and will interfere only in special circumstances - particularly when the receiver has been dealing with an unusual or difficult asset. Although the courts will carefully scrutinize the procedure followed by a receiver, they rely upon the expertise of their appointed receivers, and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations. The court will assume that the receiver is acting properly unless the contrary is clearly shown. See *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.).

24 In *Soundair*, at p. 6, Galligan J.A. outlined the duties of a court when deciding whether a receiver who has sold a property has acted properly. Those duties, in no order of priority, are to consider and determine:

> (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> (b) the interests of the parties;
>
> (c) the efficacy and integrity of the process by which offers are obtained; and
>
> (d) whether there has been unfairness in the working our of the process.

25 In *Soundair* as well, McKinlay J.A. emphasized the importance of protecting the integrity of the procedures followed by a court-appointed receiver "in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers".

26 A court-appointed receiver is an officer of the court. It has a fiduciary duty to act honestly and fairly on behalf of all claimants with an interest in the debtor's property, including the debtor (and, where the debtor is a corporation,

its shareholders). It must make candid and full disclosure to the court of all material facts respecting pending applications, whether favourable or unfavourable. See *Toronto Dominion Bank v. Usarco Ltd.* (2001), 196 D.L.R. (4th) 448 (Ont. C.A.), per Austin J.A. at paras. 28 - 31, and the authorities referred to by him, for a more elaborate outline of these principles. It has been said with respect to a court-appointed receiver's standard of care that the receiver "must act with meticulous correctness, but not to a standard of perfection": *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999) at p. 181, cited in *Toronto Dominion Bank v. Usarco Ltd.*, *supra*, at p. 459.

27 The foregoing principles must be kept in mind when considering the exercise of discretion by the motions judges in the context of these proceedings.

Analysis

The Vesting Order and the Motion to Quash

28 Aareal Bank A.G. and 203 sought to quash the appeal on the basis that it is moot. They argue that once the vesting order granted by Sachs J. was registered on title - no stay having been obtained - its effect was spent, the court's power to set it aside is extinguished, and no appeal can lie from it. Because all the parties were prepared to argue the appeal, we heard the submissions on the motion to quash during the argument of the appeal on the merits.

29 In my opinion the appeal from the vesting order should be quashed because the appeal is moot.

30 Sachs J.'s order of December 19, 2003 granted a vesting order directing the land registrar at Toronto, in the land titles system, to record 203 as the owner of the hotel. The order was subject to two conditions, namely, that 203 pay the purchase price and comply with all of its obligations on closing of the transaction and that the vesting order be delivered to 203. These conditions were complied with on January 6, 2004, and the vesting order was registered on title on that date. Aareal Bank registered its $20 million mortgage against the title to the hotel property following registration of the vesting order.

31 In Ontario, the power to grant a vesting order is conferred by the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 100, which provides as follows:

> A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

32 The vesting order itself is a creature of statute, although it has its origins in equitable concepts regarding the enforcement of remedies granted by the Court of Chancery. Vesting orders were discussed by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 195 D.L.R. (4th) 135 (Ont. C.A.), at 227, where it was observed that:

> Vesting orders are equitable in origin and discretionary in nature. The Court of Chancery made *in personam* orders, directing parties to deal with property in accordance with the judgment of the court. Judgments of the Court of Chancery were enforced on proceedings for contempt, followed by imprisonment or sequestration. *The statutory power to make a vesting order supplemented the contempt power by allowing the Court to effect the change of title directly*: see McGhee, *Snell's Equity* 30th ed., (London: Sweet and Maxwell, 2000) at 41-42 [emphasis added].

33 A vesting order, then, has a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order). This duality has important ramifications for an appeal of the original court decision granting the vesting order because, in my view, once the vesting order has been registered on title its

attributes as a conveyance prevail and its attributes as an order are spent; the change of title has been effected. Any appeal from it is therefore moot.

34 I reach this conclusion for the following reasons.

35 In its capacity as an order, a vesting order is in the ordinary course subject to appeal. In Ontario, however, the filing of a notice of appeal does not automatically stay the order and, in the absence of such a stay, it remains effective and may be registered on title under the land titles system - indeed, the land registrar is required to register it on a proper application to do so: see the *Land Titles Act*, R.S.O. 1990, c. L.5, ss.25 and 69. In this respect, an application for registration based on a judgment or court order need only be supported by an affidavit of a solicitor deposing that the judgment or order is still in full force and effect and has not been stayed; there is no requirement - as there is in some other jurisdictions[FN2] - to show that no appeal is pending and that all appeal rights have terminated: see *Ontario Land Titles Regulations*, O. Reg 26/99, s. 4.

36 Appeal rights may be protected by obtaining a stay, which precludes registration of the vesting order on title pending the disposition of the appeal. Do those appeal rights remain alive, however, where no stay has been obtained and the order has been registered?

37 In answering that question I start with the provisions of ss. 69 and 78 of the *Land Titles Act*, which deal, respectively, with vesting orders (specifically) and the effect of registration (generally). They state in part, as follows:

> 69(1) Where by order of a court of competent jurisdiction ... registered land or any interest therein is stated by the order ... to vest, be vested or become vested in, or belong to ... any person other than the registered owner of the land, the registered owner shall be deemed for the purposes of this Act to remain the owner thereof,
>
> > (a) until an application to be registered as owner is made by or on behalf of the ... other person in or to whom the land is stated to be vested or to belong; or
> >
> > (b) until the land is transferred to the ... person by the registered owner, as the case may be, in accordance with the order or Act.
>
> 78 (4) *When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register* [italics added].

38 Upon registration, then, a vesting order is deemed "to be embodied in the register and to be effective according to its nature and intent". Here the nature and effect of Sachs J.'s vesting order is to transfer absolute title in the hotel to 203, free and clear of encumbrances.[FN3] When it is "embodied in the register" it becomes a creature of the land titles system and subject to the dictates of that regime.

39 Once a vesting order that has not been stayed is registered on title, therefore, it is effective as a registered instrument and its characteristics as an order are, in my view, overtaken by its characteristics as a registered conveyance on title. In a way somewhat analogous to the merger of an agreement of purchase and sale into the deed on the closing of a real estate transaction, the character of a vesting order as an "order" is merged into the instrument of conveyance it becomes on registration. It cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under the land titles system. Those means no longer include an attempt to impeach the vesting order by way of appeal from the order granting it because, as an order, its effect is spent. Any such appeal would accordingly be moot.

40 This interpretation of the effect of registration of a vesting order is consistent with the purpose of the land titles

regime and the philosophy lying behind it. It ensures that disputes respecting the registered title are resolved under the rubric of that regime and within the scheme provided by the *Land Titles Act*. This promotes confidence in the system and enhances the certainty required in commercial and real estate transactions that must be able to rely upon the integrity of the register.

41 Donald H.L. Lamont described the purposes of the land titles system very succinctly in his text, *Lamont on Real Estate Conveyancing*, 2nd ed. looseleaf (Toronto: Carswell, 1991) vol. 1 at 1-10, as follows:

> The basis of the system is that the Act authoritatively establishes title by declaring, under a guarantee of indemnity, that a certain parcel of land is vested in a named person, subject to some special circumstances. Early defects are cured when the land is brought under the land titles system, and thenceforth investigation of the prior history of the title is not necessary.
>
> *No transfer is effective until recorded; once recorded, however, the title cannot, apart from fraud, be upset* [italics added].

42 Epstein J. elaborated further on the origins, purpose and philosophy behind the regime in *Durrani v. Augier* (2000), 50 O.R. (3d) 353 (Ont. S.C.J.). At paras. 40 - 42 she observed:

> [40] The land titles system was established in Ontario in 1885, and was modeled on the English Land Transfer Act of 1875. It is currently known as the Land Titles Act, R.S.O. 1990, c. L.5. Most Canadian provinces have similar legislation.
>
> [41] The essential purpose of land titles legislation is to provide the public with the security of title and facility of transfer: Di Castri, Registration of Title to Land, vol. 2 looseleaf (Toronto: Carswell, 1987) at p. 17-32. The notion of title registration establishes title by setting up a register and guaranteeing that a person named as the owner has perfect title, subject only to registered encumbrances and enumerated statutory exceptions.
>
> [42] The philosophy of land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. These principles form the doctrine of indefeasibility of title and is the essence of the land titles system: Marcia Neave,
>
> "Indefeasibility of Title in the Canadian Context" (1976), 26 U.T.L.J. 173 at p. 174.

43 Certainty of title and the ability of a bona fide purchaser for valuable consideration to rely upon the title as registered, without going behind it to examine the conveyance, are, therefore, the hallmarks of the land titles system. The transmogrification of a vesting order into a conveyance upon registration is consistent with these hallmarks. It does not mean that such an order, once registered on title, is absolutely immune from attack. It simply means that any such attack must be made within the parameters of the *Land Titles Act*.

44 That legislation does present a scheme of remedies in circumstances where there has been a wrongful entry on the registry by reason of fraud or of misdescription or because of other errors of certification of title or entry on the registry. The remedies take the form of damages or compensation from the assurance fund established under the Act or, in some instances, rectification of the register by the Director of Titles and/or the court: see, for example, s. 57 (Claims against the Fund), Part IX (Fraud) and Part X (Rectification). In this scheme, good faith purchasers or mortgagees who have taken an interest in the land for valuable consideration and in reliance on the register, are protected,[FN4] in keeping with the motivating principles underlying the land titles system. It has been held that there is

no jurisdiction to rectify the register if to do so would interfere with the registered interest of a *bona fide* purchaser for value in the interest as registered: see *R.A. & J. Family Investment Corp. v. Orzech* (1999), 44 O.R. (3d) 385 (Ont. C.A.); and *Durrani v. Augier*, *supra*, at paras. 49, 75 and 76.

45 Vesting orders properly registered on title, then - like other conveyances - are not immune from attack. However, any such attack is limited to the remedies provided under the *Land Titles Act* and no longer may lie by way of appeal from the original decision granting the vesting order. Title has effectively been changed and innocent third parties are entitled to rely upon that change. The effect of the vesting order *qua* order has been spent.

46 Johnstone J., of the Alberta Court of Queens Bench, came to a similar conclusion -although not based upon the same reasoning - in *Royal Trust Corp. of Canada v. Karenmax Investments Inc.* (1998), 71 Alta. L.R. (3d) 307 (Alta. Q.B. [In Chambers]). She refused to interfere with a vesting order granted by the master in the context of a receivership sale, stating (at para. 22, as amended):

> Accordingly, because the Order of Master Funduk has been entered, and no stay of execution was sought nor granted, the Order acts as a transfer of title, which having been registered at the Land Titles Office, extinguishes my ability to set aside the Order, absent any err [*sic*] in fact or law by the learned Master. ....

47 In a brief three-paragraph endorsement this court granted an unopposed motion to quash an appeal from an order approving a sale by a receiver in *National Life Assurance Co. of Canada v. Brucefield Manor Ltd.*, [1999] O.J. No. 1175 (Ont. C.A.). While a vesting order was involved, it does not appear to have been the subject of the appeal. The appeal was quashed. The sale order had been made in May 1996, a motion to stay the order pending appeal had been dismissed in August, and the sale had closed and a vesting order had been granted in November of that year. The proceeds of sale had been distributed. "Against this background", Catzman J.A. noted, "we agree with [the] submission that the order under appeal is spent".

48 This decision was based on the global situation before the court, not on the narrower premise that the vesting order had been registered and the appeal was therefore moot. I am satisfied, based on the foregoing analysis, however, that the narrower premise is sound.

49 I do not mean to suggest by this analysis that a litigant's legitimate rights of appeal from a vesting order should be prejudiced simply because the successful party is able to run to the land titles office and register faster than the losing party can run to the appeal court, file a notice of appeal and a stay motion and obtain a stay. These matters ought not to be determined on the basis that "the race is to the swiftest". However, there is no automatic stay of such an order in this province, and a losing party might be well advised to seek a stay pending appeal from the judge granting the order, or at least seek terms that would enable a speedy but proper appeal and motion for a stay to be launched. Whether the provisions of s. 57 of the *Land Titles Act* (Remedy of person wrongfully deprived of land), or the rules of professional conduct, would provide a remedy in situations where a successful party registers a vesting order immediately and in the face of knowledge that the unsuccessful party is launching an appeal and seeking a timely stay, is something that will require consideration should the occasion arise. It may be that the appropriate authorities should consider whether the Act should be amended to bring its provisions in line with those contained in the Alberta legislation, and referred to in footnote 2 above.

50 The foregoing concerns do not change the legal analysis of the effect of registration of a vesting order outlined above, however, and I conclude that the appeal from the vesting order is moot.

The Appeals on the Merits

51 Even if I am in error respecting the mootness of the appeal from the vesting order, the appeal from it and from the approval orders must be dismissed on their merits. On behalf of Regal Pacific, Mr. Rueter highlights the facts

concerning the Orenstein Group's involvement in the failed $45 million share purchase transaction, which was followed by the receivership, the sudden withdrawal by HIG (also an Orenstein company) of its $31 million bid on September 2, 2003 - just the day before the First 203 Offer for $25 million was submitted - and the involvement of the Orenstein Group in that First (and subsequent) 203 Offer. He forcefully argues that the Orenstein participation in the 203 Offers should have been disclosed to Regal Pacific and to Sachs J., and submits that had that disclosure been made Sachs J. may have declined to approve the Second 203 Offer. The non-disclosure tainted the receivership sale process to the extent that its fairness and integrity have been jeopardized, he concludes, and accordingly the sale must be set aside.

52 On behalf of the receiver, Mr. Casey acknowledges that the Orenstein involvement was not disclosed, even after the receiver became aware of it (which, he submits, was not until the time of the Second 203 Offer). He concedes that "it would have been nice" if the receiver had disclosed the information, but submits it was under no legal obligation to do so as, in its view, the information was not material to the sale process. The sale process was carried out in good faith in accordance with the duties and obligations of the receiver, and both of the 203 Offers represented the best offers available at the time of their acceptance - and, in the case of the Second 203 Offer, the *only* offer available. The transaction is in the best interests of all concerned, he contends. The orders should not be set aside.

53 203 and the intervenor, Aareal Bank A.G., support the receiver's position. On behalf of 203 Mr. Gilbert argues in addition that 203 is a *bona fide* purchaser of the hotel for value, that it has paid its deposit and purchase price and registered its interest through the vesting order on title, and that $20 million has been advanced by Aareal Bank A.G. on the strength of the registered vesting order. The transaction cannot be overturned because once the vesting order has been registered it is spent and any appeal from the order is therefore moot. Mr. Dube advanced a similar argument on behalf of Aareal Bank A.G.

54 I do not accept the argument advanced by the appellant.

55 In my view, the fact that the Orenstein Group is involved in the 203 bid is not material to the sale process conducted by the receiver. I agree with the conclusions of Farley J., recited above, in that regard.

56 Whatever may be the rights and obligations between Regal Pacific and the Orenstein Group with respect to the $45 million share purchase transaction, as determined in the pending litigation between them, the facts relating to that transaction are of little more than historical interest in the context of the receivership sale. The hotel was not bankrupt and in receivership, or closed, at that time. For the various reasons outlined earlier, the hotel is an asset progressively declining in value, and it is not surprising that the business may have attracted a higher offer in mid-2002 than it did in mid-2003. Moreover, the $45 million transaction involved the purchase of the shares of Regal Pacific rather than the assets of the hotel and, as well, the acquisition of certain other assets. None of the thirteen bids elicited by the receiver remotely approached a purchase price of $45 million. Apart from its indication that the Orenstein Group has an interest in acquiring the hotel, I do not see the significance of this earlier transaction to the sale process conducted by the receiver.

57 I turn, then, to the $31 million HIG bid. It, too, confirms an interest by the Orenstein Group in the Hotel. Mr. Rueter argues that the withdrawal of that bid the day before the First 203 Offer was presented at the lower $25 million price is suspicious, and that the court should have been apprised of what exchange of information occurred between the receiver, HIG and 203 that resulted in the HIG bid being withdrawn and the lower 203 offer going forward as the offer recommended by the receiver. In my view, however, this argument does not assist Regal Pacific.

58 First, there is not a scintilla of evidence to suggest that the receiver participated in any such discussions. Secondly, when the receiver inquired whether the deposit cheque that had been submitted with the HIG offer - and which had not been certified, as required by the court-approved bidding process - could be cashed, the receiver was told the cheque would not be honoured if presented for payment. The receiver would have been derelict in its duties if

it had accepted the HIG bid in those circumstances. Finally, in the absence of some provision in an offer or the terms of the bidding process to the contrary - which was not the case here - a potential purchaser is entitled to withdraw its offer at any time prior to acceptance for any reason, including the belief that the purchaser may be able to obtain the property at a better price by another means. Mr. Rueter conceded that the receiver was not obliged to accept the HIG offer and that he was not asserting a kind of improvident-sale claim for damages based upon the difference in price between the HIG offer and the 203 bid.

59 The stark reality is that after nearly two years of marketing efforts by Colliers, and latterly by Colliers and the receiver, there were no other offers available to the receiver that were superior to the unconditional $25 million First 203 Offer at the time of its acceptance by the receiver and approval by the court. After the failure of the First 203 Offer to close, and in spite of renewed efforts by both Colliers and the receiver, there were *no other* offers available apart from the $24 million Second 203 Offer, which was accepted by the receiver and approved by Sachs J.

60 A persuasive measure of the realistic nature of the 203 offers is the fact that they are supported by HSBC, which stands to incur a shortfall on its security of $9 million. In addition, there are outstanding unsecured creditors with over $2 million in claims. No one except Regal Pacific has opposed the sale.

61 There is simply nothing on the record to suggest that the hotel assets are likely to fetch a price that will come anywhere close to providing any recovery for Regal Pacific in its capacity as shareholder of the hotel. Regal Pacific, therefore, has little, if anything, to gain from re-opening the sale process. Apart from a liability to make some interest payments as part of an earlier agreement in the proceedings, Regal Pacific is not liable under any guarantees for the indebtedness of the hotel. It therefore has little, if anything to lose from opposing the sale, as well. This lends some credence to the respondents' argument that Regal Pacific's opposition to the sale, and this appeal, are driven by tactical motives extraneous to these proceedings and relating to the separate litigation between it and the Orenstein Group concerning the aborted $45 million share purchase transaction.

62 In the circumstances of this case, then, and given the principles courts must apply when reviewing a sale by a court-appointed receiver, as outlined above, I can find no error on the part of Sachs J. or Farley J. in the exercise of their discretion when granting the orders under appeal.

63 I would dismiss the appeals for the foregoing reasons.

Disposition

The Appeals

64 For all of the foregoing reasons, the appeal from the vesting order granted by Sachs J. is quashed, and the appeals from the orders of Sachs J. dated December 19, 2003 approving the sale, and the order of Farley J. dated January 14, 2004, are dismissed.

Costs

65 The respondents and the intervenor are entitled to their costs of the appeal, including the motion to quash, which was included in the argument of the appeal.

66 The receiver and 203 requested that costs be fixed on a substantial indemnity basis - the receiver on the ground that the allegations raised impugned its integrity in the conduct of the receivership, and 203 on the ground that the appeal was futile and brought solely for tactical purposes in an attempt to extract a settlement and at great expense to 203 in terms of uncertainty and carrying costs. I would not accede to these requests. Without in any way questioning the integrity of the receiver in the conduct of the receivership, it seems to me that some of the problems could have

been avoided had the receiver revealed the involvement of the Orenstein Group in the 203 transactions when it first learned that was the case. While I understand 203's frustration at the delay in finalizing the results of the transaction, it cannot be said that the appeal was frivolous and there is nothing in the circumstances to justify an award of costs on the higher scale: see *Foulis v. Robinson* (1978), 21 O.R. (2d) 769 (Ont. C.A.). I would therefore award costs on a partial indemnity scale.

67 Counsel provided us with bills of costs. Regal Constellation sought $57,123.25 on a partial indemnity basis if successful. The receiver asks for $61,919.00 and Aareal Bank requests $12,224.75. These amounts are inclusive of fees, disbursements and GST and seem somewhat high to me. The draft bill submitted by 203 appears to me to be exceedingly high, given the amounts sought by other parties who carried a similar burden, and notwithstanding the importance of the case for 203. 203 asks us to fix its costs in the amount of $137,444.68. Such an award is not justified and would simply not be fair and reasonable in the circumstances, in my view, given the nature and length of the appeal and the issues involved: see *Boucher v. Public Accountants Council (Ontario)*, [2004] O.J. No. 2634 (Ont. C.A.).

68 Costs are awarded, on a partial indemnity basis, as follows:

a) To the receiver, in that amount of $40,000;

b) To 203, in the amount of $40,000; and,

c) To Aareal Bank, in the amount of $12,225.

69 These amounts are inclusive of fees, disbursements and GST.

***Laskin J.A.*:**

I agree.

***Feldman J.A.*:**

I agree.

Appeal dismissed.

FN1 I shall refer to Regal Constellation Hotel Limited as "the Hotel" throughout these reasons.

FN2 See, for example, the Alberta *Land Titles Act* R.S.A. 2000, c. L-4, s. 191, which precludes registration of a judgment or order in the absence of consent, an undertaking not to appeal, or proof that all appeal rights have expired.

FN3 Except certain encumbrances that must remain on title by virtue of the *Land Titles Act*.

FN4 For instance, where an instrument would have been absolutely void if unregistered and rectification is ordered, a person suffering by the rectification is entitled to compensation as provided: s. 57(13). Persons fraudulently procuring an entry on the registry may be convicted of an offence under the Act, and where an innocent purchaser has acquired a charge or interest in the lands while the wrongful entry was subsisting on the lands the land registrar may revest the lands in the rightful owner but subject to the interests so acquired: ss 155-157.

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TAB 5

1973 CarswellOnt 236, [1974] S.C.R. 592, 40 D.L.R. (3d) 371, 11 C.P.R. (2d) 206

Canadian Aero Service Ltd. v. O'Malley

Canadian Aero Service Limited, (Plaintiff) Appellant and Thomas M. O'Malley, J.M. (George) Zarzycki, James E. Wells, Terra Surveys Limited, (Defendants) Respondents

Supreme Court of Canada

Martland, Judson, Ritchie, Spence and Laskin JJ.

Judgment: May 11, 1972
Judgment: May 12, 1972
Judgment: May 15, 1972
Judgment: May 16, 1972
Judgment: May 24, 1972
Judgment: May 25, 1972
Judgment: June 29, 1973

Proceedings: On appeal from the Court of Appeal for Ontario

Counsel: *C.L. Dubin, Q.C.*, *R.W. McKimm* and *R.A. Blair*, for the plaintiff, appellant.

Hon. C.H. Locke, Q.C., and *Gordon Blair*, for the defendant, respondent, Wells.

John P. Nelligan, Q.C., and *Denis Power*, for the defendants, respondents, O'Malley, Zarzycki and Terra Surveys Ltd.

Subject: Intellectual Property; Property; Corporate and Commercial

Corporations --- Directors and officers — Fiduciary duties — Taking of corporate opportunity

Directors and officers — Fiduciary duties — Taking of corporate opportunity.

Use of company's confidential information by former directors, senior officers and their solicitor -- Senior officers owe same duty to corporate employer as director -- Duty continuing after termination of employment -- Liability not dependent upon ability of corporation to take advantage of opportunity -- Fiduciary duty upon director or senior officer one of loyalty, good faith, avoidance of conflict of duty and self-interest -- No general rule for liability since multiplicity of factors must be considered -- Facts surrounding solicitor such that no conclusion of law by which to fix liability.

The judgment of the Court was delivered by *Laskin J.*:

1 This appeal arises out of a claim by the plaintiff-appellant (hereinafter referred to as Canaero) that the de-

fendants had improperly taken the fruits of a corporate opportunity in which Canaero had a prior and continuing interest. The allegation against the defendants O'Malley and Zarzycki is that while directors or officers of Canaero they had devoted effort and planning in respect of the particular corporate opportunity as representatives of Canaero, but had subsequently wrongfully taken the benefit thereof in breach of a fiduciary duty to Canaero. The defendant Wells, who had been a director of Canaero but never an officer, was brought into the action as an associate of the other individual defendants in an alleged scheme to deprive Canaero of the corporate opportunity which it had been developing through O'Malley and Zarzycki; and the defendant Terra Surveys Limited was joined as the vehicle through which the individual defendants in fact obtained the benefit for which Canaero had been negotiating.

2 Canaero failed before Grant J. whose judgment on October 8, 1969, was affirmed by the Ontario Court of Appeal, speaking through MacKay J.A., on June 18, 1971. The trial judge fixed the damages at $125,000 in the event of a successful appeal, and this determination was implicitly endorsed by the Ontario Court of Appeal. The appeal to this Court is taken in the light of concurrent findings of fact on all points touching the course of events, but the Ontario Court of Appeal did not agree with Grant J. that the relationship of O'Malley and Zarzycki to Canaero, by reason of their positions as senior managerial officers, was of a fiduciary character, like that existing between directors and a company; rather, it was of the view that the relationship was simply that of employees and employer, involving no corresponding fiduciary obligations and, apart from valid contractual restriction, no limitation upon post-employment competition save as to appropriation of trade secrets and enticement of customers, of which there was no proof in this case.

3 Canaero was incorporated in 1948 under the *Companies Act* of Canada as a wholly-owned subsidiary of Aero Service Corporation, a United States company whose main business, like that of Canaero and other subsidiaries, was topographical mapping and geophysical exploration. In 1961, the parent Aero and its subsidiaries came under the control of another United States corporation, Litton Industries Inc. O'Malley joined Aero Service Corporation in 1936 and, apart from army service, remained with it until 1950 when he became general manager and president of Canaero whose head office was in Ottawa. He returned to the parent Aero company in 1957, but rejoined Canaero in 1964 as president and chief executive officer, and remained as such until he resigned on August 19, 1966. Acknowledgement and acceptance of the resignation followed on August 26, 1966.

4 Zarzycki, who attained a widely-respected reputation in geodesy, joined Canaero in 1953, soon becoming chief engineer. He was named executive vice-president in 1964 and made a director in March 1965. He resigned these posts on August 22, 1966, and received the acknowledgment and acceptance of his resignation in a letter of August 29, 1966.

5 Wells, a solicitor in Ottawa, knowledgeable about external aid programmes and the opportunities open in that connection to aeroplane companies, became a director of Canaero on March 15, 1950, at the same time as O'Malley. He was never an officer and was, on the evidence, an inactive director. When Survair Limited was incorporated in 1960 at Canaero's instance to provide it with flying services (at first, exclusively, but not so after February 1, 1966), Wells became a shareholder by reason of his association with Canaero. He submitted his resignation as a director of Canaero at the request of Litton Industries Inc. when the latter took control, the resignation to be effective at its pleasure. No such pleasure was indicated, and Wells submitted a resignation on his own on February 5, 1965. There is an uncontested finding that he ceased to be a director after that date.

6 The defendant Terra Surveys Limited was incorporated on August 16, 1966, following a luncheon meeting of O'Malley, Zarzycki and Wells on August 6, 1966, at which the suggestion to form a company of their own was made by Wells to O'Malley and Zarzycki. To Wells' knowledge, the latter were discontented at Canaero by reason of the limitations upon their authority and the scope of independent action imposed by the Litton company, and they also feared loss of position if Canaero should fail to get contracts. Nominal directors and officers of the new company were appointed, but O'Malley and Zarzycki became major shareholders when common stock was issued on September 12, 1966. One share was issued to Wells at this time but he made a further investment in the new company on November 6, 1966. There is no doubt that Terra Surveys Limited was conceived as a company through which O'Malley and

Zarzycki could pursue the same objects that animated Canaero. O'Malley became president of Terra Surveys Limited and Zarzycki became executive vice-president shortly after its incorporation.

7 The legal issues in this appeal concern what I shall call the Guyana project, the topographical mapping and aerial photographing of parts of Guyana (known as British Guiana until its independence on May 25, 1965) to be financed through an external aid grant or loan from the Government of Canada under its programme of aid to developing countries. Terra Surveys Limited, in association with Survair Limited and another company, succeeded in obtaining the contract for the Guyana project which Canaero had been pursuing through O'Malley and Zarzycki, among others, for a number of years. There is a coincidence of dates and events surrounding the maturing and realization of that project, and the departure of O'Malley and Zarzycki from Canaero, their involvement with Wells in the incorporation of Terra Surveys Limited and its success, almost immediately thereafter, in obtaining the contract for the project. The significance of this coincidence is related, first, to the nature of the duty owed to Canaero by O'Malley and Zarzycki by reason of their positions with that company and, second, to the continuation of the duty, if any, upon a severance of relationship.

8 The coincidence aforementioned emerges from a review of the activities of Canaero in respect of the Guyana project. The business in which Canaero and other like companies were engaged involved technical, administrative and even diplomatic capabilities because, in the main, their dealings were with governments, both of countries seeking foreign aid for development and of countries, like United States and Canada, which had programmes for such aid. Companies like Canaero risked initiative and expenditure in preparatory work for projects without any assurance of return in the form of contracts; they saw their business as not only bidding on projects ripe for realization, but as also embracing suggestion and development of projects for which they would later seek approval and contracts to carry them out. In this latter aspect, the development of a project involved negotiation with officials of the country for whose benefit it was intended and the establishment of a receptive accord with a country offering aid for such matters. Of course, a suggested project was more likely to be viewed favourably if its technical and administrative aspects were well worked out in the course of its presentation for governmental approval.

9 Canaero's interest in promoting a project in Guyana for the development of its natural resources, and in particular electrical energy, began in 1961. It had done work in nearby Surinam (or Dutch Guiana) where conditions were similar. It envisaged extensive aerial photography and mapping of the country which, apart from the populated coastal area, was covered by dense jungle. Promotional work to persuade the local authorities that Canaero was best equipped to carry out the topographical mapping was done by O'Malley and by another associate of the parent Aero. A local agent, one Gavin B. Kennard, was engaged by Canaero. In May 1962, Zarzycki spent three days in Guyana in the interests of Canaero, obtaining information, examining existing geographical surveys and meeting government officials. He submitted a report on his visit to Canaero and to the parent Aero company.

10 Between 1962 and 1964 Canaero did magnetometer and electromagnetometer surveys in Guyana on behalf of the United Nations, and it envisaged either the United Nations or the United States as the funding agency to support the topographical mapping project that it was evolving as a result of its contacts in Guyana and Zarzycki's visit and report. Political conditions in Guyana after Zarzycki's visit in May 1962 did not conduce to furtherance of the project and activity thereon was suspended.

11 It was resumed in 1965 when it appeared that funds for it might be made available under Canada's external aid programme. The United States had adopted a policy in this area of awarding contracts to United States firms. The record in this case includes a letter of October 22, 1968, after the events which gave rise to this litigation, in which the Canadian Secretary of State for External Affairs wrote that Canada's external aid policy was to require contractors to be incorporated in Canada, managed and operated from Canada and to employ Canadian personnel; and although preference in awarding external aid contracts was given to Canadian controlled firms, this was not an absolute requirement of eligibility to obtain such contracts. Canaero would hence have been eligible at that time for an award of a contract and, inferentially, in 1966 as well.

12 Zarzycki returned to Guyana on July 14, 1965, and remained there until July 18, 1965. By July 26, 1965, he completed a proposal for topographical mapping of the country, a proposal that the Government thereof might use in seeking Canadian financial aid. Copies went to a Guyana cabinet minister, to the Canadian High Commissioner there and to the External Aid Office in Ottawa. Zarzycki in his evidence described the proposal as more sales-slanted than technical. The technical aspects were none the less covered; for example, the report recommended the use of an aerodist, a recently invented airborne electronic distance-measuring device. Zarzycki had previously urged that Canaero purchase one as a needed piece of equipment which other subsidiaries of Litton Industries Inc. could also use. Canaero placed an order for an aerodist, at a cost of $75,000, on or about July 15, 1966.

13 A few days earlier, on July 10, 1966, to be exact, an internal communication to the acting director-general of the Canadian External Aid Office, one Peter Towe, informed him that the Governments of Guyana and Canada had agreed in principle on a loan to Guyana for a topographical survey and mapping. The Prime Minister of Guyana had come to Ottawa early in July, 1966, for discussion on that among other matters. O'Malley had felt that if the assistance from Canada was by way of a loan Guyana would have the major say in naming the contractor, and this would make Canaero's chances better than if the assistance was by way of grant because then the selection would be determined by Canada. Although a loan was authorized, its terms were very liberal, and it was decided that Canada would select the contractor with the concurrence of Guyana, after examining proposals from a number of designated companies which would be invited to bid. An official of the Department of Mines and Technical Surveys visited Guyana and prepared specifications for the project which was approved by the Cabinet on August 10, 1966. Towe was informed by departmental letter of August 18, 1966, of a recommendation that Canaero, Lockwood Survey Corporation, Spartan Air Services Limited and Survair Limited be invited to submit proposals for the project. There was a pencilled note on the side of the letter, apparently added later, of the following words: "general photogramy Terra Ltd.".

14 The Canadian External Aid Office by letter of August 23, 1966, invited five companies to bid on the Guyana project. Survair Limited was dropped from the originally recommended group of four companies, and Terra Surveys Limited and General Photogrammetric Services Limited were added. A briefing on the specifications for the project was held by the Department of Mines and Technical Surveys on August 29, 1966. Zarzycki and another represented Terra Surveys Limited at this briefing.

15 O'Malley and Zarzycki pursued the Guyana project on behalf of Canaero up to July 25, 1966, but did nothing thereon for Canaero thereafter. On July 9, 1966, they had met with the Prime Minister of Guyana during his visit to Ottawa, and on July 13, 1966, they had met with Towe (who had previously been informed of the inter-governmental agreement in principle on the Guyana project) and learned from him that the project was on foot. O'Malley had written to Kennard, Canaero's Guyana agent, on July 15, 1966, that he felt the job was a certainty for Canaero. By letter of the same date to Towe, O'Malley wrote that Zarzycki had spent about 20 days in Georgetown, Guyana, on two successive visits to inventory the data available and determine the use to which the control survey and mapping would be put, and that he had subsequently prepared a proposal for a geodetic network and topographical mapping which was submitted to the Honourable Robert Jordan (the appropriate Guyanese cabinet minister) on July 27, 1965. On July 22, 1966, O'Malley wrote to an officer of the parent company that the Prime Minister of Guyana had advised him that "the Canadian Government would honour the project". Finally, on July 25, 1966, O'Malley wrote to Kennard to ask if he could learn what position Guyana was taking on the selection of a contractor, that is whether it proposed to make the selection with Canada's concurrence or whether it would leave the selection to Canada subject to its concurrence.

16 Thereafter the record of events, subject to one exception, concerns the involvement of O'Malley and Zarzycki with Wells in the incorporation of Terra Surveys Limited, their resignations from their positions with Canaero and their successful intervention through Terra Surveys Limited into the Guyana project. As of the date of O'Malley's letter of resignation, August 19, 1966, Terra Surveys Limited had a post office box and a favourable bank reference. Zarzycki had then not yet formally resigned as had O'Malley but had made the decision to do so. O'Malley informed the Canadian External Aid Office on August 22, 1966, of the new company which he, Zarzycki and Wells had formed.

17 The exception in the record of events just recited concerns a visit of Zarzycki, his "regular trip to the External

Aid Office" (to use his own words), to the man in charge of the Caribbean area. This was on or about August 13, 1966, after his return from holidays and after the luncheon meeting with O'Malley and Wells that led to the incorporation of Terra. The purpose of the visit related to two project possibilities in the Caribbean area for Canaero, that in Guyana and one in Ecuador. Zarzycki then received confirmation of what he had earlier learned from Towe, namely, that the Guyana project had been approved in principle.

18 Despite having lost O'Malley and Zarzycki and also a senior employee Turner (who joined the Terra venture and attended the briefing session on August 29, 1966, on its behalf with Zarzycki), Canaero associated itself with Spartan Air Services Limited in the latter's proposal on the Guyana project which was submitted under date of September 12, 1966. Prior to this submission, representatives of these two companies visited Guyana to assure officials there that Canaero was involved in the preparation of the Spartan proposal and was supporting it.

19 Terra Surveys Limited submitted its proposal on September 12, 1966, through Zarzycki, having sent a letter on that date to the External Aid Office setting out its qualifications. A report on the various proposals submitted was issued on September 16, 1966, by the Canadian government officer who had visited Guyana and had prepared the specifications for the project. He recommended that Terra Surveys Limited be the contractor, and included in his report the following observations upon its capabilities:

> This project is one of the most demanding that has been undertaken in the Canadian technical assistance program. The parts of the operation most seriously affected by the difficult conditions are the establishment of survey control and the procurement of the aerial photography, and the success of the project will depend greatly on the ability of the company selected to complete these two phases satisfactorily. The subsequent operations are somewhat less complex and are dependent on the successful completion of the initial phases. Furthermore, should the project lag in these phases, further resources are readily available in other companies in Canada.
>
> In my discussions with senior survey officials in Guyana, I was informed that an accurate framework of survey control was required to form the base for the topographical mapping now urgently required and in addition to permit the orderly completion of the national coverage in the future. Our experience is that the Aerodist system can provide the precision and density of control required more economically than any other method developed to date. Operational experience with this equipment by Canadian commercial companies has been extremely limited and has only been gained on projects where they acted in a support role to Surveys and Mapping Branch engineers. This has been kept in mind in the examination of the proposals in evaluating the plans of approach presented for this phase....
>
> The proposals for the control surveys and topographical mapping project in Guyana submitted to the Director General on September 12, 1966 by Lockwood Survey Corporation, Spartan Air Services Limited and Terra Surveys Limited have been carefully reviewed.
>
> Representatives of General Photogrammetric Services Limited and Canadian Aero Services Limited submitted no proposals. However, Spartan Air Services Limited has indicated that they intend to make use of equipment and services of Canadian Aero Service Limited while Terra Surveys Limited has stated that they intend to subcontract compilation and draughting work to General Photogrammetric Services Limited....
>
> Terra Surveys Limited has submitted a detailed proposal outlining their assessment of the major points to be considered in undertaking the proposed project in Guyana and their solution. It concludes with their proposed plan of operations and associated time schedule and is accompanied by a summary of what the Government of Guyana may expect to receive as well as the support it will be expected to provide....
>
> Although Terra, like other Canadian companies, has had no practical experience in planning and executing a similar type of Aerodist project, the proposal indicates that its authors have studied the subject very thoroughly

> and in preparing their plan of operation have also taken conditions peculiar to Guyana into account....
>
> Dr. J.M. Zarzycki is named as the project manager. He is known internationally as an outstanding photogrammetric engineer and has developed and successfully used an aerial triangulation procedure utilizing superwide angle photography, the Wild B. 8 and auxiliary data. Like most photogrammetric operations it requires good work by technicians but its success or failure hinges on the professional judgment and supervision of the engineer. Dr. Zarzycki has demonstrated this ability most clearly in past years.
>
> Mr. M.H. Turner is to assist Dr. Zarzycki. He gained extensive experience in different field operations in Africa and has shown his ability to establish excellent working relationships with the senior survey officials as well as carrying out very difficult survey tasks. The Aerodist project will call for a high degree of theoretical knowledge in geodesy as well as practical management ability. This can be provided by Messrs. Turner and Zarzycki....
>
> The proposal submitted by Terra Surveys Limited covered the operation in much greater detail than might normally be expected. However, the suggestions put forward indicate that all aspects of the operation have been most carefully reviewed and the plan of operation well thought out. The sections of the Terra proposal dealing with Aerodist indicate a more complete understanding of the problems in the field and subsequent operations than the other two proposals.
>
> The treatment of many aspects of the project varies very little in the three proposals. However, appreciable differences do appear in the key phases of aerial photography and Aerodist control as explained in the preceding paragraphs. My assessment is that Terra Surveys Limited, in combination with Survair Limited and General Photogrammetric Services Limited, is best fitted to undertake this very difficult operation.

In the result, Terra Surveys Limited negotiated a contract with the External Aid Office, and on November 26, 1966, entered into an agreement with the Government of Guyana to carry out the project for the sum of $2,300,000. This was the amount indicated in the proposal of July 26, 1965, prepared by Zarzycki on behalf of Canaero.

20 There is no evidence that either Zarzycki or any other representative of Terra visited Guyana between August 23, 1966, the date when the invitations to submit proposals went out, and September 12, 1966, the date of the Terra proposal. The reference in the report of September 16, 1966, to the fact that the Terra proposal "covered the operation in much greater detail than might normally be expected" is a tribute to Zarzycki that owed much to his long involvement in the Guyana project on behalf of Canaero. From the time of his contact with certain Guyana officials in Canada in July 1966, Zarzycki had no relationship with them or any others until he went to Guyana to sign the contract which had been awarded to Terra.

21 There are four issues that arise for consideration on the facts so far recited. There is, first, the determination of the relationship of O'Malley and Zarzycki to Canaero. Second, there is the duty or duties, if any, owed by them to Canaero by reason of the ascertained relationship. Third, there is the question whether there has been any breach of duty, if any is owing, by reason of the conduct of O'Malley and Zarzycki in acting through Terra to secure the contract for the Guyana project; and, fourth, there is the question of liability for breach of duty if established.

22 Like Grant J., the trial judge, I do not think it matters whether O'Malley and Zarzycki were properly appointed as directors of Canaero or whether they did or did not act as directors. What is not in doubt is that they acted respectively as president and executive vice-president of Canaero for about two years prior to their resignations. To paraphrase the findings of the trial judge in this respect, they acted in those positions and their remuneration and responsibilities verified their status as senior officers of Canaero. They were "top management" and not mere employees whose duty to their employer, unless enlarged by contract, consisted only of respect for trade secrets and for confidentiality of customer lists. Theirs was a larger, more exacting duty which, unless modified by statute or by contract (and there is nothing of this sort here), was similar to that owed to a corporate employer by its directors. I adopt what

is said on this point by Gower, *Principles of Modern Company Law*, 3rd ed., 1969, at p. 518 as follows:

> ...these duties, except in so far as they depend on statutory provisions expressly limited to directors, are not so restricted but apply equally to any officials of the company who are authorized to act on its behalf, and in particular to those acting in a managerial capacity.

23 The distinction taken between agents and servants of an employer is apt here, and I am unable to appreciate the basis upon which the Ontario Court of Appeal concluded that O'Malley and Zarzycki were mere employees, that is servants of Canaero rather than agents. Although they were subject to supervision of the officers of the controlling company, their positions as senior officers of a subsidiary, which was a working organization, charged them with initiatives and with responsibilities far removed from the obedient role of servants.

24 It follows that O'Malley and Zarzycki stood in a fiduciary relationship to Canaero, which in its generality betokens loyalty, good faith and avoidance of a conflict of duty and self-interest. Descending from the generality, the fiduciary relationship goes at least this far: a director or a senior officer like O'Malley or Zarzycki is precluded from obtaining for himself, either secretly or without the approval of the company (which would have to be properly manifested upon full disclosure of the facts), any property or business advantage either belonging to the company or for which it has been negotiating; and especially is this so where the director or officer is a participant in the negotiations on behalf of the company.

25 An examination of the case law in this Court and in the Courts of other like jurisdictions on the fiduciary duties of directors and senior officers shows the pervasiveness of a strict ethic in this area of the law. In my opinion, this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing; he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired.

26 It is this fiduciary duty which is invoked by the appellant in this case and which is resisted by the respondents on the grounds that the duty as formulated is not nor should be part of our law and that, in any event, the facts of the present case do not fall within its scope.

27 This Court considered the issue of fiduciary duty of directors in *Zwicker v. Stanbury*[FN1], where it found apt for the purposes of that case certain general statements of law by Viscount Sankey and by Lord Russell of Killowen in *Regal* (*Hastings*) *Ltd. v. Gulliver*[FN2], at pp. 381 and 389. These statements, reflecting basic principle which is not challenged in the present case, are represented in the following passages:

28 *Per* Viscount Sankey:

> In my view, the respondents were in a fiduciary position and their liability to account does not depend upon proof of *mala fides*. The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect. If he holds any property so acquired as trustee, he is bound to account for it to his *cestui que trust*. The earlier cases are concerned with trusts of specific property: *Keech v. Sandford* ((1726), Sel. Cas. Ch. 61) per Lord King, L.C. The rule, however, applies to agents, as, for example, solicitors and directors, when acting in a fiduciary capacity.

29 *Per* Lord Russell of Killowen:

> In the result, I am of opinion that the directors standing in a fiduciary relationship to Regal in regard to the ex-

ercise of their powers as directors, and having obtained these shares by reason and only by reason of the fact that they were directors of Regal and in the course of the execution of that office, are accountable for the profits which they have made out of them. The equitable rule laid down in *Keech v. Sandford* [*supra*] and *Ex p. James* ((1803), 8 Ves. 337), and similar authorities applies ... in full force. It was contended that these cases were distinguishable by reason of the fact that it was impossible for Regal to get the shares owing to lack of funds, and that the directors in taking the shares were really acting as members of the public. I cannot accept this argument. It was impossible for the *cestui que trust* in *Keech v. Sandford* to obtain the lease, nevertheless the trustee was accountable. The suggestion that the directors were applying simply as members of the public is a travesty of the facts. They could, had they wished, have protected themselves by a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting. In default of such approval, the liability to account must remain.

30 I need not pause to consider whether on the facts in *Regal* (*Hastings*) *Ltd. v. Gulliver* the equitable principle was overzealously applied; see, for example, Gower, *op. cit.*, at pp. 535-537. What I would observe is that the principle, or, indeed, principles, as stated, grew out of older cases concerned with fiduciaries other than directors or managing officers of a modern corporation, and I do not therefore regard them as providing a rigid measure whose literal terms must be met in assessing succeeding cases. In my opinion, neither the conflict test, referred to by Viscount Sankey, nor the test of accountability for profits acquired by reason only of being directors and in the course of execution of the office, reflected in the passage quoted from Lord Russell of Killowen, should be considered as the exclusive touchstones of liability. In this, as in other branches of the law, new fact situations may require a reformulation of existing principle to maintain its vigour in the new setting.

31 The reaping of a profit by a person at a company's expense while a director thereof is, of course, an adequate ground upon which to hold the director accountable. Yet there may be situations where a profit must be disgorged, although not gained at the expense of the company, on the ground that a director must not be allowed to use his position as such to make a profit even if it was not open to the company, as for example, by reason of legal disability, to participate in the transaction. An analogous situation, albeit not involving a director, existed for all practical purposes in the case of *Phipps v. Boardman*[FN3], which also supports the view that liability to account does not depend on proof of an actual conflict of duty and self-interest. Another, quite recent, illustration of a liability to account where the company itself had failed to obtain a business contract and hence could not be regarded as having been deprived of a business opportunity is *Industrial Development Consultants Ltd. v. Cooley*[FN4], a judgment of a Court of first instance. There, the managing director, who was allowed to resign his position on a false assertion of ill health, subsequently got the contract for himself. That case is thus also illustrative of the situation where a director's resignation is prompted by a decision to obtain for himself the business contract denied to his company and where he does obtain it without disclosing his intention.

32 What these decisions indicate is an updating of the equitable principle whose roots lie in the general standards that I have already mentioned, namely, loyalty, good faith and avoidance of a conflict of duty and self-interest. Strict application against directors and senior management officials is simply recognition of the degree of control which their positions give them in corporate operations, a control which rises above day-to-day accountability to owning shareholders and which comes under some scrutiny only at annual general or at special meetings. It is a necessary supplement, in the public interest, of statutory regulation and accountability which themselves are, at one and the same time, an acknowledgment of the importance of the corporation in the life of the community and of the need to compel obedience by it and by its promoters, directors and managers to norms of exemplary behavior.

33 A particular application of the equitable principle against a director is found in an early Australian case, appealed unsuccessfully to the Privy Council, where there was a refusal to permit a director to carry out a scheme for acquiring a mining claim of the company, through unopposed enforcement of a forfeiture, on his undertaking to give all shareholders save a pledgee bank the benefit of his purchase according to their shareholdings: see *Smith v. Harrison*[FN5]. The High Court of Australia applied the equitable principle on a conflict of duty and self-interest basis in a case where a director, who was empowered to sell a branch of his company's business with which he was particularly associated (which would result in loss of his position), arranged with the purchaser to enter its employ, doing so with

the approval of the chairman of the board of the seller company, he having consulted with his fellow directors: see *Furs Ltd. v. Tomkies*[FN6]. As was there pointed out, there was failure to make full disclosure to the shareholders of the financial arrangements made by the director, and it was no answer to the breach of fiduciary duty that no loss was caused to the company or that any profit made was of a kind which the company could not have obtained.

34 In the same vein is the New Zealand case of *G.E. Smith Ltd. v. Smith*[FN7], which founded itself not only on *Regal* (*Hastings*) *Ltd. v. Gulliver, supra*, but as well on the proposition stated by Lord Cranworth in *Aberdeen Railway Co. v. Blakie Bros*.[FN8] that a possible conflict of personal interest and duty will establish a basis for relief. The case concerned acquisition by a company director in his own right of an import licence (which had been refused to the company) for goods in which the company dealt, this being done at a time when liquidation of the company was contemplated by him and the other principal shareholder but before an agreement was concluded by which the defendant sold his interest in the company to that other shareholder.

35 Cases in the United States show that early enunciations of principle, resting on particular fact situations, have been broadened to cover succeeding cases, but one cannot pretend that there is any one consistent line of approach among the different state jurisdictions: see James C. Slaughter, "The Corporate Opportunity Doctrine", 18 Southwestern L.J. 96 (1964). What emerges from a review of the American case law is an imprecise ethical standard "which prohibits an executive — here defined to include either a director or an officer — from appropriating to himself a business opportunity which in fairness should belong to the corporation": see Note, "Corporate Opportunity", 74 Harv. L. Rev. 765 (1961).

36 A useful examination of the approach to corporate opportunity in American decisions is that found in *Burg v. Horn*[FN9], a majority decision of the Second Circuit Court of Appeals applying New York law in a diversity suit. What was involved in that case was not the usurpation of an opportunity which the particular company was pursuing, but the more far-reaching question whether a director was obliged to offer to the company, before taking them for himself, opportunities in its line of business of which he rather than the company became aware and which he pursued. The facts, briefly, were that directors of a company, operating low rental housing, who were known to their co-director plaintiff to have unrelated interests and also interests, acquired earlier, in other like companies, acquired a number of low rental properties which they did not offer to the company of which they and the plaintiff were co-directors. These properties had not been sought by the company nor did the defendants learn of them through the company. In denying liability, the majority expressed New York law to require a determination in each case, by considering the relationship between director and company, whether a duty to offer the company all opportunities within its line of business was fairly to be implied. The dissenting judge saw the case as one where, in the absence of a contrary understanding between the parties, the defendants were under a fiduciary obligation to offer the properties to the company before buying them for themselves.

37 That the rigorous standard of behavior enforced against directors and executives may survive their tenure of such offices was indicated as early as *Ex p. James*[FN10] where Lord Eldon, speaking of the fiduciary in that case who was a solicitor purchasing at a sale, said (at p. 390 E.R.):

> With respect to the question now put whether I will permit Jones to give up the office of solicitor and to bid, I cannot give that permission. If the principle is right that the solicitor cannot buy, it would lead to all the mischief of acting up to the point of the sale, getting all the information that may be useful to him, then discharging himself from the character of solicitor and buying the property. ...On the other hand I do not deny that those interested in the question may give the permission.

The same principle, although applied in a master-servant case in respect of the use to his own advantage of confidential information acquired by the respondent while employed by the appellant, was recognized by this Court in *Pre-Cam Exploration* & *Development Ltd. v. McTavish*[FN11].

38 The trial judge appeared to treat this question differently in quoting a passage from *Raines v. Toney*[FN12], a judgment of the Supreme Court of Arkansas, at p.809. The passage is in the following words:

> It is, however, a common occurrence for corporate fiduciaries to resign and form a competing enterprise. Unless restricted by contract, this may be done with complete immunity because freedom of employment and encouragement of competition generally dictate that such persons can leave their corporation at any time and go into a competing business. They cannot while still corporate fiduciaries set up a competitive enterprise ... or resign and take with them the key personnel of their corporations for the purposes of operating their own competitive enterprises ... but they can, while still employed, notify their corporation's customers of their intention to resign and subsequently go into business for themselves, and accept business from them and offer it to them ... but they can use in their own enterprise the experience and knowledge they gained while working for their corporation ... They can solicit the customers of their former corporation for business unless the customer list is itself confidential.

39 Prior to quoting from *Raines v. Toney*, Grant J. had referred to and rejected a submission of the appellant that "as long as the defendants came upon the profit making possibility inherent in the Guyana contract in the course of and by reason of occupying their positions as directors and senior officers of Canaero ... the strict equitable rule must be applied against them". *Albert A. Volk Inc. v. Fleschner Bros. Inc.*[FN13] had been cited in support of the submission. The trial judge's position on this point was put by him as follows:

> I do not interpret the decision above quoted as indicating that the mere fact of learning of the contract or even doing extensive work and preparation in attempts to secure the same for the plaintiff while they were still in their offices for it, of itself prevents them, after severing relations with their employer, from seeking to acquire it for themselves. It is not the coming upon or learning of the proposed contract while directors that establishes liability, but rather obtaining the same because of such fiduciary position and in the course of their duties as such. I would think that when directors or senior officers leave the employ of the company they must not use confidential information which they have acquired in such employment for the purpose of assisting them in getting such a contract for themselves. Such information so acquired by them would remain an asset of their principal even after they had left their employment.

40 In so far as the trial judge, founding himself upon what Lord Russell of Killowen said in *Regal* (*Hastings*) *Ltd. v. Gulliver*, would limit the liability of directors or senior officers to the case where they obtained a contract "in the course of their duties as such", I regard his position as too narrowly conceived. *Raines v. Toney* does not support the trial judge's view, as is evident from the assertion of the Supreme Court of Arkansas that the fiduciary duty of a director or officer does not terminate upon resignation and that it cannot be renounced at will by the termination of employment: see also *Mile-O-Mo Fishing Club Inc. v. Noble*[FN14]. The passage quoted by Grant J. from *Raines v. Toney* was directed to a different point, namely, that of a right to compete with one's former employer unless restricted by contract.

41 The view taken by the trial judge, and affirmed by the Court of Appeal (which quoted the same passage from the reasons of Lord Russell of Killowen in *Regal* (*Hastings*) *Ltd. v. Gulliver*), tended to obscure the difference between the survival of fiduciary duty after resignation and the right to use non-confidential information acquired in the course of employment and as a result of experience. I do not see that either the question of the confidentiality of the information acquired by O'Malley and Zarzycki in the course of their work for Canaero on the Guyana project or the question of copyright is relevant to the enforcement against them of a fiduciary duty. The fact that breach of confidence or violation of copyright may itself afford a ground of relief does not make either one a necessary ingredient of a successful claim for breach of fiduciary duty.

42 Submissions and argument were addressed to this Court on the question whether or how far Zarzycki copied Canaero's documents in preparing the Terra proposal. The appellant's position is that Zarzycki was not entitled to use for Terra what he compiled for Canaero; and the respondents contended that, although Zarzycki was not entitled to use for Terra the 1965 report or proposal as such that he prepared for Canaero, he was entitled to use the information

therein which came to him in the normal course and by reason of his own capacity. It was the respondents' further submission that Zarzycki did not respond in 1966 on behalf of Terra on the basis of his 1965 report as an officer of and for Canaero; and they went so far as to say that it did not matter that O'Malley and Zarzycki worked on the same contract for Terra as they had for Canaero, especially when the project was not exactly the same.

43 In my opinion, the fiduciary duty upon O'Malley and Zarzycki, if it survived their departure from Canaero, would be reduced to an absurdity if it could be evaded merely because the Guyana project had been varied in some details when it became the subject of invited proposals, or merely because Zarzycki met the variations by appropriate changes in what he prepared for Canaero in 1965 and what he proposed for Terra in 1966. I do not regard it as necessary to look for substantial resemblances. Their presence would be a factor to be considered on the issue of breach of fiduciary duty but they are not a *sine qua non*. The cardinal fact is that the one project, the same project which Zarzycki had pursued for Canaero, was the subject of his Terra proposal. It was that business opportunity, in line with its general pursuits, which Canaero sought through O'Malley and Zarzycki. There is no suggestion that there had been such a change of objective as to make the project for which proposals were invited from Canaero, Terra and others a different one from that which Canaero had been developing with a view to obtaining the contract for itself.

44 Again, whether or not Terra was incorporated for the purpose of intercepting the contract for the Guyana project is not central to the issue of breach of fiduciary duty. Honesty of purpose is no more a defence in that respect than it would be in respect of personal interception of the contract by O'Malley and Zarzycki. This is fundamental in the enforcement of fiduciary duty where the fiduciaries are acting against the interests of their principal. Then it is urged that Canaero could not in any event have obtained the contract, and that O'Malley and Zarzycki left Canaero as an ultimate response to their dissatisfaction with that company and with the restrictions that they were under in managing it. There was, however, no certain knowledge at the time O'Malley and Zarzycki resigned that the Guyana project was beyond Canaero's grasp. Canaero had not abandoned its hope of capturing it, even if Wells was of opinion, expressed during his luncheon with O'Malley and Zarzycki on August 6, 1966, that it would not get a foreign aid contract from the Canadian Government. Although it was contended that O'Malley and Zarzycki did not know of the imminence of the approval of the Guyana project, their ready run for it, when it was approved at about the time of their resignations and at a time when they knew of Canaero's continuing interest, are factors to be considered in deciding whether they were still under a fiduciary duty not to seek to procure for themselves or for their newly-formed company the business opportunity which they had nurtured for Canaero.

45 Counsel for O'Malley and Zarzycki relied upon the judgment of this Court in *Peso Silver Mines Ltd.* (*N.P.L.*) *v. Cropper*[FN15], as representing an affirmation of what was said in *Regal* (*Hastings*) *Ltd. v. Gulliver* respecting the circumscription of liability to circumstances where the directors or senior officers had obtained the challenged benefit by reason only of the fact that they held those positions and in the course of execution of those offices. In urging this, he did not deny that leaving to capitalize on their positions would not necessarily immunize them, but he submitted that in the present case there was no special knowledge or information obtained from Canaero during their service with that company upon which O'Malley and Zarzycki had relied in reaching for the Guyana project on behalf of Terra.

46 There is a considerable gulf between the *Peso* case and the present one on the facts as found in each and on the issues that they respectively raise. In *Peso*, there was a finding of good faith in the rejection by its directors of an offer of mining claims because of its strained finances. The subsequent acquisition of those claims by the managing director and his associates, albeit without seeking shareholder approval, was held to be proper because the company's interest in them ceased. There is some analogy to *Burg v. Horn* because there was evidence that Peso had received many offers of mining properties and, as in *Burg v. Horn*, the acquisition of the particular claims out of which the litigation arose could not be said to be essential to the success of the company. Whether evidence was overlooked in *Peso* which would have led to the result reached in *Regal* (*Hastings*) *Ltd. v. Gulliver* (see the examination by Beck, "The Saga of Peso Silver Mines: Corporate Opportunity Reconsidered", (1971), 49 Can. Bar. Rev. 80, at p. 101) has no bearing on the proper disposition of the present case. What is before this Court is not a situation where various opportunities were offered to a company which was open to all of them, but rather a case where it had devoted itself to originating and bringing to fruition a particular business deal which was ultimately captured by former senior officers who had been in

charge of the matter for the company. Since Canaero had been invited to make a proposal on the Guyana project, there is no basis for contending that it could not, in any event, have obtained the contract or that there was any unwillingness to deal with it.

47 It is a mistake, in my opinion, to seek to encase the principle stated and applied in *Peso*, by adoption from *Regal* (*Hastings*) *Ltd. v. Gulliver*, in the straight-jacket of special knowledge acquired while acting as directors or senior officers, let alone limiting it to benefits acquired by reason of and during the holding of those offices. As in other cases in this developing branch of the law, the particular facts may determine the shape of the principle of decision without setting fixed limits to it. So it is in the present case. Accepting the facts found by the trial judge, I find no obstructing considerations to the conclusion that O'Malley and Zarzycki continued, after their resignations, to be under a fiduciary duty to respect Canaero's priority, as against them and their instrument Terra, in seeking to capture the contract for the Guyana project. They entered the lists in the heat of the maturation of the project, known to them to be under active Government consideration when they resigned from Canaero and when they proposed to bid on behalf of Terra.

48 In holding that on the facts found by the trial judge, there was a breach of fiduciary duty by O'Malley and Zarzycki which survived their resignations I am not to be taken as laying down any rule of liability to be read as if it were a statute. The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.

49 Wells stands on a different footing from O'Malley and Zarzycki. The case put against Wells in the submissions to this Court is not that he personally owed a fiduciary duty to Canaero in respect of the Guyana project from the time it took shape but rather that he was a party to a conspiracy with O'Malley and Zarzycki to convert Canaero's business opportunity in respect of the Guyana project to personal benefit in breach of fiduciary obligation. Although Wells was associated with his co-defendants beyond the role of their solicitor, and was a director and substantial shareholder of Survair Limited, which was among the original intended invitees to submit proposals for the Guyana project but was dropped when the formal invitations were issued, there is no reason to interfere with the concurrent findings of fact upon which the action against Wells was dismissed and the dismissal affirmed on appeal. Unlike the case with O'Malley and Zarzycki, the findings of fact do not admit of a conclusion of law by which to fix Wells with liability.

50 There remains the question of the appropriate relief against O'Malley and Zarzycki, and against Terra through which they acted in breach of fiduciary duty. In fixing the damages at $125,000, the trial judge based himself on a claim for damages related only to the loss of the contract for the Guyana project, this being the extent of Canaero's claim as he understood it. No claim for a different amount or for relief on a different basis, as, for example, to hold Terra as constructive trustee for Canaero in respect of the execution of the Guyana contract, was made in this Court. Counsel for the respondents, although conceding that there was evidence of Terra's likely profit from the Guyana contract, emphasized the trial judge's finding that Canaero could not have obtained the contract itself in view of its association with Spartan Air Services Limited in the submission of a proposal. It was his submission that there was no evidence that that proposal would have been accepted if Terra's had been rejected and, in any event, there was no evidence of Canaero's likely share of the profit.

51 Liability of O'Malley and Zarzycki for breach of fiduciary duty does not depend upon proof by Canaero that, but for their intervention, it would have obtained the Guyana contract; nor is it a condition of recovery of damages that Canaero establish what its profit would have been or what it has lost by failing to realize the corporate opportunity in question. It is entitled to compel the faithless fiduciaries to answer for their default according to their gain. Whether the

damages awarded here be viewed as an accounting of profits or, what amounts to the same thing, as based on unjust enrichment, I would not interfere with the quantum. The appeal is, accordingly, allowed against all defendants save Wells, and judgment should be entered against them for $125,000. The appellant should have its costs against them throughout. I would dismiss the appeal as against Wells with costs.

Appeal allowed against all defendants save Wells.

Solicitors of record:

Solicitors for the plaintiff, appellant: *Soloway, Wright, Houston, McKimm, Killeen* & *Greenberg*, Ottawa.

Solicitors for the defendant, respondent, Wells: *Herridge, Tolmie, Gray, Coyne* & *Blair*, Ottawa.

Solicitors for the defendants, respondents, O'Malley, Zarzycki and Terra Surveys Ltd.: *Nelligan/Power*, Ottawa.

FN1 [1953] 2 S.C.R. 438.

FN2 [1942] 1 All E.R. 378.

FN3 [1967] 2 A.C. 46.

FN4 [1972] 2 All E.R. 162.

FN5 (1872), 27 L.T.R. 188.

FN6 (1936), 54 C.L.R. 583.

FN7 [1952] N.Z.L.R. 470.

FN8 (1854), 1 Macq. 461.

FN9 (1967), 380 F. 2d 897.

FN10 (1803), 8 Ves. 337, 32 E.R. 385.

FN11 [1966] S.C.R. 551.

FN12 (1958), 313 S.W. 2d 802.

FN13 (1945), 60 N.Y.S. 2d 244.

FN14 (1965), 210 N.E. 2d 12.

FN15 [1966] S.C.R. 673.

END OF DOCUMENT

TAB 6

P. C.
1967

Devan Nair v. Yong Kuan Teik

an inherent power to cleanse his list by striking out or better by dismissing those petitions which have become nullities by failure to serve the petition within the time prescribed by the rules. A

For these reasons their lordships will report to the Head of Malaysia their opinion that the appeal should be allowed and the petition of the respondent dismissed and that the respondent should pay the appellant's costs of this appeal and in the courts below. B

Solicitors: *Coward, Chance & Co.; Garber, Vowles & Co.*

C

[HOUSE OF LORDS]

H. L. (E.)*
1966

March 2, 3; *April* 25; *June* 7, 8, 9, 13; *Nov.* 3.

BOARDMAN AND ANOTHER . . . . APPELLANTS

AND

PHIPPS . . . . RESPONDENT D

[ON APPEAL FROM PHIPPS *v.* BOARDMAN]

Trusts—Constructive trust—Liability to account—Acquisition of valuable knowledge by virtue of fiduciary relationship—Opportunity for profitable share purchase—Purchase and subsequent profit.

Trusts—Remuneration of trustee—Special expert work—Complex transaction in company's shares by solicitor to trust and beneficiary—Profit by self-appointed agents—Accountability to beneficiary for profit—Whether agents entitled to remuneration for work done. E

Agency—Fiduciary relationship—Profit from agency—Accountability for profit made by agent—Self-appointed agents for trustees—Whether agents entitled to remuneration for work done.

The respondent, a beneficiary under a will trust, claimed an account of profits made as a result of purchasing shares in a company in which the trust had a substantial holding of 8,000 £1 shares. The purchasers, the appellants, defendants to the action, were B., who at all material times was solicitor to the trustees of the will, and T. P., a beneficiary. In 1956 there were three trustees: Mrs. P., an elderly widow who was not consulted about the trust and who died in 1958; her daughter Mrs. N., who relied on B.'s advice; and an accountant F. The appellants were dissatisfied with the company's accounts and the appellants on behalf of the trust attended the annual general meeting of the company in December, 1956, with proxy forms signed by Mrs. N. F G

**Present*: VISCOUNT DILHORNE, LORD COHEN, LORD HODSON, LORD GUEST and LORD UPJOHN.

A and F. Early in 1957, the appellants decided to make a "take-over" bid personally for the outstanding 22,000 £1 shares in the company so as to obtain control and, by a liquidation of assets, make a repayment of capital to the shareholders. F. was in agreement with this decision, which was communicated to Mrs. N., Mrs. P. not being informed. During the negotiations for the purchase of the shares, the appellants referred to their representative capa-
B city and made use of the information which they had received at the annual general meeting as representatives of the trustees. Further detailed knowledge of the assets of the company and their value was obtained during the negotiations, the information being acquired upon the basis of their representation of the share holding of the trust. On March 10, 1959, agreement was reached for the purchase by the appellants of 14,567 shares, completion to be
C on May 31, 1959, subject to withdrawal by either side before that date. On March 10, 1959, B. wrote to the beneficiaries, including the respondent and Mrs. N., giving them an outline of the negotiations and asking whether they had any objection to the personal interest he was taking in the purchase, bearing in mind that his initial inquiry was on behalf of the trust. At a meeting on March 20, 1959, B. gave explanations to the respondent, who, according to B., was fully satisfied. The trial judge found that the respondent
D was justified in thinking that he had only been told half the truth. By the end of 1959, the appellants had got altogether 21,986 shares, some at £3 a share, but the great majority at £4 10s. a share. The transaction proved profitable. The assets of the company were worth far more than £4 10s. a share. The company was able to make capital distributions totalling £5 17s. 6d. a share, after which the shares were still worth more than £2 a share.
E Consequently the trustees did well with their 8,000 shares and the appellants made a substantial profit.

Wilberforce J. held that the appellants were liable to account for the profit attributable to the respondent's share in the trust fund, less their expenditure incurred to enable it to be realised and making a liberal allowance for their skill and work in producing it. On appeal:—

F *Held*, dismissing the appeal (Viscount Dilhorne and Lord Upjohn dissenting), (1) that the appellants had placed themselves in a special position, which was of a fiduciary character, in relation to the negotiations with the directors of the company relating to the trust shares. That out of such special position and in the course of such negotiations the appellants obtained the
G opportunity to make a profit out of the shares and knowledge that the profit was there to be made. A profit was made and they were accountable accordingly (post, pp. 102F—103B, 107C–D, 112E, 118A–C).

Regal (Hastings) Ltd. v. *Gulliver* (post, p. 134); [1942] 1 All E.R. 378, H.L. applied.

(2) That the appellants had acted openly, but mistakenly, in a manner which was highly beneficial to the trust and accordingly

H. L. (E.)
1966

Phipps
v.
Boardman

were entitled in the circumstances to payment on a liberal scale for their work and skill (post, pp. 104E–G, 112D). A

Decision of the Court of Appeal [1965] Ch. 992; [1965] 2 W.L.R. 839; [1965] 1 All E.R. 849, C.A. affirmed.

APPEAL from the Court of Appeal.

This was an appeal from an order of the Court of Appeal (Lord Denning M.R., Pearson and Russell L.JJ.) dated January 26, 1965, affirming an order of Wilberforce J. dated March 25, 1964. The orders were made in an action in which the respondent, John Anthony Phipps, was plaintiff and the appellants, Thomas Gray Boardman and Thomas Edward Phipps, and also Wilfred Harcourt Fox and Mariquita Laura Noble, were defendants. Wilfred Harcourt Fox and Mariquita Laura Noble took no part in the proceedings before Wilberforce J. and the Court of Appeal and they took no part in the present appeal. B C

The question at issue in this appeal was whether the appellants were accountable to the respondent as constructive trustees of certain shares of Lester & Harris Ltd., which were purchased by them in the years 1957 to 1959. D

The following statement of facts is taken substantially from the judgment of Wilberforce J. at first instance.

By his will dated September 23, 1943, the testator, Charles William Phipps, who died in 1944, gave his residuary estate (subject to an annuity of £3,000 to his widow) between his four children, the three sons taking 5/18ths each and the daughter 3/18ths. On November 19, 1958, his widow died, whereupon the residuary estate vested absolutely in possession in his three surviving children, the respondent, the plaintiff in the action, John Anthony Phipps, the second defendant, Thomas Edward Phipps (hereinafter called "Tom Phipps"), the fourth defendant, Mrs. Mariquita Laura Noble, and the estate of his deceased son. After the death of the widow, who was one of the trustees of the will, the third defendant, Wilfred Harcourt Fox, who was a professional trustee and an accountant, and Mrs. Noble were the trustees. E F

The residuary estate included 8,000 £1 shares in a private company, Lester & Harris Ltd. (hereinafter called "the company"), which carried on business in textiles with factories at Nuneaton, Coventry and a subsidiary in Australia. The company had an issued share capital of 30,000 £1 shares of one class and its articles contained certain restrictions on transfer. The chairman of the board of directors was one Smith, a solicitor. The residuary estate also contained a considerable shareholding in Phipps & Son Ltd., a G

A family company also in the textile field, which had a capital of over £250,000. Among its directors were the appellants, the first defendant, Thomas Gray Boardman, and Tom Phipps, who was also its chairman.

Boardman was a solicitor and partner in the firm of Messrs. Phipps and Troup, solicitors to the trust, with Boardman particu- B larly concerned and also acting personally as solicitor for the Phipps family but not during the material period for the respondent. The judge found that, whereas Boardman had conspicuous ability, energy, clarity of mind and persistence, the respondent was not quick on the uptake, particularly when dealing with financial matters, and he was not easy to negotiate with as he had a "one- C track mind." The respondent was not on close terms with his brother and sister. They would be likely to rely on the advice of Boardman in business affairs.

In December, 1955, an inquiry had been received whether the trustees would sell the trust shareholding in the company. That D inquiry having reached Boardman, he consulted Fox and was shown the accounts of the company for the year ending December 31, 1954, which showed that the shares had an assets value in the balance sheet of approximately £10 per share. Towards the end of 1956 Boardman asked for authority to enable himself and Tom Phipps to "represent the holding" at the annual general E meeting of the company, and in due course they attended as proxies for the executors at the annual general meeting held on December 28, 1956. Boardman took the initiative and expressed dissatisfaction with the results of the company's business and with the accounts. He pointed out that the prosperity of the company was declining and he asked for information concerning the F group profits and for details of the company's Australian subsidiary. His questions concerning the accounts were answered and some of the details he wanted were forthcoming, but Boardman expressed dissatisfaction and proposed a resolution that no dividend should be paid. There was an argument about voting powers and proxies, and an amendment proposed by Boardman G was rejected. Boardman said that, as the company's business appeared to be on the decline, Tom Phipps, who knew something about the textile industry, ought to be elected to the board, particularly as his family held the largest individual block of shares in the company. The chairman was reluctant to accept this proposition, of which no notice had been given. Various other questions were asked by Boardman relating to powers of attorney,

H. L. (E.)
1966
Phipps v. Boardman

shareholdings of directors and how much they had paid for their A shares, the presence of one of the directors, Harris, in Australia, and generally about the Australian company. All these points were dealt with by the chairman; but the replies did not satisfy Boardman.

After the meeting Boardman asked for details of dealings with the shares, and on January 3, 1957, he wrote to Mrs. Noble, B saying: " We "—that is to say, he and Tom Phipps—" are considering what further action we can take to safeguard the value of the shares," and said that they were consulting Fox. In due course he was given some details of the prices at which shares had been transferred, and on January 11, 1957, he wrote to Fox saying that he and Tom Phipps had decided that the only way to C get results in the company was to endeavour to get control, that they had been unable to buy the shares privately, and had, therefore, decided that they would personally make an offer for all the outstanding shares. He said that a circular had been prepared and submitted to the Board of Trade, but that before the circular went out he would like Fox's confirmation that it was in order from D his point of view, both as regards the references to the figures and with regard to Tom Phipps's and his position vis-à-vis the trust. That letter was written by Boardman as representative of, and solicitor to, the trustees. At the same time the form of the proposed offer was sent to the directors, requesting on behalf of the executors a list of members and their addresses. E

On January 17 Boardman wrote a long letter to Mrs. Noble reporting on the meeting he and Tom Phipps had attended, their failure to get satisfaction, and his proposal that Tom Phipps should be appointed a director. Continuing, he said that the only real hope of getting the true value of the shares was by acquiring a F controlling holding so that a large part of the assets could be liquidated, retaining only the profitable parts of the business. That would enhance the share values and release cash. It involved offering to buy the remaining shares and hoping for sufficient acceptances to get control. He went on to say that it was improper for trustees to make an offer in this form, so that he and Tom G Phipps had, therefore, agreed to make an offer personally of £2 5s. per share, which exceeded the earnings and dividend value of the shares, but was below their assets value. No similar letter, or any letter relating to this matter, was sent to the respondent; he at this time knew nothing about it. On January 24 Boardman and Tom Phipps wrote to the shareholders offering £2 5s. for each

A share, and referring to the fact that Boardman and Tom Phipps represented the trust holding of 8,000 shares, which was over 26 per cent. of the issued capital.

Mrs. Noble, replying to Boardman's letter of January 17, said that she thought the suggested line was the only possible one, but she wondered where the money to pay for the shares would B come from. She presumed that it would be the trust fund and she added that there was something very suspicious about the whole thing. Commenting on that the judge said at the hearing that it seemed plain that in so far as she had understood the situation, she was not contemplating that Boardman and Tom Phipps were acting or should act outside the trust. Boardman replied on January C 28, 1957, stating that he did not think that the trustees could properly make an offer of this nature and for that reason he and Tom Phipps were making it personally "with the object of taking such shares as we can and the balance being taken by Phipps & Son Ltd."

On January 30 the directors advised the shareholders not to D accept the offer to sell at £2 5s. a share and stated that if, notwithstanding this advice, they wished to sell, the directors would be willing to buy the shares at the price offered by Tom Phipps and Boardman.

On February 25 Tom Phipps and Boardman increased their offer to £3 a share conditionally on acceptance in respect of not E less than 7,500 shares or such lesser number as might be decided. This offer became unconditional at a much later date, in June or July, 1959, the number of shares being acquired under that offer being 2,925. On February 25 Boardman asked Fox to forward to him any communications which Fox, as trustee of the will and in particular as holder of the 8,000 shares, might receive, and on F March 1 Fox sent round a circular received in that way. On February 28 the chairman and the secretary of the company wrote to the shareholders, referring to the fact that Tom Phipps and Boardman were seeking to acquire shares as nominees of the Phipps family. In the protracted negotiations which ensued G Boardman, writing to the directors and to the company on numerous occasions, said that he represented the 8,000 trust shares in the company, emphasising not only that he and Tom Phipps were representing a substantial minority shareholding but also that they were prepared, if necessary, to use the voting power of the shares and the rights which those shares carried under the articles in order to strengthen their negotiating position.

H. L. (E.)
1966
Phipps v. Boardman

Until August, 1958, it was proposed that the undertaking of the company might be divided in some way between the Phipps family and the directors; and in that connection Boardman made various requests for information about the company's site in Australia and the turnover of the business there, and also about the company's site in Nuneaton. That information was supplied by Smith, who gave the value of the Nuneaton site as between £50,000 and £60,000, stating that the information so supplied was confidential. On June 4, 1957, Boardman asked if he could look around the Nuneaton factory, and Smith agreed and that was done. On August 16, 1957, Boardman asked for more detailed information and for separate asset and trading and profit and loss figures as regards the various parts of the company's business. Smith sent him a professional valuation of the fixed assets, setting out the valuation of the works and the fixed assets at Coventry, of the premises and of the fixed assets at Nuneaton and of various other items, and shortly after, in reply to a question from Boardman, Smith said that he knew of no special features which would affect the value of the company's assets. Boardman then asked whether figures could be given as to the profitability of the company's businesses; and in a further letter he pointed out that the question of importance was how far the asset values of the company could be supported by profits. On December 13, 1957, a detailed valuation on a break-up basis was received by Boardman, in response to his request, from another firm of valuers, Jackson, Stops & Staff, of the company's assets in the United Kingdom, made after inspection of the businesses and after consideration of the earlier valuation and of plans prepared for purposes of fire insurance. The valuers had been shown round by a director, who had given them every consideration and help.

On January 3, 1958, Boardman pointed out that a valuation could not be made of the company as a going concern in the absence of profit figures, and that those ought to be supplied. Smith told him that £42,000 had been spent on new plant since 1954, and he said that the business ought to be valued as a going concern. On January 23, Boardman again asked whether profit figures could be supplied. On January 24, 1958, he wrote a letter to Fox in which he again asked for communications from the company as soon as they arrived because of the " rather delicate negotiations " in which he was involved and in which it would be helpful if Tom Phipps and he were on the share register. He went on to ask if Fox would object to one share being transferred

A into the joint names of Tom Phipps and the trustees, and another
share into the names of himself and the trustees, so that notices,
etc., would be sent direct, and that they would have the right to
speak at meetings; and he said that if that was agreed, he would
prepare transfers. On February 11, 1958, Boardman wrote to
Mrs. Noble and referred to the negotiations with the company
B during the preceding year. He continued by telling her of the
proposal that the company should be divided, part being allocated
in satisfaction of the estate shares. That, he said, ought to produce
much more capital for those shares than they were ever likely
to realise as a minority holding. He then said that one of the
difficulties he was faced with was getting any information from
C the directors and not having the right to attend and speak at
meetings; and he referred to the suggestion that a share should be
transferred to him and to Tom Phipps jointly with the trustees and
sent transfers to her. Mrs. Noble replied, enclosing the forms
signed and witnessed; she thought it a very good idea and she
hoped that Boardman and Tom Phipps would now be able to
D get "inside information." Wilberforce J. stated that it was quite
clear that the proposed allocation was presented as a trust matter.

Boardman continued his negotiations, and on March 11, 1958,
he returned to the question of separate profits as regarded the
company's separate factories, and he referred again to the fact
that he and Tom Phipps were representatives of the largest
E shareholding.

The annual general meeting of the company took place on
March 19, 1958, and was again attended by Tom Phipps and
Boardman "as proxies representing the trustees of C. W. Phipps,
dec." The directors' report and accounts were presented, and
F Boardman and another shareholder criticised the trading and
profit margin for the year and said that, having regard to the asset
value, inadequate profits were being earned. A number of ques-
tions were asked, which were answered—but not to Boardman's
full satisfaction. Boardman again referred to the representation
of Tom Phipps on the board and some abortive discussion took
G place, the position being that Tom Phipps would not accept unless
Boardman was also offered a seat.

On April 26, 1958, Boardman wrote to Smith comparing the
two valuations and proposing allocation of the assets on a propor-
tional basis. He stated that about 12,000 shares were "available
to us"—referring to the 8,000 original shares and certain other
additional shares which they were in a position to acquire by

virtue of their offer of £3 a share. Broadly, what was suggested was that about one-third of the assets should be allocated in respect of that holding. A

On May 13 Boardman, in another letter, stated that the Australian factory appeared to be new and that the valuation ought not to be written down. On May 19, figures were supplied by the company as to the external liabilities of Coventry and Nuneaton. On May 22, Boardman again stated his view that the Australian assets ought to be taken as at their book value. On June 12, he wrote again and referred to the legal remedies which might be available to protect the minority interest in the company which the trustees had, adding a week later that the objective of his action had always been "to increase the value of our investment." On July 18 he proposed that the Australian business should be allocated to the Tom Phipps' holding, and again referred to the shareholders' powers to prevent transfers outside the existing membership. B C

Then the proposed division of the assets or undertakings was dropped and the subsequent negotiations were directed to a possible purchase of the directors' shareholding. On August 16 Boardman wrote to Smith suggesting that the directors' shares should be bought at (say) £5 a share and that the Coventry part of the business might be resold back to them, he gave detailed figures with separate values of the parts of the undertaking. He asked for further information as to future purchases and sales to which the company was committed and to the position as regards the senior executives of the company and the terms and nature of their employment. On August 27 Smith said that if Boardman wished to deal with the directors he must buy the rest of the shares. In the same letter he allocated the assets and liabilities of the company to the respective factories, and gave the further information for which he had previously been asked. On October 3, again Boardman stated that he controlled about 12,000 shares; and Smith in reply said that the proposal that he was prepared to entertain was a straight purchase of the directors' shares at £5 per share without any resale of any part of the assets. Boardman then asked for detailed profit and loss accounts of the company for the last five years, and at first Smith refused but eventually he agreed and, on November 14, the company's accountants sent turnover and trading profit figures of the company's separate undertakings for the last five years. On that, a detailed report was prepared by Fox dealing with such matters as sales, D E F G

A manufacturing costs, overheads, net trading profit, etc., and a number of analyses of manufacturing costs and the trend in such costs and in overheads were made.

In November Boardman asked for the accounts of the company up to June of the current year, and for an assurance from Smith that no material alteration in the company's trading had B taken place, which assurance Smith gave. On December 5 Boardman asked for an actual warranty as regards the company's position; but Smith wrote saying that during the past 18 months a great deal of confidential information, facts and figures had been supplied to assist Boardman but that he was now asking for a warranty on facts and figures which he, Smith, had not seen, and C he was not prepared to give it.

Negotiations were reopened after the death of the testator's widow. Boardman wrote on January 1, 1959, referring to Mrs. Phipps' death and said that the executors and the beneficiaries would join in, and on January 5 he said that they were prepared to offer £4 5s. per share. But on February 3 he wrote that further D discussion was needed as to the names in which the purchase would be made, and he suggested that perhaps this could be left open for the moment. He asked for the memorandum and articles of the company, for particulars of minority interests and for the accounts of the company's subsidiaries. In reply Smith wrote back, agreeing that Boardman might make an investigation per- E sonally into the Australian business and he sent the information which Boardman had asked for.

On February 25 Boardman wrote to one Crockett, a stockbroker who was acting as an intermediary between Boardman and a finance house which it was hoped might provide money for the F acquisition of the shares. He set out the various considerations and figures which would be relevant to the decision whether to make the advance and he gave the two valuations, that made for the directors and the Jackson Stops' valuation. Those were set out in parallel columns, and the different bases on which they had been obtained were noted. Boardman referred to the separate G businesses at Coventry and Nuneaton and stated his belief that there would be quite a lot of interest in both places, Coventry and Nuneaton, either as separate going concerns or, in the case of Coventry at any rate as a factory for the use of Courtaulds, who had premises all around. He went on to say that the figure for stock shown in the balance sheet should be discounted but was probably not unduly inflated even on dispersal basis. He referred to the assets and finances of the Australian company, and concluded that on the figures given, adopting Jackson Stops' valuation for the freehold properties and plant, the value of the equity as at June, 1957, was approximately £250,000 (which would produce a share value of £8 6s.). This figure might be reduced if the whole business was liquidated and stock losses resulted, but that it might be substantially increased by favourable sales of the Nuneaton and Coventry businesses as going concerns and if the values put forward in the other valuation were obtained the equity was worth over £380,000, producing a share value of £12 13s. 4d. He went on:

> "As I explained, we hold 8,000 shares and I am concluding negotiations to acquire a further 14,600 at £4 10s. each. This will give us over 75 per cent. and I have options on some of the other shares at slightly below £4 10s. each, although I may find it necessary to increase the price for these to £4 10s. As a term of the agreement the offer of £4 10s. must be extended to all the other shareholders, whose shares we have not acquired. At the agreed price of £4 10s. the equity is costing us £135,000, putting in our shares at the same price, and I feel that there is a most attractive margin to go for."

On February 26 Boardman asked Smith for authority to investigate fully the Australian business. Then on February 27 he received a statement of the terms on which the finance house would be prepared to advance money to buy the shares, namely, £99,000. One of the terms was that the holders of the 8,000 shares should enter into an agreement to vote with the lenders; and, as regards the loan, it was provided that if any loss were incurred on the transaction, the shortfall should be borne as to two-thirds by Boardman and one-third by the lenders, and that the surplus over the £99,000 was to be divided in a similar way. After further negotiations revised terms were quoted under which the maximum loss which might fall on Boardman (meaning Boardman and Tom Phipps) was fixed at £15,000. Other terms included the same term as to voting on the 8,000 shares. On March 4 Boardman wrote again about the proposed Australian visit and inspection, and proposing that the local director should be told that Tom Phipps and he were visiting Australia in connection with their negotiations for the acquisition of a larger holding. On March 5, 1959, Boardman reported to Tom Phipps, who was then in Ireland, suggesting a meeting with the other beneficiaries as soon as

A possible. He said that they might wish to sell their shares, but that if they wished to retain them

> " we should like to know that they will vote with us. I should also like to know that they have no objection to my taking a personal interest in this, despite the fact that the knowledge of the company came through my professional connection with the family trust. Do you agree to such a meeting. . . ."

B

On March 6 Smith sent the Australian accounts for the years ending June, 1957, and June, 1958, which Boardman was asked to treat confidentially for the time being.

On March 10, 1959, an agreement for sale was drawn up between Smith of the one part and Tom Phipps and Boardman of C the other relating to the directors' 14,567 shares in the company. It was agreed that Tom Phipps and Boardman should purchase the shares for £4 10s. each, completion was to be on May 30, 1959, but that the purchasers could give notice before January 1, 1959, to determine the agreement by notice in writing (which period was designed so as to enable them to complete their inspection in D Australia before they became absolutely bound). The purchasers agreed to offer all other shareholders £4 10s. for each of their shares, on the same terms. The same day Boardman wrote to the respondent. This letter was the first communication which Boardman had had with the respondent in relation to this matter of the trust holding of 8,000 shares. The respondent knew nothing E about the intentions of the trustees or Boardman in relation to those shares or of any negotiations which had taken place. Boardman referred to the earlier history of the matter and to the initial offer of £2 5s. a share, to the counter offer by the directors and he then dealt with the offer for 14,500 directors' shares. These, F he said, had been offered to Tom Phipps and himself at about twice the price at which they acquired them. That, he said, was considered to be a high price but they both felt that there was probably quite a lot of asset value in the company and that they might well be able, by better management or by liquidation, to make the shares worth a good deal more than that. They G proposed, therefore, to accept the conditional offer and to see whether they could effect some sales of the Australian interest, and possibly of some of the English interest, to yield a profit above the offer price. They would go to Australia to look at the business there and assess its value and future prospects. If successful in making the shares worth more than £4 10s. the increased value would, he said, of course equally reflect upon the trust holding of shares, and to that extent the beneficiaries would benefit. Both Tom Phipps and he, however, wanted to be reassured on two points. The first, which Boardman said only concerned him, was whether the respondent had any objection to the personal interest taken by Boardman in the purchase,

> " bearing in mind that my initial inquiry with regard to it was on behalf of the C. W. Phipps estate. At that time the trustees did not wish to purchase any shares themselves and expressed their agreement to my taking a personal interest. However, as the shares will shortly be distributed amongst each of you, I should like to have your approval of the proposals. They do not, of course, involve you in any liability and there is no conflict of interest, as it will of course be in the interests of yourself as much as it will be for Tom [Phipps] and me, that we should try to realise the maximum value possible for these shares."

Secondly, he asked for an assurance that the respondent agreed that the votes on the trust shares should be exercised as one block with the shares that were offered to Boardman and Tom Phipps.

> " This," said Boardman, " I hope will enable the maximum value to be got for the shares. Without the assurance that these votes would be exercised together it would obviously be unwise to pay anything approaching £4 10s. for the shares, the dividend upon which is, for the year to June, 1958, likely to be only 5 per cent. It is difficult to put the issues concisely in a letter, but this will I hope give you a summary of what is involved, and if there are any special queries which you would like to raise please let me know."

An identical letter was written on the same date to Mrs. Phipps, as representing the estate of the deceased brother, and also to Mrs. Noble. Mrs. Noble replied on March 14:

> " Yes, I remember hearing about this firm before and am perfectly content to leave the whole matter entirely to you and Tom to deal with as you both think best as you know all about what appears to be a very complicated business."

There followed a meeting on March 20 between the respondent and Boardman. There was a conflict of evidence as to what took place, the respondent's view, which the judge accepted, being that far less was disclosed than Boardman said had been the case.

Tom Phipps and Boardman went out to Australia and inspected the Australian assets. On May 11 Boardman reported to Smith on the visit and asked for certain further information as to the capital reserve of the company and also for balance-sheet figures for the company's subsidiaries. On the same day he wrote to the

A manager of Lloyds Bank, who was an alternative source of finance, a detailed letter setting out most of the figures which had previously been obtained and which had been sent to Crockett, and stating amongst other things that Courtaulds were interested in the Coventry business. He also said that he hoped he could get £80,000 sterling for the Australian business. He wrote on the same B day to the other interested finance house and said that he thought the value of the Australian business was £100,000 (Australian). The result of this Australian business was not, so it appears, reported to the respondent.

On July 15 he wrote to the shareholders, stating that, together with the shareholding that Tom Phipps and Boardman previously C represented, they had acquired over 85 per cent. of the issued share capital, and £4 10s. was offered for any outstanding shares. A further letter was sent on January 13, 1960, saying that the Australian business had been sold for £88,768 and announcing a capital distribution of £3 per share. On January 20 Boardman D wrote a long letter to the respondent, referring to his previous communication about the company's shares and the visit to Australia. He announced the disposal of the Australian interest at the figure quoted and said that that was a profitable deal, and the hope was expressed that a higher level of profits would be achieved as regards the rest of the business. He referred to the E capital distribution of £3 a share, and he hoped that a level of profits would be made which would make the shares worth considerably more than their previous value. The respondent replied briefly on January 24, saying:

> "Thank you so much for your letter. This is indeed welcome news. You must be feeling very satisfied that your F hunch backed by much hard work and perspicacity has turned out so well for all concerned."

On June 2, 1961, Boardman again wrote to the respondent, referring to an earlier letter and announcing the sale of the Coventry factory for £150,000, and stated that a decision had been made to make a further capital distribution at the rate of G £2 17s. 6d. per share; a cheque was enclosed, and it was pointed out that, with the previous £3, a capital sum of £5 17s. 6d. had been received per company's share against a probate value of £2 7s. 6d., and that what was left was the Nuneaton interest which it was hoped would prove profitable. Soon after Tom Phipps telephoned the respondent and offered him £2 for his proportionate holding in the trust shares. On that, the respondent consulted his solicitors. A

The position at that date was that under the original offer of £3 per share, which became partly unconditional in or about June, 1959, 2,925 shares were acquired at various prices, and 14,567 directors' shares were acquired at £4 10s. a share. Under the later offer which was made to the remaining shareholders, 4,494 shares were acquired at £4 10s. each in about July, 1959. In respect of all those shares, capital distributions amounting to £5 17s. 6d. had been made and the shares were still held, covered by the remaining assets of the company, that was in effect the Nuneaton business and part of the Coventry business. B C

In March, 1962, the respondent issued a writ claiming first a declaration that Boardman and Tom Phipps held 5/18ths of 21,986 ordinary shares of £1 each in the company, or alternatively 5/18ths of the following holdings in the company, namely, 2,925 shares, 14,567 shares or 4,494 shares (or some one or more of such holdings) as constructive trustees for the respondent; and, secondly, an account of the profits made by them from these holdings; and, thirdly, an order that they should transfer to the respondent the shares which they held as constructive trustees for him and should pay to him 5/18ths of the profit. No relief was claimed against Fox and Mrs. Noble, who in their defence stated that they would submit to act as the court might direct and who took no active part in the action or in the subsequent appeal. D E

In the statement of claim it was pleaded that the initial investigation of the company's affairs in December, 1956, had been made by Boardman and Tom Phipps as agents for the trustees and that, by reason of their position as agents, they were then and had ever since remained in a fiduciary relationship with the trustees and the beneficiaries. By reason of the information they obtained at the company's annual general meeting they were able to make the offer to purchase and to buy the shares offered. The offer to sell the directors' shares was only received by Boardman and Tom Phipps because of their position and action as agents of the trustees. The agreement to purchase those shares was entered into and became unconditional because of information they had acquired in or because their capacity of agents enabled them to calculate that it would be a profitable deal and because the beneficiaries had assured them that they would use their voting power as one block with the shares purchased under the agreement. F G

A Lastly, it was said that because of those facts the opportunity to purchase the three blocks of shares, and the shares when purchased, were assets of the estate and 5/18ths of the holding were held by Boardman and Tom Phipps as constructive trustees for the respondent. Boardman and Tom Phipps, in their defence, denied the agency and that they were in a fiduciary position, and B alleged that the purchase was made with the respondent's knowledge and consent.

On March 25, 1964, Wilberforce J. held that the appellants were accountable for the proportionate profit on the 21,986 shares in the company and that an inquiry should be held as to the C allowances to which they were entitled in respect of their work and skill in obtaining the shares and the profits. The appellants appealed on the grounds that the judge was wrong, inter alia, in holding that the scope of their agency extended beyond the preservation and improvement of the value of the 8,000 shares in the company belonging to the trust, that the information acquired by D them in the course of their agency was the property of the trust, that the purchase of the 21,986 shares was within the scope of their agency and that they failed to make adequate disclosure to the respondent.

The Court of Appeal dismissed the appeal.

E

Further facts are stated in the opinion of Viscount Dilhorne.

W. A. Bagnall Q.C. and *Eric Griffith* for the appellants. The question for determination is whether the appellants, who were never trustees of any property of the respondent, are nevertheless F accountable to him as constructive trustees in respect of certain shares in a company which the appellants bought on their own initiative, with their own money and at their own risk. In other words, were the circumstances such that the consciences of the appellants were so affected that under the principles of equity that which in law is their property must nevertheless be held by them G for the benefit of the respondent?

There are three submissions: (1) The appellants were never agents for the trustees at all except for three quite specific and limited purposes: Boardman investigating the offer to buy the trust shares in 1955 and on the two occasions when they attended company meetings as proxies for the trustees. (2) If they were agents it was their duty as part of their agency to do exactly what they did do to improve the value of the trust shares. Alternatively, if they were agents even on that basis they were not accountable because the purchase of the shares was wholly outside the scope of the agency and they were not in competition with their principals, the trustees. (3) No asset of the trust was ever put in the appellants' hands at all and certainly no asset to which the appellant Phipps was not entitled for his own benefit as beneficiary. A B

Where there is a trust, in order to make a stranger accountable as a constructive trustee there must be either an abuse of a fiduciary relationship towards the real trustee or a guilty or knowing participation in a breach of trust: *Barnes* v. *Addy*,[1] *per* Lord Selborne L.C. This is the correct approach to the present case. C

There are three and only three possibilities of a fiduciary relationship here: (i) solicitor and client; (ii) beneficiary and co-beneficiary; (iii) agency. As to (i), a solicitor owes a duty to his client to be honest, skilful and careful and his only other duty is not to take advantage of the presumed influence of a solicitor over his client. It is to be observed that there is no continuing office D of solicitor: *Saffron Walden Second Benefit Building Society* v. *Rayner*.[2] As to (ii), it is well established that a beneficiary owes no fiduciary duty either to the trustees or to his co-beneficiaries: *Kennedy* v. *De Trafford*,[3] a case which is also of importance in that it deprecates a loose use of the word "agency." *In re Biss* [4] shows that a beneficiary under a will or an intestacy is entitled to E take any advantage offered in connection with the estate in the absence of fraudulent dealing. Thus in that case [4] a beneficiary was entitled to use his knowledge and opportunity to obtain renewal of a tenancy. For an old decision see *Featherstonhaugh* v. *Fenwick*.[5]

F

Prima facie every beneficiary has the right to inspect all documents and receive all information held by the trustees in that capacity: *In re Cowin*.[6] It follows that all communications from Lester and Harris Ltd. to the trustees as shareholders in the company would all be trust property open to inspection at any time by the appellant Phipps. The only information to which he would G not be entitled would be of documents passing between the trustees relating to the exercise of a discretionary power vested in them:

[1] (1874) 9 Ch.App. 244, 251, C.A.
[2] (1880) 14 Ch.D. 406, 409, 415, C.A.
[3] [1897] A.C. 180, 186–190, H.L.
[4] [1903] 2 Ch. 40, C.A.
[5] (1810) 17 Ves. 298.
[6] (1886) 33 Ch.D. 179, 185.

In re Londonderry's Settlement.[7] *Butt* v. *Kelson*[8] is important because all the information obtained by the appellants here on behalf of the trustees must have been by virtue of the shareholding (no trustee was a director) and therefore it was the property of all the beneficiaries and the appellant Phipps was entitled to have it. (iii) Agency. Omitting agency by estoppel the following propositions (excluding the last) are incontrovertible: (a) agency is a relationship which arises out of a contract express or implied. (b) Each party must assent to all express and implied terms. (c) If there is no contract there is no agency. (d) The rights and obligations of the parties depend upon the terms of the contract. To the extent that the contract is silent they depend on the general law. (e) There is no such person known to the law as a self-appointed agent. As to how an agent is appointed see *Pole* v. *Leask.*[9] Nowhere in the present case is there any statement of how the agency was constituted or its terms agreed. It is all based on " self-appointed agent."

The basic fallacy of the decisions below is that they first impose on the appellants all the duties and obligations of a general agent and then ask whether, on that assumption, the appellants have divested themselves of their fiduciary duty. The first question is whether the appellants were agents at all, and, if so, what were the terms on which they were expressly or impliedly appointed. The answer is either they were not agents at all or, if they were, one of the terms of the agency was that they should buy shares for themselves so as to improve the value of the trust shares. That thread runs all through this case—the appellants were to buy shares for themselves so as to obtain friendly management of the company.

The observations of Lord Devlin in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*[10] that " a man cannot be said voluntarily to be undertaking a responsibility if at the very moment when he is said to be accepting it he declares that in fact he is not " are relevant here. A duty cannot be imposed on the appellants to account for these shares to the trust when at the moment the arrangement was made to acquire them everyone contemplated that they were acquiring them for themselves.

As to the judgments below, Lord Denning M.R. and Pearson L.J. were at one (i) in considering that there was no contract of

[7] [1965] Ch. 918; [1965] 2 W.L.R. 229; [1964] 3 All E.R. 855, C.A.

[8] [1952] Ch. 197, 205, 207; [1952] 1 T.L.R. 214; [1952] 1 All E.R. 167, C.A.

[9] (1860) 28 Beav. 562, 574.

[10] [1964] A.C. 465, 533; [1963] 3 W.L.R. 101; [1963] 2 All E.R. 575, H.L.

H. L. (E.) 1966 Phipps v. Boardman

agency; (ii) in assuming that the appellants were validly appointed proxies; (iii) in recognising the limited nature of the agency as proxies; and (iv) in founding their decision (as did Wilberforce J.) wholly on the concept of self-appointed agency as being the sole basis of accountability. Reliance was placed on *Lyell* v. *Kennedy*.[11] The ratio decidendi of that case, however, is that if property is received by one continuing or assuming to act as agent for another, then the property is held as trustee for that other. This is as high as the decision can be put against the appellants.

It is said that the appellants, purporting to act as agents, received information, which was the property of the trustees, and that therefore they became accountable as agents of the trustees. This is too wide. It is necessary to consider the nature of the property. In *Lyell* v. *Kennedy*[11] the title to the property was certain—the rents belonged to the owner of the land. But where the alleged property is information the title is not apparent, for information, unlike rents, can be enjoyed by a number of persons at the same time. In the present case the information belonged to the trustees only if the appellants were their agents. It is to argue in a circle if it be said that the appellants were agents only because they received the information. Further, even if the information be regarded as property for present purposes it is only of value to persons who wished to buy the shares. *Lyell* v. *Kennedy*[11] is not applicable here for the following reasons: (i) A person cannot be a self-constituted agent if at the moment when he is said to constitute himself an agent, both he and the so-called principal assert that the former is not an agent. In *Lyell* v. *Kennedy*[11] Lyell was asserting throughout that he was an agent. In the present case, the appellants, Fox and Mrs. Noble, were all asserting that the appellants were not agents. If the appellants were principals at the start of negotiations they could not suddenly become agents at a later date. (ii) Information may be used and turned to account by more than one person at the same time. Therefore the trustees here had to decide whether to assert their exclusive right to use it and prevent its use by the appellants. But the trustees decided not to use it. (iii) In any event the appellant Phipps was entitled to all the information as his own property and to use it as he thought fit. (iv) If the above propositions be rejected, then it is submitted that the appellants are not accountable because the purchase of the shares was not within the scope

[11] (1889) 14 App.Cas. 437, H.L.

A of the agency and it was not in competition with the trustees: *Aas* v. *Benham* [12] and *Regal (Hastings) Ltd.* v. *Gulliver.*[13]

As to the judgment of Russell L.J., there are four points: (i) no property was put into the hands of the appellants by two of the three trustees for nothing left the hands of the trustees. In their discretion they took no steps to prevent the appellants from taking B and using the information for they wanted them to use it since they considered that it would benefit the trust. In any event, the appellant Phipps was entitled as a beneficiary to the information. (ii) It is said that the appellants are accountable on "general principles" for the profit. But the question may be asked: what principle? This case comes nowhere near the principle in *Barnes* C v. *Addy*,[14] nor is reliance placed on the concept of "self-appointed agent." This statement is too wide for not everyone who receives trust property is accountable as though he were a trustee. (iii) To state that the information must be used "exclusively" for the benefit of the trust goes too far. Any contractual operation must be for the benefit of both parties. (iv) It is all very unrealistic D for at any stage the trustees could have bid for the shares themselves.

As to the position of the widow, Mrs. Ethel Phipps, true trusteeship is a joint office and where trustees have to exercise a discretion all the trustees must exercise their discretion, that is, all trustees who have a *mind* with which to exercise such discre- E tion. Thus the act of a majority of trustees cannot bind a dissenting minority nor the trust estate: *Luke* v. *South Kensington Hotel Co.*[15]

If it be wrong that the position of Mrs. Phipps can be disregarded, then it is submitted that the only relevance of *Luke's* case [15] here is that all the trustees would have to join in any dis- F position of property. But that is irrelevant unless the appellants have to rely on a contract. The trustees neither approbated nor reprobated the appellants' actions—they simply took no part but allowed them to go on since the trustees thought that it was beneficial to the trust.

As to the scope of the agency, much reliance was placed on G *Regal (Hastings) Ltd.* v. *Gulliver*,[16] but that case established no new principle, it was decided on the facts and has no bearing on the present case. It differs in two respects in that (i) the defendants were at all times directors of the company and therefore

[12] [1891] 2 Ch. 244, C.A.
[13] Post, p. 134; [1942] 1 All E.R. 378, H.L.
[14] 9 Ch.App. 244.
[15] (1879) 11 Ch.D. 121, C.A.
[16] Post, p. 134.

they were in a fiduciary capacity which was unlimited; (ii) the directors entered initially into a contract on behalf of the company and then in the middle of the transaction they "changed horses" and entered into negotiations on their own behalf and eventually signed a contract on their own behalf instead of for the company. The decision [16] is an application of the well-established principle that if agents enter into a transaction on behalf of a company and subsequently substitute themselves as principals and thereafter make a profit they are accountable for such profit to the company. Contrast the decision in *Regal* [16] with that in *Aas* v. *Benham*,[17] which has several features in common with the present case and on which the appellants rely. The purchase of these shares by the appellants was wholly outside the scope of any agency undertaken for the trustees.

In conclusion, every one in the present case was concerned to improve the value of the trust shares. At no time was it ever contemplated that the trustees should buy any shares of the company. No one contemplated that the appellants were acting as agents for the trustees (save as proxies); certainly not as agents to purchase shares. The trustees never parted with any trust property and never committed a breach of trust. If in any way the appellants were agents, the purchase of the shares was wholly outside the scope of the agency and could not and did not compete with any actions of the trustees.

Ultimately, the question for decision resolves itself into whether the appellants, who have taken all the burden and risk, must account for what they have purchased with their own money. There is no principle of equity which constrains any court so to hold.

Raymond Walton Q.C. and *N. C. H. Browne-Wilkinson* for the respondent. Reliance is placed on the following propositions: 1. The 8,000 shares in the company were a trust asset. 2. As a result of the interest aroused by an outside inquiry which was dealt with by Boardman as solicitor to the trust, the appellants went to the 1956 annual general meeting of the company as agents of the trustees. 3. That visit triggered off a chain of events which gave them, acting ostensibly in the same capacity, the opportunity of acquiring knowledge of the affairs of the company which was only made available to them because they were backed throughout by the trust shareholding. 4. All knowledge so obtained was an asset of their principals, the trustees. 5. In the

[16] Post, p. 134.

[17] [1891] 2 Ch. 244, C.A.

A course of acting as ostensible agents for the trustees they acquired the opportunity of purchasing the shares at a low price. 6. Any property so acquired as a result of that opportunity belongs to their principals, the trustees. 7. There was no prior or subsequent consent from the trustees, as an informed body, to the appellants' taking a personal interest. 8. There was no valid consent given B by the respondent because the position was not fully disclosed to him.

It is not open to the appellants to contend that, because the trustees could not take up the shares, the appellants are therefore not accountable for the profit made in taking them up: see *Keech* v. *Sandford*.[18]

C As to the position of Boardman, he was solicitor to the trustees at all material times. This was admitted in the pleadings. It is conceded that there is no continuing office of solicitor but there can be a continuing retainer: see Cordery on Solicitors, 5th ed. (1961), p. 100. It is a fallacy to suppose that because there is no continuous office of a solicitor therefore a solicitor acts discon- D tinuously. In any event, even if Boardman only acted for the trustees from time to time, it does not follow that the fiduciary relationship between solicitor and client ends with the matter in hand: *McMaster* v. *Byrne*.[19] If Boardman had not been solicitor to the trust the proposed scheme would never have gone forward. It follows that "before a person in his position could cease to be E an agent and become a self-regarding principal, the clearest possible decision based on the clearest understanding of the position would be necessary," *per* Wilberforce J.[20]

As to the position of the appellant Phipps, (i) he was also an agent of the trustees before any question arose of his acting with Boardman for their own benefit. (ii) The whole matter depends F on the activities of Boardman, who was in a fiduciary capacity anyway—they were co-venturers, with Boardman leading and conducting all the negotiations. (iii) There was never any attempt in the pleadings to differentiate between the defendants.

The powers and duties of trustees. The office of trustee is a joint office and all the trustees must join in the execution of trust G matters: *Luke* v. *South Kensington Hotel Co.*[21]; Underhill's Law of Trusts and Trustees, 11th ed. (1959), pp. 379, 380. It must follow that if two out of three trustees purport to do an act, that act is not the act of the trustees as such and whatever liability

[18] (1726) Sel.Cas.Ch. 61.
[19] [1952] 1 All E.R. 1362, 1367, P.C.
[20] [1964] 1 W.L.R. 993, 1008.
[21] 11 Ch.D. 121.

they place themselves thereunder it is not binding on the trust. A All three must join in the exercise of any duties conferred on the trustees, in the disposal of any property vested in the trustees or in the making of any contract which is to bind the trustees as such. Similar considerations apply to complying with statutory provisions: *In re Flower (C.) and Metropolitan Board of Works.*[22] Further, a majority of trustees cannot validly agree to put the B property of the trust in the hands of, or make the facilities of the trust available to, any stranger to the trust, and if they do so de facto, that is a breach of trust. A person who takes trust property with knowledge that he is taking in breach of trust becomes a constructive trustee. This is the ratio decidendi of Russell L.J.'s judgment. C

It is too late for the appellants to challenge Wilberforce J.'s conclusion[23] that the "knowledge" of which profitable use was made "was essentially the property of the trust." It is plain that the appellants received massive information as a result of the backing they had of the 8,000 trust shares the holders of which the appellants put forward themselves as representing. The D directors of Lester & Harrison Ltd. were never willing sellers. It was the combination of the opportunity to acquire the shares from the directors coupled with the knowledge which the appellants had acquired from representing themselves as agents for the holders of the trust shares, which enabled the appellants to make the offer that was accepted. By their acts in representing themselves to be E agents on behalf of the trustees throughout the appellants voluntarily put themselves under the same fiduciary duty as agents.

It was suggested that *In re Biss*[24] is an answer to the last proposition and that, for example, merely being a beneficiary does not put a person in a fiduciary position. But in that case[24] Romer L.J. makes it plain[25] that if the beneficiary had been in a F special position because of his interest by virtue of which he was able to obtain a renewal of the lease he would have been liable to account. That is applicable here because it was by virtue of their position in regard to the holders of the 8,000 shares that the appellants were able to obtain more. G

It is conceded that the phrase "self-appointed agent" may be considered inapt but the concept is very familiar in English law: see *Lyell* v. *Kennedy.*[26]

[22] (1884) 27 Ch.D. 592.
[23] [1964] 1 W.L.R. 993, 1012.
[24] [1903] 2 Ch. 40.
[25] Ibid. 61.
[26] 14 App.Cas. 437, 457, 463.

A Certain types of information are capable of coming within the legal concept of property. It has been contended that even if the information obtained here was a form of property, that does not affect the appellants since the appellant Phipps was entitled to it under the general law as a beneficiary. But it would be quite wrong if one beneficiary was entitled to such information and the B opportunities it afforded to the exclusion of the other beneficiaries. Reliance is placed on the observation of Lindley L.J. in *Aas* v. *Benham*,[27] "it is not the source of the information, but the use to which it is applied, which is important in these matters."

On the question of agency, the precise scope of the agency of the appellants was the preservation and improvement of the value C of the 8,000 shares belonging to the trust estate of C. W. Phipps, deceased. As to accountability, the basic principle is that an agent is liable to account for the profits he has made out of the trust property if there is *any possibility* of conflict between his interest and duty. There are three observations to be made on this: (i) it rests on the mere possibility of conflict. (ii) The know-D ledge or opportunity of which the advantage is taken must have been acquired in the course of the agency or by the use of the principal's property. (iii) If it be a requirement in the case of an agent that he is a "fiduciary agent" the term is used in a very loose sense and which certainly extends to the agency here in question.

E As to (i), see *Parker* v. *McKenna*.[28] The bank there had suffered no loss at all; nevertheless the defendants had to account to the bank for any profit made. In the present case there was a possibility of conflict. Further, it is to be noted that the scheme which was adopted was that which profited the appellants the most. As to (ii), see *Regal (Hastings) Ltd.* v. *Gulliver*,[29] which applies to the F facts here since the appellants stood in a fiduciary relationship to the trustees and through the trustees to the beneficiaries. Whether the knowledge which accrues to and is available to the agent is properly to be called "property" does not affect the issue for Lord Wright states[30] plainly that it is the taking advantage of the opportunity and knowledge which gives rise to the duty of account-G ing. Further, *Regal*[31] and the cases therein cited show that the fact that the principal himself could not have made a profit is totally irrelevant to the question of accountability.

[27] [1891] 2 Ch. 244, 256.
[28] (1874) 10 Ch.App. 96, 118, 124, 125, C.A.
[29] Post, pp. 134, 137E–138D, 143D–145E, 149F–150A, 154B–155E.
[30] Post, pp. 134, 154F.
[31] Post, p. 134.

H. L. (E.)
1966
Phipps
v.
Boardman

Aas v. *Benham*[32] is distinguishable as being a very special case for a partner is only in a fiduciary position in relation to matters within the ambit of partnership business. As to a trustee becoming a director and the subsequent fiduciary relationship, see *In re Macadam*[33]; *In re Gee, decd.*[34] A

In conclusion, the appellants placed themselves in a special position, the nearest equivalent to which is agency, in relation to the negotiations with the directors of Lester & Harris Ltd. regarding the trust shares. Out of such special position and in the course of those negotiations the appellants obtained the opportunity to make a profit in the knowledge that the profit was there to be made. They made it and are accountable accordingly. Further, and in the alternative, there was here a technical breach of trust by two of the three trustees in that an aspect of an asset of the trust, namely, the means of acquiring information of the company's affairs, was put into the hands of the appellants, who were strangers to the trust; accordingly they are accountable to the trust as constructive trustees for any profit made as a result of exploiting that knowledge. B C D

[Reference was also made to Snell's Principles of Equity, 25th ed. (1965), pp. 173, 174.]

Bagnall Q.C. in reply. *Parker* v. *McKenna*[35] is distinguishable for what was done in the present case was wholly outside the scope of the agency.

As to *Regal (Hastings) Ltd.* v. *Gulliver*,[36] (i) here were directors of a company who were already under a contract of agency with the company as a result of becoming directors thereof. (ii) The scope of the agency extended to acting in any matter which it was within the power of the company to do under its memorandum. (iii) They negotiated as agents for the company for the purchase of certain cinemas under which the company was to take the whole of the benefit of the new cinemas. (iv) In the middle of that transaction the directors took two-fifths of the benefit of the newly-acquired cinemas for themselves. In other words, the directors having entered into a contract for the benefit of the company entered into a similar contract for their own benefit. This they could not do. Contrast with that case[36] the facts in *Aas* v. *Benham*,[37] where the defendant was held not liable to E F G

[32] [1891] 2 Ch. 244.
[33] [1946] Ch. 73; 62 T.L.R. 48; [1945] 2 All E.R. 664.
[34] [1948] Ch. 284; [1948] 1 All E.R. 498.
[35] 10 Ch.App. 96, 116, 118.
[36] Post, p. 134.
[37] [1891] 2 Ch. 244.

A account because the information obtained was not acquired within the scope of his agency.

The test is to ask what use has the so-called agent made of the information? Having ascertained this there arises the further question: could this information have been used by the principal for that purpose for which it was used by the agent? If the
B answer is in the negative then the information was not the principal's property or, alternatively, it was not used in the course of the execution of the agent's duty as agent.

Here, the information was used for the purchase of shares in Lester & Harris Ltd. The information could not have been used at any time by the trustees for that purpose. It is no more
C relevant to the decision here that the trustees could have gone to the court to seek approval to buy the shares than it would have been to the decision in *Aas* v. *Benham* [37] that the partners could have changed the articles of partnership, or to that in *Regal* [38] that the company could have altered the scope of its memorandum.

[Reference was also made to *Keech* v. *Sandford* [39]; *McMaster*
D v. *Byrne* [40]; *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*[41] and *Lyell* v. *Kennedy*.[42]]

Their lordships took time for consideration.

November 3, 1966. VISCOUNT DILHORNE. My Lords, on
E March 1, 1962, the respondent, John Anthony Phipps, commenced an action against his younger brother, Thomas Edward Phipps, and Mr. T. G. Boardman, a solicitor and partner in the firm of Messrs. Phipps & Troup. In that action he claimed a declaration that they held shares in a private company called Lester & Harris Ltd. as constructive trustees for him, an account of the profits made by
F them and transfer to him of the shares held by them as constructive trustees for him and 5/18ths of the profits made by them.

The action was tried by Wilberforce J. He gave judgment for the plaintiff. The defendants appealed to the Court of Appeal (Lord Denning M.R., Pearson and Russell L.JJ.). The appeal was dismissed and they now appeal to this House.

G The estate of Mr. C. W. Phipps, the father of the appellant Phipps and the respondent, included 8,000 shares in Lester & Harris Ltd., which was engaged in the textile business. Its issued capital was 30,000 £1 ordinary shares. Mr. Phipps' estate also included a

[37] [1891] 2 Ch. 244, 256.
[38] Post, p. 134.
[39] Sel.Cas.Ch. 61.
[40] [1952] 1 All E.R. 1362.
[41] [1964] A.C. 465, 533.
[42] 14 App.Cas. 437.

A substantial holding in a family company, Phipps & Son Ltd., also engaged in the textile business. The appellant Phipps was chairman of this company and Mr. Boardman was one of its directors.

By his will dated December 23, 1943, Mr. C. W. Phipps left an annuity to his widow and subject thereto 5/18ths of his estate to each of his sons and 3/18ths to his daughter, Mrs. Noble. In the B event of a son not surviving him, that son's 5/18ths was to go to the son's family. His eldest son did not survive him and so one 5/18ths went to his family.

At all relevant times until her death in November, 1958, Mr. C. W. Phipps' widow, Mrs. Ethel Phipps, was a trustee of his will. She was, when the events which gave rise to this case occurred, over C 80 years of age and suffering from senility. Consequently she did not take an active part in the affairs of the trust. The other trustees were Mrs. Noble and a Mr. Fox, an accountant.

In December, 1955, Mr. Boardman, who acted as solicitor to the trust and for several members of the Phipps family, received a letter asking whether the trustees were prepared to sell their holding in D Lester & Harris Ltd. He consulted Mr. Fox on this and as there had been some trade connection between Lester & Harris Ltd. and Phipps & Son Ltd., Mr. T. E. Phipps, the appellant, was also consulted, for it was thought that what was done with these shares might affect the Phipps' interests in Phipps & Son Ltd.

Mr. Fox and Mr. Boardman looked at the accounts of Lester & E Harris Ltd. According to Mr. Boardman they showed that that company was going through a lean time and it was apparently decided to consider the Lester & Harris holding again when the accounts for the current year were published with a view to seeing whether anything could be done to improve the value of the trust's holding.

F In his reply to the inquiry he had received, Mr. Boardman wrote on January 13, 1956, that he did not imagine that his clients would be prepared to sell except at a price approaching the asset value of the shares which he estimated at £10 a share on the basis of the 1954 balance sheet and that his clients were far from satisfied with the return that the shares had yielded during recent years.

G On December 17, 1956, Mr. Boardman wrote to Mrs. Noble telling her that Mr. Fox had just received the accounts of Lester & Harris Ltd., that they were very unsatisfactory and that "we all feel that something should be done to improve the position." He said that the appellant Phipps had suggested that he and Boardman should attend the annual general meeting of Lester & Harris Ltd.

A on December 28, 1956, and he enclosed proxy forms to be signed by Mrs. Noble and her mother.

The appellants attended the annual general meeting on December 28, 1956, representing the trust holding. Mr. Boardman expressed their dissatisfaction with the position of the company and sought without success to get Mr. Phipps elected a director. He
B also asked a number of questions. In his evidence at the trial he said that they got no information which was not in the published accounts. The appellants thought that the attitude of the board of Lester & Harris Ltd. was hostile.

On their return to Northampton they reported what had happened to Mr. Fox. In the course of their discussion Mr. Boardman
C suggested that the only way in which the matter could be resolved would be by the purchase of a controlling interest in Lester & Harris Ltd. Mr. Boardman in his evidence said that Mr. Fox's reaction was to say that "he did not consider that a take-over bid for shares in a private company was something that he as a trustee or the trust should take any part in." Mr. Fox when giving
D evidence was asked:

> "Was there ever any question, so far as you were concerned, of the trustees buying all the outstanding shares?"

His answer was:

> "I would not consider the trustees buying those shares under any circumstances."

E He was then asked: "Did you consider the matter and reject it?" to which his reply was: "I considered the matter and rejected it."

When Mr. Fox made it clear that he was against the trustees buying the shares, Mr. Boardman suggested that the appellant Phipps should try to buy them. Phipps refused to do so unless Boardman agreed to come in with him and Boardman agreed to do
F so. In cross-examination Mr. Fox was asked:

> "When Mr. Boardman and Mr. Phipps decided to make an offer for the shares themselves, did they ask your consent on behalf of the trust or anything like that?"

His answer was:

> G "I do not know that they asked my consent. I was only too glad. Here was I holding 8,000 shares, a minority interest in a company where the directors were unfriendly, and, having had experience in other cases of the weakness of the Companies Act with regard to minority shareholders, as soon as I could see the prospect of getting friendly directors and friendly shareholders I was only too glad."

Later, as will be seen, Mr. Boardman entered into an agreement

H. L. (E.) 1966 Phipps v. Boardman — Viscount Dilhorne

under which the appellants purchased 14,567 shares in Lester & Harris Ltd., and Mr. Fox was asked the following question: A

> " What would your reaction have been if Mr. Boardman and Mr. Phipps, having concluded an agreement, had come to you and said ' We have agreed to buy the whole of the issued capital of these shares, and of course we were doing that as agents for the trustees with whom you must now complete the agreement '? " B

His answer was:

> " They were not doing it for the trustees; that was the whole point."

After the meeting at the end of 1956 Mr. Boardman wrote, on January 11, 1957, to Mr. Fox telling him that the appellants' efforts to buy the shares privately had failed and that they proposed to make an offer to buy the shares personally by circular. He pointed out that this would not involve the trustees who would share in any advantage gained and he asked Mr. Fox to confirm that the circular was in order and that it was in order " with regard to Mr. Phipps and my position vis-à-vis the trust." C

Mr. Fox raised no objection to this, but suggested that Mr. Boardman should write to Mrs. Noble and tell her what was proposed. Mr. Boardman did so on January 17, 1957, and in his letter said: D

> " We " (i.e., the appellants) " both feel that the only real hope of getting the true value of the shares is by acquiring a controlling holding so that a large part of the assets can be liquidated and only those parts of the business retained that are profitable. By so doing we should be able to put up the value of the shares and get some cash out. This involves making an offer for all the remaining shares and hoping that we will get sufficient acceptances to get control. The making of an offer in this form is not a matter which trustees should properly do and Tom and I have, therefore, agreed to make an offer personally. Our offer price is £2 5s. per share, which exceeds the value of the shares on an earnings and dividend basis, but is below their value on an asset basis. Although the offer is formally made to the trustees it is not intended, of course, that they should accept, as we hope that they will join with us in putting the company in order and getting full value for their holding. E F G
>
> " Our intention is that if we acquire sufficient shares which, with the trust's holding, will give us control, to reorganise the boards and see to what extent a repayment of capital can be made. It will depend upon the number of acceptances whether Phipps & Son are also asked to support the offer, but initially the proposal is that it should be a personal one. I have discussed this with Mr. Fox, who is in agreement with the

A proposal, which as I have said does not involve the trustees in any liability and will I hope be to their advantage."

In the same letter he said that the profits of the company had gone down in the last few years, that the dividend for the year to December, 1955, was $7\frac{1}{2}$ per cent. instead of a previous 10 per cent., that no dividend was paid for the six months to June, 1956, and
B that the company's assets on the balance sheet came out at a net surplus of £314,000.

Mrs. Noble replied on January 27, 1957, and said that she thought that the line the appellants were taking was the only possible one and asked where the money to pay for the shares was
C coming from. Boardman replied on January 28, 1957, saying that he did not think that the trustees could properly make an offer of this nature and for that reason he and Mr. T. E. Phipps were making it personally " with the object of taking such shares as we can and the balance being taken by Phipps & Son Ltd."

Messrs. Phipps & Troup sent an advance copy of the circular
D letter to Lester & Harris Ltd., with a letter which made it clear that the offer was by the appellants. In the same letter they said they were instructed to ask on behalf of the executors of C. W. Phipps for a list of the members of the company and their addresses. This information was obviously wanted so that the circular might be sent to them.

E The directors of Lester & Harris Ltd. advised their shareholders not to sell. The appellants then increased their offer to £3 per share. This offer was conditional upon acceptance by the holders of not less than 7,500 shares. It was accepted by the holders of 2,925 shares. It was not until June, 1959, that it was declared unconditional and the shares were then transferred to the appellants.

F In the course of his judgment Wilberforce J.[1] expressed the opinion that Mrs. Noble accepted the appellants' " action as a trust action, and the transaction and proposed action as trust matters." If by this he meant that Mrs. Noble thought that they were proposing to buy the shares on behalf of the trust, with the greatest
G respect I must venture to disagree with him. In his letter of January 17, 1957, to which I have referred, Mr. Boardman clearly stated that the appellants were going to make an offer for the shares personally and not for the trust. Her answer of January 27, 1957, shows that she did not appreciate this but Mr. Boardman's letter to her on January 28, 1957, put the matter beyond all doubt.

1 [1964] 1 W.L.R. 993, 1007; [1964] 2 All E.R. 187.

H. L. (E.)
1966
Phipps v. Boardman
VISCOUNT DILHORNE

Wilberforce J. went on to say [2]: A

> "It seems to me that the true interpretation of this initial phase is that the agency of Phipps and Boardman was continued, the nature of it being to use and exploit the trust holding and its voting power to obtain information and, if possible, to strengthen the management of the company by securing representation on the board of the trust holding. Added to this was an intention that Boardman and Phipps B should acquire additional shares with a view to obtaining control. This was no departure from the agency."

I regret that I do not agree with this conclusion. It is, I think, clear both from the correspondence and from the evidence to which I have referred that Mr. Fox would not agree to the trustees seeking to buy the shares and that, in seeking to do so, the appellants were C acting on their own behalf. Far from the proposed acquisition being no departure from the agency, it was, in my opinion, wholly outside the scope of any agency. As Mr. Fox said: "They were not doing it for the trustees: that was the whole point."

The trust could not in fact have bought the shares without the sanction of the court and whether the court would have sanctioned D this speculation at a time when on the death of his widow, then in failing health, Mr. C. W. Phipps' estate would have become divisible among the beneficiaries of his will and when the proposed investment was in a private company which was not doing well, and the trust had no money available for investment, may well be open to doubt. E

In my opinion, the position was that from the time of the meeting in December, 1956, when Mr. Fox stated that he as trustee would not take any part in a take-over bid for the shares, the appellants' efforts to acquire the shares were wholly outside the scope of their agency; and that Mr. Fox, as trustee, believing that it was in the interests of the trust that they should do so, gave them F such assistance as he could. In one sense it was a joint operation for the benefit of the trust, but there is no doubt that the efforts of the appellants to buy the shares were made solely on their own behalf. If they succeeded in doing so, it must have been clear to Mr. Fox and Mrs. Noble that the appellants would make a profit if the speculation was successful. G

The failure to secure sufficient acceptances of their offer of £3 a share did not lead Mr. Boardman and Mr. Phipps to abandon their efforts. On April 26, 1957, Mr. Boardman wrote to Mr. Smith, the chairman of Lester & Harris Ltd., pointing out that

[2] [1964] 1 W.L.R. 993, 1007.

A Mr. Smith and his colleagues held just under 50 per cent. of the shares and that most of the other shares are "held by my clients or on offer to them." It is not clear to whom Mr. Boardman was referring. The appellants held no shares at that time in Lester & Harris Ltd.: though some were on offer to them. The trustees held shares but none were on offer to them. Mr. Boardman suggested B that to avoid difficulties in the future a possible solution might be to divide the Lester & Harris "group" so that "the Harris family and the directors own the whole of one part, and the Phipps interests own the balance with suitable adjustments, of course, for the few shareholders who may be 'in neither camp.'"

This letter marks the commencement of the second phase of the C negotiations that took place with the directors of Lester & Harris Ltd.

Mr. Smith and his colleagues on the board of Lester & Harris did not reject this suggestion and from this time until October, 1958, negotiations were continued with a view to finding an acceptable basis for splitting up the business of Lester & Harris Ltd. In D the course of these negotiations the appellants obtained information as to the property Lester & Harris owned in Australia and as to Lester & Harris's factory at Nuneaton and the nature of the business carried on at each place. They inspected the factory at Nuneaton and the Park Street premises of Lester & Harris. A valuation of their property was made by valuers employed by Lester & Harris E Ltd., and valuers employed by the appellants were also allowed to make a valuation.

Lester & Harris Ltd. also sent them a valuation of their property and fixed assets in Australia. Lester & Harris also had a factory at Coventry. The value placed on the factories at Coventry F and Nuneaton by Lester & Harris's valuers was £215,675, whereas the appellants' valuers valued them at £90,650. After further correspondence, on October 3, 1958, Mr. Boardman wrote to Mr. Smith saying that the appellants were

> "able to control about 12,000 shares. These, on the asset values submitted with your letter would require an allocation G of assets valued at £126,000. Such proportion might be satisfied by either: (a) the transfer to us of the Nuneaton factory and plant, at a value of £88,000 plus net current assets adjusted to produce £38,000; or (b) the transfer of the whole of the Australian company plus U.K. assets of the value of £26,000."

On October 13, 1958, Mr. Smith suggested that they should make an offer for the whole of the remaining share capital, and

H. L. (E.)
1966
Phipps v. Boardman
Viscount Dilhorne

on October 17, 1958, told Mr. Boardman that he would be prepared to recommend a figure of £5 a share. A

On October 21, 1958, Mr. Boardman wrote to Mr. Smith saying that he and Phipps would like to give further consideration to obtaining the whole share capital. He said that so far they had only seen the balance sheet and summarised accounts, and he asked to be supplied with copies of "the detailed trading and profit and loss accounts for the last five years or so, both for the English company and for the Australian company." At first Mr. Smith refused to agree to this, but after a further letter from Mr. Boardman pointing out that although they had received "a good deal of information as to the assets" the figures they had been given and the published accounts gave no real guidance to the "going concern" value of the business, Mr. Smith agreed that their accountants should meet. Mr. Fox was employed for this purpose by the appellants and examined the trading accounts for five years. After receipt of his report, on January 5, 1959, Mr. Boardman made an offer of £4 5s. a share. A little later, after a discussion with Mr. Smith, he agreed with Mr. Smith a price of £4 10s. a share, "subject to various safeguards and escape clauses." B C D

The making of this agreement may be taken to mark the conclusion of the second phase of the negotiations during which the appellants were seeking to secure the division of the assets of Lester & Harris Ltd. between the two groups of shareholders. E

During the whole of this time the appellants kept open the possibility of acquiring the 2,925 shares by extending the period within which the offers might be made unconditional.

In what capacity was Mr. Boardman acting during this second phase? He was, no doubt, acting on behalf of the appellant Phipps as well as for himself, and it is clear that he was not instructed to seek to secure a division of the assets by the trustees. Nevertheless, he clearly represented to Mr. Smith that he was acting on their behalf. In a letter dated April 30, 1958, he told Mr. Smith that the appellants had "been required by the trustees to look after their interests in the company." On June 12, 1958, he wrote to Mr. Smith asking, if no progress in the negotiations could be made, that the Phipps interest should be represented on the board of Lester & Harris and saying that if they could not reach agreement "either as to a division or as to representation" they would be forced to exercise their legal F G remedies to protect the minority interest. In his letter of June 19, 1958, to Mr. Smith, he stated:

> "Our primary interest is, and always has been, to increase the value of *our* investment by endeavouring to secure a greater profitability for the business, and only if the directors were not prepared to accept our co-operation in this, then to have some form of division of the assets."

In a letter to Mr. Fox on January 24, 1958, he thanked him for sending him the notice convening the annual general meeting of Lester & Harris, and said:

> "I shall be glad if I can receive any communications from that company as soon as they arrive because, as you know, I am involved in some rather delicate negotiations with them."

He went on to say that it would be helpful if the appellants were registered as shareholders and suggested that one share should be transferred by the trustees into his name and that of the trustees and another into the names of Phipps and the trustees to ensure that notices were sent direct to them and that they would have the right to speak at any meeting. On February 11, 1958, he wrote to Mrs. Noble telling her of the proposal that Lester & Harris should be divided and part of it allocated in satisfaction of the estate shares.

> "This," he wrote, "should produce much more capital for those shares than they are ever likely to realise as a minority holding. . . ."

He sent her transfers for two shares with the request that they should be executed by her and her mother so as to give the appellants greater rights to inquire into the company's affairs than they had at that moment.

Mr. Fox, Mrs. Noble and her mother executed the transfers, but the directors of Lester & Harris refused to accept them. The appellants attended the annual general meeting as holders of proxies signed by the three trustees. In so doing they acted as agents for the trustees but, as I have said, they were not authorised to act for them in seeking a division of the assets. The trustees were not asked to pay and did not pay for the valuation procured by the appellants. The appellants paid for that and they paid Mr. Fox for the work he had done at their request.

I do not doubt that the appellants' primary interest was, as Mr. Boardman stated in his letter of June 19, 1958, to increase the value of the trust investment. The only profit that they would have made on a division of the assets among the shareholders A would have been on the 2,925 shares offered to them if they had acquired those shares.

I think that throughout this phase the appellants were continuing to act in pursuance of the common design agreed with Mr. Fox at their meeting in December, 1956, on their return from Lester & Harris's annual general meeting and B assented to by Mrs. Noble in January, 1957, namely, to seek to improve the value of the trust holding.

One question for consideration is whether, having got the information about Lester & Harris in the way they did, they were in breach of any duty they owed to the trustees in making use of it to increase their offer for the shares from £3 to £4 5s. a C share and when agreeing to the price of £4 10s. per share. I shall revert to this question later.

On March 10, 1959, an agreement was made between Mr. Smith and the appellants for the sale to them of 14,567 shares in Lester & Harris at £4 10s. a share. Completion was to be on May 30, 1959, but provision was made for the rescission D of the agreement by the appellants by notice given before a specified date. The appellants also agreed to offer the other shareholders £4 10s. a share.

In April, 1959, the appellants went to Australia at their own expense to get an assessment of the realisable value of the business there. In a letter dated March 5, 1959, Mr. Boardman E said that Mr. Phipps took the view that neither party should be bound until after their return from Australia.

> "By that time," he wrote, "we should have a much clearer picture as to what is involved and the risks and we hope also to know a little more about the prospects of a rapid sale of the English interests." F

The same day Mr. Boardman wrote to Mr. Phipps a letter which contained the following paragraph:

> "I think we should have a meeting with your brother" (the respondent) "and sister and Mrs. F. M. Phipps" (representing the estate of the dead brother) "as soon as possible after your return to Northampton to inform them G of the proposals and to get their views on the family holding. They may wish to sell their shares, but if they wish to retain them, we should like to know that they will vote with us. I should also like to know that they have no objection to my taking a personal interest in this despite the fact that my knowledge of the company came through my professional connection with the family trust."

A Mrs. Ethel Phipps, the widow of Mr. C. W. Phipps, having died in November, 1958, the beneficiaries under his will were entitled to their respective shares in Lester & Harris on the distribution of his estate. For reasons unconnected with this case, that distribution did not take place until April, 1960.

The suggested meeting did not take place, but on March 10, B 1959, Mr. Boardman wrote to the respondent, Mrs. Noble and Mrs. F. M. Phipps (representing the estate of the dead brother) letters in identical terms, telling them of the offer to sell the shares to Mr. Phipps and to him at £4 10s. per share, "about twice the price at which they acquired them," and saying:

> C "Whilst we consider this to be a high price, we feel that there is probably quite a lot of asset value in the company and that we may well be able, by better management or by liquidation, to make the shares worth a good deal more than this. We are proposing, therefore, subject to this letter, to accept the conditional offer of these shares and to see whether we can effect some sales of the Australian interest, and possibly some of the English interest to yield a profit D above the price at which the shares are now offered. We are proposing to go to Australia next month.
>
> "If we are successful in making the shares worth more than £4 10s. the increased value will, of course, equally reflect upon the shares which are held in the estate of the late C. W. Phipps, and to that extent you will benefit by them. Both of us, however, would like to be re-assured on E two points:
>
> "1. The first point, which really concerns me, alone, is whether you have any objection to my taking a personal interest in this purchase, bearing in mind that my initial inquiry with regard to it was on behalf of the C. W. Phipps estate. At that time the trustees did not wish to purchase any shares themselves and expressed their agreement to my F taking a personal interest. However, as the shares will shortly be distributed amongst each of you, I should like to have your approval of the proposals. They do not, of course, involve you in any liability and there is no conflict of interest, as it will of course be in the interests of yourself as much as it will be for Tom and me, that we should try to realise the maximum value possible for these shares."

G It must have been obvious to the recipients of this letter that approval of the proposals must involve, if their efforts were successful, the appellants obtaining a profit for themselves. Mr. Boardman was not entirely accurate in saying that the trustees had expressed their agreement to his taking a personal interest, for Mrs. Ethel Phipps, the widow, had not been approached and had not, therefore, agreed, though the other trustees, Mr. Fox and Mrs. Noble, had done so. A

In an earlier letter on February 25, 1959, to a gentleman through whom he was seeking to obtain finance for the purchase of the shares. Mr. Boardman had stated that, on their valuer's valuation, the equity was worth approximately £250,000 and if the values put forward by Lester & Harris's valuers were obtained, the equity would be worth over £380,000. He went on to say: B

> " At the agreed price of £4 10s. the equity is costing us £135,000 . . . and I feel that there is a most attractive margin to go for. It is of course true that the earnings do not support a figure as high as the asset values, but I think that this is largely due to bad management." C

On the figure of Lester & Harris's valuers, this meant that each share was worth £12 6s. 8d. In his letter of January, 13, 1956, Mr. Boardman had put their value, based on the 1954 balance sheet, at £10 a share.

Mr. Boardman's letter to the respondent was followed by a meeting at which he, the respondent and the respondent's wife were present. Mr. Boardman's note of that meeting records that the respondent agreed to the appellants " undertaking the adventure on their own behalf." D

Then the appellants went to Australia. On June 3, 1959, the purchase of the 14,567 shares was completed. By June 19, 1959, the appellants had paid for 16,442 shares and were about to acquire a further 1,400 shares. Taking into account the trust holding of 8,000, this left a balance of 4,158 shares to be acquired. They eventually made up their holding to 21,986 shares. E

At the end of July Mr. Boardman made a further visit to Australia with a view to the sale of the Australian business. F

On January 13, 1960, Mr. Boardman, who had become chairman of Lester & Harris Ltd., informed the shareholders of that company that the Australian business had been sold for £88,000 and announced the distribution of a capital bonus of £3 a share.

On January 20, 1960, Mr. Boardman wrote a long letter to the respondent telling him what the appellants had done, of " the sale of the Australian business " at twice the amount that " had at one time seemed obtainable," that the appellants were on the board of the English company and that they had had a very busy six months reorganising it, and that apart from the capital bonus of £3 a share which meant that C. W. Phipps' estate G benefited to the extent of £24,000, his holdings remained unchanged and that they hoped that they could produce a level of profit which would make the shares worth considerably more than their previous value. To this the respondent replied on January 24, 1960:

> "This is indeed welcome news. You must be feeling very satisfied that your hunch backed by much hard work and perspicacity has turned out so well for all concerned."

In April, 1960, transfers for the shares in Lester & Harris Ltd. to which the respondent was entitled on the distribution of Mr. Phipps' estate were sent to him by Mr. Boardman, and shortly thereafter the Lester & Harris shares held by the estate were distributed. Mr. Boardman appears to have acted at this time professionally for the respondent in connection with the transfer of some shares in Phipps & Son Ltd. by the respondent to his wife. The correspondence shows that Mr. Boardman and the respondent were then on good terms.

Later in the year the appellants sold the Coventry factory of Lester & Harris and secured a very substantial capital profit. They then made a further capital distribution of £2 17s. 6d. a share and so the respondent received £5 17s. 6d. in respect of each share which came to him as against the original probate value of £2 7s. 6d. while retaining the shares which were still worth more than £2 a share.

Nearly two months after the receipt by the respondent of this good news, Mr. Boardman received a letter from solicitors employed by the respondent alleging that at all times he had been acting in a fiduciary capacity and was therefore accountable to the beneficiaries for any profit he had made. A similar letter was sent to the appellant Phipps.

Mr. Boardman, on July 28, 1961, sent a long letter in reply, denying liability and pointing out "there was not at any stage any possible conflict of duty and personal interest." It included the following paragraph:

> "Although I am not aware of any duty or moral obligation requiring me to do so, I did not contemplate taking any personal interest in the affairs of Lester & Harris except with the full knowledge and approval of the trustees and beneficiaries under the will of C. W. Phipps deceased (the trustees include a chartered accountant who had as full information as I had on the affairs of Lester & Harris Ltd.). Approval was obtained."

Mr. Boardman also pointed out that the vendors of the controlling holding, the then directors of Lester & Harris, were the then chairman, a solicitor in Coventry with wide commercial experience, the then managing director, who had spent most of his life in the business, the son of the founder, who had been in the business all his working life, and a practising chartered accountant, who had detailed knowledge of all the affairs of the company and its underlying value. He then wrote:

> "You may, therefore, think that these experienced men, who collectively held control, were not likely to sell at an undervaluation, that they extracted from us the full worth of the shares at that time, and that the substantial appreciation in value is due to the ability brought into the company by the new purchasers."

This did not satisfy the respondent and after some further correspondence the writ in this action was issued on March 1, 1962.

Throughout this long history the appellants acted with the object of securing an improvement in the value of the trust's holding in Lester & Harris Ltd. Throughout they thought that they were acting with the approval of the active trustees, Mr. Fox and Mrs. Noble, and, in relation to the purchase of the shares at £4 10s. a share, with the approval of the beneficiaries under the will of C. W. Phipps. At the outset they thought that if they could get control, they would be able to increase the value of the holding but it was not until a considerable time later that Mr. Boardman, as a result of information they had received from Lester & Harris, their valuer's report and the report of Mr. Fox, was able to write to the gentlemen through whom he sought financial aid, saying that he felt that there was a most attractive margin to go for.

When they offered to buy the shares in 1957 and when they bought them in 1959, they did not act or purport to act as agents for the trustees. The acquisition of the shares brought no immediate profit. The substantial profits that were obtained were made as a result of the appellants' work when they had gained control of Lester & Harris.

Does equity require the appellants to account at the instance of one of the four beneficiaries under C. W. Phipps' will for the profits that they made?

Equity, may, where there has been some impropriety of conduct on the part of a person in a fiduciary relationship as, for

A instance, a trustee purchasing trust property, require that person
to account.

Mr. Walton, for the respondent, argued that as the appellants
had acquired knowledge and information about Lester & Harris
Ltd. in the course of acting as agents of the trustees and had used
B this knowledge and information when making their offers for the
shares, they were liable to account. He relied strongly on the
decision in this House in *Regal (Hastings) Ltd.* v. *Gulliver.*[3]
The facts of that case were very different from those of this.
In that case[3] the directors of the Regal company had formed
a subsidiary company with the intention that all the shares in
C the subsidiary company should be held by Regal. When the
landlord of two cinemas was not prepared to grant a lease of
them to the subsidiary company without either the rent being
guaranteed by the directors of Regal or the subsidiary company
having a paid-up capital of £5,000, the directors of Regal decided
that Regal should invest £2,000 in the subsidiary company and
D that the balance of £3,000 should be found by each of the
directors and Regal's solicitor investing £500.

Thus the directors of Regal and Regal's solicitor became the
owners of shares which were to have been the property of the
Regal company. These shares were later sold at a profit. This
House held that the directors were in a fiduciary relationship to
E the company; that they had made a profit on the shares in the
course of their execution of their office as directors; and that
those directors who had made a profit on the shares were liable
to account.

In this case the appellants did not make a profit out of
F buying shares which it was intended that the trust should acquire
or which, unless Mr. Fox changed his mind and the sanction of
the court was obtained, there was any possibility of the trust
acquiring.

There are, however, passages in the opinions delivered in
that case which are very relevant to the issues your Lordships
G have to determine. Viscount Sankey said[4]:

> "The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect."

[3] Post, p. 134.

[4] Post, pp. 134, 137G.

Lord Russell of Killowen said[5]: A

> "The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether B he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account."

C

He held that the directors were in a fiduciary relationship to the company and that they had acquired the shares "by reason, and only by reason of the fact that they were directors of Regal, and in the course of their execution of that office."[6] Lord Macmillan said[7]:

> "We must take it that they entered into the transaction D lawfully, in good faith and indeed avowedly in the interests of the company. However, that does not absolve them from accountability for any profit which they made, if it was by reason and in virtue of their fiduciary office as directors that they entered into the transaction . . .
>
> "The issue thus becomes one of fact. The plaintiff company has to establish two things: (i) that what the directors E did was so related to the affairs of the company that it can properly be said to have been done in the course of their management and in utilisation of their opportunities and special knowledge as directors; and (ii) that what they did resulted in a profit to themselves."

Lord Wright said[8] that the question to be decided was: F

> "whether an agent, a director, a trustee or other person in an analogous fiduciary position, when a demand is made upon him by the person to whom he stands in a fiduciary relationship to account for profits acquired by him by reason of his fiduciary position, and by reason of the opportunity and the knowledge, or either, resulting from it, is entitled to defeat the claim upon any ground save that he made G the profits with the knowledge and assent of the other person. The most usual and typical case of this nature is that of principal and agent. The rule in such cases is compendiously expressed to be that an agent must account for net profits

[5] Post, pp. 134, 144G–145A.
[6] Post, pp. 134, 146G–147A.
[7] Post, pp. 134, 153D, E.
[8] Post, pp. 134, 154B.

A secretly (that is, without the knowledge of his principal) acquired by him in the course of his agency."

and a little later[8a]:

> " both in law and equity, it has been held that, if a person in a fiduciary relationship makes a secret profit out of the relationship, the court will not inquire whether the other
> B 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."

And Lord Porter said[9]:

> " The legal proposition may, I think, be broadly stated by saying that one occupying a position of trust must not
> C make a profit which he can acquire only by use of his fiduciary position, or, if he does, he must account for the profit so made."

In the light of these passages, the first question to be decided is whether the appellants were throughout the negotiations or during any part of them in a fiduciary relationship to the trust.
D They had been authorised by the trustees to represent the trust holding at two annual general meetings of Lester & Harris Ltd., Boardman as trust solicitor had dealt with the inquiry whether the trust would sell their holding and Boardman as solicitor and Phipps had discussed with Mr. Fox in December, 1956, Lester & Harris's accounts and what should be done to
E improve the value of the trust holding. Apart from these occasions, I agree with Lord Denning that there was not any contract of employment of the appellants made by the trustees or any of them.

Wilberforce J. held[10] that in 1956 the appellants assumed the character of self-appointed agents of the trustees; that the agency
F continued throughout the negotiations; and, as I have said, in my view wrongly, that the acquisition of shares by them was no departure from the agency.

In the Court of Appeal Lord Denning M.R. agreed[11] with Wilberforce J. that they had assumed this character and said that they had taken upon themselves an authority they did not
G possess. Pearson L.J. held[12] that they were acting with the authority of the trustees and Russell L.J. expressed the view[13]

8a Post, pp. 134, 154F.
9 Post, pp. 134, 158E–F.
10 [1964] 1 W.L.R. 993, 1007.
11 [1965] Ch. 992, 1017; [1965] 2 W.L.R. 839; [1965] 1 All E.R. 849, C.A.
12 [1965] Ch. 992, 1022.
13 Ibid. 1031.

that two out of three trustees could come to an arrangement with A a third party which would have the effect of placing the latter in a fiduciary position.

In my opinion, despite the able arguments advanced by Mr. Bagnall for the appellants, the unanimous opinion of the Court of Appeal and of Wilberforce J. that their relationship to the trust was fiduciary is correct. In my opinion that relation- B ship arose from their being employed as agents of the trust on the occasions I have mentioned and continued throughout.

It does not, however, necessarily follow that they are liable to account for the profit they made. If they had entered into engagements in which they had or could have had a personal interest conflicting with the interests of those they were bound to C protect, clearly they would be liable to do so. On the facts of this case there was not, in my opinion, any conflict or possibility of a conflict between the personal interests of the appellants and those of the trust. There was no possibility so long as Mr. Fox was opposed to the trust buying any of the shares of any conflict D of interest arising through the purchase of the shares by the appellants.

If in February, 1957, their offer of £3 a share had then led to their acquisition of 7,500 shares in Lester & Harris Ltd., that acquisition would not and could not have involved any conflict of interest. If then they had raised their offer to £4 10s. a share E and that offer had been accepted, the position would have been the same.

Lord Russell of Killowen in the *Regal* case [14] held that the directors had acquired the shares " by reason, and only by reason of the fact that they were directors of Regal, and in the course of their execution of that office." Lord Macmillan [15] said that F the directors were accountable for any profit which they made if it was by reason and in virtue of their office. Lord Wright said [16] that an agent must account for profits secretly acquired " in the course of his agency," and Lord Porter said [17] that " one occupying a position of trust must not make a profit which he can acquire only by use of his fiduciary position, or, if he does, G he must account for the profit so made."

If the profits made by the appellants had been made as a result of the acquisition of shares by them in 1957, it could not, in my view, be said that the shares were acquired " only by use

[14] Post, pp. 134, 146G–147A.
[15] Post, pp. 134, 153C–D.
[16] Post, pp. 134 154C–D.
[17] Post, pp. 134, 158E.

A of" their "fiduciary position," or "in the course of" their "agency" or by reason and only by reason of the fact that they were agents of the trust for certain limited purposes.

Between 1957 and 1959 when they acquired the shares did anything occur which altered the position? In my view, nothing occurred during this period which gave rise or could have given B rise to a conflict of interest. Mr. Fox is a chartered accountant. He had, according to Boardman—and it was not disputed—as much information as Boardman possessed of the affairs of Lester & Harris. He had seen their trading accounts for the past five years. In his evidence at the trial he stated that he would not consider the trustees buying the shares under any circum- C stances. This being his attitude, there was no possibility of a conflict of interest arising through purchase of the shares by the appellants either in 1957 or in 1959. In fact, as his evidence shows, far from there being a conflict of interest, Mr. Fox thought that it would be to the advantage of the trust if the appellants bought the shares.

D Between 1957 and 1959 the appellants obtained a mass of information about Lester & Harris Ltd. They had been shown the valuation made by Lester & Harris's valuers. They had been allowed to employ their own valuers. As I have said, Mr. Fox examined Lester & Harris's trading accounts for the past five years at the request of the appellants. At the start of the negotia- E tions they had obtained some information, a small part of the total, when acting as agents of the trust. A great deal of it was obtained during the second phase of the negotiations when Boardman was representing that he was acting for the trust, but it was not until their return from Australia and after they F had seen for themselves the position there that the appellants finally committed themselves to the purchase of the 14,567 shares at £4 10s. a share.

The information they obtained during the second phase was clearly of great value to the appellants, for it enabled them to form an estimate of the profits that they might secure if all went G well. Without it they might not have been prepared to pay £4 10s. a share and without it they might not have been able to secure the necessary finance.

Was the information they obtained the property of the trust? If so, then they made use of trust property in securing a profit for themselves and they would be accountable.

While it may be that some information and knowledge can

H. L. (E.)
1966

Phipps
v.
Boardman

Viscount Dilhorne

properly be regarded as property, I do not think that the information supplied by Lester & Harris and obtained by Mr. Boardman as to the affairs of that company is to be regarded as property of the trust in the same way as shares held by the trust were its property. Nor do I think that saying that they represented the trust without authority amounted to use of the trust holding. A

What was said in *Aas* v. *Benham*[18] throws some light on this question. That was a partnership case and a partner is not only a principal but also an agent of his fellow partners. In his capacity as agent he is in a fiduciary relationship with them. In that case it was claimed that the defendant had made use of information gained by him as a partner for his own use and benefit. Lindley L.J. said[19]: B C

> "As regards the use by a partner of information obtained by him in the course of the transaction of partnership business, or by reason of his connection with the firm, the principle is that if he avails himself of it for any purpose which is within the scope of the partnership business, or of any competing business, the profits of which belong to the firm, he must account to the firm for any benefits which he may have derived from such information, but there is no principle or authority which entitles a firm to benefits derived by a partner from the use of information for purposes which are wholly without the scope of the firm's business. . . . D
> "It is not the source of the information, but the use to which it is applied, which is important in such matters. E
> "To hold that a partner can never derive any personal benefit from information which he obtains from a partner would be manifestly absurd."

Bowen L.J. agreed[20] with this and went on to comment on and explain a dicta of Cotton L.J. in *Dean* v. *MacDowell*.[21] He said[22]: F

> "I think that when Cotton L.J. said that a partnership was entitled to the profits which arose out of information obtained by one of the partners as a partner, he was speaking of information to which the partnership was entitled in the sense in which they are entitled to property. I think you can only read the sentence in which the expression occurs in that way. It is as follows[23]: 'Again, if he makes any profit by the use of any property of the partnership, including, I may say, information which the partnership is entitled to, there the profit is made out of the partnership property' . . . He is speaking of information which a partnership is entitled to G

[18] [1891] 2 Ch. 244, C.A.
[19] Ibid. 255, 256.
[20] Ibid. 257.
[21] (1878) 8 Ch.D. 345, C.A.
[22] [1891] 2 Ch. 244, 257, 258.
[23] 8 Ch.D. 345, 354.

A in such a sense that it is information which is the property, or is to be included in the property of the partnership—that is to say, information the use of which is valuable to them as a partnership, and to the use of which they have a vested interest. But you cannot bring the information obtained in this case within that definition."

B Thus it was held that use by a partner for his own benefit of information obtained by him as a partner did not always render him liable to account for the profits he made and that not all the information gained as a partner was to be regarded as the property of the partnership.

Lindley L.J. said [24] that if a partner avails himself of informa-
C tion for any purpose which is within the scope of the partnership business, he must account to the firm for any benefit he may have derived from such information.

In this case the acquisition of the shares was outside the scope of the trust and outside the scope of the agency created by the employment of the appellants to act for the trust.

D I think that the principle stated by Lindley L.J. applies also to other agents and to trustees. If it did not, no trustee could safely use information obtained while engaged on the business of one trust for the benefit of another or his own benefit. This would place trustees of a number of trusts and corporate trustees, like the Public Trustee, in a difficult position. Whether or not
E there is a breach of duty by a trustee in the use of information so obtained appears to me to depend on whether the information could be used in relation to the trust in connection with which it was obtained, and, if it could, whether the use made of it was to the prejudice of that trust.

While information is not infrequently described as property,
F Bowen L.J. held [25] that not all information obtained as a partner was the property of the partnership. The test he applied was whether use of the information was valuable to the partnership and a use in which they had a vested interest.

The information obtained by the appellants was not, in my opinion, of any value to the trust. Wilberforce J. described the
G knowledge they acquired as of "a most extensive and valuable character." [26] So it was to the appellants but it could be of no use or value to the trust unless the trust could and wanted to buy the shares or to surrender them in exchange for assets.

[24] [1891] 2 Ch. 244, 255, 256.
[25] Ibid. 258.
[26] [1964] 1 W.L.R. 993, 1011.

Lord Denning said[27] in the Court of Appeal that he thought that Boardman had placed himself in a position where there was a conflict between his duty to advise an application to the court and his interest to acquire the shares himself. A

There can only be two occasions when such a duty arose, if it arose at all; first, when the appellants were discussing in December, 1956, what should be done about the trust's holding in Lester & Harris Ltd.; and secondly, when in the light of all the information obtained, Boardman was in a position to forecast that purchase of the shares at £4 10s. a share could reasonably be expected to yield a profit. I do not consider that Boardman was under any duty to advise an application to the court when Mr. Fox said that he would not consider the trust purchasing the shares under any circumstances. If one takes the second occasion as at the time Boardman wrote on February 25, 1959, saying that he thought that there was a most attractive margin to go for, can it be said that Boardman then was under a duty to advise the trustees to apply to the court? B C D

Mr. Fox too, must have known that there was a most attractive margin to go for, and, as a chartered accountant, that it was possible on occasions to secure the sanction of the court to an investment not within the investment clause of the trust. I do not therefore see that it became Boardman's duty to advise him on an application to the court. He was in a position, as good a position as Boardman, to assess the prospects of the speculation being successful and, as so much would depend on what was achieved after control was obtained, it could not be said that there was not some risk involved. He would not consider the trust buying the shares under any circumstances. E

That there was such a conflict of interest and duty was not alleged in the pleadings. It was not an issue at the trial. No evidence was directed to it. If Mr. Fox had been asked about it, he might well have said: "I would not consider the trust buying the shares and so I would not consider an application to the court to allow it to do so." There is no indication in the evidence or in the correspondence of any change of attitude on the part of Mr. Fox. F G

In my opinion, there was no conflict between the interests and duties of the appellants or between the interests of the trust and the appellants at any time.

[27] [1965] Ch. 992, 1020.

A Russell L.J. based his judgment on different grounds to those of Lord Denning, Pearson L.J. and Wilberforce J. He held[28] that

> "The substantial trust holding was an asset of which one aspect was its potential use as a means of acquiring knowledge of the company's affairs, or of negotiating allocations of the company's assets, or of inducing other shareholders
B to part with their shares. That aspect was part of the trust assets."

He thus held that this potential use of an aspect of an asset was the property of the trust. I do not think that this potential use can properly be so regarded. The fact that the appellants claimed to represent the trust holding and threatened minority
C action did not, in my opinion, involve use of any trust property.

Russell L.J. went on to say[28]:

> "That aspect was put into the hands of the defendants, B. and T.P., by two only out of three trustees, and must in those hands have remained part of the trust assets. The defendants exploited that aspect—that potential use—and as a result were able to profit by acquiring other shares: for
D that profit they must on general principle be accountable."

I do not take the view that Mr. Fox and Mrs. Noble by assenting to the appellants' proposals and facilitating the obtaining of information by them parted with an asset of the trust. I am for these reasons unable to agree with Russell L.J.

E If the making of the profits by the appellants constituted a breach of their fiduciary duty, they would be liable to account unless they established that they had done so with the consent of their principals. They could not claim that they had the consent of the trustees for they had not sought and had not obtained the consent of Mrs. Ethel Phipps, nor can it be said
F that they obtained a binding consent from the respondent. Wilberforce J. held that the letter to him, which was expressed to be a summary, did not sufficiently disclose the situation and that the deficiencies were not remedied at the meeting between Boardman, the respondent and the respondent's wife. From this finding there was no appeal.

G I do not consider that it was ever necessary for the appellants to obtain the consent of their principals to their course of action for, in my opinion, that course of action did not involve any breach of the fiduciary duty they owed in consequence of their employment as agents.

[28] [1965] Ch. 992, 1031.

I have not sought to distinguish between the position of the appellant Phipps and Boardman. Throughout they acted together both in the negotiations and in this litigation. I see no reason to distinguish between them. A

Nor have I drawn any distinction between the position of the trust and that of the respondent vis-à-vis the appellants. The appellants were not his agents nor did they represent that they were. On occasions they acted for the trust and they represented that they were so acting although not in fact authorised to do so. The trust continued in existence until a very short time before the completion of the purchase of the 14,567 shares. If what they did was not a breach of the duty they owed by reason of the fiduciary relationship to the trust, their principals, I do not see how it can be regarded as a breach of any duty to the beneficiaries of the trust. B C

I do not think that my conclusion involves any departure from the principles so often and firmly laid down as to the liability of agents to account if there has been a conflict or possibility of conflict between their interests and duties, and in breach of their fiduciary duty they have made profits out of their agency without the knowledge and consent of their principals. In this case, as Lord Macmillan said in the *Regal* case,[29] the result depends on issues of fact. Liability to account must depend on there being some breach of duty, some impropriety of conduct on the part of those in a fiduciary position. On the facts of this case I do not consider that there was any breach of duty or impropriety of conduct on the part of the appellants. D E

For the reason I have given I would allow the appeal.

Lord Cohen. My lords, I would dismiss this appeal. I have been privileged to read the speeches to be delivered by my noble and learned friends Lord Hodson and Lord Guest, who are of the same opinion. Agreeing, as I do in substance, with the reasons they give for their conclusion I can state my own reasons shortly. F

The noble and learned Lord Viscount Dilhorne has dealt so fully with the facts that I shall confine myself to repeating only so much as is necessary to explain the conclusion I have reached. G

The respondent claims as one of the residuary legatees under the will dated September 23, 1943, of his father, who died in

[29] Post, pp. 134, 153E.

1944. The residuary estate included 8,000 out of the 30,000 issued shares in a private company Lester & Harris Ltd., to which I shall hereafter refer as the company. By his will the testator, Charles William Phipps, bequeathed an annuity of £3,000 per annum to his widow and the 8,000 shares in the company were part of the fund set aside to assure that annuity. At the end of the year 1955 the trustees of the testator's will were his widow, his daughter, Mrs. Noble, and Mr. William Fox, a chartered accountant. The appellant, Mr. Boardman, at all material times was solicitor to the trustees and also to the children of the testator (other than the respondent). Mr. Fox was the active trustee of the trust created by the will, the widow was failing in health and took little or no part in the affairs of the trust.

At the end of December, 1955, the appellant, Mr. Boardman received an inquiry from someone wishing to purchase the said 8,000 shares in the company. This offer was rejected because it was made on behalf of a person who was thought to be in competition with Phipps & Son Ltd., most of the shares in which were part of the testator's estate. The appellant Mr. Boardman and Mr. Fox investigated the published accounts of the company and the register of members and directors and they and the appellant Tom Phipps, a residuary legatee, became dissatisfied with the conduct of the business of the company. In the result, at the request of Mr. Fox and with proxies signed by him, the appellants attended the annual general meeting of the company held on December 28, 1956. The appellant Mr. Boardman expressed the dissatisfaction of the Phipps family with the state of the company's affairs. He asked for further information, which was given, and tried to get the appellant Tom Phipps elected to the board of the company, but failed to do so. After the meeting Mr. Boardman reported to Mr. Fox that he and the appellant Tom Phipps were agreed that the only way to get results was to get control of the company and that they had therefore decided that they would make an offer for all the outstanding shares in the company other than the 8,000 held by the trustees.

I pause here to observe (1) that the trustees could not have made any offer without the sanction of the court, as such shares were not an authorised investment under the testator's will; (2) that Mr. Fox said in evidence that he would not consider the trustees buying these shares under any circumstances.

At the request of Mr. Fox, Mr. Boardman wrote to Mrs.

H. L. (E.)
1966
Phipps v. Boardman
LORD COHEN

Noble on January 17, 1957, telling her what had happened and that Tom Phipps and he were making an offer of £2 5s. per share for the shares in the company not held by the trustees. He sent a copy of this letter to Mr. Fox. Mrs. Noble appears at first to have thought the trustees were going to find the money for the purchase if it came off but by letter to her of January 28, 1957, Mr. Boardman wrote that the trustees could not properly make an offer of this nature and for that reason Tom Phipps and he were making it personally. A B

It is, I think, clear that both Mr. Fox and Mrs. Noble approved what was being done but there is no evidence that the widow was consulted; so it cannot be said that the making of the offer by Mr. Boardman and Tom Phipps personally was approved by the trustees if their consent was necessary. C

The appellants afterwards increased their offer to £3 a share but did not obtain sufficient acceptances to induce them to go through with their offer at that time, and by April 26, 1957, it seemed clear that they were unlikely to do so. This may be said to be the end of what was described in argument as the first phase of this matter. D

During this phase the appellants acted as proxies of the trustees and obtained information about the company at the annual general meeting on behalf of the trustees. They were, however, making the offer to purchase on their own behalf and I do not understand why, in the headnote,[30] it is said they were making the initial offer as agents for the trustees. They were no doubt seeing what could be done to improve the position of the company and were doing so at the request of or at least with the approval of Mr. Fox, but it is inconsistent with his evidence to conclude that an offer to purchase additional shares in the company was made on behalf of the trustees. E F

By a letter of April 26, 1957, Mr. Boardman suggested to Mr. Smith, the then chairman of the company, that they should see whether the assets of the company could be divided between the Harris family and the directors on the one hand and the Phipps family on the other. In the second phase, which continued until well into the year 1958, this suggestion was being pursued and it is, I think, clear that throughout it Mr. Boardman was purporting to act on behalf of the trustees. See, for instance, a letter dated April 30, 1958, from Mr. Boardman to Mr. Smith G

[30] [1964] 1 W.L.R. 993, 995.

A in which, dealing with the questions of transfers of one share from the trustees to Tom Phipps and the trustees and one share from the trustees to Mr. Boardman and the trustees, he says: "the object of the transfer was that as we have been required by the trustees to look after their interests in the company we should be the first-named holders of the shares."

B During this period Mr. Boardman obtained a mass of information about the company which threw light on the potential value of the shares of the company.

The negotiations for the division of the assets of the company between the two groups of shareholders in the end broke down and by August 16, 1958 (see letter of that date from Mr. Boardman to Mr. Smith), an alternative suggestion had been made that Tom Phipps and Mr. Boardman should buy the shares held by the directors' group and should afterwards sell back to the directors the Coventry part of the business of the company. This may be said to be the commencement of the third phase. The proposed resale of part of the business to the directors' group was dropped and after protracted negotiation it was agreed on March 10, 1959, that Tom Phipps and Mr. Boardman should buy the directors' holding at £4 10s. per share and should make an offer at a similar price for the other shares in the company not held by the directors or by the trustees or obtained by Tom Phipps and Mr. Boardman as the result of the earlier offer of £3 a share. The agreement contained a clause giving either party a right to call off the deal before a specified date, but this right was not exercised. I should mention that the widow had died in November, 1958, so that the sole trustees were Mrs. Noble and Mr. Fox and the residuary estate had become distributable among the beneficiaries. Accordingly Mr. Boardman wrote on March 10, 1959, to the respondent, to Mrs. Noble, and to Mrs. P. M. Phipps, the widow of a deceased brother of Tom Phipps, giving a concise account of what had happened and ending as follows:

> "If we are successful in making the shares worth more than £4 10s. the increased value will, of course, equally reflect upon the shares which are held in the estate of the late C. W. Phipps, and to that extent you will benefit by them. Both of us, however, would like to be re-assured on two points.
>
> "1. The first point, which really concerns me alone, is whether you have any objection to my taking a personal interest in this purchase, bearing in mind that my initial

H. L. (E.)

1966

Phipps v. Boardman

Lord Cohen

inquiry with regard to it was on behalf of the C. W. Phipps estate. At that time the trustees did not wish to purchase any shares themselves and expressed their agreement to my taking a personal interest. However, as the shares will shortly be distributed amongst each of you, I should like to have your approval of the proposals. They do not, of course, involve you in any liability and there is no conflict of interest, as it will of course be in the interests of yourself as much as it will be for Tom and me, that we should try to realise the maximum value for these shares. A B

"2. That if you are in agreement with the course we were proposing to take, we should like to know that you are equally in agreement that the votes on the shares belonging to the estate should be exercised as one block with the shares that are offered to us. By doing this we should have a combined voting control which I hope will enable the maximum value to be got for the shares. Without the assurance that these votes would be exercised together it would obviously be unwise to pay anything approaching £4 10s. for the shares, the dividend upon which is, for the year to June 1958, likely to be only 5 per cent. C

"It is difficult to put the issues concisely in a letter, but this will, I hope, give you a summary of what is involved, and if there are any special queries which you would like to raise please let me know." D

It is to be observed that Mr. Boardman evidently thought that if the consent of the trustees to his taking a personal interest in the purchase of shares in the company was necessary in January, 1957, it had been obtained. In this he was wrong, as the widow was alive and had not been consulted. E

The respondent, after receipt of the letter of March 10, 1959, expressed his satisfaction at what had been done. The agreement of March 10, 1959, was carried through, and in June and July, 1959, transfers of 21,986 shares to the appellants were completed. Thereafter parts of the business of the company were sold off and the company made returns of capital amounting in the aggregate to £5 17s. 6d. per share. F

The appellants thus acquired 21,986 shares in the company and still hold the same. They received the said sum of £5 17s. 6d. per share and the shares are probably still worth at least £2 per share as Tom Phipps offered that sum to the respondent if he wished to sell the shares in the company which he received on the distribution of the residuary estate of the testator. G

The respondent became critical of the action of the appellants, and on March 1, 1962, issued the writ in this action claiming

A (1) that the appellants held 5/18ths of the above-mentioned 21,986 shares as constructive trustees for the respondent and (2) an account of the profits made by the appellants out of the said shares.

He based his claim on an allegation that the information as to the said shares and the opportunity to purchase the same and B the shares when purchased were assets of the testator's estate and that the appellants were accountable to him for 5/18ths of the profit made by them in breach of their fiduciary duty. The appellants denied any breach of duty and alleged that the purchase of the shares personally and for their own benefit was made with the knowledge and consent of the plaintiff.

C The action was tried by Wilberforce J. and on March 25, 1964, he made an order declaring that the appellants held 5/18ths of the 21,986 ordinary shares in the company as constructive trustees for the plaintiff and directed an account of the profits which had come to the hands of the appellants and each of them from the said shares and an inquiry as to what sum is proper D to be allowed to the appellants or either of them in respect of their or his work and skill in obtaining the shares and the said profits. From this order the appellants appealed to the Court of Appeal, who dismissed the appeal.

The ratio decidendi of the trial judge is conveniently summed E up in the following passage from the judgment in the Court of Appeal of Pearson L.J., where he said [31]:

> ". . . the defendants were acting with the authority of the trustees and were making ample and effective use of their position as representing the trustees and wielding the power of the trustees, who were substantial minority shareholders, to extract from the directors of the company a great deal of F information as to the assets and resources of the company; and . . . this information enabled the defendants to appreciate the true potential value of the company's shares and to decide that a purchase of the shares held by the director's group at the price offered would be a very promising venture. The defendants made their very large profit, not only by their own skill and persistence and risk-taking, but also by making G use of their position as agents for the trustees. The principles stated in *Regal (Hastings) Ltd.* v. *Gulliver* [32] are applicable in this case."

The trial judge also held that the appellants could not rely by way of defence on the consent of the respondent given in answer

[31] [1965] Ch. 992, 1022. [32] Post, p. 134.

H. L. (E.)
1966
Phipps
v.
Boardman
Lord Cohen

to Mr. Boardman's letter of March 10, 1959, as neither in the letter nor in the subsequent interview did he give sufficient information as to the material facts. This defence was not pressed in the Court of Appeal or raised before your Lordships. Accordingly, only one issue remains for decision, namely, were the appellants in such a fiduciary relationship vis-à-vis the trustees that they must be taken to be accountable to the beneficiaries for the shares and for any profit derived by them therefrom? A B

In the statement of claim the respondent based his claim on an allegation of agency but it is, in my opinion, plain that no contract of agency which included the purchase of further shares in the company was ever made; it is plain for two reasons: first, in 1957 the widow was alive and her approval was not sought or obtained; secondly, Mr. Fox was clear in his evidence that he would never have given his consent to such acquisition. Wilberforce J. was, I think, of this opinion but he held[33] that the appellants assumed the character of self-appointed agents for the trustees for the purpose of extracting information as to the company's business from its directors and if possible to strengthen the management of the company by securing representation on the board of the trust holding. I agree that the appellants were the agents of the trustees for this purpose. I doubt, however, whether "self-appointed" is the correct adjective. Fox was the active trustee and where it is not a question of delegating authority to make binding contracts I agree with Russell L.J.[34] that two trustees, or for that matter one trustee, can come to an arrangement with a third party which will have the effect of placing the latter in a fiduciary position vis-à-vis the trust. C D E

In the case before your Lordships it seems to me clear that the appellants throughout were obtaining information from the company for the purpose stated by Wilberforce J. but it does not necessarily follow that the appellants were thereby debarred from acquiring shares in the company for themselves. They were bound to give the information to the trustees but they could not exclude it from their own minds. As Wilberforce J. said,[35] the mere use of any knowledge or opportunity which comes to the trustee or agent in the course of his trusteeship or agency does not necessarily make him liable to account. In the present case had the company been a public company and had the appellants bought the shares on the market, they would not, I think, have F G

[33] [1964] 1 W.L.R. 993, 1007.
[34] [1965] Ch. 992, 1031.
[35] [1964] 1 W.L.R. 993, 1011.

A been accountable. But the company is a private company and not only the information but the opportunity to purchase these shares came to them through the introduction which Mr. Fox gave them to the board of the company and in the second phase when the discussions related to the proposed split-up of the company's undertaking it was solely on behalf of the trustees that Mr. B Boardman was purporting to negotiate with the board of the company. The question is this: when in the third phase the negotiations turned to the purchase of the shares at £4 10s. a share, were the appellants debarred by their fiduciary position from purchasing on their own behalf the 21,986 shares in the C company without the informed consent of the trustees and the beneficiaries?

Wilberforce J. and, in the Court of Appeal, both Lord Denning M.R. and Pearson L.J. based their decision in favour of the respondent on the decision of your Lordships' House in *Regal (Hastings) Ltd.* v. *Gulliver.*[36] I turn, therefore, to consider that D case.[36] Mr. Walton relied upon a number of passages in the judgments of the learned Lords who heard the appeal: in particular on (1) a passage in the speech of Lord Russell of Killowen where he says[37]:

> "The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account E for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited F by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made."

(2) a passage in the speech of Lord Wright, where he says[38]:

> "That question can be briefly stated to be whether an agent, a director, a trustee or other person in an analogous fiduciary position, when a demand is made upon him by the G person to whom he stands in the fiduciary relationship to account for profits acquired by him by reason of his fiduciary position, and by reason of the opportunity and the knowledge, or either, resulting from it, is entitled to defeat the claim upon any ground save that he made profits with the knowledge and assent of the other person. The most usual

[36] Post, p. 134.
[37] Post, pp. 134, 144G–145A.
[38] Post, pp. 134, 154B–C.

H. L. (E.)
1966
Phipps v. Boardman
LORD COHEN

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> and typical case of this nature is that of principal and agent. The rule in such cases is compendiously expressed to be that an agent must account for net profits secretly (that is, without the knowledge of his principal) acquired by him in the course of his agency. The authorities show how manifold and various are the applications of the rule. It does not depend on fraud or corruption."

B
These paragraphs undoubtedly help the respondent but they must be considered in relation to the facts of that case. In that case the profit arose through the application by four of the directors of Regal for shares in a subsidiary company which it had been the original intention of the board should be subscribed for by Regal. Regal had not the requisite money available but there was no question of it being ultra vires Regal to subscribe for the shares. In the circumstances Lord Russell of Killowen said [39]: C

> "I have no hesitation in coming to the conclusion, upon the facts of this case, that these shares, when acquired by the directors, were acquired by reason, and only by reason of the fact that they were directors of Regal, and in the course of their execution of that office." D

He goes on to consider whether the four directors were in a fiduciary relationship to Regal and concludes that they were. Accordingly, they were held accountable. Mr. Bagnall argued that the present case is distinguishable. He puts his argument thus. The question you ask is whether the information could have been used by the principal for the purpose for which it was used by his agents? If the answer to that question is no, the information was not used in the course of their duty as agents. In the present case the information could never have been used by the trustees for the purpose of purchasing shares in the company; therefore purchase of shares was outside the scope of the appellant's agency and they are not accountable. E F

This is an attractive argument, but it does not seem to me to give due weight to the fact that the appellants obtained both the information which satisfied them that the purchase of the shares would be a good investment and the opportunity of acquiring them as a result of acting for certain purposes on behalf of the trustees. Information is, of course, not property in the strict sense of that word and, as I have already stated, it does not necessarily follow that because an agent acquired information and opportunity while acting in a fiduciary capacity he is accountable to his principals for any profit that comes his way as the G

[39] Post, pp. 134, 146G–147A.

A result of the use he makes of that information and opportunity.
His liability to account must depend on the facts of the case. In
the present case much of the information came the appellants'
way when Mr. Boardman was acting on behalf of the trustees on
the instructions of Mr. Fox and the opportunity of bidding for
the shares came because he purported for all purposes except
B for making the bid to be acting on behalf of the owners of the
8,000 shares in the company. In these circumstances it seems to
me that the principle of the *Regal* case[40] applies and that the
courts below came to the right conclusion.

That is enough to dispose of the case but I would add that
C an agent is, in my opinion, liable to account for profits he makes
out of trust property if there is a possibility of conflict between
his interest and his duty to his principal. Mr. Boardman and
Tom Phipps were not general agents of the trustees but they
were their agents for certain limited purposes. The information
they had obtained and the opportunity to purchase the 21,986
D shares afforded them by their relations with the directors of the
company—an opportunity they got as the result of their introduc-
tion to the directors by Mr. Fox—were not property in the strict
sense but that information and that opportunity they owed to
their representing themselves as agents for the holders of the
8,000 shares held by the trustees. In these circumstances they
E could not, I think, use that information and that opportunity to
purchase the shares for themselves if there was any possibility
that the trustees might wish to acquire them for the trust. Mr.
Boardman was the solicitor whom the trustees were in the habit
of consulting if they wanted legal advice. Granted that he would
not be bound to advise on any point unless he is consulted, he
F would still be the person they would consult if they wanted ad-
vice. He would clearly have advised them that they had no
power to invest in shares of the company without the sanction of
the court. In the first phase he would also have had to advise on
the evidence then available that the court would be unlikely to
give such sanction: but the appellants learnt much more during
G the second phase. It may well be that even in the third phase
the answer of the court would have been the same but, in my
opinion, Mr. Boardman would not have been able to give un-
prejudiced advice if he had been consulted by the trustees and
was at the same time negotiating for the purchase of the shares

[40] Post, p. 134.

H. L. (E.)
1966

Phipps
v.
Boardman

LORD COHEN

on behalf of himself and Tom Phipps. In other words, there was, in my opinion, at the crucial date (March, 1959), a possibility of a conflict between his interest and his duty. A

In making these observations I have referred to the fact that Mr. Boardman was the solicitor to the trust. Tom Phipps was only a beneficiary and was not as such debarred from bidding for the shares, but no attempt was made in the courts below to differentiate between them. Had such an attempt been made it would very likely have failed as Tom Phipps left the negotiations largely to Mr. Boardman and it might well be held that if Mr. Boardman was disqualified from bidding Tom Phipps could not be in a better position. Be that as it may, Mr. Bagnall rightly did not seek at this stage to distinguish between the two. He did, it is true, say that Tom Phipps as a beneficiary would be entitled to any information the trustees obtained. This may be so, but nonetheless I find myself unable to distinguish between the two appellants. They were, I think, in March, 1959, in a fiduciary position vis-à-vis the trust. That fiduciary position was of such a nature that (as the trust fund was distributable) the appellants could not purchase the shares on their own behalf without the informed consent of the beneficiaries: it is now admitted that they did not obtain that consent. They are therefore, in my opinion, accountable to the respondent for his share of the net profits they derived from the transaction. B C D E

I desire to repeat that the integrity of the appellants is not in doubt. They acted with complete honesty throughout and the respondent is a fortunate man in that the rigour of equity enables him to participate in the profits which have accrued as the result of the action taken by the appellants in March, 1959, in purchasing the shares at their own risk. As the last paragraph of his judgment clearly shows, the trial judge evidently shared this view. He directed an inquiry as to what sum is proper to be allowed to the appellants or either of them in respect of his work and skill in obtaining the said shares and the profits in respect thereof. The trial judge concluded by expressing the opinion that payment should be on a liberal scale. With that observation I respectfully agree. F G

In the result I agree in substance with the judgments of Wilberforce J. and of Lord Denning M.R. and Pearson L.J. in the Court of Appeal, and I would dismiss the appeal.

A LORD HODSON. My Lords, I will not repeat the facts already set out in the judgment of Wilberforce J. and in the speech of my noble and learned friend Viscount Dilhorne.

The proposition of law involved in this case is that no person standing in a fiduciary position, when a demand is made upon him by the person to whom he stands in the fiduciary relation-
B ship to account for profits acquired by him by reason of his fiduciary position and by reason of the opportunity and the knowledge, or either, resulting from it, is entitled to defeat the claim upon any ground save that he made profits with the knowledge and assent of the other person.

C I take the above proposition from the opening words of the speech of Lord Wright in *Regal (Hastings) Ltd.* v. *Gulliver*[41] where he states the proposition in the form of the question which he answered as had all the members of your Lordships' House in such a way as to affirm the proposition.

It is obviously of importance to maintain the proposition in
D all cases and to do nothing to whittle away its scope or the absolute responsibility which it imposes.

The persons concerned in this case, namely, Mr. Thomas Boardman and Mr. Tom Phipps, are not trustees in the strict sense but are said to be constructive trustees by reason of the
E fiduciary position in which they stood. As Lord Selborne pointed out in *Barnes* v. *Addy*[42]:

> "That responsibility" (viz., that of trustees) "may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees de son tort, or actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust. But,
> F on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps, of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees."

G There is no question of fraud in this case; it has never been suggested that the appellants acted in any other than an open and honourable manner.

If, however, they are in a fiduciary position they are as

[41] Post, pp. 134, 154B–C.

[42] (1874) 9 Ch. App. 244, 251, 252.

H. L. (E.)
1966

Phipps
v.
Boardman

LORD HODSON

trustees bound by duty, succinctly stated by Lord Cranworth L.C. in *Aberdeen Railway Co.* v. *Blaikie Brothers*[43]: A

> "And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect." B

So far as Mr. Tom Phipps is concerned, he was not placed in a fiduciary position by reason of his being a beneficiary under his father's will. He was acting as agent for the trustees with Mr. Boardman before any question of acting with him for his own benefit arose. He has not, however, sought to be treated in a different way from Mr. Boardman upon whom the conduct C of the whole matter depended and with whom he has acted throughout as a co-adventurer; he does not claim that he should succeed in this appeal if Mr. Boardman fails.

Mr. Boardman's fiduciary position arose from the fact that he was at all material times solicitor to the trustees of the will of Mr. Phipps senior. This is admitted, although counsel for the D appellants has argued, and argued correctly, that there is no such post as solicitor to trustees. The trustees either employ a solicitor or they do not in a particular case and there is no suggestion that they were under any contractual or other duty to employ Mr. Boardman or his firm. Nevertheless as a historical fact they E did employ him and look to him for advice at all material times and this is admitted. It was as solicitor to the trustees that he obtained the information which is so clearly summarised in the judgment of Wilberforce J.[44] and repeated in the speech of my noble and learned friend Lord Upjohn. This information enabled him to acquire knowledge of a most extensive and valuable F character, as the learned judge pointed out, which was the foundation upon which a decision could and was taken to buy the shares in Lester & Harris Ltd.

This information was obtained on behalf of the trustees, most of it at a time during the history of the negotiations when the proposition was to divide the assets of the company between G two groups of shareholders. This object could not have been effected without a reconstruction of the company and Mr. Boardman used the strong minority shareholding which the trustees held, that is to say, 8,000 shares in the company, wielding this

[43] (1854) 1 Macq. 461, 471, H.L. [44] [1964] 1 W.L.R. 993, 1013.

A holding as a weapon to enable him to obtain the information of which he subsequently made use.

As to this it is said on behalf of the appellants that information as such is not necessarily property and it is only trust property which is relevant. I agree, but it is nothing to the point to say that in these times corporate trustees, e.g., the Public
B Trustee and others, necessarily acquire a mass of information in their capacity of trustees for a particular trust and cannot be held liable to account if knowledge so acquired enables them to operate to their own advantage, or to that of other trusts. Each case must depend on its own facts and I dissent from the view that information is of its nature something which is not properly to be
C described as property. We are aware that what is called "know-how" in the commercial sense is property which may be very valuable as an asset. I agree with the learned judge and with the Court of Appeal that the confidential information acquired in this case which was capable of being and was turned to account can be properly regarded as the property of the trust. It was
D obtained by Mr. Boardman by reason of the opportunity which he was given as solicitor acting for the trustees in the negotiations with the chairman of the company, as the correspondence demonstrates. The end result was that out of the special position in which they were standing in the course of the negotiations the
E appellants got the opportunity to make a profit and the knowledge that it was there to be made.

The appellants argue that this is not enough, and in support of the contention rely on the authority of *Aas* v. *Benham*.[45] This case was concerned with a partnership of ship-brokers, and the defendant carried on the business of ship builder, using know-
F ledge acquired in the partnership business. A claim against him to account to the partnership for the profits of his business as ship builder failed. Lindley L.J. said[46] that it is not the source of the information but the use to which it is put which is important—

> "To hold that a partner" (or trustee) "can never derive any
> G personal benefit from information which he obtains as a partner would be manifestly absurd."

It was held that the defendant was not liable to account because the profit was made outside the scope of the partnership and that in no sense was the defendant acting as the agent of the partners. Similarly the appellants contend that the purchase of the shares

45 [1891] 2 Ch. 244. 46 Ibid. 256.

in question was outside the scope of the fiduciary relationship existing between them and the trustees. A

The case of partnership is special in the sense that a partner is the principal as well as the agent of the other partners and works in a defined area of business so that it can normally be determined whether the particular transaction is within or without the scope of the partnership. B

It is otherwise in the case of a general trusteeship or fiduciary position such as was occupied by Mr. Boardman, the limits of which are not readily defined, and I cannot find that the decision in the case of *Aas* v. *Benham*[47] assists the appellants, although the purchase of the shares was an independent purchase financed by themselves. *Aas* v. *Benham*[47] was a case depending on the C alleged relationship of principal and agent as it exists between one partner and another. There was no such relationship here but the position of an agent is relevant and the expression "self-appointed agent" used by the learned judge is a convenient way to describe someone who, assuming to act as agent for another, receives property belonging to that other so that the property is D held by the self-constituted agent as trustee for such other. Such a case was *Lyell* v. *Kennedy*.[48] Thus the learned judge found that the appellants were in the same position as if they had been agents for the trustees in the technical sense for the purpose of using the trust shareholding to extract knowledge of the affairs of the company and ultimately to improve the company's profit- E earning capacity.

Keech v. *Sandford*[49] was a case in which it was impossible for the cestui que trust to obtain the renewal of a lease, nevertheless the trustee was held accountable for renewal obtained by him. Similarly in *Regal (Hastings) Ltd.* v. *Gulliver*,[50] from which some of your Lordships have cited passages, the directors of F Regal were held accountable to the company for the profit they made in acquiring shares when the opportunity fell to them as directors of the company, notwithstanding the fact that it was impossible for Regal to take the shares owing to lack of funds.

Regal (Hastings) Ltd. v. *Gulliver*[50] differs from this case G mainly in that the directors took up shares and made a profit thereby, it having been originally intended that the company should buy these shares. Here there was no such intention on the part of the trustees. There is no indication that they either

[47] [1891] 2 Ch. 244.
[48] (1889) 14 App.Cas. 437, H.L.
[49] (1726) Sel.Cas.Ch. 61.
[50] Post, p. 134.

A had the money or would have been ready to apply to the court for sanction enabling them to do so. On the contrary, Mr. Fox, the active trustee and an accountant who concerned himself with the details of the trust property, was not prepared to agree to the trustees buying the shares and encouraged the appellants to make the purchase. This does not affect the position. As *Keech* v. B *Sandford* [51] shows, the inability of the trust to purchase makes no difference to the liability of the appellants, if liability otherwise exists. The distinction on the facts as to intention to purchase shares between this case and *Regal (Hastings) Ltd.* v. *Gulliver* [52] is not relevant. The company (Regal) had not the money to apply for the shares upon which the profit was made. The C directors took the opportunity which they had presented to them to buy the shares with their own money and were held accountable. Mr. Fox's refusal as one of the trustees to take any part in the matter on behalf of the trust, so far as he was concerned, can make no difference. Nothing short of fully informed consent D which the learned judge found not to have been obtained could enable the appellants in the position which they occupied having taken the opportunity provided by that position to make a profit for themselves.

Likewise it is no answer to the respondent's claim that there was no contract of agency and that the appellants were at all E times acting for themselves without concealment and indeed with the encouragement of one of the trustees, namely, Mr. Fox.

If they received confidential information from Lester & Harris in their capacity as representing the trustees it matters not whether or no there was a true agency. I refer again to the passage from Lord Wright's judgment in *Regal (Hastings) Ltd.* v. F *Gulliver* [53] when he speaks of "an agent, a director, a trustee or other person in an analogous fiduciary position" and, as an illustration, says that the most usual and typical case of this nature is that of principal and agent.

The relevant information is not any information but special G information which I think must include that confidential information given to the appellants which is so fully detailed in the judgment of Wilberforce J. There is a passage in *Aas* v. *Benham* [54] in the judgment of Bowen L.J. which I think is of assistance, although the learned Lord Justice was dealing with

[51] Sel.Cas.Ch. 61.
[52] Post, p. 134.
[53] Post, pp. 134, 154B–C.
[54] [1891] 2 Ch. 244, 258.

H. L. (E.)
1966

Phipps
v.
Boardman

LORD HODSON

partnership, not trusteeship: he was explaining some observations of Cotton L.J. in *Dean* v. *MacDowell*.[55] These were A

> "Again, if he" (that is, a partner) "makes any profit by the use of any property of the partnership, including, I may say, information which the partnership is entitled to, there the profit is made out of the partnership property."

Bowen L.J. commented[56]: B

> "He is speaking of information which a partnership is entitled to in such a sense that it is information which is the property, or is to be included in the property of the partnership—that is to say, information the use of which is valuable to them as a partnership, and to the use of which they have a vested interest. But you cannot bring the information obtained in this case within that definition." C

Aas v. *Benham*[57] is an important case as showing that a partner may make a profit from information obtained in the course of the partnership business where he does so in another firm which is outside the scope of the partnership business. In that case the partnership business was ship-broking and the profit made was in D a business which had no connection with that of the partnership. This shows the limitation which must be kept in mind in considering the sense in which each partner is the agent of the partnership, but does not assist the appellants. Mr. Boardman continued to be in a fiduciary position up to and including the time when the shares were purchased (March, 1959), and the E scope of the trust concerning which his fiduciary relationship existed was not limited in the same way as a partnership carrying on a particular business.

It cannot, in my opinion, be said that the purchase of shares in Lester & Harris was outside the scope of the fiduciary relationship in which Mr. Boardman stood to the trust. F

The confidential information which the appellants obtained at a time when Mr. Boardman was admittedly holding himself out as solicitor for the trustees was obtained by him as representing the trustees, the holders of 8,000 shares of Lester & Harris. As Russell L.J. put it[58]:

G

> "The substantial trust shareholding was an asset of which one aspect was its potential use as a means of acquiring knowledge of the company's affairs, or of negotiating allocations of the company's assets, or of inducing other shareholders to part with their shares."

[55] 8 Ch.D. 345, 354.
[56] [1891] 2 Ch. 244, 258.
[57] [1891] 2 Ch. 244.
[58] [1965] Ch. 992, 1031.

A Whether this aspect is properly to be regarded as part of the trust assets is, in my judgment, immaterial. The appellants obtained knowledge by reason of their fiduciary position and they cannot escape liability by saying that they were acting for themselves and not as agents of the trustees. Whether or not the trust or the beneficiaries in their stead could have taken advantage of the
B information is immaterial, as the authorities clearly show. No doubt it was but a remote possibility that Mr. Boardman would ever be asked by the trustees to advise on the desirability of an application to the court in order that the trustees might avail themselves of the information obtained. Nevertheless, even if the possibility of conflict is present between personal interest and the
C fiduciary position the rule of equity must be applied. This appears from the observations of Lord Cranworth L.C. in *Aberdeen Railway Co.* v. *Blaikie.*[59]

In the later case of *Bray* v. *Ford*[60] Lord Herschell stated the rule in a way which has peculiar application to the facts of this case, when he said:

D

> "It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's 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. It does not appear to me that this rule is, as has been said, founded upon principles of morality.
> E I regard it rather as based on the consideration that human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and
> F without any consciousness of wrong-doing. Indeed, it is obvious that it might sometimes be to the advantage of the beneficiaries that their trustee should act for them professionally rather than a stranger, even though the trustee were paid for his services."

It is said that the appellants never had the necessary facts
G pleaded against them to raise the question of conflict of interest so that they did not have the opportunity of dealing with allegations which would be relevant thereto: I cannot see what further facts were relevant to be raised other than those to which reference has been made in the judgments in the court below and in

[59] 1 Macq. 461, 471.

[60] [1896] A.C. 44, 51, 52; 12 T.L.R. 119, H.L.

the speeches of your Lordships. The question whether or not there was a fiduciary relationship at the relevant time must be a question of law and the question of conflict of interest directly emerges from the facts pleaded, otherwise no question of entitlement to a profit would fall to be considered. No positive wrongdoing is proved or alleged against the appellants but they cannot escape from the consequences of their acts involving liability to the respondent unless they can prove consent. This they endeavoured without success to do for, although they gave the respondent some information, that which they gave was held by the learned judge to be insufficient and there is no appeal against his decision on this point.

I agree with the decision of the learned judge and with that of the Court of Appeal which, in my opinion, involves a finding that there was a potential conflict between Boardman's position as solicitor to the trustees and his own interest in applying for the shares. He was in a fiduciary position vis-à-vis the trustees and through them vis-à-vis the beneficiaries. For these reasons in my opinion the appeal should be dismissed; but I should add that I am in agreement with the learned judge that payment should be allowed on a liberal scale in respect of the work and skill employed in obtaining the shares and the profits therefrom.

Lord Guest. My Lords, the first appellant is a solicitor and the second appellant is a beneficiary under a will made by his father, who died in 1944. The will directed the trustees to pay an annuity to the widow and the residue was to be divided among his children in these proportions: 5/18ths was to go to the second appellant; 5/18ths to the estate of a deceased son; 5/18ths to the respondent and 3/18ths to a daughter, Mrs. Noble. The trustees under the will were the widow, Mrs. Noble and a Mr. Fox, a chartered accountant.

The respondent obtained an order from Wilberforce J. declaring that the appellants held 21,986 shares of £1 each in a company Lester & Harris Ltd. as constructive trustees for the respondent and ordered an account of the profits made by the appellants to be taken and a declaration of a proper sum to be allowed to the appellants for their work and skill in obtaining the shares and profits. The Court of Appeal unanimously affirmed the decision of Wilberforce J.

Among the trust assets was a controlling interest in the family business of Phipps & Son Ltd., textile manufacturers, and also

A 8,000 out of 30,000 shares of £1 each in a private company, Lester & Harris Ltd., which also manufactured textiles and had factories at Coventry and Nuneaton and also in Australia.

In 1956 Boardman as solicitor to the trust decided that the recent accounts of Lester & Harris were very unsatisfactory and that something should be done to improve the position and with B this in view the appellants attended the annual general meeting of the company held in December, 1956, having obtained proxies from Mrs. Noble and Mr. Fox. They were not satisfied with the answers given at the meeting regarding the state of the company's affairs. They then decided that the only way to improve the position was to endeavour to obtain control of the company and C with this in view to make an offer for all the outstanding shares in Lester & Harris. This was the first phase of a series of three in the negotiations which culminated in their purchasing all the outstanding shares in May, 1959. Their avowed object was thereby to improve the value of the trust holding in Lester & Harris. Mr. Fox was informed of their intentions and although D he gave no formal consent he raised no objection, as he thought that to have the Lester & Harris shares in friendly hands could not but work to the advantage of the trust. Mrs. Noble was also informed and she raised no objection. The widow was not informed. She was at this time 83 and suffering from senile dementia and unable to attend to trust affairs. There was never E any question at this time of the trustees buying the shares, which in fact they had no power to do. But there is no doubt that at this time Boardman, in his relations with Mr. Fox and Mrs. Noble, was acting as solicitor to the trust. When he attended the annual general meeting he acted as agent for the trustees and in his relations with Lester & Harris prior to and including the formal F offer for the shares he was purporting to act for the trustees and in their interests. In this first phase Boardman obtained information from the company as to the prices at which shares had recently changed hands. And on January 24, 1957, after informing the directors of their intentions, the appellants made an offer of G £2 5s. per share to the members of Lester & Harris which was conditional on acceptance by not less than 15,500 holders of shares. This offer was subsequently increased on February 25, 1957, to £3 per share. This offer only received acceptance from 2,925 shareholders. Thus ended phase 1 of the negotiations.

The opening of phase 2 was a letter, dated April 26, 1957, from Boardman to Mr. Smith, chairman of the board of Lester

H. L. (E.)
1966
Phipps
v.
Boardman
LORD GUEST

& Harris, in which the suggestion was made that the assets of the company should be divided between the Harris family and the trustees, one suggestion being that the Harris family should be the sole owners of the Australian venture of the company and the trustees should own and control the English side of the business. During this phase Boardman obtained from the company extensive and valuable information as to the value of the company's assets. This information is fully detailed in the judgment of Wilberforce J.[61] In obtaining this information Boardman was avowedly acting on behalf of the trustees; in fact the operation suggested could only have been achieved by the trustees, after a successful application to the court, buying shares in Lester & Harris and by a reorganisation of that company. Between April, 1957, and October, 1958, voluminous correspondence took place between Boardman and Smith during which Boardman suggested that, if agreement could not be reached, legal proceedings might have to be taken to protect their minority interests. These negotiations proved abortive.

Phase 3 began in October, 1958. The widow died on November 19, 1958. On October 7, 1958, Smith informed Boardman that he was prepared to sell his shares and to recommend his associates to sell their shares to the appellants at £5 each. A conditional agreement for the sale of these shares was made on March 10, 1959. Subsequently on May 26, 1959, the appellants gave notices making unconditional agreements to buy 14,567 shares held by Smith and his associates at the price of £4 10s. per share. This, in addition to the earlier agreements to purchase 2,925 at £3 and the purchase of a further 4,494 shares at £4 10s. each made the appellants holders in all of 21,986 shares.

The 21,986 shares in Lester & Harris are the shares of which the courts below have held the appellants to be constructive trustees and in respect of which as to 5/18ths the appellants are accountable to the respondent for the profits arising from such purchase.

The question, and the only question before this House, is whether the appellants are constructive trustees of these shares. I make no distinction between the two appellants. They have never asked to be dealt with separately and they must be treated as co-venturers.

Boardman set the ball rolling in his capacity as solicitor to

[61] [1964] 1 W.L.R. 993, 1013.

A the trustees and, in my view, he continued to act in this capacity throughout the negotiations. The three phases of the negotiations were continuous and designed to the same end, namely, the purchase of the controlling interest in Lester & Harris. This is stated explicitly by the appellants in their defence "3. The first defendant at all material times acted as solicitor to the second
B defendant" (the respondent) "as well as to the trustees." This admission was repeated in the appellants' printed case and could scarcely have been withheld having regard to the terms of the correspondence. Boardman would never have been able to obtain all the information which was obtained in phase 2 unless he had been acting for the trustees. This information enabled him to put
C forward the offer of £4 10s. per share which was fully acceptable to Smith. I take the view that from first to last Boardman was acting in a fiduciary capacity to the trustees. This fiduciary capacity arose in phase 1 and continued into phase 2, which glided into phase 3. In saying this I do not for one moment suggest that there was anything dishonest or underhand in what
D Boardman did. He has obtained a clean certificate below and I do not wish to sully it. But the law has a strict regard for principle in ensuring that a person in a fiduciary capacity is not allowed to benefit from any transactions into which he has entered with trust property. If Boardman was acting on behalf of the trust, then all the information he obtained in phase 2
E became trust property. The weapon which he used to obtain this information was the trust holding. And I see no reason why information and knowledge cannot be trust property. In *Hamilton* v. *Wright* [62] Lord Brougham said:

> "The knowledge which he acquires as trustee is of itself
> F sufficient ground of disqualification, and of requiring that such knowledge shall not be capable of being used for his own benefit to injure the trust; the ground of disqualification is not merely because such knowledge may enable him actually to obtain an undue advantage over others."

In *Regal (Hastings) Ltd.* v. *Gulliver* [63] Viscount Sankey says:

> G "*Imperial Hydropathic Hotel Co. Blackpool* v. *Hampson* [64] makes no exception to the general rule that a solicitor or director, if acting in a fiduciary capacity, is liable to account for the profits made by him from knowledge acquired when so acting."

[62] (1842) 9 Cl. & F. 111, 124, H.L.
[63] Post, pp. 134, 139C.
[64] (1882) 23 Ch.D. 1, C.A.

H. L. (E.) 1966 Phipps v. Boardman Lord Guest

Aas v. *Benham*[65] is another case where the use of information by a person in a fiduciary capacity was challenged. A

The position of a person in a fiduciary capacity is referred to in *Regal (Hastings) Ltd.* v. *Gulliver* by Lord Russell of Killowen[66] where he said:

> "My Lords, with all respect I think there is a misapprehension here. The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account." B C

Again Lord Russell[67] quotes with approval from the judgment of the Lord Ordinary in *Huntington Copper Co.* v. *Henderson*[68] to the following effect: D

> "Whenever it can be shown that the trustee has so arranged matters as to obtain an advantage whether in money or money's worth to himself personally through the execution of his trust, he will not be permitted to retain, but be compelled to make it over to his constituent." E

Lord Wright in the same case said[69]:

> "That question can be briefly stated to be whether an agent, a director, a trustee or other person in an analogous fiduciary position, when a demand is made upon him by the person to whom he stands in the fiduciary relationship to account for profits acquired by him by reason of his fiduciary position, and by reason of the opportunity and the knowledge, or either, resulting from it, is entitled to defeat the claim upon any ground save that he made profits with the knowledge and assent of the other person." F

Again Lord Wright said[69a]: G

> "The courts below have held that it does not apply in the present case, for the reason that the purchase of the shares by the respondents, though made for their own advantage, and though the knowledge and opportunity which

[65] [1891] 2 Ch. 244.
[66] Post, pp. 134, 144A–145B
[67] Post, pp. 134, 149D–E
[68] (1877) 4 R. 294.
[69] Post, pp. 134, 154B–C.
[69a] Post, pp. 134, 154D–F.

A enabled them to take the advantage came to them solely by reason of their being directors of the appellant company, was a purchase which, in the circumstances, the respondents were under no duty to the appellant to make, and was a purchase which it was beyond the appellant's ability to make, so that, if the respondents had not made it, the appellant would have been no better off by reason of the respondents B abstaining from reaping the advantage for themselves. With the question so stated, it was said that any other decision than that of the courts below would involve a dog-in-the-manger policy. What the respondents did, it was said, caused no damage to the appellant and involved no neglect of the appellant's interests or similar breach of duty. However, I think the answer to this reasoning is that, both in law and C equity, it has been held that, if 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. Nor can the court adequately investigate the matter in most cases."

D Applying these principles to the present case I have no hesitation in coming to the conclusion that the appellants hold the Lester & Harris shares as constructive trustees and are bound to account to the respondent. It is irrelevant that the trustees themselves could not have profited by the transaction. It is also irrelevant that the appellants were not in competition with the E trustees in relation to the shares in Lester & Harris. The appellants argued that as the shares were not acquired in the course of any agency undertaken by the appellants they were not liable to account. Analogy was sought to be obtained from the case of *Aas* v. *Benham* [70] where it was said that before an F agent is to be accountable the profits must be made within the scope of the agency (see Lindley L.J.[71]). That, however, was a case of partnership where the scope of the partners' power to bind the partnership can be closely defined in relation to the partnership deed. In the present case the knowledge and information obtained by Boardman was obtained in the course of the G fiduciary position in which he had placed himself. The only defence available to a person in such a fiduciary position is that he made the profits with the knowledge and assent of the trustees. It is not contended that the trustees had such knowledge or gave such consent.

[70] [1891] 2 Ch. 244. [71] Ibid. 255, 256.

H. L. (E.)
1966
Phipps v. Boardman
Lord Guest

In the Court of Appeal the Master of the Rolls[72] and Pearson L.J.[73] decided the case in the respondent's favour upon the basis that the appellants were "self-appointed agents" and thus placed themselves in a fiduciary capacity. Reference was made to *Lyell* v. *Kennedy*.[74] I prefer, however, to base my opinion upon the broader ground which was epitomised by Mr. Walton in his closing submission. Boardman and Tom Phipps, he said, placed themselves in a special position which was of a fiduciary character in relation to the negotiations with the directors of Lester & Harris relating to the trust shares. Out of such special position and in the course of such negotiations they obtained the opportunity to make a profit out of the shares and knowledge that the profit was there to be made. A profit was made and they are accountable accordingly. A B C

I would dismiss the appeal.

Lord Upjohn. My lords, the facts have been set out so fully in the opinion of my noble and learned friend Viscount Dilhorne that I do not propose to say anything about the family, the trusts declared by Charles William Phipps' will or the trust holding of 8,000 shares in a textile company called Lester & Harris Ltd. (the company). I shall content myself with a brief account of the relevant history before I examine the law. D

It is convenient to follow the pattern adopted in argument on both sides and to divide this history into chapters and phases. E

Chapter 1 begins in December, 1956, when Mr. Fox, a practising chartered accountant and the active trustee, received the accounts of the company which he thought were very unsatisfactory. So he consulted the family solicitor, the appellant Boardman, who also advised the trustees from time to time. Mr. Fox, who had already formed the impression that the directors were unfriendly to the Phipps family, wanted to see the majority holding in friendly hands and not in unfriendly hands. F

It was decided that Mr. Boardman and the appellant Tom Phipps (Tom), who was engaged in the textile industry, should go to the annual general meeting of the company on December 28, 1956, with the idea of getting Tom appointed a director and they were given proxies for that purpose. Mrs. Noble, G

[72] [1965] Ch. 992, 1017, 1018.
[73] Ibid. 1030.
[74] 14 App.Cas. 437.

A Tom's sister, another trustee, was kept in touch with events by Mr. Boardman, her mother, the third trustee, being too old and ill to pay any attention to trust affairs. So Tom and Mr. Boardman attended the meeting and Mr. Boardman explained that the Phipps family were very dissatisfied with the accounts. There was a good deal of argument about the validity of certain B proxy forms of the Harris family and a number of questions on the accounts put by Mr. Boardman were answered by the chairman Mr. Smith, a solicitor. Mr. Boardman proposed that Tom should be elected to the board, but the chairman after much discussion refused to accept the motion. So the meeting ended in the defeat of the Phipps representatives and they reported C to Mr. Fox that they had met with a very hostile reception.

Then there were discussions and Mr. Boardman suggested that Tom should try to buy a controlling interest in the company, but the latter felt that the operation was too big for him and wanted Mr. Boardman to come in with him and the latter agreed to do so. Mr. Fox was most happy at this idea as he could see D the company getting under far more efficient management than in the past. So they set about making a bid for the outside shares accordingly. It is of cardinal importance, and, in my view fundamental to the decision of this case, to appreciate that at this stage there was no question whatever of the trustees contemplating the possibility of a purchase of further shares in the company. E Mr. Fox (whose evidence was accepted by the judge) made it abundantly plain that he would not consider any such proposition. The reasons for this attitude are worth setting out in full: (a) The acquisition of further shares in the company would have been a breach of trust, for they were not shares authorised by the investment F clause in the will; (b) although not developed in evidence it must have been obvious to those concerned that no court would sanction the purchase of further shares in a small company which the trustees considered to be badly managed. It would have been throwing good money after bad. It would also have been necessary to bring in proposals for installing a new manage- G ment. Mr. Fox was a busy practising chartered accountant who obviously would not have considered it; no one from start to finish ever suggested that Tom, who was running the family concern of Phipps & Son Ltd., would be willing to undertake this arduous task on behalf of the trustees; (c) the trustees had no money available for the purchase of further shares.

A

I think one question and answer at the trial of the action during the brief cross-examination of Mr. Fox is important on an aspect of the case with which I must deal, so that I shall set it out in full:

"Q. When Mr. Boardman and Mr. Phipps decided to make an offer for the shares themselves, did they ask your consent on behalf of the trust or anything like that?

B

"A. I do not know that they asked my consent. I was only too glad. Here was I holding 8,000 shares a minority interest in a company where the directors were unfriendly, and, having had experience in other cases of the weakness of the Companies Act with regard to minority shareholders, as soon as I could see the prospect of getting friendly directors and friendly shareholders I was only too glad."

C

I may here add, and it is a matter equally fundamental, that on the evidence there never was any suggestion at any subsequent stage that Mr. Fox or any other trustee would ever have contemplated any purchase of further shares. The reasons I have just given above applied throughout the history right down to the end in 1959.

D

So chapter 1 closes and chapter 2, phase 1, begins with an offer to all shareholders on January, 24, 1957, by the appellants to purchase their shares at the price of £2 5s. cash. The offer was conditional on the acceptance by holders of at least 15,500 shares. Though they portrayed themselves as representing the Phipps Trust it is quite clear that the offer was by these two personally. Indeed, I cannot see that it matters whether the offer could have been construed as made on behalf of the trustees; only those to whom it was addressed could have complained, and it was, for the reasons already mentioned, clear that the appellants had no authority to make any offer on behalf of the trustees and did not intend to do so. Then there followed counter-offers by the Harris group and in a well-known pattern in take-over bids the appellants finally offered £3 a share. In response to this and their earlier offer they received acceptances of 2,925 shares only. Naturally the acceptance of these offers was not made unconditional. It should be stated here that though this offer was formally made to the trustees in respect of their shareholding, it is common ground that in these offers and the later offers in 1958–59 it was never intended that it should be accepted. So phase 1 closes.

E

F

G

Phase 2 of chapter 2 opens on April 26, 1957, when in this state of deadlock Mr. Boardman wrote to Mr. Smith suggesting

A that a "possible solution might, therefore, be to divide the group so that the Harris family and the directors own the whole of one part, and the Phipps interest own the balance. . . ." This led to very complicated and protracted negotiations until the late summer or early autumn of 1958, but I can deal with them quite shortly, assuming, as I am prepared to do, everything against the
B appellants.

Throughout this period it is obvious that the appellants were representing themselves as acting on behalf of the trustees though in fact they had no authority to do so. This is obvious not only from the vast mass of correspondence when Mr. Boardman, who wrote all the letters on behalf of himself and
C his co-appellant, made it clear that he was so acting but from the fact that if negotiations had fructified into definite proposals they could not have been accepted by the appellants but only by the trustees.

The trustees would then have had to consider the matter and if they approved in principle they would have had to obtain
D the consent of the court; probably, too, some petition to the Companies Court would also have been necessary to sanction a reconstruction of the company.

Throughout phase 2, therefore, it is perfectly clear that the appellants were obtaining by reason and by reason only of their
E purportedly representing the biggest minority holding in the company, that is, the trustees' 8,000 shares, a great deal of information about the company. How much information they obtained is set out in the judgment of Wilberforce J.,[75] though in connection with the question whether Mr. Boardman had in a certain letter made a full disclosure to the respondent of information he had
F obtained, a point not now relevant:

> "Secondly, it wholly failed to make available or to indicate the existence of the mass of knowledge which Boardman had accumulated. Let us just see what the information was. The information which he had by March, 1959, consisted of, amongst other things, the following:
> G The 1956 balance sheet; the information as to the company's site in Australia and the Australian turnover, and the information as to the Nuneaton site, obtained in May, 1957, the information through looking round the Nuneaton premises in June of 1957; the company's valuation of all fixed assets, the site plan of the Coventry factory, the insurance plans as regards the rest, obtained in November,

[75] [1964] 1 W.L.R. 993, 1013, 1014.

1957; the valuation of the Australian fixed assets obtained at the same time; the certificate of Smith that no special features existed affecting values, given at the same time; the Jackson Stops' valuation based on information supplied by the company and based on a visit to the company's premises accompanied by a director; the chairman's statement that £42,000 had been spent on new plant since 1954; the figures as to the company's external liabilities given in May, 1958; the information allocating assets and liabilities to separate factories, August, 1958; information regarding future purchases and sales and as regards the position of executives, August, 1958; the accountants' meeting on profits and turnover, and the trading profits for the last five years coupled with Fox's analysis made towards the end of 1958; the chairman's assurance that no material alteration had taken place on those figures; the Australian accounts for the years 1957 and 1958 . . . "

It will be seen from this that Mr. Fox himself, acting not as trustee, but as accountant to the appellants, made detailed analyses of the profits of the company for five years, so obviously he knew exactly what was going on.

Counsel for both parties agreed that phase 2 really merged or slid into phase 3. Both the Phipps and Harris families were getting tired of this war of attrition and negotiations seemed to be getting nowhere. Mr. Smith and Mr. Boardman had a meeting on August 13, 1958, when the suggestion was made that the appellants should buy 16,000 shares of the Smith side at £5 a share and then sell the Coventry business to that side for £50,000, but this was not acceptable to the appellants. After further discussion Mr. Smith in a letter of October 13, 1958, resurrected the idea of the appellants making an offer for the whole of the remaining share capital of the business and a little later suggested £5 a share. It was in consequence of this that Mr. Fox made the analysis of profits already mentioned in the judgment of Wilberforce J. just quoted. Finally, after more negotiations, the appellants, on March 10, 1959, purchased 14,567 shares held by Mr. Smith and his friends for £4 10s. per share and after a visit to Australia in April, 1959, they purchased at the same price a further 4,494 shares in the company, making them the holders of 21,986 out of the 22,000 shares outside the trust holding of 8,000. At the same time the conditional acceptance of the 2,925 shares bought at £3 a share in 1957 was made unconditional. The purchase price was raised by the appellants through financial circles in

A London and the whole of the costs of these protracted negotiations including of course the visit to Australia were borne by the appellants. Not one penny was charged or sought to be charged to the trustees.

In these circumstances the respondent rather surprisingly seeks to hold the appellants accountable to him for his 5/18ths B share of the 21,986 shares so purchased, on the footing that the appellants are constructive trustees of these shares for and on behalf of the trust. So I turn to the relevant law upon which this claim is based, but start by stating what is not in dispute, that the conduct of the appellants and each of them has never been anything except utterly honest and above board in every way. C If they or either of them are accountable it is because of the operation of some harsh doctrine of equity upon consciences completely innocent in every way.

Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circum- D stances of each case. The relevant rule for the decision of this case is the fundamental rule of equity that a person in a fiduciary capacity must not make a profit out of his trust which is part of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict. I believe the rule is best stated in *Bray* v. *Ford*[76] by Lord Herschell, who plainly E recognised its limitations:

> "It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's, 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. It does not appear to me that F this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive G rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing. Indeed, it is obvious that it might sometimes be to the advantage of the beneficiaries that their trustee should act for them professionally rather than a stranger, even though the trustee were paid for his services."

[76] [1896] A.C. 44, 51.

It is perhaps stated most highly against trustees or directors in the A celebrated speech of Lord Cranworth L.C. in *Aberdeen Railway* v. *Blaikie*,[77] where he said:

> " And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests B of those whom he is bound to protect."

The phrase " possibly may conflict " requires consideration. In my view it means that the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could C imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict.

Your Lordships were referred at length to the decision of this House in *Regal* (*Hastings*) *Ltd.* v. *Gulliver*.[78] That is a helpful case for its restatement of the well-known principles but the case D itself bears no relation to the one before your Lordships. The facts were very different and I summarise them from the opinion of Lord Russell of Killowen.[79] The plaintiff company (Regal), the owner of a cinema, was contemplating the purchase of the leases of two other cinemas which were to be transferred to a subsidiary E company formed by Regal called Amalgamated. Concurrently Regal was contemplating the sale of all three cinemas to a third party. The intention of the directors was that Regal should subscribe for shares in Amalgamated and then Regal would sell those shares to the third party. There was some trouble over providing a guarantee; the transaction was changed so that the F directors of Regal subscribed for shares in Amalgamated instead of Regal itself and then those directors sold those shares to the third party, thereby making an immediate and handsome profit of £2 16s. 1d. per share. That was an obvious case where duty of the director and his interest conflicted. The scheme had been that Regal would make the profit, in fact its directors did. It was a G clear case and does not really assist in the present case. It had long been settled in *Keech* v. *Sandford*[80] that the inability of a beneficiary to obtain the renewal of a lease which was trust property and a renewal of which has always been considered to be

[77] 1 Macq. 461, 471.
[78] Post, p. 134.
[79] Post, p. 134, 140.
[80] Sel.Cas.Ch. 61.

A trust property did not permit the purchase of that property by the trustee himself. That bears no relation to this case. This case, if I may emphasise it again, is one concerned not with trust property or with property which the persons to whom the fiduciary duty was owed were contemplating a purchase but in contrast to the facts in *Regal* [81] with property which was not trust property nor B property which was ever contemplated as the subject-matter of a possible purchase by the trust.

There has been much discussion in the courts below and in this House upon the observations of their Lordships in the *Regal* case.[81] But in my view, their Lordships were not attempting to lay down any new view on the law applicable and indeed could not do C so for the law was already so well settled. The whole of the law is laid down in the fundamental principle exemplified in Lord Cranworth's statement I have already quoted. But it is applicable, like so many equitable principles which may affect a conscience, however innocent, to such a diversity of different cases that the observations of judges and even in your Lordships' House in cases D where this great principle is being applied must be regarded as applicable only to the particular facts of the particular case in question and not regarded as a new and slightly different formulation of the legal principle so well settled. Therefore, as the facts in *Regal* [81] to which alone their Lordships' remarks were directed were so remote from the facts in this case I do not propose to E examine the *Regal* case [81] further.

Two further matters must be mentioned. First, that Tom was at all material times merely a residuary legatee of an undivided aliquot share of his father's estate; as such he was prima facie under no fiduciary relationship to the trustees or his co-beneficiaries (*Kennedy* v. *de Trafford* [82]).

F There must be special circumstances, therefore, to place him in such a relationship. However, in the rather peculiar circumstances of this case and by refusing the offer made to him in the Court of Appeal to sever from Mr. Boardman I think he must have elected to be treated on the same footing as Mr. Boardman.

G Secondly, as to the position of Mr. Boardman himself. There is no doubt that from time to time he acted as solicitor to the trust and to the family and he was therefore throughout in a fiduciary capacity at least to the trustees. Whether he was ever in a fiduciary capacity to the respondent was not debated before

[81] Post, p. 134.

[82] [1897] A.C. 180, H.L.

H. L. (E.)
1966
Phipps v. Boardman
Lord Upjohn

your Lordships and I do not think it matters. I think, again, that A some of the trouble that has arisen in this case, it being assumed rightly that throughout he was in such a capacity, is that it has been assumed that it has necessarily followed that any profit made by him renders him accountable to the trustees. This is not so. A solicitor who acts for a client from time to time is no doubt rightly described throughout as being in a fiduciary capacity to B him but that means fundamentally no more than this, that if he has dealings with his client, e.g. accepts a present from him or buys property from him, there is a presumption of undue influence and the onus is on the solicitor to justify the present or purchase (see, for example, *McMaster* v. *Byrne* [83]). That principle has no relevance to the present case. There is no such thing as an office C of being solicitor to a trust (*Saffron Walden Second Benefit Buildings Society* v. *Rayner*,[84] *per* James L.J.). Though these remarks of James L.J. were admittedly obiter they represent the law. It is perfectly clear that a solicitor can if he so desires act against his clients in any matter in which he has not been retained by them provided, of course, that in acting for them generally he has not D learnt information or placed himself in a position which would make it improper for him to act against them. This is an obvious application of the rule that he must not place himself in a position where his duty and his interest conflict. So in general a solicitor can deal in shares in a company in which the client is a shareholder, subject always to the general rule that the solicitor must E never place himself in a position where his interest and his duty conflict; and in this connection it may be pointed out that the interest and duty may refer (and frequently do) to a conflict of interest and duty on behalf of different clients and have nothing to do with any conflict between the personal interest and duty of the solicitor, beyond his interest in earning his fees. F

My Lords, the judgments of Wilberforce J. and Lord Denning M.R. and Pearson L.J. proceeded upon the footing that by acting as self-appointed agents the appellants placed themselves in a fiduciary capacity to the trustees and became accountable accordingly. That they were never in fact agents has been demonstrated G by Lord Denning in his judgment and I desire to add nothing thereto except to say I agree with him. But as I have already pointed out it seems to me that this question whether this assumption of office leads to the conclusion that the appellants were

[83] [1952] 1 All E.R. 1362, 1368, P.C.

[84] (1880) 14 Ch.D. 406, 409, C.A.

accountable requires a closer analysis than it has received in the lower courts.

This analysis requires detailed consideration:

1. The facts and circumstances must be carefully examined to see whether in fact a purported agent and even a confidential agent is in a fiduciary relationship to his principal. It does not necessarily follow that he is in such a position (see *In re Coomber* [85]).

2. Once it is established that there is such a relationship, that relationship must be examined to see what duties are thereby imposed upon the agent, to see what is the scope and ambit of the duties charged upon him.

3. Having defined the scope of those duties one must see whether he has committed some breach thereof and by placing himself within the scope and ambit of those duties in a position where his duty and interest may possibly conflict. It is only at this stage that any question of accountability arises.

4. Finally, having established accountability it only goes so far as to render the agent accountable for profits made within the scope and ambit of his duty.

Before applying these principles to the facts, however, I shall refer to the judgment of Russell L.J., which proceeded on a rather different basis. He said [86]:

> "The substantial trust shareholding was an asset of which one aspect was its potential use as a means of acquiring knowledge of the company's affairs, or of negotiating allocations of the company's assets, or of inducing other shareholders to part with their shares. That aspect was part of the trust assets."

My Lords, I regard that proposition as untenable.

In general, information is not property at all. It is normally open to all who have eyes to read and ears to hear. The true test is to determine in what circumstances the information has been acquired. If it has been acquired in such circumstances that it would be a breach of confidence to disclose it to another then courts of equity will restrain the recipient from communicating it to another. In such cases such confidential information is often and for many years has been described as the property of the donor, the books of authority are full of such references; knowledge of secret processes, "know-how," confidential information as to the prospects of a company or of someone's intention or the

[85] [1911] 1 Ch. 723, C.A. [86] [1965] Ch. 992, 1031.

expected results of some horse race based on stable or other A confidential information. But in the end the real truth is that it is not property in any normal sense but equity will restrain its transmission to another if in breach of some confidential relationship.

With all respect to the views of Russell L.J. I protest at the idea that information acquired by trustees in the course of their B duties as such is necessarily part of the assets of the trust which cannot be used by the trustees except for benefit of the trust. Russell L.J. referred [86] to the fact that two out of three of the trustees could have no authority to turn over this aspect of trust property to the appellants except for the benefit of the trust; this I do not understand, for if such information is trust C property not all the trustees acting together could do it for they cannot give away trust property.

We heard much argument upon the impact of the fact that the testator's widow was at all material times incapable of acting in the trust owing to disability. Of course trustees must act all of them and unanimously in matters affecting trust affairs, but in this D case they never performed any relevant act on behalf of the trust at all; I quoted Mr. Fox's answer earlier for this reason. At no time after going to the meeting in December, 1956, did Mr. Boardman or Tom rely on any express or implied authority or consent of the trustees in relation to trust property. They understood rightly that there was no question of the trustees acquiring E any further trust property by purchasing further shares in the company, and it was only in the purchase of other shares that they were interested.

There is, in my view, and I know of no authority to the contrary, no general rule that information learnt by a trustee during the course of his duties is property of the trust and cannot F be used by him. If that were to be the rule it would put the Public Trustee and other corporate trustees out of business and make it difficult for private trustees to be trustees of more than one trust. This would be the greatest possible pity for corporate trustees and others may have much information which they may initially acquire in connection with some particular trust but G without prejudice to that trust can make it readily available to other trusts to the great advantage of those other trusts.

The real rule is, in my view, that knowledge learnt by a trustee in the course of his duties as such is not in the least property of

[86] [1965] Ch. 992, 1031.

A the trust and in general may be used by him for his own benefit or for the benefit of other trusts unless it is confidential information which is given to him (1) in circumstances which, regardless of his position as a trustee, would make it a breach of confidence for him to communicate to anyone for it has been given to him expressly or impliedly as confidential, or (2) in a fiduciary B capacity, and its use would place him in a position where his duty and his interest might possibly conflict. Let me give one or two simple examples. A, as trustee of two settlements X and Y holding shares in the same small company, learns facts as trustee of X about the company which are encouraging. In the absence of special circumstances (such, for example, that X wants C to buy more shares) I can see nothing whatever which would make it improper for him to tell his co-trustees of Y who feel inclined to sell that he has information that this would be a bad thing to do. Another example: A as trustee of X learns facts that make him and his co-trustees want to sell. Clearly he could not communicate this knowledge to his co-trustees of Y until at all events D the holdings of X have been sold for there would be a plain conflict, reflected in the prices that might or might possibly be obtained.

My Lords, I do not think for one moment that Lord Brougham in *Hamilton* v. *Wright*,[87] quoted in the speech of my noble and E learned friend Lord Guest, was saying anything to the contrary; you have to look and see whether the knowledge acquired was capable of being used for his own benefit *to injure* the trust (my italics). That test can have no application to the present. There was no possibility of the information being used to injure the trust. The knowledge obtained was used not in connection with F trust property but to enhance the value of the trust property by the purchase of other property in which the trustees were not interested.

With these general observations on the applicable principles of law let me apply them to the facts of this case.

Chapter 1. At this stage the appellants went to the meeting G with the object of persuading the shareholders to appoint Tom a director; admittedly they were acting on behalf of the trustees at that meeting. It is the basis of the respondent's case that this placed the appellants in a fiduciary relationship which they never after lost or, as it was argued, it " triggered off a chain of events " and gave them the opportunity of acquiring knowledge so that

[87] 9 Cl. & F. 111, 124.

they thereafter became accountable to the trustees. From this it must logically follow that in acquiring the 2,925 shares they became constructive trustees for the trust. A

My Lords, I must emphatically disagree. The appellants went to the meeting for a limited purpose (the election of Tom as a director) which failed. Then the appellants' agency came to an end. They had no further duties to perform. The discussions B which followed showed conclusively that the trustees would not consider a purchase of further shares. So when chapter 2, phase 1, opened I can see nothing to prevent the appellants from making an offer for shares for themselves, or for that matter, I cannot see that Mr. Boardman would have been acting improperly in advising some other client to make an offer for shares (other than the 8,000) C in the company.

In the circumstances, the appellants' duties having come to an end, they owed no duty and there was no conflict of interest and duty, they were in no way dealing in trust property. Further, of course, they had the blessing of two trustees in their conduct in trying to buy further shares. D

So had phase 1 of chapter 2 been successful I can see nothing to make them constructive trustees of the shares they purchased for the trust.

Consider a simple example. Blackacre is trust property and next to it is Whiteacre; but there is no question of the trustees being interested in a possible purchase of Whiteacre as being con- E venient to be held with Blackacre. Is a trustee to be precluded from purchasing Whiteacre for himself because he may have learnt something about Whiteacre while acting as a trustee of Blackacre? I can understand the owner of Whiteacre being annoyed but surely not the beneficial owners of Blackacre, they have no interest in Whiteacre and their trustees have no duties to perform in respect F thereof.

It is phase 2 of chapter 2 that gives rise to difficulty.

If that phase had come to a successful conclusion one of two things would have happened.

The appellants would have had to communicate everything G they knew to the trustees; the latter might then have ratified their actions and proceeded to carry out the proposals provisionally agreed between the appellants and Mr. Smith. No doubt old Mrs. Phipps would have had to be removed from her position as a trustee. Had all this happened cadit quaestio. But supposing the trustees had decided against the proposals. The appellants'

A agency not having been ratified they never became agents. Admittedly they had learnt much about the company but on this hypothesis they had communicated that information to the trustees who decided to make no use of it.

I will assume that at this stage the appellants remained in a general fiduciary capacity to the trustees in the *McMaster* v.
B *Byrne* [88] sense as described above, but what particular fiduciary duties remained upon the appellants? Surely their particular relationship came to an end, and why should they not be entitled to use that information for the purchase of shares in the company if the trustees were not interested? I can see nothing to prevent the appellants making use of it, for there is no longer any conflict
C between duty and interest. They have performed their duty. This is in marked contrast to *Keech* v. *Sandford*,[89] where the beneficiary was interested, and to the facts in *Regal*,[90] where the directors acted so as to deprive their beneficiary of a profit in respect of property of which the beneficiary has contemplated the purchase and which the directors as trustees should have preserved at all
D costs.

However, we know this did not happen and phase 3 started.

My Lords, I believe the only conflict between the duty and interest of the appellants that can be suggested is that having learnt so much about the company and realised that in the hands of experts like Tom the shares were a good buy at more than
E £3 a share they should have communicated this fact to the trustees and suggested that they ought to consider a purchase and an application to the court for that purpose.

This, so far as I can ascertain, was suggested for the first time in the judgment of Lord Denning M.R.[91]

Had this been an issue in the action this might have been a
F very difficult matter, but it never was. There is no sign of any such case made in the pleadings; but what is much more important is that from start to finish in all three courts there was no suggestion of this in argument on behalf of the respondent; and what is most important of all, there is no suggestion in cross-examination of either of the trustees or of the appellants that
G the latter were under any such obligation. Mr. Fox must in fact have known all about these negotiations and the value of the shares at this time. In these circumstances can it really be asserted that by failure (if, indeed, they did so fail; we simply do not know) formally to tell the trustees that the shares were worth more

[88] [1952] 1 All E.R. 1362.
[89] Sel.Cas.Ch. 61.
[90] Post, p. 134.
[91] [1965] Ch. 992, 1020.

than had previously been thought the appellants had placed themselves in a position where their interest might possibly conflict with their duty? A

For my part unless the trustees, which means in fact the active trustee Mr. Fox, had communicated some change of policy as to the purchase of further shares I cannot conceive why the appellants should have thought themselves under any duty to communicate to the trustees the fact that they, the appellants, were prepared to pay £4 10s. for the shares, for that is all that had happened over the intervening chapter 2, phase 2, negotiations. That does not mean that the shares would have been worth purchasing by the trustees at £4 10s., for no court would have sanctioned that purchase unless Tom was willing to enter into a contract to run the company for a period and, of course, he need not have done so. In principle I cannot see any difference between this situation and the end of chapter 1. It was nice for the trustees to know that the appellants were willing to expend more of their own money in buying the non-trust shares in pursuance of the general scheme to get rid of the Smith faction but had no further relevance. B C D

However this may be, all this was an issue, as I have said, never explored.

My Lords, it would, in my opinion, be most unjust to the appellants to draw any inference against them in such circumstances without giving them any opportunity of explaining the situation as it really occurred in 1958. We do not know what would have been said on this point in the witness box, but it is not unlikely Mr. Fox would have said: "I knew all about it but I was still inflexibly opposed to a purchase of more shares. All along I hoped the appellants would buy them." Had he said that, it would seem to me perfectly clear that there would be no possible conflict between the appellants' duty and interest. E F

I cannot condemn the appellants unheard on this point.

Apart from that, what was the position? The appellants were able to offer a greatly increased price in phase 3 by reason of the knowledge they had acquired but they were not acquiring trust property or, so far as the evidence goes, any property which the trustees had any idea of purchasing. The inference I draw is that the trustees were still giving their blessing to the idea that the appellants should purchase the majority holding so that it should be in friendly hands. G

A As a result of the information they acquired, admittedly by reason of the trust holding, they found it worth while to offer a good deal more for the shares than in phase 1 of chapter 2. I cannot see that in offering to purchase non-trust shares at a higher price they were in breach of any fiduciary relationship in using the information they had acquired for this purpose.

B I cannot see that they have, from start to finish, in the circumstances of this case, placed themselves in a position where there was any possibility of a conflict between their duty and interest except in respect of the one matter which I have considered and rejected on the facts of this case. While I have not answered my earlier analysis specifically I think I have done so in the course of this judgment, except No. 4, which, in my view, does not arise.

C

I have dealt with the problems that arise in this case at considerable length but it could, in my opinion, be dealt with quite shortly.

In *Barnes* v. *Addy* [92] Lord Selborne L.C. said:

D

> "It is equally important to maintain the doctrine of trusts which is established in this court, and not to strain it by unreasonable construction beyond its due and proper limits. There would be no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable applications of them."

E That, in my judgment, is applicable to this case.

The trustees were not willing to buy more shares in the company. The active trustees were very willing that the appellants should do so themselves for the benefit of their large minority holding. The trustees, so to speak, lent their name to the appellants in the course of prolonged and difficult negotiations and, of course, the appellants thereby learnt much which would have otherwise been denied to them. The negotiations were in the end brilliantly successful.

F

And how successful Tom was in his reorganisation of the company is apparent to all. They ought to be very grateful.

G In the long run the appellants have bought for themselves at entirely their own risk with their own money shares which the trustees never contemplated buying and they did so in circumstances fully known and approved of by the trustees.

To extend the doctrines of equity to make the appellants

[92] 9 Ch.App. 244, 251.

H. L. (E.) 1966 Phipps v. Boardman

A accountable in such circumstances is, in my judgment, to make unreasonable and unequitable applications of such doctrines.

I would allow the appeal and dismiss the action.

Appeal dismissed.

B Solicitors: *Joynson-Hicks & Co.; J. D. Langton & Passmore for Mellows & Sons, Bedford.*

J. A. G.

C

[NOTE]

[HOUSE OF LORDS]

D

H. L. (E.)

REGAL (HASTINGS) LTD. *v.* GULLIVER AND OTHERS

1941 *Nov.* 14, 17, 18, 20, 21, 24. 1942 *Feb.* 20.

Company — Director — Fiduciary duty to company — Accounting for profits to company — Dealings with company and subsidiary company.

E APPEAL from the Court of Appeal.

The appellants, Regal (Hastings) Ltd. (" Regal ") were plaintiffs in the action and the respondents Charles Gulliver, Arthur Frank Bibby, David Edward Griffiths, Henry Charles Bassett, Harry Bentley and Peter Garton were the defendants.

The action was brought by Regal against the first five respondents who were former directors of Regal, to recover from them sums of money amounting to £7,018 8s. 4d., being profits made by them upon F the acquisition and sale by them of shares in a subsidiary company formed by Regal and known as Hastings Amalgamated Cinemas Ltd. The action was brought against the respondent Garton, who was Regal's former solicitor, to recover a sum of £1,402 1s. 8d. and also a sum of £233 15s. in respect of a solicitor's bill of costs, the former sum being profit made by him in a similar dealing in the said shares and the latter sum being a sum paid to him by Regal in respect of work pur- G ported to have been done on their behalf. There were alternative claims for damages and misfeasance and for negligence.

The action was based upon the allegation that the directors and the solicitor had used their position as such to acquire the shares in Amalgamated for themselves with a view to enabling them at once to sell them at a very substantial profit, that they had obtained that profit by using their offices as directors and solicitor and were therefore accountable for it to Regal, and also that in so acting they had placed

TAB 7

in the House of Lords in 1758, when a bill for amending the law relating to *habeas corpus* was before the House, makes it clear that no dispute on any matter of fact was allowed on a return to the writ, and that the only question which could be debated was whether the return disclosed on its face a ground for the detention which was sufficient in law. The reason was that in those days it was only a jury that could try a question of fact. Accordingly, if the applicant for the writ desired to dispute any fact alleged in the return, he could do so only by an action, or by preferring an indictment, for a false return. If he obtained A a verdict, the court would then take notice that the allegation was false and proceed accordingly. It appears from a note at the end of the report of the judge's opinion that the bill was rejected, and it was by the Act of 1816 that the law in this respect was first altered.

Solicitors: *Oswald Hickson, Collier & Co.* (for the appellant); *Treasury Solicitor* (for the Home Secretary).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*] B

REGAL (HASTINGS), LTD. *v.* GULLIVER AND OTHERS.

[HOUSE OF LORDS (Viscount Sankey, Lord Russell of Killowen, Lord Macmillan, Lord Wright and Lord Porter), **November 14, 17, 18, 20,** C **21, 24, 1941, February 20, 1942.**]

Companies—Directors—Sale of shares in subsidiary company—Fiduciary relationship—Right of company to profit on sale.

The appellant company were the owners of a cinema in Hastings. With a view to the sale of the property of the company as a going concern they were anxious to acquire two other cinemas in Hastings. For this purpose D they formed a subsidiary company with a capital of £5,000 in £1 shares. They were offered a lease of the two cinemas, but the landlord required a guarantee of the rent by the directors unless the paid-up capital of the subsidiary company was £5,000. The intention of the directors of the appellant company was that the appellant company should hold all the shares in the subsidiary company, and, since the appellant company at that time was unable to provide more than £2,000, it seemed that the directors would be E obliged to give the required guarantee. The directors wished to avoid giving this guarantee, and the matter was arranged in this way. The appellant company was to take up 2,000 shares at par; the chairman of the directors promised to find £500; the other directors promised to do the same; and Garton, who was the solicitor to the appellant company, also promised to provide £500. This arrangement was made at a board meeting to which F the directors and Garton were called by two notices, one of a board meeting of the appellant company and the other of a board meeting of the subsidiary company. Both meetings were to be held at the same time and place. In fulfilment of the arrangement 2,000 shares were allotted to the appellant company; 500 to each of the directors and Garton, but the shares in respect of the £500 "found" by the chairman of the directors were allotted to and paid for by two companies and one private individual, so that the companies G and the individual took as beneficial owners and not as nominees of the chairman. Ultimately the transaction was not carried through by the sale of the property of the company as a going concern, but by the sale of all the shares in the appellant company and in the subsidiary company. The 3,000 shares in the subsidiary company which were allotted to or on behalf of the directors of the appellant company and Garton were sold at a profit of £2 16*s.* 1*d.* per share. It was found as a fact that all the H transactions were *bona fide* :—

HELD: (i) in the circumstances, the directors, other than the chairman, were in a fiduciary relationship to the appellant company and liable, therefore, to repay to it the profit they had made on the sale of the shares,

(ii) the chairman of the directors, since he did not take the shares beneficially, was not liable to repay the profit made by those who took the shares from him, as the latter were not in a fiduciary relationship to the company.

(iii) since Garton was not a director of the appellant company he was not in a fiduciary relationship to it, and was not liable to make any repayment. Moreover, he took the shares at the express request of the directors of the appellant company.

[**EDITORIAL NOTE.** The importance of this case lies in the modern practice of carrying on business by means of a number of companies either associated together or some subsidiary to one principal company. It shows that the directors of the company must have regard to the interest of the shareholders in all their dealings with the property of the company. The principle applied in this case was enunciated as early as 1726, long before there were limited liability companies, and was originally restricted to trustees. It has been applied to agents, partners and, lastly, to directors. As the opinions in this case state, the liability of directors is not quite the same as that of trustees, but the general principle remains that any person in a fiduciary capacity is not allowed to make a profit out of property in regard to which the fiduciary relationship exists. This equitable principle or doctrine has been surrounded with many high-sounding phrases and terms, and while it is no doubt one of the great doctrines of equity and a very valuable remedy in the case of improper dealings by persons in fiduciary relationships, it is a principle which can inflict considerable hardship, especially in the administration of small estates. In the case here reported the result is not altogether equitable, for, of the six persons concerned in the transaction impugned, four have by the operation of the doctrine been obliged to give up a profit made with perfect good faith, while the remaining two, by what seems no more than the mere chance of circumstance, have been allowed to retain their share of the profit. As their Lordships point out, no question as to the right to retain this profit could have arisen if the respondents had taken the precaution of obtaining the approval of the appellant company in general meeting, and this would have been a mere matter of form, since they doubtless controlled the voting.

AS TO FIDUCIARY POSITION OF DIRECTOR, see HALSBURY, Hailsham Edn., Vol. 5, pp. 319-325, paras. 533-538; and FOR CASES, see DIGEST, Vol. 9, pp. 491-503, Nos. 3224-3301.]

Cases referred to:

(1) *Keech* v. *Sandford* (1726), Sel. Cas. Ch. 61; 43 Digest 633, *720*.
(2) *Ex p. James* (1803), 8 Ves. 337; 43 Digest 779, *2193*.
(3) *Hamilton* v. *Wright* (1842), 9 Cl. & Fin. 111; 43 Digest 864, *3105*.
(4) *Aberdeen Ry. Co.* v. *Blaikie Brothers* (1854), 1 Macq. 461; 10 Digest 1176, *8339*; 2 Eq. Rep. 1281; 23 L.T.O.S. 315.
(5) *Imperial Hydropathic Hotel Co., Blackpool* v. *Hampson* (1882), 23 Ch.D. 1; 9 Digest 668, *4454*; 49 L.T. 150.
(6) *Re Forest of Dean Coal Mining Co.* (1878), 10 Ch.D. 450; 9 Digest 483, *3173*; 40 L.T. 287.
(7) *Re Faure Electric Accumulator Co.* (1888), 40 Ch.D. 141; 9 Digest 178, *1131*; 58 L.J.Ch. 48; 59 L.T. 918.
(8) *Parker* v. *McKenna* (1874), 10 Ch. App. 96; 9 Digest 493, *3240*; 44 L.J.Ch. 425; 31 L.T. 739.
(9) *Imperial Mercantile Credit Assocn.* (*Liquidators*) v. *Coleman* (1873), L.R. 6 H.L. 189; 9 Digest 491, *3225*; 42 L.J.Ch. 644; 29 L.T. 1; *reversing* 6 Ch. App. 558.
(10) *Huntington Copper Co.* v. *Henderson* (0000) 4 R. (Ct. of Sess.) 294.
(11) *Boston Deep Sea Fishing & Ice Co.* v. *Ansell* (1888), 39 Ch.D. 339; 9 Digest 528, *3490*; 59 L.T. 345.
(12) *Lister & Co.* v. *Stubbs* (1890), 45 Ch.D. 1; 1 Digest 482, *1623*; 59 L.J.Ch. 570; 63 L.T. 75.
(13) *Re North Australian Territory Co., Archer's Case*, [1892] 1 Ch. 332; 9 Digest 488, *3201*; 61 L.J.Ch. 129; 65 L.T. 800.

APPEAL by Regal Hastings, Ltd., from an order of the Court of Appeal, dated Feb. 15, 1941, dismissing an appeal from an order of WROTTESLEY, J., dated Aug. 30, 1940. The appeal was brought by special leave of the Appeal Committee, granted on Apr. 2, 1941. The facts and arguments are fully set out in the opinion of LORD RUSSELL OF KILLOWEN.

A. T. Miller, K.C., and *F. W. Beney* for the appellants.
Cartwright Sharp, K.C., and *C. B. Guthrie* for the respondent Garton.
H. Wynn Parry, K.C., and *P. B. Morle* for the respondents other than Garton.

VISCOUNT SANKEY: My Lords, the appellants were the plaintiffs in the action and are referred to as Regal; the respondents were the defendants. The action was brought by Regal against the first five respondents, who were former directors of Regal, to recover from them sums of money amounting to £7,010 8*s*. 4*d*., being profits made by them upon the acquisition and sale by them of shares in the subsidiary company formed by Regal and known as Hastings

Amalgamated Cinemas Ltd. This company is referred to as Amalgamated. The action was brought against the defendant, Garton, who was Regal's former solicitor, to recover the sum of £1,402 1*s*. 8*d*., being profits made by him in similar dealing in the said shares. There were alternative claims for damages and misfeasance and for negligence. The action was based on the allegation that the directors and the solicitor had used their position as such to acquire the shares in Amalgamated for themselves, with a view to enabling them at once to sell them at a very substantial profit, that they had obtained that profit by using A their offices as directors and solicitor and were, therefore, accountable for it to Regal, and also that in so acting they had placed themselves in a position in which their private interests were likely to be in conflict with their duty to Regal. The facts were of a complicated and unusual character. I have had the advantage of reading and I agree with the statement as to them prepared by my noble and learned friend, LORD RUSSELL OF KILLOWEN. It will be sufficient for my purpose to set them out very briefly. B

In the summer of 1935 the directors of Regal, with a view to the future development or sale of their company, were anxious to extend the sphere of its operations by the acquisition of other cinemas. In Hastings and St. Leonards there were two small ones called the Elite and the De Luxe. Negotiations began both for their acquisition or control by lease or otherwise and for the disposal of Regal itself. Part of the machinery for the purpose was the creation by Regal of a subsidiary company, the Amalgamated. It was registered on C Sept. 26, 1935, with a capital of £5,000 in £1 shares. The directors were the same as those of Regal with the addition of Garton. It was thought that only £2,000 of the capital was to be issued and that it would be subscribed by Regal, who would control it. Then difficulties began with the Elite and the De Luxe as to a lease, amongst others whether the directors of Amalgamated would guarantee the rent. The directors were not willing to do so. At last all difficulties D were surmounted at a crucial meeting of Oct. 2, 1935. It was a peculiar meeting. The directors both of Regal and Amalgamated were summoned to attend at the same place and at the same time. They did so, but, although separate minutes were subsequently attributed to each company, it is not easy to say from the evidence at any particular moment for which company a particular director was appearing. It was resolved that Regal should apply for 2,000 shares in Amalgamated. It was agreed that £2,000 was the total sum which Regal E could find. The value of the leases of the two cinemas was taken at £15,000. The draft lease was approved. Each of the Regal directors, except Gulliver, the chairman, agreed to apply for 500 shares, Gulliver saying he would find people to take up 500. The Regal directors requested Garton to take up 500. I will deal later with particular evidence applying to Gulliver and Garton, who delivered separate defences. Thus, the capital of Amalgamated was fully F subscribed, Regal taking 2,000 shares, the five respondents taking 500 shares each, and the persons found by Gulliver the remaining 500. The shares were duly paid for and allotted. In the final transaction shortly afterwards these shares were sold at substantial profit, and it is this profit which Regal asks to recover in this action.

The directors gave evidence and were severely cross-examined as to their good faith. The trial judge said : G

> All this subsequent history does not help me to decide whether the action of the directors of the plaintiff company and their solicitor on Oct. 2 was *bona fide* in the interests of the company and not *mala fide* and in breach of their duty to the company . . . I must take it that, in the realisation of those facts, it means that I cannot accept what has to be established by the plaintiff, and that is that the defendants here acted in ill faith . . . Finally, I have to remind myself, were it necessary, that the burden of proof, as in a criminal case, is the plaintiffs', who must establish the fraud they allege. H On the whole, I do not think the plaintiff company succeeds in doing that and, therefore, there must be judgment for the defendants.

This latter statement was criticised in the Court of Appeal by DU PARCQ, L.J., who said :

> To anyone who has read the pleadings, but not followed the course of the trial, that would seem a remarkable statement, because it is common ground that there is no allegation of fraud in the pleadings whatever . . . but the course which the case has taken makes the learned judge's statement quite apprehensible, because it does appear to have been put before him as, in the main at any rate, a case of fraud.

It must be taken, therefore, that the respondents acted *bona fide* and without fraud.

In the Court of Appeal, LORD GREENE, M.R., said :

> If the directors in coming to the conclusion that they could not put up more than £2,000 of the company's money had been acting in bad faith, and if that restriction of the company's investment had been done for the dishonest purpose of securing for themselves profit which not only could but which ought to have been procured for their company, I apprehend that not only could they not hold that profit for themselves if
> A the contemplated transaction had been carried out, but they could not have held that profit for themselves even if that transaction was abandoned and another profitable transaction was carried through in which they did in fact realise a profit through the shares . . . but once they have admittedly *bona fide* come to the decision to which they came in this case, it seems to me that their obligation to refrain from acquiring these shares came to an end. In fact, looking at it as a matter of business, if that was the conclusion they came to, a conclusion which, in my judgment, was amply justified
> B by the evidence from a business point of view, then there was only one way left of raising the money, and that was putting it up themselves . . . That being so, the only way in which these directors could secure that benefit for the company was by putting up the money themselves. Once that decision is held to be a *bona fide* one and fraud drops out of the case, it seems to me there is only one conclusion, namely, that the appeal must be dismissed with costs.

It seems therefore that the absence of fraud was the reason of the decision.
C In the result, the Court of Appeal dismissed the appeal and from their decision the present appeal is brought.

The appellants say they are entitled to succeed: (i) because the respondents secured for themselves the profits upon the acquisition and sale of the shares in Amalgamated by using the knowledge acquired as directors and solicitors respectively of Regal and by using their said respective positions and without the knowledge or consent of Regal ; (ii) because the doctrine laid down with
D regard to trustees is equally applicable to directors and solicitors. Although both in the court of first instance and the Court of Appeal the question of fraud was the prominent feature, the appellants' counsel in this House at once stated that it was no part of his case and quite irrelevant to his arguments. His contention was that the respondents were in a fiduciary capacity in relation to the appellants and, as such, accountable in the circumstances for the profit which they made on the sale of the shares.

E As to the duties and liabilities of those occupying such a fiduciary position, a number of cases were cited to us which were not brought to the attention of the trial judge. In my view, the respondents were in a fiduciary position and their liability to account does not depend upon proof of *mala fides*. The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a
F personal interest conflicting with the interests of those whom he is bound to protect. If he holds any property so acquired as trustee, he is bound to account for it to his *cestui que trust*. The earlier cases are concerned with trusts of specific property : *Keech* v. *Sandford* (1), per LORD KING, L.C. The rule, however, applies to agents, as, for example, solicitors and directors, when acting in a fiduciary capacity. The headnote to *Ex p. James* (2), reads as follows :

> Purchase of a bankrupt's estate by the solicitor to the commission set aside. The
> G Lord Chancellor would not permit him to bid upon the resale, discharging himself from the character of solicitor, without the previous consent of the persons interested, freely given, upon full information.

In that case LORD ELDON, L.C., said, at p. 345 :

> The doctrine as to purchase by trustees, assignees, and persons having a confidential character, stands much more upon general principle than upon the circumstances of any individual case. It rests upon this; that the purchase is not permitted in any case,
> H however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance; as no court is equal to the examination and ascertainment of the truth in much the greater number of cases.

In *Hamilton* v. *Wright* (3) the headnote reads :

> A trustee is bound not to do anything which can place him in a position inconsistent with the interests of his trust, or which can have a tendency to interfere with his duty in discharging it. Neither the trustee nor his representative can be allowed to retain an advantage acquired in violation of this rule.

At p.124, LORD BROUGHAM said :

> The knowledge which he acquires as trustee is of itself sufficient ground of dis-

qualification, and of requiring that such knowledge would not be capable of being used for his own benefit to injure the trust. The ground of disqualification is not merely because such knowledge may enable him actually to obtain an undue advantage over others.

In *Aberdeen Ry. Co.* v. *Blaikie* (4), the headnote reads :

The director of a railway company is a trustee, and, as such, is precluded from dealing, on behalf of the company, with himself, or with a firm of which he is a partner.

At p. 471, LORD CRANWORTH, L.C., said : A

A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. B

It is not, however, necessary to discuss all the cases cited, because the respondents admitted the generality of the rule as contended for by the appellants, but were concerned rather to confess and avoid it. Their contention was that, in this case, upon a true perspective of the facts, they were under no equity to account for the profits which they made. I will deal first with the respondents, other than Gulliver and Garton. We were referred to *Imperial Hydropathic Hotel Co., Blackpool* v. *Hampson* (5), where BOWEN, L.J., at p. 12, drew attention C to the difference between directors and trustees, but the case is not an authority for contending that a director cannot come within the general rule. No doubt there may be exceptions to the general rule, as, for example, where a purchase is entered into after the trustee has divested himself of his trust sufficiently long before the purchase to avoid the possibility of his making use of special information acquired by him as trustee (see the remarks of LORD ELDON, in D *Ex p. James* (2) at p. 352) or where he purchases with full knowledge and consent of his *cestui que trust*. *Imperial* v. *Hampson* (5) makes no exception to the general rule that a solicitor or director, if acting in a fiduciary capacity, is liable to account for the profits made by him from knowledge acquired when so acting.

It was then argued that it would have been a breach of trust for the respondents, as directors of Regal, to have invested more than £2,000 of Regal's money in E Amalgamated, and that the transaction would never have been carried through if they had not themselves put up the other £3,000. Be it so, but it is impossible to maintain that, because it would have been a breach of trust to advance more than £2,000 from Regal and that the only way to finance the matter was for the directors to advance the balance themselves, a situation arose which brought the respondents outside the general rule and permitted them to retain the profits which accrued to them from the action they took. At all material F times they were directors and in a fiduciary position, and they used and acted upon their exclusive knowledge acquired as such directors. They framed resolutions by which they made a profit for themselves. They sought no authority from the company to do so, and, by reason of their position and actions, they made large profits for which, in my view, they are liable to account to the company. G

I now pass to the cases of Gulliver and Garton. Their liability depends upon a careful examination of the evidence. Gulliver's case is that he did not take any shares and did not make any profit by selling them. His evidence, which is substantiated by the documents, is as follows. At the board meeting of Oct. 2 he was not anxious to put any money of his own into Amalgamated. He thought he could find subscribers for £500 but was not anxious to do so. He did, however, find subscribers—£200 by South Down Land Company, £100 by a H Miss Geering and £200 by Seguliva A.G., a Swiss company. The purchase price was paid by these three, either by cheque or in account, and the shares were duly allotted to them. The shares were held by them on their own account. When the shares were sold, the moneys went to them, and no part of the moneys went into Gulliver's pocket or into his account. In these circumstances, and bearing in mind that Gulliver's evidence was accepted, it is clear that he made no profits for which he is liable to account. The case made against him rightly fails, and the appeal against the decision in his favour should be dismissed.

Garton's case is that in taking the shares he acted with the knowledge and consent of Regal, and that consequently he comes within the exception to the general rule as to the liability of the person acting in a fiduciary position to account for profits. At the meeting of Oct. 2, Gulliver, the chairman of Regal, and his co-directors were present. He was asked in cross-examination about what happened as to the purchase of the shares by the directors. The question was :

> Did you say to Mr. Garton, " Well, Garton, you have been connected with Bentley's
> A for a long time, will you not put up £500 ? "

His answer was :

> I think I can put it higher. I invited Mr. Garton to put the £500 and to make up the £3,000.

This was confirmed by Garton in examination in chief. In these circumstances, and bearing in mind that this evidence was accepted, it is clear that he took
B the shares with the full knowledge and consent of Regal and that he is not liable to account for profits made on their sale. The appeal against the decision in his favour should be dismissed.

The appeal against the decision in favour of the respondents other than Gulliver and Garton should be allowed, and I agree with the order to be proposed by my noble and learned friend, LORD RUSSELL OF KILLOWEN as to amounts and costs. The appeal against the decision in favour of Gulliver and Garton
C should be dismissed with costs.

LORD RUSSELL OF KILLOWEN : My Lords, the very special facts which have led up to this litigation require to be stated in some detail, in order to make plain the point which arises for decision on this appeal.

The appellant is a limited company called Regal (Hastings), Ltd., and may conveniently be referred to as Regal. Regal was incorporated in the year
D 1933 with an authorised capital of £20,000 divided into 17,500 preference shares of £1 each and 50,000 ordinary shares of one shilling each. Its issued capital consisted of 8,950 preference shares and 50,000 ordinary shares. It owned, and managed very successfully, a freehold cinema theatre at Hastings called the Regal. In July, 1935, its board of directors consisted of one Walter Bentley and the respondents Gulliver, Bobby, Griffiths and Bassett. Its shareholders were twenty in number. The respondent Garton acted as its solicitor.
E In or about that month, the board of Regal formed a scheme for acquiring a lease of two other cinemas (viz., the Elite at Hastings, and the Cinema de Luxe at St. Leonards), which were owned and managed by a company called Elite Picture Theatres (Hastings & Bristol), Ltd. The scheme was to be carried out by obtaining the grant of a lease to a subsidiary limited company, which was to be formed by Regal, with a capital of 5,000 £1 shares, of which Regal was to subscribe for 2,000 in cash, the remainder being allotted to Regal or its
F nominees as fully paid for services rendered. The whole beneficial interest in the lease would, if this scheme were carried out, enure solely to the benefit of Regal and its shareholders, through the shareholding of Regal in the subsidiary company. The respondent Garton, on the instructions of Regal, negotiated for the acquisition of the lease, with the result that an offer to take a lease for 35 or 42 years at a rent of £4,600 for the first year, rising in the second and third
G years up to £5,000 in the fourth and subsequent years, was accepted on behalf of the owners on Aug. 21, 1935, subject to mutual approval of the form of the lease. Subsequently, the owners of the two cinemas required the rent under the proposed lease to be guaranteed.

On Sept. 11, 1935, Walter Bentley died ; and on Sept. 18, 1935, his son, the respondent Bentley, who was one of his executors, was appointed a director of Regal. It should now be stated that, concurrently with the negotiations for
H the acquisition of a lease of the two cinemas, Regal was contemplating a sale of its own cinema, together with the leasehold interest in the two cinemas which it was proposing to acquire. On Sept. 18, 1935, at a board meeting of Regal, the respondent Garton was instructed that the directors were prepared to give a joint guarantee of the rent of the two cinemas, until the subscribed capital of the proposed subsidiary company amounted to £5,000. He was further instructed to deal with all offers received for the purchase of Regal's own assets. On Sept. 26, 1935, the proposed subsidiary company was registered under the name Hastings Amalgamated Cinemas, Ltd., which may, for brevity, be referred

to as Amalgamated. Its directors were the five directors of Regal, and in addition the respondent Garton.

Harry Bentley, who had been appointed a director of Regal only on Sept. 18, at the end of the board meeting of that date, inquired from Garton the position as regards the new company, Amalgamated. In reply, he received a letter dated Sept. 26, 1935, in which the position, as at that date, is set out by Garton. After stating that the capital of Amalgamated is £5,000, of which £2,000 is being subscribed by Regal, " which sum will form virtually the whole of the present paid up capital " of Amalgamated, and that the rent is to be guaranteed by the directors so long as the issued capital of Amalgamated is under £5,000, he concludes as follows :

> Inasmuch as it is the intention of all the parties that the Regal (Hastings), Ltd. will not only control the Hastings (Amalgamated) Cinemas, Ltd., but will continue to hold virtually the whole of the capital, the position of a shareholder of Regal (Hastings), Ltd., is merely that he has the advantage of a possible asset of the two new cinemas on sale by the Regal (Hastings), Ltd., of its undertaking, so that the price realised to the shareholders of the Regal (Hastings), Ltd., will be the amount that he would normally have received for his interest in such company, plus his proportion of the sale price of such two new cinemas.

On Oct. 2, 1935, an offer was received from would-be purchasers offering a net sum of £92,500 for the Regal cinema and the lease of the two cinemas. Of this sum £77,500 was allotted as the price of Regal's cinema, and £15,000 as the price of the two leasehold cinemas. This splitting of the price seems to have been done by the purchasers at the request of the respondent Garton ; but it must be assumed in favour of the Regal directors that they were satisfied that £77,500 was not too low a price to be paid for their company's cinema, with the result that £15,000 cannot be taken to have been in excess of the value of the lease which Amalgamated was about to acquire. On the afternoon of Oct. 2, the six respondents met at 62, Shaftesbury Avenue, London, the registered offices of Regal. Various matters were mentioned and discussed between them, and they came to certain decisions. Subsequently, minutes were prepared which record the different matters as having been transacted at two separate and distinct board meetings, viz., a meeting of the board of Regal, and a meeting of the board of Amalgamated. The respondent Gulliver stated in his evidence that two separate meetings were held, that of the Amalgamated board being held and concluded before that of the Regal board was begun. On the other hand, the respondent Bentley says :

> It was more or less held in one lump, because we were talking about selling the three properties.

The respondent Garton states that, after it was decided that Regal could only afford to put up £2,000 in Amalgamated, which was purely a matter for the consideration of the Regal board, the next matter discussed was one which figures in the minutes of the Amalgamated board meeting. Moreover, both meetings are recorded in the minutes as having been held at 3 p.m.

Whatever may be the truth as to this, the matters discussed and decided included the following : (i) Regal was to apply for 2,000 shares in Amalgamated ; (ii) the offer of £77,500 for the Regal cinema and £15,000 for the two leasehold cinemas was accepted ; (iii) the solicitor reporting that completion of the lease was expected to take place on Oct. 7, it was resolved that the seal of Amalgamated be affixed to the engrossment when available ; and (iv) the respondent Gulliver having objected to guaranteeing the rent it was resolved

> . . . that the directors be invited to subscribe for 500 shares each and that such shares be allotted accordingly.

On Oct. 7, 1935, a lease of the two cinemas was executed in favour of Amalgamated, for the term of 35 years from Sept. 29, 1935, in accordance with the agreement previously come to. The shares of Amalgamated were all issued, and were allotted as follows : 2,000 to Regal, 500 to each of the respondents Bobby, Griffiths, Bassett, Bentley and Garton, and (by the direction of the respondent Gulliver) 200 to a Swiss company called Seguliva A.G., 200 to a company called South Downs Land Co., Ltd., and 100 to a Miss Geering.

In fact, the proposed sale and purchase of the Regal cinema and the two leasehold cinemas fell through. Another proposition, however, took its place, viz., a proposal for the purchase from the individual shareholders of their shares in Regal and Amalgamated. This proposal came to maturity by agreements dated Oct. 24, 1935, as a result of which the 3,000 shares in Amalgamated held otherwise than by Regal were sold for a sum of £3 16s. 1d. per share, or in other words at a profit of £2 16*s*. 1*d*. per share over the issue price of par.

As a sequel to the sale of the shares in Regal, that company came under the management of a new board of directors, who caused to be issued the writ which initiated the present litigation. By this action Regal seek to recover from its five former directors and its former solicitor a sum of £8,142 10*s*. either as damages or as money had and received to the plaintiffs' use. The action was tried by WROTTESLEY, J., who entered judgment for all the defendants with costs. An appeal by the plaintiffs to the Court of Appeal was dismissed with costs.

My Lords, those are the relevant facts which have led up to the debate in your Lordships' House, and I now proceed to consider whether the appellants are entitled to succeed against any and which of the respondents. The case has, I think, been complicated and obscured by the presentation of it before the trial judge. If a case of wilful misconduct or fraud on the part of the respondents had been made out, liability to make good to Regal any damage which it had thereby suffered could, no doubt, have been established; and efforts were apparently made at the trial, by cross-examination and otherwise, to found such a case. It is, however, due to the respondents to make it clear at the outset that this attempt failed. The case was not so presented to us here. We have to consider the question of the respondents' liability on the footing that, in taking up these shares in Amalgamated, they acted with *bona fides*, intending to act in the interest of Regal.

Nevertheless, they may be liable to account for the profits which they have made, if, while standing in a fiduciary relationship to Regal, they have by reason and in course of that fiduciary relationship made a profit. This aspect of the case was undoubtedly raised before the trial judge, but, in so far as he deals with it in his judgment, he deals with it on a wrong basis. Having stated at the outset quite truly that what he calls " this stroke of fortune " only came the way of the respondents because they were the directors and solicitor of the Regal, he continues thus:

> But in order to succeed the plaintiff company must show that the defendants both ought to have caused and could have caused the plaintiff company to subscribe for these shares, and that the neglect to do so caused a loss to the plaintiff company. Short of this, if the plaintiffs can establish that, though no loss was made by the company, yet a profit was corruptly made by the directors and the solicitor, then the company can claim to have that profit handed over to the company, framing the action in such a case for money had and received by the defendants for the plaintiffs' use.

Other passages in his judgment indicate that, in addition to this " corrupt " action by the directors, or, perhaps, alternatively, the plaintiffs in order to succeed must prove that the defendants acted *mala fide*, and not *bona fide* in the interests of the company, or that there was a plot or arrangement between them to divert from the company to themselves a valuable investment. However relevant such considerations may be in regard to a claim for damages resulting from misconduct, they are irrelevant to a claim against a person occupying a fiduciary relationship towards the plaintiff for an account of the profits made by that person by reason and in course of that relationship.

In the Court of Appeal, upon this claim to profits, the view was taken that in order to succeed the plaintiff had to establish that there was a duty on the Regal directors to obtain the shares for Regal. Two extracts from the judgment of LORD GREENE, M.R., show this. After mentioning the claim for damages, he says:

> The case is put on an alternative ground. It is said that, in the circumstances of the case, the directors must be taken to have been acting in the matter of their office when they took those shares; and that accordingly they are accountable for the profits which they have made . . . There is one matter which is common to both these claims which, unless it is established, appears to me to be fatal. It must be shown that in the circumstances of the case it was the duty of the directors to obtain these shares for their company.

Later in his judgment he uses this language:

> But it is said that the profit realised by the directors on the sale of the shares must be accounted for by them. That proposition involves that on Oct. 2, when it was

decided to acquire these shares, and at the moment when they were acquired by the directors, the directors were taking to themselves something which properly belonged to their company.

Other portions of the judgment appear to indicate that upon this claim to profits, it is a good defence to show *bona fides* or absence of fraud on the part of the directors in the action which they took, or that their action was beneficial to the company, and the judgment ends thus :

> That being so, the only way in which these directors could secure that benefit for A
> their company was by putting up the money themselves. Once that decision is held to be a *bona fide* one, and fraud drops out of the case, it seems to me there is only one conclusion, namely, that the appeal must be dismissed with costs.

My Lords, with all respect I think there is a misapprehension here. The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of *bona fides* ; or upon such questions or considerations as whether the profit B
would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account. C

The leading case of *Keech* v. *Sandford* (1) is an illustration of the strictness of this rule of equity in this regard, and of how far the rule is independent of these outside considerations. A lease of the profits of a market had been devised to a trustee for the benefit of an infant. A renewal on behalf of the infant was refused. It was absolutely unobtainable. The trustee, finding that it was impossible to get a renewal for the benefit of the infant, took a lease for his own D
benefit. Though his duty to obtain it for the infant was incapable of performance, nevertheless he was ordered to assign the lease to the infant, upon the bare ground that, if a trustee on the refusal to renew might have a lease for himself, few renewals would be made for the benefit of *cestuis que trust*. LORD KING, L.C., said, at p. 62 :

> This may seem hard, that the trustee is the only person of all mankind who might not have the lease : but it is very proper that the rule should be strictly pursued, and not in E
> the least relaxed . . .

One other case in equity may be referred to in this connection, viz., *Ex p. James* (2), decided by LORD ELDON, L.C. That was a case of a purchase of a bankrupt's estate by the solicitor to the commission, and LORD ELDON, L.C., refers to the doctrine thus, at p. 345 :

> This doctrine as to purchases by trustees, assignees, and persons having a confidential F
> character, stands much more upon general principles than upon the circumstances of any individual case. It rests upon this : that the purchase is not permitted in any case however honest the circumstances ; the general interests of justice requiring it to be destroyed in every instance ; as no court is equal to the examination and ascertainment of the truth in much the greater number of cases.

Let me now consider whether the essential matters, which the plaintiff must prove, have been established in the present case. As to the profit being in fact G
made there can be no doubt. The shares were acquired at par and were sold three weeks later at a profit of £2 16*s*. 1*d*. per share. Did such of the first five respondents as acquired these very profitable shares acquire them by reason and in course of their office of directors of Regal ? In my opinion, when the facts are examined and appreciated, the answer can only be that they did. The actual allotment no doubt had to be made by themselves and Garton (or some of them) in their capacity as directors of Amalgamated ; but this was H
merely an executive act, necessitated by the alteration of the scheme for the acquisition of the lease of the two cinemas for the sole benefit of Regal and its shareholders through Regal's shareholding in Amalgamated. That scheme could only be altered by or with the consent of the Regal board. Consider what in fact took place on Oct. 2, 1935. The position immediately before that day is stated in Garton's letter of Sept. 26, 1935. The directors were willing to guarantee the rent until the subscribed capital of Amalgamated reached £5,000. Regal was to control Amalgamated and own the whole of its share capital,

with the consequence that the Regal shareholders would receive their proportion of the sale price of the two new cinemas. The respondents then meet on Oct. 2, 1935. They have before them an offer to purchase the Regal cinema for £77,500, and the lease of the two cinemas for £15,000. The offer is accepted. The draft lease is approved and a resolution for its sealing is passed in anticipation of completion in five days. Some of those present, however, shy at giving guarantees, and accordingly the scheme is changed by the Regal directors in a
A vital respect. It is agreed that a guarantee shall be avoided by the six respondents bringing the subscribed capital up to £5,000. I will consider the evidence and the minute in a moment. The result of this change of scheme (which only the Regal directors could bring about) may not have been appreciated by them at the time; but its effect upon their company and its shareholders was striking. In the first place, Regal would no longer control Amalgamated, or own the whole of its share capital. The action of its directors had deprived it (acting through
B its shareholders in general meeting) of the power to acquire the shares. In the second place, the Regal shareholders would only receive a largely reduced proportion of the sale price of the two cinemas. The Regal directors and Garton would receive the moneys of which the Regal shareholders were thus deprived. This vital alteration was brought about in the following circumstances—I refer to the evidence of the respondent Garton. He was asked what was
C suggested when the guarantees were refused, and this is his answer:

> Mr. Gulliver said "We must find it somehow. I am willing to find £500. Are you willing," turning to the other four directors of Regal, "to do the same?" They expressed themselves as willing. He said, "That makes £2,500," and he turned to me and said, "Garton, you have been interested in Mr. Bentley's companies; will you come in to take £500?" I agreed to do so.

Although this matter is recorded in the Amalgamated minutes, this was in fact a decision come to by the directors of Regal, and the subsequent allotment by
D the directors of Amalgamated was a mere carrying into effect of this decision of the Regal board. The resolution recorded in the Amalgamated minute runs thus:

> After discussion it was resolved that the directors be invited to subscribe for 500 shares each, and that such shares be allotted accordingly.

As I read that resolution, and my reading agrees with Garton's evidence, the
E invitation is to the directors of Regal, and is made for the purpose of effectuating the decision which the five directors of Regal had made, that each should take up 500 shares in the Amalgamated. The directors of Amalgamated were not conveying an "invitation" to themselves. That would be ridiculous. They were merely giving effect to the Regal directors' decision to provide £2,500 cash capital themselves, a decision which had been followed by a successful appeal by Gulliver to Garton to provide the balance.

F My Lords, I have no hesitation in coming to the conclusion, upon the facts of this case, that these shares, when acquired by the directors, were acquired by reason, and only by reason of the fact that they were directors of Regal, and in the course of their execution of that office.

It now remains to consider whether in acting as directors of Regal they stood in a fiduciary relationship to that company. Directors of a limited company are the creatures of statute and occupy a position peculiar to themselves. In
G some respects they resemble trustees, in others they do not. In some respects they resemble agents, in others they do not. In some respects they resemble managing partners, in others they do not. In *Re Forest of Dean Coal Mining Co.* (6), a director was held not liable for omitting to recover promotion money which had been improperly paid on the formation of the company. He knew of the improper payment, but he was not appointed a director until a later date.
H It was held that, although a trustee of settled property which included a debt would be liable for neglecting to sue for it, a director of a company was not a trustee of debts due to the company and was not liable. I cite two passages from the judgment of SIR GEORGE JESSEL, M.R. At pp. 451, 452, he said:

> Directors have sometimes been called trustees, or commercial trustees, and sometimes they have been called managing partners, it does not matter what you call them so long as you understand what their true position is, which is that they are really commercial men managing a trading concern for the benefit of themselves and all other shareholders in it.

Later, after pointing out that traders have a discretion whether they shall sue for a debt, which discretion is not vested in trustees of a debt under a settlement, he said, at p. 453 :

> Again directors are called trustees. They are no doubt trustees of assets which have come to their hands, or which are under their control, but they are not trustees of a debt due to the company . . . A director is the managing partner of the concern, and although a debt is due to the concern I do not think it right to call him a trustee of that debt which remains unpaid, though his liability in respect of it may in certain cases and in some respects be analogous to the liability of a trustee.

The position of directors was considered by KAY, J., in *Re Faure Electric* A
Accumulator Co. (7). That was a case where directors had applied the company's money in payment of an improper commission, and a claim was made for the loss thereby occasioned to the company. In referring to the liability of directors, the judge pointed out that directors were not trustees in the sense of trustees of a settlement, that the nearest analogy to their position would be that of a managing agent of a mercantile house with large powers, but that there was no analogy which was absolutely perfect ; and he added, at p. 151 : B

> However, it is quite obvious that to apply to directors the strict rules of the Court of Chancery with respect to ordinary trustees might fetter their action to an extent which would be exceedingly disadvantageous to the companies they represent.

In addition a passage from the judgment of BOWEN, L.J., in *Imperial Hydropathic Hotel Co.* v. *Hampson* (5) may be usefully recalled. He said, at p. 152 :

> I should wish . . . to begin by remarking this, that when persons who are directors of a company are from time to time spoken of by judges as agents, trustees, or managing C
> partners of the company, it is essential to recollect that such expressions are not used as exhaustive of the powers and responsibilities of those persons, but only as indicating useful points of view from which they may for the moment and for the particular purpose be considered—points of view at which for the moment they seem to be cutting the circle, or falling within the category of the suggested kind. It is not meant that they belong to the category, but that it is useful for the purpose of the moment to observe that they fall *pro tanto* within the principles which govern that particular class. D

These three cases, however, were not concerned with the question of directors making a profit ; but that the equitable principle in this regard applies to directors is beyond doubt. In *Parker* v. *McKenna* (8), a new issue of shares of a joint stock bank was offered to the existing shareholders at a premium. The directors arranged with one Stock to take, at a larger premium, the shares not taken up by the existing shareholders. Stock, being unable to fulfil his contract, requested the directors to relieve him of some. They did so, and made E
a profit. They were held accountable for the profit so made. LORD CAIRNS, L.C., said, at p. 118 :

> The court will not enquire and is not in a position to ascertain, whether the bank has or has not lost by the acts of the directors. All the court has to do is to examine whether a profit has been made by an agent, without the knowledge of his principal, in the course and execution of his agency, and the court finds, in my opinion, that these agents in the course of their agency have made a profit, and for that profit they must, F
> in my opinion, account to their principal.

In the same case JAMES, L.J., stated his view in the following terms, at pp. 124, 125 :

> . . . it appears to me very important that we should concur in laying down again and again the general principle that in this court no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge of his principal; that the rule is an inflexible rule, and must be applied inexorably by this G
> court, which is not entitled, in my judgment, to receive evidence, or suggestion, or argument, as to whether the principal did or did not suffer any injury in fact, by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that.

In *Imperial Mercantile Credit Assocn.* v. *Coleman* (9), one Coleman, a stockbroker and a director of a financial company, had contracted to place a large amount of railway debentures for a commission of 5 per cent. He proposed H
that his company should undertake to place them for a commission of 1½ per cent. The 5 per cent commission was in due course paid to the director, who paid over the 1½ per cent. to the company. He was held liable to account for the 3½ per cent., by MALINS, V.-C., who said, at p. 563 :

> It is of the highest importance that it should be distinctly understood that it is the duty of directors of companies to use their best exertions for the benefit of those whose interests are committed to their charge, and that they are bound to disregard their own private interests whenever a regard to them conflicts with the proper discharge of such duty.

His decree was reversed by LORD HATHERLEY on the ground that the transaction was protected under the company's articles of association. Your Lordships' House, however, thought that in the circumstances of the case the articles of association gave no protection, and restored the decree with unimportant variations. The liability was based on the view, which was not disputed by LORD HATHERLEY, that the director stood in a fiduciary relationship to the company. That relationship being established, he could not keep the profit which had been earned by the funds of the company being employed in taking up the debentures. The courts in Scotland have treated directors as standing in a fiduciary relationship towards their company and, applying the equitable principle, have made them accountable for profits accruing to them in the course and by reason of their directorships. It will be sufficient to refer to *Huntington Copper Co.* v. *Henderson* (10), in which the LORD PRESIDENT cites with approval the following passage from the judgment of the LORD ORDINARY :

> Whenever it can be shown that the trustee has so arranged matters as to obtain an advantage whether in money or money's worth to himself personally through the execution of his trust, he will not be permitted to retain, but be compelled to make it over to his constituent.

In the result, I am of opinion that the directors standing in a fiduciary relationship to Regal in regard to the exercise of their powers as directors, and having obtained these shares by reason and only by reason of the fact that they were directors of Regal and in the course of the execution of that office, are accountable for the profits which they have made out of them. The equitable rule laid down in *Keech* v. *Sandford* (1) and *Ex p. James* (2), and similar authorities applies to them in full force. It was contended that these cases were distinguishable by reason of the fact that it was impossible for Regal to get the shares owing to lack of funds, and that the directors in taking the shares were really acting as members of the public. I cannot accept this argument. It was impossible for the *cestui que trust* in *Keech* v. *Sandford* (1) to obtain the lease, nevertheless the trustee was accountable. The suggestion that the directors were applying simply as members of the public is a travesty of the facts. They could, had they wished, have protected themselves by a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting. In default of such approval, the liability to account must remain. The result is that, in my opinion, each of the respondents Bobby, Griffiths, Bassett and Bentley is liable to account for the profit which he made on the sale of his 500 shares in Amalgamated.

The case of the respondent Gulliver, however, requires some further consideration, for he has raised a separate and distinct answer to the claim. He says : " I never promised to subscribe for shares in Amalgamated. I never did so subscribe. I only promised to find others who would be willing to subscribe. I only found others who did subscribe. The shares were theirs. They were never mine. They received the profit. I received none of it." If these are the true facts, his answer seems complete. The evidence in my opinion establishes his contention. Throughout his evidence Gulliver insisted that he only promised to find £500, not to subscribe it himself. The £500 was paid by two cheques in favour of Amalgamated, one a cheque for £200 signed by Gulliver as director and on behalf of the Swiss company Seguliva, the other a cheque for £300 signed by Gulliver as managing director of South Downs Land Co., Ltd. They were enclosed in a letter of Oct. 3, 1935, from Gulliver to Garton, in which Gulliver asks that the share certificates be issued as follows, 200 shares in the name of himself, Charles Gulliver, 200 shares in the name of South Downs Land Co., Ltd., and 100 shares in the name of Miss S. Geering. The money for Miss Geering's shares was apparently included in South Down Land Co.'s cheque. The certificates were made out accordingly, the 200 shares in Gulliver's name being, he says, the shares subscribed for by the Swiss company.

When the sale and purchase of the Amalgamated shares was arranged, the agreement for the sale and purchase was signed on behalf of the vendor shareholders (other than the respondent Bentley) by Garton & Co. ; and in a letter of Oct. 17, 1935, Gulliver sent to Garton (who held the three certificates) three transfers, viz. (1) a transfer of 200 shares executed by South Downs Land Co., Ltd., (2) a transfer of 200 shares executed by himself, and (3) a transfer of 100 shares executed by Miss Geering. When the purchase money was paid cheques were drawn as follows : a cheque for £360 in favour of Miss Geering, a cheque for £720 in favour of South Downs Land Co., Ltd., and a cheque for the same amount in favour of Gulliver. By letter of Oct. 24, 1935, written by Gulliver to the National Provincial Bank, these cheques were paid into the respective accounts of Miss Geering, South Downs Land Co., Ltd., and Seguliva, A.G.

From the evidence of Gulliver it appeared that Miss Geering is a friend who from time to time makes investments on his advice ; that the issued capital of South Downs Land Co., Ltd., is £1,000 in £1 shares, held by some 11 or 12 A
shareholders, of whom Gulliver is one and holds 100 shares ; and that in the Swiss company Gulliver holds 85 out of 500 shares.

It is of the first importance on this part of the case to bear in mind that these directors have been acquitted of all suggestion of *mala fides* in regard to the acquisition of these shares. They had no reason to believe that they could be called to account. Why then should Gulliver go to the elaborate pains of having the shares put into the names of South Downs Land Co. and Miss Geering, and B
of having the proceeds of sale paid into the respective accounts before mentioned, if the shares and proceeds really belonged to him ? *Ex hypothesi* he had no reason for concealment ; and no question was raised against the transaction until months after the proceeds of sale had been paid into the banking accounts of those whom Gulliver asserts to have been the owners of the shares. I can see no reason for doubting that the shares never belonged to Gulliver, and that C
he made no profit on the sale thereof.

Counsel for the appellant, however, contended that the trial judge had found as a fact that Gulliver was the owner of the shares ; and he relied on certain scattered passages in the judgment, the strongest of which seems to me to be the one in which the judge said :

> I may say this with regard to Mr. Gulliver, that I have not been misled in any way or led to decide in his favour by the fact that he handed over his shares to his nominees D
> but rather the reverse.

I cannot regard that as a finding by the judge that the shares were subscribed for by Gulliver under aliases, and that the shares and the proceeds of sale in fact belonged to him. It is equally susceptible of the meaning that he allowed others to subscribe for the shares which he could have obtained for himself had he so wished. If it be claimed as a finding of fact in the former sense, all I can say is that there is no evidence which in my opinion would justify such a finding. E

It was further argued that, even if the shares and the proceeds of sale did not belong to Gulliver, he is nevertheless liable to account to Regal for the profit made by the owners of the shares, and that upon the authority of *Imperial Mercantile Credit Assocn.* (*Liquidators*) v. *Coleman* (9), to which I have already referred. One of the contentions put forward there by Coleman was that his transaction was a transaction for the benefit of a partnership in the profits of F
which he was only interested to the extent of a half, and that accordingly he could only be made accountable to that extent. That contention was disposed of by LORD CAIRNS in the following terms, at p. 208 :

> My Lords, I think there is no foundation for this argument. The profit on the transaction was obtained by Mr. Coleman, and, in the view that I take, was obtained by him as a director of the association. Whether he desired or whether he determined to reserve it all to himself or to share it with his firm appears to me to be perfectly immaterial. G
> The source from which the profit is derived is Mr. Coleman. It is only through him that his firm can claim. He is liable for the whole of the profits which were obtained ; and it is not the course for a Court of Equity to enter into the consideration of what afterwards would have become of those profits.

I am unable to see how this authority helps Regal if it be assumed that neither the shares nor the profit ever belonged to Gulliver.

It was further said that Gulliver must account for whatever profits he may H
have made indirectly through his shareholding in the two companies, and that an inquiry should be directed for this purpose. As to this, it is sufficient to say that there is no evidence upon which to ground such an inquiry. Indeed, the evidence so far as it goes, shows that neither company has distributed any part of the profit. Finally, it was said that Gulliver must account for the profit on the 200 shares as to which the certificate was in his name. If in fact the shares belonged beneficially to the Swiss company (and that is the assumption for this purpose), the proceeds of sale did not belong to Gulliver, and were rightly paid into the

Swiss company's banking account. Gulliver accordingly made no profit for which he is accountable. As regards Gulliver, this appeal should, in my opinion, be dismissed.

There remains to consider the case of Garton. He stands on a different footing from the other respondents in that he was not a director of Regal. He was Regal's legal adviser ; but, in my opinion, he has a short but effective answer to the plaintiffs' claim. He was requested by the Regal directors to apply for
A 500 shares. They arranged that they themselves should each be responsible for £500 of the Amalgamated capital, and they appealed, by their chairman, to Garton to subscribe the balance of £500 which was required to make up the £3,000. In law his action, which has resulted in a profit, was taken at the request of Regal, and I know of no principle or authority which would justify a decision that a solicitor must account for profit resulting from a transaction which he has entered into on his own behalf, not merely with the consent, but
B at the request of his client.

My Lords, in my opinion the right way in which to deal with this appeal is (i) to dismiss the appeal as against the respondents Gulliver and Garton with costs, (ii) to allow it with costs as against the other four respondents, and (iii) to enter judgment as against each of these four respondents for a sum of £1,402 1*s*. 8*d*. with interest at 4 per cent. from Oct. 25, 1935, as to £1,300 part thereof and from
C Dec. 5, 1935, as to the balance. As regards the liability of these four respondents for costs, I have read the shorthand notes of the evidence at the trial, and it is clear to me that the costs were substantially increased by the suggestions of *mala fides* and fraud with which the cross-examination abounds, and from which they have been exonerated. In my opinion a proper order to make would be to order these four respondents to pay only three-quarters of the appellants' taxed costs of the action. The taxed costs of the appellants in the Court of
D Appeal and in this House they must pay in full.

One final observation I desire to make. In his judgment Lord Greene, M.R., stated that a decision adverse to the directors in the present case involved the proposition that, if directors *bona fide* decide not to invest their company's funds in some proposed investment, a director who thereafter embarks his own money therein is accountable for any profits which he may derive therefrom. As to this, I can only say that to my mind the facts of this hypothetical case bear but
E little resemblance to the story with which we have had to deal.

Lord Macmillan : My Lords, the real question for decision in this appeal seems unfortunately to have been somewhat obscured by the course of the arguments before the trial judge and to some extent also in the Court of Appeal. The issue, as it was formulated before your Lordships, was not whether the
F directors of Regal (Hastings), Ltd., had acted in bad faith. Their *bona fides* was not questioned. Nor was it whether they had acted in breach of their duty. They were not said to have done anything wrong. The sole ground on which it was sought to render them accountable was that, being directors of the plaintiff company and therefore in a fiduciary relation to it, they entered in the course of their management into a transaction in which they utilised the position and knowledge possessed by them in virtue of their office as directors, and that the
G transaction resulted in a profit to themselves. The point was not whether the directors had a duty to acquire the shares in question for the company and failed in that duty. They had no such duty. We must take it that they entered into the transaction lawfully, in good faith and indeed avowedly in the interests of the company. However, that does not absolve them from accountability for any profit which they made, if it was by reason and in virtue of their fiduciary office as directors that they entered into the transaction.

H The equitable doctrine invoked is one of the most deeply rooted in our law. It is amply illustrated in the authoritative decisions which my noble and learned friend Lord Russell of Killowen has cited. I should like only to add a passage from Principles of Equity, by Lord Kames, which puts the whole matter in a sentence (3rd Edn., 1778, vol. 2, p. 87) : "Equity," he says, "prohibits a trustee from making any profit by his management, directly or indirectly."

The issue thus becomes one of fact. The plaintiff company has to establish two things : (i) that what the directors did was so related to the affairs of the

company that it can properly be said to have been done in the course of their
management and in utilisation of their opportunities and special knowledge as
directors ; and (ii) that what they did resulted in a profit to themselves. The
first of these propositions is clearly established by the analysis of the whole
complicated circumstances for which the House is indebted to my noble and
learned friend who has preceded me. The second proposition is admitted,
except in the case of Gulliver, in whose case I agree that, on the evidence, he is
not proved to have made any profit personally. The conditions are, therefore,
in my opinion, present which preclude the four directors who made a personal A
profit by the transaction from retaining such profit.

The position of the respondent Garton is quite different. He was the solicitor
of the plaintiff company and in no sense a trustee for it. True, he made a profit,
as did the four directors, but he subscribed for his shares not only with the
knowledge, but at the express request, of his clients, and I know of no principle
on which he could be held accountable to them for any resultant profit to himself. B

I should have been content simply to express my concurrence with the views
expounded by my noble and learned friend LORD RUSSELL OF KILLOWEN,
with which I wholly agree, but for the fact that we are differing from the Court
of Appeal. For that reason I have thought it proper to state briefly the grounds
of my concurrence.

LORD WRIGHT : My Lords, of the six respondents, two, Gulliver and Garton, C
stand on a different footing from the other four. It is in regard to the latter that
the important question of principle brought into issue by the decisions of
WROTTESLEY, J., and the Court of Appeal call for determination. That question
can be briefly stated to be whether an agent, a director, a trustee or other person
in an analogous fiduciary position, when a demand is made upon him by the
person to whom he stands in the fiduciary relationship to account for profits D
acquired by him by reason of his fiduciary position, and by reason of the
opportunity and the knowledge, or either, resulting from it, is entitled to defeat
the claim upon any ground save that he made profits with the knowledge and
assent of the other person. The most usual and typical case of this nature is
that of principal and agent. The rule in such cases is compendiously expressed
to be that an agent must account for net profits secretly (that is, without the
knowledge of his principal) acquired by him in the course of his agency. The E
authorities show how manifold and various are the applications of the rule.
It does not depend on fraud or corruption.

The courts below have held that it does not apply in the present case, for the
reason that the purchase of the shares by the respondents, though made for their
own advantage, and though the knowledge and opportunity which enabled them
to take the advantage came to them solely by reason of their being directors
of the appellant company, was a purchase which, in the circumstances, the F
respondents were under no duty to the appellant to make, and was a purchase
which it was beyond the appellant's ability to make, so that, if the respondents
had not made it, the appellant would have been no better off by reason of the
respondents abstaining from reaping the advantage for themselves. With the
question so stated, it was said that any other decision than that of the courts
below would involve a dog-in-the-manger policy. What the respondents did, G
it was said, caused no damage to the appellant and involved no neglect of the
appellant's interests or similar breach of duty. However, I think the answer
to this reasoning is that, both in law and equity, it has been held that, if 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. Nor can the court adequately investigate the matter H
in most cases. The facts are generally difficult to ascertain or are solely in the
knowledge of the person who is being charged. They are matters of surmise ;
they are hypothetical because the inquiry is as to what would have been the
position if that party had not acted as he did, or what he might have done if
there had not been the temptation to seek his own advantage, if, in short,
interest had not conflicted with duty. Thus, in *Keech* v. *Sandford* (1), a case
in which the fiduciary relationship was that of trustee and *cestui que trust*, the
trustee was held liable to assign a lease to the infant *cestui que trust*, though

the lessor had refused to renew to the infant. LORD KING, L.C., said, at p. 62 :

> This may seem hard, that the trustee is the only person of all mankind who might not have the lease . . .

It did not matter that the infant could not himself have got it and that he was not damaged by the trustee taking it for himself. One reason why the rule is strictly pursued is given by LORD ELDON in *Ex p. James* (2), at p. 345 :

> . . . no court is equal to the examination and ascertainment of the truth in much A the greater number of cases.

In *Parker* v. *McKenna* (8), a most instructive case, the rule is so admirably stated by JAMES, L.J., that I cannot resist repeating his language, though my noble and learned friend LORD RUSSELL OF KILLOWEN, in his speech just delivered, which I have had the opportunity of reading in print, and with which I agree completely, has already quoted it to your Lordships. The words of JAMES, L.J., B which I emphasise, are [pp. 124, 125] :

> . . . that the rule is an inflexible rule and must be applied inexorably by this court which is not entitled, in my judgment, to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent ; *for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that.*

C The italics are mine. I need not multiply citations to the same effect, or illustrations of the different circumstances in which the rule has been applied.

In the present case the four respondents were acting in the matter as agents for the appellant company in their capacity of directors, that is, " as commercial men managing a trading concern for the benefit of themselves and all other shareholders in it," if I may borrow that part of the description applied to directors by SIR GEORGE JESSEL, M.R., in *Re Forest of Dean Coal Mining Co.* (6), at p. 452. D In the numerous actions, or most of them, which have been brought against directors of companies for profits secretly (that is, without the assent of the shareholders) secured in the course of their dealings as directors, the claims have been against them in their capacity as agents. Thus, to take a familiar instance, in *Boston Deep Sea Fishing & Ice Co.* v. *Ansell* (11), the defendant was held liable to account to the plaintiff company of which he was director for secret bribes or bonuses which he had received from persons making contracts with the E company. The defendant's liability flowed from the fiduciary relationship in which he stood to the company as its agent. BOWEN, L.J., said, at pp. 367, 368 :

> . . . the law implies a use, that is to say, there is an implied contract, if you put it as a legal proposition—there is an equitable right, if you treat it as a matter of equity—as between the principal and agent that the agent should pay it over, which renders the agent liable to be sued for money had and received, and there is an equitable right in F the master to receive it, and to take it out of the hands of the agent, which gives the principal a right to relief in equity.

As it was held in *Lister & Co.* v. *Stubbs* (12), the relationship in such a case is that of debtor and creditor, not trustee and *cestui que trust.* Many instances can be quoted from the books of the stringency with which the courts have enforced the rule that a director must account to his company for any benefit G which he obtains in the course of and owing to his directorship, even though the benefit comes from a third person and involves no loss to the company. I cite as one example *Re North Australian Territory Co., Archer's Case* (13), where a director was held liable to account to the company for the sum paid to him by the promoter of the company by way of indemnity against the money which the director had to pay for his qualification shares.

H The analysis of the facts in the present case which has been made by LORD RUSSELL OF KILLOWEN shows clearly enough that the opportunity and the knowledge which enabled the four respondents to purchase the shares came to them simply in their position as directors of the appellant company. WROTTESLEY, J., clearly so held. He said at the outset of his judgment :

> There is no doubt they (the respondents) did take up in their own names shares which only after a few days and certainly only after a week or two they were able to sell at a very large profit indeed. There is no doubt that it was only because they were directors and solicitor respectively of the plaintiff company that this stroke of fortune came in their way.

He decided against the appellant company because he fixed his attention on his view that the appellant suffered no loss by the respondents' conduct, instead of fixing attention on the crucial fact that the respondents made a secret profit out of their agency. I do not think that any different view was taken on this aspect of the case by the Court of Appeal, or that it was questioned by that court that the opportunity of making the profits came to the four respondents by reason of their fiduciary position as directors. The Court of Appeal held that, in the absence of any dishonest intention, or negligence, or breach of a specific A duty to acquire the shares for the appellant company, the respondents as directors were entitled to buy the shares themselves. Once, it was said, they came to a *bona fide* decision that the appellant company could not provide the money to take up the shares, their obligation to refrain from acquiring those shares for themselves came to an end. With the greatest respect, I feel bound to regard such a conclusion as dead in the teeth of the wise and salutary rule so stringently enforced in the authorities. It is suggested that it would have been mere B quixotic folly for the four respondents to let such an occasion pass when the appellant company could not avail itself of it; but LORD KING, L.C., faced that very position when he accepted that the person in the fiduciary position might be the only person in the world who could not avail himself of the opportunity. It is, however, not true that such a person is absolutely barred, because he could by obtaining the assent of the shareholders have secured his freedom to make the profit for himself. Failing that, the only course open is to C let the opportunity pass. To admit of any other alternative would be to expose the principal to the dangers against which JAMES, L.J., in the passage I have quoted uttered his solemn warning. The rule is stringent and absolute, because "the safety of mankind" requires it to be absolutely observed in the fiduciary relationship. In my opinion, the appeal should be allowed in the case of the four respondents. D

In the case of the other two respondents, I agree with LORD RUSSELL OF KILLOWEN that the appeal should be dismissed for the several reasons which he has given in regard to each of them. These appeals turn on issues of evidence and fact, and I do not desire to add to what has fallen from my noble and learned friend.

LORD PORTER: My Lords, I have had an opportunity of reading the speech which has been delivered by my noble and learned friend, LORD RUSSELL OF E KILLOWEN, and had we not been differing from the view of the Court of Appeal I should not desire to add to what he has said. As we are reversing the judgment of both the court of first instance and the Court of Appeal I desire, out of respect for the opinions expressed in them, to state in the briefest possible compass the grounds for the view which I hold.

My Lords, I am conscious of certain possibilities which are involved in the conclusion which all your Lordships have reached. The action is brought by F the Regal company. Technically, of course, the fact that an unlooked for advantage may be gained by the shareholders of that company is immaterial to the question at issue. The company and its shareholders are separate entities. One cannot help remembering, however, that in fact the shares have been purchased by a financial group who were willing to acquire those of the Regal and the Amalgamated at a certain price. As a result of your Lordships' decision G that group will, I think, receive in one hand part of the sum which has been paid by the other. For the shares in Amalgamated they paid £3 16*s*. 1*d*. per share, yet part of that sum may be returned to the group, though not necessarily to the individual shareholders by reason of the enhancement in value of the shares in Regal—an enhancement brought about as a result of the receipt by the company of the profit made by some of its former directors on the sale of Amalgamated shares. This, it seems, may be an unexpected windfall, but whether it H be so or not, the principle that a person occupying a fiduciary relationship shall not make a profit by reason thereof is of such vital importance that the possible consequence in the present case is in fact as it is in law an immaterial consideration.

The plaintiff, the Regal company, by its pleadings, claimed (i) damages for negligence, (ii) alternatively, the profit obtained on the sale of the shares in Amalgamated as money had and received by the defendants to the plaintiffs' use, and (iii) in the further alternative damages for misfeasance. No claim for fraud was suggested, and the trial judge expressly exonerated the defendants from any liability for negligence or misfeasance. Before your Lordships' House the claim for money had and received was alone persisted in. The alternative claim for misfeasance, however, seems also to have been presented to the Court of Appeal, but to have been rejected by them, and in common with the rest of your Lordships I unreservedly accept the findings of both courts.

It remains, therefore, to consider the claim that (in the words of LORD GREENE,
A M.R.) :

> . . . in the circumstances of the case the directors must be taken to have been acting in the matter of their office when they took those shares and that, accordingly, they are accountable for the profits, which they have made.

That the shares were obtained by the defendants by reason of their position as directors of Regal is, I think, plain. The original proposition, when the formation of the subsidiary company was suggested, was that the whole of the shares
B should be issued to the Regal company, partly for cash and partly for services rendered, and this proposition was discussed and accepted at board meetings of that company. It was only afterwards, when the necessity for finding £5,000 cash arose, that the issue to any one other than the company was considered, and then the directors turned to themselves. "There is no doubt it was only because they were directors and solicitor respectively of the plaintiff company
C that this stroke of fortune came their way," says WROTTESLEY, J., and I agree with his observation.

In these circumstances, it is to my mind immaterial that the directors saw no way of raising the money save from amongst themselves and from the solicitor to the company, or, indeed, that the money could in fact have been raised in no other way. The legal proposition may, I think, be broadly stated by saying that one occupying a position of trust must not make a profit which he can acquire
D only by use of his fiduciary position, or, if he does, he must account for the profit so made. For this proposition the cases of *Keech* v. *Sandford* (1) and *Ex p. James* (2) are sufficient authority. WROTTESLEY, J., and the members of the Court of Appeal appear to have adopted a narrower outlook with which, with all respect, I find myself unable to agree. WROTTESLEY, J., said :

> In order to succeed the plaintiff company must show that the defendants both ought to have caused and could have caused the plaintiff company to subscribe for these
> E shares and that the neglect to do so caused a loss to the plaintiff company.

In the Court of Appeal, LORD GREENE, M.R., said :

> It must be shown that in the circumstances of the case it was the duty of the directors to obtain these shares for their company . . . The position of the Regal company would have been very much strengthened by having all these shares in the two companies in the same hands with the possibility of one control. That being so, the only way in which these directors could secure that benefit for their company was by putting up the
> F money themselves. Once that decision is held to be a *bona fide* one, and fraud drops out of the case, it seems to me there is only one conclusion, namely, that the appeal must be dismissed with costs.

To treat the problem in this way is, in my view, to look at it as involving a claim for negligence or misfeasance and to neglect the wider aspect. Directors, no doubt, are not trustees, but they occupy a fiduciary position towards the
G company whose board they form. Their liability in this respect does not depend upon breach of duty but upon the proposition that a director must not make a profit out of property acquired by reason of his relationship to the company of which he is director. It matters not that he could not have acquired the property for the company itself—the profit which he makes is the company's, even though the property by means of which he made it was not and could not have been acquired on its behalf. Adopting the words of LORD ELDON, L.C.,
H in *Ex p. James* (2), at p. 345 :

> . . . the general interests of justice require it to be destroyed in every instance; as no court is equal to the examination and ascertainment of the truth in much the greater number of cases.

My Lords, these observations apply generally to the action, but the cases of Gulliver and Garton stand on a somewhat different footing. As to them, there are additional and special considerations to be kept in mind. I need not set them out or refer to them further than by saying that I find myself in agreement with the reasoning and conclusion of my noble and learned friend, LORD RUSSELL

OF KILLOWEN, and would submit with him that the appeal should be allowed so far as concerns the defendants Bobby, Griffiths, Bassett and Bentley, and should be dismissed in the case of Gulliver and Garton. I also concur in the order as to costs which he suggests.

Appeal dismissed as against the respondents Gulliver and Garton. Appeal allowed as against the other respondents.

Solicitors: *H. S. Wright & Webb* (for the appellants); *Boyce Evans & Sheppard*
(for the respondents Bobby, Griffiths & Bassett); *Tackley, Fall & Read* (for A
the respondent Bentley); *Hugh V. Harraway & Son* (for the respondent Gulliver); *Underwood & Co.* (for the respondent Garton).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

BANK POLSKI *v.* K. J. MULDER & CO.

B

[COURT OF APPEAL (Lord Greene, M.R., and MacKinnon, L.JJ.), **February 27, 1942.**]

Bills of Exchange—Acceptance—Bills expressed to be payable in Dutch currency at named bank in Amsterdam—Bills accepted in London—Whether local acceptance—Absence of statement that bills were not payable elsewhere than at named place—Bills of Exchange Act, 1882 (*c.* 61), *s.* 19 (2) (*c*). C

The Bank Polski were holders for value of bills of exchange drawn in Poland and expressed to be payable at a named bank in Amsterdam in Dutch currency. The bills were accepted in London by M. & Co. In an action upon the bills, M. & Co. contended that the acceptance was a local acceptance within the Bills of Exchange Act, 1882, s. 19 (2) (*c*), and that therefore the Bank Polski was not entitled to sue them as acceptors in
default of presentation for payment:— D

HELD: since there was no express statement that the bills were payable only at the place specified, and not elsewhere, the acceptance was not a local acceptance within the meaning of the subsection.

Decision of TUCKER, J. ([1942] 2 All E.R. 647) *affirmed.*

[**EDITORIAL NOTE.** It was stated in the course of this appeal that there was a wide difference of opinion whether the omission of the words "only" and "and not
elsewhere" was a material difference and that it was desired to obtain a decision of the E
court on the point. The Act clearly states that an acceptance to pay at a particular place is a general acceptance, unless it is expressly stated that the bill is to be paid there only and not elsewhere. The Court of Appeal have found no difficulty in holding that this subsection must be strictly complied with if an acceptance is to be treated as a local acceptance.

AS TO QUALIFIED ACCEPTANCE OF BILLS OF EXCHANGE, see HALSBURY, Hailsham
Edn., Vol. 2, pp. 635-637, paras. 875-877; and FOR CASES, see DIGEST, Vol. 6, pp. 63-65, F
Nos. 510-527.]

Case referred to:

(1) *Ex p. Hayward* (1887), 3 T.L.R. 687; 6 Digest 237, *1498*.

APPEAL by the defendants from a judgment of TUCKER, J., dated June 24, 1941, reported [1941] 2 All E.R. 647, where the facts are fully set out. The
point taken on appeal was not argued before TUCKER, J. G

H. J. Wallington, K.C. and *Valentine Holmes* for the appellants.

H. G. Robertson for the respondents.

Wallington, K.C.: The appellants, the acceptors of the bills, desire to have a decision of the court that the acceptance was intended to be a qualified acceptance although the word "only" or the words "and not elsewhere" were not written upon the bills. Looking at the bills there is an express statement to pay
at that place, and it should be regarded as a statement to pay there and H
not elsewhere. The acceptors accepted the bills as they were directed by the drawers to accept them. On the face of these bills there is a contract between drawers and acceptors. It is one thing for an acceptor to write on a bill that he will pay at a certain place and not elsewhere, but it is quite a different thing for a drawer to specify the place of payment.

[MACKINNON, L.J. referred to *Ex p. Hayward* (1).]

Wallington, K.C.: In that case the place of payment was written on the bills by the acceptor as well as by the drawer. The present case differs from any

TAB 8

LETHULIER *v.* CASTLEMAIN.

Oct. 27, 1726.

On bill for a trial at law for the bounds of a manor, each side must give notes of the bounds they claim; and if jury find different, to be indorsed on the *postea.*

Bill brought to have trial at law for the bounds of a manor.

[61] Mr. *Talbot* informed the Court, that in the case of the Bishop of Durham, which was parallel to this, it was ordered, that each side should give a note to the other of what each claimed as their bounds; and if the jury find bounds different from the note given by either side, that those different boundaries should be indorsed on the *postea*: and so it was ordered here; only it being a trial at bar, it was to be indorsed on the *habeas corpus.*

Same order made Nov. 4, 1726, between *Hughes* v. *Grames.*

ROBINSON *v.* SAVILE.

[See 55 Geo. III. c. 192, and The Wills Act, 7 Wm. IV. & 1 Vict. c. 26, s. 3.]

Oct. 28, 1726.

Person mortgaged a copyhold estate for the payment of debts, and after devises his estate for payment of debts, interest was paid after his decease; foreclosure decreed.

A person mortgaged his copyhold estate; after he makes his will, and devises his estate for payment of debts; the interest of the mortgage was paid after his decease. Bill brought for a foreclosure.

Lord Chancellor. Though a devise of a copyhold is void at law, without a surrender to the use of his will, it will pass in equity, if it be for payment of debts; but that is if no third person be injured; but if there be assets, they shall be first applied; and here by the payment of interest, it is an admission there are assets; and therefore decreed a foreclosure.

KEECH *v.* SANDFORD.

[S. C. 2 Wh. & T. L. C. 693.]

Oct. 31, 1726.

Lease of a market devised to a trustee for the benefit of an infant; lessor, before expiration of the lease, refuses to renew to the infant; trustee takes it himself, shall be obliged to convey to the infant, and account for the profits.

A person being possessed of a lease of the profits of a market, devised his estate to trustee in trust for the infant; before the expiration of the term the trustee applied to the lessor for a renewal, for the benefit of the infant, which he refused, in regard that it being only of the profits of a market, there could be no distress, and must rest singly in covenant, which the infant could not do; there was clear proof of the refusal to renew for the benefit of the infant, on which the trustee gets a lease made to himself. Bill is now brought to have the lease assigned to him, and to account for the profits, on this principle, that wherever a lease is renewed by a trustee or executor, it shall be for the benefit of *cestui que* use; which principle was agreed on the other side; though endeavoured to be differenced, on account of the express proof of refusal to renew to the infant.

[62] *Lord Chancellor.* I must consider this as a trust for the infant; for I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust-estates would be renewed to *cestui que* use; though I do not say there is a fraud in this case, yet he should rather have let it run out, than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to *cestui que* use. So decreed, that the lease should

be assigned to the infant, and that the trustee should be indemnified from any covenants comprised in the lease, and an account of the profits made since the renewal.

HUGHES *v.* GAMES.

By custom, with consent of the homage, new copies may be granted ; Q. whether good custom without.

In this case it was admitted, that a lord by custom may make new grants of part of the manor to hold by copy ; and a case was cited to that purpose.

Lord Chancellor. In the case cited such grants were made with consent of the homage ; the question here is, whether there be a custom to do it without the homage, and that must go to law ; and then it will be by them considered, how far a custom to make such grants, without the homage, be a good custom,

It was said, Lord Chief Justice *Pemberton* had a copy in this manor.

COLE *v.* RUMNEY.

Nov. 7, 1726.

Bill by executor dismissed with costs out of assets ; which, if deny, to be examined on interrogatories.

Executor brings a very frivolous bill, which was dismissed with costs out of assets ; ordered to be examined on interrogatories, if deny assets. So done in another cause the next day.

[63] GIBSON *v.* SCUDAMORE.

[S. C. 2 Eq. Cas. Abr. 773 ; Mosel. 7 ; Dick. 45. See *Att.-Gen.* v. *Ailesbury*, 1887, L. R. 12 App. Cas. 682.]

[*Nov.* 7, 1726.]

Person obliged to lay out trust-money to be settled on herself for life, remainder to the heirs of *A.* ; she buys lands not of the value of the trust-money, and devises those lands to *B.*, who is heir-at-law to *A.*, and also her own right heir ; and gives several legacies, which could not be paid if the devise were not to be taken as part satisfaction ; and for that reason so decreed.

Mrs. Scudamore in the year 1699, leaves to Mrs. Prince the sum of £8784 in trust to be by her invested in lands, and to settle the same on herself for life, and then to the heirs of Lord Scudamore ; a decree was had against Mrs. Prince, to lay out the money in lands, and to settle the same according to Mrs. Scudamore's will in 1699. Mrs. Prince purchases lands to the value of £3300 and makes her will, whereby she devises to Miss Scudamore (who is heir-at-law to Lord Scudamore), and her heirs, this land which she had purchased, and gives several legacies, and devises all her personal estate also to Miss Scudamore, after payment of her debts and legacies.

Miss Scudamore was heir-at-law also to Mrs. Prince ; the question here was, whether this estate purchased and devised of the value of £3300 should be considered as part of the trust-money of £8784 ; if it should, there would be assets sufficient to pay the legacies else ; so whether this is to be considered as a particular devise, or a devise in satisfaction of the trust.

That it should be considered as in part satisfaction of the trust, it was argued, that it is the constant justice of this Court, that if a father, who is obliged to settle lands, suffer lands of equal value to descend, it shall be deemed to be as a completion of the settlement, and done in satisfaction of it ; here Mrs. Prince leaves this estate which cost £3300 to the same person, and in the same manner as she was prescribed to do it. It is the intent of the person who makes a will, that every part of it should take effect ; which cannot be here, unless it be in part satisfaction of the trust which she was obliged to perform : here Miss Scudamore is Mrs. Prince's heir-at-law, and if it had not been devised to her, she would have had it without the will ; so by giving it her, must be taken to be a satisfaction of what she was obliged.

TAB 9

WATERS' LAW OF TRUSTS IN CANADA

Fourth Edition

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B. Purchase in the Name of Another, or in the Names of the Purchaser and Another

The principle has been established since the early eighteenth century that if one person buys property, but has it conveyed into another's name, or into the joint names of himself and another, that other becomes a resulting trustee for the purchaser of all the interest taken by that other, *unless* it be proved that the buyer intended to make a gift of the property. The best-known statement of the principle, cited and quoted in many Canadian cases, is that of Chief Baron Eyre in *Dyer v. Dyer*:

> The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase-money.[29]

Dyer v. Dyer concerned land, but the principle is clearly applicable to all forms of property, and there has never been any question of its general application.[30]

1. Purchase or Loan

In order to take advantage of the principle, the claimant must first show that it was he who advanced the purchase money.[31] Because the resulting trust is excepted from the *Statute of Frauds*, parol evidence is admissible for this purpose, even if the property purchased is land. Circumstantial evidence is also admissible. In *Vaselenak v. Vaselenak*[32] the impecuniosity of the transferee of title proved the major factor in establishing the claimant's case. This apparent facility of the claimant to introduce such informal evidence is not enough, however, to prevent many such claimants from failing at this stage. Where the claimant and the transferee are members of a

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[29] (1788), 2 Cox Eq. Cas. 92, 30 E.R. 42 (Exch.) at 43 [E.R.].

[30] *Hudson's Bay Co. v. Hosie*, [1926] 2 W.W.R. 730, [1926] 4 D.L.R. 489 (Sask. C.A.) (shares); *Boulos v. Boulos* (1986), 57 Nfld. & P.E.I.R. 181, 24 E.T.R. 56 (Nfld. T.D.) (debt obligations); *Fancy v. Quilty* (1998), 161 Nfld. & P.E.I.R. 296, 37 R.F.L. (4th) 409 (Nfld. T.D.) (truck). Glanville Williams argued that in a situation where A contracts with B to confer a benefit upon C, no resulting trust should arise in favour of A over any property acquired by C from B: "Contracts for the Benefit of Third Parties" (1944), 7 M.L.R. 123 at 126-7. He suggested that should there be such a trust arising, legislative change would be in order. We cannot see the force of this argument if it does not attack all resulting trusts, which is a more defensible argument. Surely if a contract intends "to confer a benefit" upon C, the evidence demonstrating that intent will rebut the presumption of resulting trust. The law governing privity of contract has been amended in New Brunswick (*Law Reform Act*, R.S.N.B. 2011, c. 184, s. 4) and in England and Wales (*Contracts (Rights of Third Parties) Act*, 1999 (Eng.)), and note *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108, 176 D.L.R. (4th) 257 (S.C.C.).

[31] Purchase means the payment of money for the acquisition of a capital asset; it does not include the payment of rent for the use of property: *Savage v. Dunningham* (1973), [1974] Ch. 181, [1973] 3 All E.R. 429.

[32] [1921] 1 W.W.R. 889, 57 D.L.R. 370 (Alta. C.A.).

common household, as is so often the case, the source of the purchase moneys can easily remain in doubt, though it be established that the moneys were handed to the vendor by the claimant.

Though the claimant can establish that he owned and paid over the purchase money, he must also prove that he acted throughout as a purchaser. If in fact he was lending the money to the transferee, then his relationship with the transferee is that of a creditor with a debtor.[33] It is not open to him to argue that he advanced the money which facilitated the purchase of the property, advantageous though such a position might be to the claimant in the event of the transferee's bankruptcy. *Clark v. MacInnis*[34] provides the object lesson. The claimant merely asserted that he was entitled to a reconveyance of a certain house from the defendant, and was prepared to prove that he had made the down payment. His statement of claim was struck out with costs. He had not shown an express trust, nor any other basis upon which the transferee was to hold the house, and as there was not even a statement that he had made the down payment as a purchaser, there could be no resulting trust. Nor was the court prepared to accept an allegation that because the claimant had agreed to sell the house to the transferee, a resulting trust was established in the claimant's favour.

If the claimant is lending money and takes title in the transferee's name, then he is merely acting as an agent for the transferee.[35] A person is also acting as an agent if, on another's behalf, he uses his own money to buy property, and takes title in his own name. In those circumstances the payor has lent the purchase money to another, possibly holding the property as security. Such a person is a resulting trustee of the benefit of the property for the other. If, however, the payor had bought the property for himself, and had agreed with another that on the other paying him the price, he would transfer to the other, the payor is not a resulting trustee. The relationship between the payor and the other is purely contractual; the property may have been bought by the payor with the idea of fulfilling the agreement to sell after

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[33] *Caruk v. Ludyk* (1987), 59 Sask. R. 155 (Sask. C.A.); *Hollett v. Hollett* (1993), 106 Nfld. & P.E.I.R. 271, 334 A.P.R. 271 (Nfld. T.D.); *Vancouver Trade Mart Inc. (Trustee of) v. Creative Prosperity Capital Corp.* (1998), 50 B.C.L.R. (3d) 155 (B.C. S.C.), additional reasons at (1998), 7 C.B.R. (4th) 3 (B.C. S.C.); *Carpe Investments Corp. v. Creative Prosperity Capital Corp.* (1998), 6 C.B.R. (4th) 230 (B.C. C.A.).

[34] [1953] O.W.N. 551 (Ont. H.C.). In *McKenzie v. Ross* (1900), 33 N.S.R. 252 (N.S. C.A.), it was particularly difficult to determine whether the transferee bought in his own name with moneys loaned to him by the claimant (whose trustee in bankruptcy was not suing) or whether he had bought as an agent of the bankrupt. The transferee had entered the bankrupt's business, many years before the bankruptcy, as an employee and son-in-law. As the bankrupt's health deteriorated, the transferee came to be the controller of the business. The land purchases were made with moneys coming from the business, but with the bankrupt's consent. Both trial judge and appeal court found that the moneys were in fact loaned to the transferee for him to buy in his own name, though the purchased lands were later mortgaged and the proceeds of the mortgage paid into the business. Consequently no resulting trust arose in favour of the bankrupt's creditors. A crucial point was that the *transferee* negotiated the purchases, the bankrupt on one occasion even refusing to be a purchaser.

[35] It involves a nice point where the claimant alleges that money the transferee acquired from a third party, so that the purchase might be made, was acquired by the transferee as an agent for the claimant: see *Henry v. Vukasha* (1957), 21 W.W.R. 409 (Sask. Q.B.).

he himself had bought, but the property was not bought on behalf of the other. This distinction is well brought out in *Brown v. Storoschuk.*[36]

Again, if A agrees with B to purchase land for B, paying the price with B's money, but enters into a binding contract with a vendor in his own name, A thereupon becomes a resulting trustee of the chose in action for B. Stuart J. came somewhat reluctantly to this conclusion in *Vaselenak v. Vaselenak*;[37] he preferred to see B seek a declaration of agency. In *Boulter-Waugh & Co. v. Phillips*, Lamont J.A. said:

> The same result, in my opinion, follows where a person takes title in his own name to land which he agreed to purchase, but which, prior to obtaining title, he had assigned to another.[38]

That is to say, the assignor becomes a resulting trustee for the assignee.

2. Multiple Contributors

What is the position if two persons advance the money for the purchase of certain property, which is taken in the name of one of them? If the amount subscribed by each is determinable, it is clear that the transferee holds on a proportionate resulting trust. But what if it proves impossible to determine how much was subscribed by each? Suppose the parties have kept their savings in a shared strong box, and from those savings a house is bought, in the name, as it happens, of one of the parties. In *Wilde v. Wilde*[39] it was said by Strong V.C. that in those circumstances no resulting trust could arise. This result seems obviously unsatisfactory, although it is clear that the resulting trust can only benefit the deprived party to the extent of his contribution. In *Szczepkowski v. Eppler*[40] it was pointed out that Strong V.C.'s words could conflict with *Lupton v. White.*[41] The latter case established that, if A undertakes to keep the property of B distinct, but mixes it with his own, the whole must be taken to be the property of B.[42] This situation would occur, for example, where B requests A to keep

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36 [1946] 3 W.W.R. 641 (B.C. C.A.). That which rests in contract cannot give rise to a resulting trust. If A agrees to sell land to B for a certain sum, and transfers title to B before he has been paid, A retains an equitable lien against the land, but, if B fails to pay, A cannot assert that B is a resulting trustee of the land: *Taylor v. Taylor* (1879), (sub nom. *Taylor v. Wallbridge*) 2 S.C.R. 616 (S.C.C.) at 674. On agreement by one person to purchase as agent for another, see also *Chupak v. Cirka* (1982), 11 E.T.R. 262, 132 D.L.R. (3d) 251 (Ont. H.C.), and *infra*, note 191.

37 *Supra*, note 32.

38 [1918] 3 W.W.R. 27, 42 D.L.R. 548 (Sask. C.A.) at 33 [W.W.R.], additional reasons at [1918] 3 W.W.R. 196 (Sask. C.A.), reversed on other grounds 58 S.C.R. 385, (sub nom. *Union Bank v. Boulter-Waugh Ltd.*) [1919] 1 W.W.R. 1046 (S.C.C.).

39 See also *Taylor v. Taylor*, *supra*, note 36, at 683 *per* Henry J.

40 [1945] O.R. 149, [1945] 1 D.L.R. 657 (Ont. H.C.), reversed on other grounds [1945] O.R. 540, [1945] 4 D.L.R. 104 (Ont. C.A.). Trial decision restored, [1946] 3 D.L.R. 641 (S.C.C.).

41 (1808), 15 Ves. Jun. 432, 33 E.R. 817.

42 This proposition has been refined in further cases, both in equity and at common law. It is not so much a rule of forfeiture, but a rule of evidence: if a person, by a wrongful act, creates an evidentiary difficulty, that difficulty will be resolved against him; but only to the extent of the uncertainty. The principle has been applied to difficulties of accounting, physical confusions of goods, mixtures of

a record of B's savings handed to A, but consents to the savings of both parties being kept in the same strong box. A does not keep a record of B's money. Alternatively, A may have kept the savings distinct, but have drawn indiscriminately and without record from the box when the parties needed money.[43]

Most cases of this kind, where it is impossible to determine how much each party contributed to a purchase taken in the name of one of them, will occur where there has been some pooling of resources, and in *S. v. S.*,[44] in Manitoba, Campbell J. refused to follow the statement of Strong V.C. in *Wilde v. Wilde*. He preferred to follow the English authority of *Jones v. Maynard*[45] and to hold that the transferee held the property jointly for himself and the other. An equal division is at least more equitable, if arbitrary. *S. v. S.* was in fact a case of husband and wife, as was *Jones v. Maynard*, and here the English authorities have found it easier to justify such a division. As we shall see,[46] there has been a more recent turning away from the post-World War II English authorities on this point, and *S. v. S.* may not now represent the Canadian solution.

Care should be taken to see what is meant when property is purchased in the "joint names" of two parties, or where, as in *S. v. S.*, property is deemed to be held by the title holder for himself and another "jointly". When property is bought by one person and title taken in joint names, a joint tenancy will arise which confers upon each party an equal entitlement to the property, which includes a so-called right of survivorship. This right, which is not a separate right but merely an incident of joint tenancy, will cause the whole property to vest in the survivor. The reason is that in a joint tenancy, if one joint tenant dies, his interest simply disappears and nothing passes to his estate. The result is that the interest of the surviving joint tenant is effectively converted into sole ownership. It is this effect which is often described as a right of survivorship. If A supplies the purchase money and conveyance is taken in the joint names of A and B, B during the joint lives will hold his interest for A;[47]

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money in bank accounts, and difficulties of determining the value of things. For full citations, see *Smith*, at 77-79.

[43] B cannot "trace" his savings because, where no record has been kept, he cannot quantify how much is his own, and, where the savings have been kept distinct, he cannot show that withdrawals from his savings were either quantified or not used for his own benefit. In view of *Lupton v. White*, could B trace the whole fund as his own?

[44] (1952), 5 W.W.R. (N.S.) 523 (Man. Q.B.): Campbell J. said (at 527) that *Wilde v. Wilde* had "no application to the instant case", and he refused to follow *Dudgeon v. Dudgeon* (1907), 6 W.L.R. 346, 13 B.C.R. 179 (B.C. S.C.), in which there is a favourable reference to *Wilde v. Wilde*. One important point in favour of this view is that the principle that evidentiary difficulties shall be resolved against the wrongdoer (*supra*, note 42) operates only where the creation of the evidentiary difficulty is, itself, a wrongful act, such as a breach of trust. This was not the case in *S. v. S.*, where the mixing was part of the everyday life of the parties. It was noted by the Manitoba Court of Appeal that Campbell J. was affirmed on appeal in an unreported decision: this is stated in an unrelated case, also confusingly called *S. v. S.*, [1954] 2 D.L.R. 765 (Man. C.A.) (which itself was reversed: [1955] S.C.R. 658, [1955] 4 D.L.R. 6). See also *Barleben v. Barleben* (1964), 44 D.L.R. (2d) 332, 46 W.W.R. 683 (Alta. C.A.).

[45] [1951] Ch. 572, [1951] 1 All E.R. 802 (Eng. Ch. Div.). Campbell J. thought the facts of the instant case more compelling than *Jones v. Maynard*, in that a joint interest was intended.

[46] *Infra*, Part II G 4.

[47] Or, if both parties contributed unequally, the beneficial interests in the property will reflect the proportions of the contributions: *Miles v. Conkin* (1996), 24 R.F.L. (4th) 211 (B.C. C.A.).

TAB 10

SUPREME COURT OF CANADA

CITATION: Pecore *v*. Pecore, 2007 SCC 17

DATE: 20070503
DOCKET: 31202

BETWEEN:

Michael Pecore
Appellant
and
Paula Pecore and Shawn Pecore
Respondents

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 76)	Rothstein J. (McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ. concurring)
CONCURRING REASONS: (paras. 77 to 107)	Abella J.

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pecore *v.* pecore

Michael Pecore *Appellant*

v.

Paula Pecore and Shawn Pecore *Respondents*

Indexed as: Pecore *v.* Pecore

Neutral citation: 2007 SCC 17.

File No.: 31202.

2006: December 6; 2007: May 3.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal for ontario

Wills and estates — Joint bank and investment accounts with right of survivorship — Presumptions of resulting trust and advancement — Father gratuitously placing assets in joint accounts with daughter — Whether assets in joint accounts to be included in father's estate upon his death — Whether presumption of resulting trust *rebutted — Whether presumption of advancement applicable — Standard of proof applicable to rebut presumptions.*

Wills and estates — Joint bank and investment accounts with right of survivorship — Presumptions of resulting trust and advancement — Father gratuitously placing assets in joint accounts with daughter — Evidence to be considered in ascertaining transferor's intention — Whether evidence of intention that arises subsequent to transfer should be excluded.

Wills and estates — Joint bank and investment accounts with right of survivorship — Nature of survivorship in context of joint accounts.

Gifts — Gratuitous transfer from parent to child — Presumption of advancement — Whether presumption applies between mother and child — Whether presumption applies only to transfers made between parent and minor child.

An ageing father gratuitously placed the bulk of his assets in joint accounts with his daughter P, who was the closest to him of his three adult children. Unlike her siblings, who were financially secure, P worked at various low-paying jobs and took care of her quadriplegic husband, M. P's father helped P and her family financially, including buying them a van, making improvements to their home, and assisting her son while he was attending university. P's father alone deposited funds into the joint accounts. He continued to use and control the accounts, and declared and paid all the taxes on the income made from the assets in the accounts. In his will, P's father left specific bequests to P, M and her children but did not mention the accounts. The residue of the estate was to be divided equally between P and M. Upon the father's death, P redeemed the balance in the joint accounts on the basis of a right of survivorship. P and M later divorced, and a dispute over the accounts arose during their matrimonial property proceedings. M claimed that P held the balance in the accounts in trust for the benefit of her father's estate and, consequently, the assets formed part of the residue and should be distributed according to the will. The trial judge held that P's father intended to make a gift of the beneficial interest in the accounts upon his death to P alone, concluding that the evidence failed to rebut the presumption of advancement. The Court of Appeal dismissed M's appeal, but found that it was not necessary to rely on the presumption of advancement because the presumption is only relevant in the absence of evidence of actual intention or where the evidence is evenly balanced.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Charron and **Rothstein** JJ.: The long-standing common law presumptions of advancement and resulting trust continue to play a role in disputes over gratuitous transfers. These presumptions provide a guide for courts where evidence as to the transferor's intent in making the transfer is unavailable or unpersuasive. They also provide a measure of certainty and predictability for individuals who put property in joint accounts or make other gratuitous transfers. The presumption of resulting trust is the general rule for gratuitous transfers and the onus is placed on the transferee to demonstrate that a gift was intended. However, depending on the nature of the relationship between the transferor and transferee, the presumption of advancement may apply and it will fall on the party challenging the transfer to rebut the presumption of a gift. The civil standard of proof is applicable to rebut the presumptions. The applicable presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities. [23-24] [27] [43-44]

In the context of a transfer to a child, the presumption of advancement, which applies equally to fathers and mothers, is limited in its application to gratuitous transfers made by parents to minor children. Given that a principal justification for the presumption of advancement is parental obligation to support dependent children, the presumption does not apply in respect of independent adult children. Moreover, since it is common nowadays for ageing parents to transfer their assets into joint accounts with their adult children in order to have that child assist them in managing their financial affairs, there should be a rebuttable presumption that the adult child is holding the property in trust for the ageing parent to facilitate the free and efficient management of that parent's affairs. The presumption of advancement is also not applicable to dependent adult children because it would be impossible to list the wide variety of the circumstances that make someone "dependent" for the purpose of applying the presumption. Courts would have to determine on a case-by-case basis whether or not a particular individual is "dependent", creating uncertainty and unpredictability in almost every instance. While dependency will not be a basis on which to apply the presumption, evidence as to the degree of dependency of an adult transferee child on the transferor parent may provide strong evidence to rebut the presumption of a resulting trust. [33] [36] [40-41]

With joint accounts, the rights of survivorship, both legal and equitable, vest when the account is opened. The gift of those rights is therefore *inter vivos* in nature. Since the nature of a joint account is that the balance will fluctuate over time, the gift in these circumstances is the transferee's survivorship interest in the account balance at the time of the transferor's death. The presumption of a resulting trust means in that context that it will fall to the surviving joint account holder to prove that the transferor intended to gift the right of survivorship to whatever assets are left in the account to the survivor. [48][50][53]

The types of evidence that should be considered in ascertaining a transferor's intent will depend on the facts of each case. The evidence considered by a court may include the wording used in bank documents, the control and use of the funds in the account, the granting of a power of attorney, the tax treatment of the joints account, and evidence subsequent to the transfer if such evidence is relevant to the transferor's intention at the time of the transfer. The weight to be placed on a particular piece of evidence in determining intent should be left to the discretion of the trial judge. [55] [59-62] [69]

In this case, the trial judge erred in applying the presumption of advancement. P, although financially insecure, was not a minor child. The presumption of a resulting trust should therefore have been applied. Nonetheless, this error does not affect the disposition of the appeal because the trial judge found that the evidence clearly demonstrated the intention on the part of the father that the balance left in the joint accounts was to go to P alone on his death through survivorship. This strong finding regarding the father's actual intention shows that the trial judge's conclusion would have been the same even if he had applied the presumption of a resulting trust. [75]

Per **Abella** J.: The trial judge properly applied the correct legal presumption to the facts of the case. Historically, the presumption of advancement has been applied to gratuitous transfers to children, regardless of the child's age, and there is no reason now to limit its application to non-adult children. The argument that a principal justification for the presumption was the parental obligation to support dependent children unduly narrows and contradicts the historical rationale for the presumption. Parental affection, no less than parental obligation, has always grounded the presumption of advancement. Furthermore, the intention to have an adult child manage a parent's financial affairs during his or her lifetime is hardly inconsistent with the intention to make a gift of money in a joint account to that child. Parents generally want to benefit their children out of love and affection. If children assist them with their affairs, this cannot logically be a reason for displacing the assumption that parents desire to benefit them. It is equally plausible that an elderly parent who gratuitously enters into a joint bank account with an adult child on whom he or she depends for assistance intends to make a gift in gratitude for this assistance. If the intention is merely to have assistance in financial management, a power of attorney would suffice, as would a bank account without survivorship rights. Accordingly, since the presumption of advancement emerged no less from affection than from dependency, and since parental affection flows from the inherent nature of the relationship not of the dependency, the presumption of advancement should logically apply to all gratuitous transfers from parents to their children, regardless of the age or dependency of the child or the parent. The natural affection parents are presumed to have for their adult children when both were younger should not be deemed to atrophy with age. [79] [89] [100] [102] [107]

In any event, bank account documents which, as in this case, specifically confirm a survivorship interest should be deemed to reflect an intention that what has been signed is sincerely meant. There is no justification for ignoring the presumptive relevance of clear language in banking documents in determining the transferor's intention. [104]

Cases Cited

By Rothstein J.

Referred to: *Csak v. Aumon* (1990), 69 D.L.R. (4th) 567; *Carter v. Carter* (1969), 70 W.W.R. 237; *Re Mailman Estate,* [1941] S.C.R. 368; *Niles v. Lake*, [1947] S.C.R. 291; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Saylor v. Madsen Estate* (2005), 261 D.L.R. (4th) 597; *Hyman v. Hyman*, [1934] 4 D.L.R. 532; *Grey (Lord) v. Grey (Lady)* (1677), Rep. Temp. Finch 338, 23 E.R. 185; *Lattimer v. Lattimer* (1978), 18 O.R. (2d) 375; *Edwards v. Bradley*, [1957] S.C.R. 599, rev'g [1956] O.R. 225; *Rupar v. Rupar* (1964), 49 W.W.R. 226; *Dagle v. Dagle Estate* (1990), 38 E.T.R. 164; *Re Wilson* (1999), 27 E.T.R. (2d) 97; *McLear v. McLear Estate* (2000), 33 E.T.R. (2d) 272; *Cooper v. Cooper Estate* (1999), 27 E.T.R. (2d) 170; *Christmas Estate v. Tuck* (1995), 10 E.T.R. (2d) 47; *Cho Ki Yau Trust (Trustees of) v. Yau Estate* (1999), 29 E.T.R. (2d) 204; *Bayley v. Trusts and Guarantee Co.*, [1931] 1 D.L.R. 500; *Johnstone v. Johnstone* (1913), 12 D.L.R. 537; *Pettitt v. Pettitt*, [1970] A.C. 777; *McGrath v. Wallis*, [1995] 2 F.L.R. 114; *Dreger (Litigation Guardian of) v. Dreger* (1994), 5 E.T.R. (2d) 250; *Burns Estate v. Mellon* (2000), 48 O.R. (3d) 641; *Lohia v. Lohia*, [2001] EWCA Civ 1691; *Standing v. Bowring* (1885), 31 Ch. D. 282; *Hill v. Hill* (1904), 8 O.L.R. 710; *Larondeau v. Laurendeau*, [1954] O.W.N. 722; *Re Reid* (1921), 64 D.L.R. 598; *Mordo v. Nitting*, [2006] B.C.J. No. 3081 (QL), 2006 BCSC 1761; *Shaw v. MacKenzie Estate* (1994), 4 E.T.R. (2d) 306; *Reber v. Reber* (1988), 48 D.L.R. (4th) 376; *Russell v. Scott* (1936), 55 C.L.R. 440; *Young v. Sealey*, [1949] 1 All E.R. 92; *Aroso v. Coutts*, [2002] 1 All E.R. (Comm) 241, [2001] EWHC Ch 443; *Matter of Totten*, 179 N.Y. 112 (1904); *Matter of Berson,* 566 N.Y.S.2d 74 (1991); *Matter of Halpern,* 303 N.Y. 33 (1951); *Clemens v. Clemens Estate*, [1956] S.C.R. 286; *Jeans v. Cooke* (1857), 24 Beav. 513, 53 E.R. 456; *Shephard v. Cartwright*, [1955] A.C. 431; *Neazor v. Hoyle* (1962), 32 D.L.R. (2d) 131; *Lavelle v. Lavelle,* [2004] EWCA Civ 223; *Taylor v. Wallbridge* (1879), 2 S.C.R. 616.

By Abella J.

Madsen Estate v. Saylor, 2007 SCC 18; *Nelson v. Nelson* (1995), 184 C.L.R. 538; *Cho Ki Yau Trust (Trustees of) v. Yau Estate* (1999), 29 E.T.R. (2d) 204; *Pettitt v. Pettitt*, [1970] A.C. 777; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Grey (Lord) v. Grey (Lady)* (1677), 2 Swans. 594, 36 E.R. 742; *Sidmouth v. Sidmouth* (1840), 2 Beav. 447, 48 E.R. 1254; *Scawin v. Scawin* (1841), 1 Y. & C.C.C. 65, 62 E.R. 792; *Hepworth v. Hepworth* (1870), L.R. 11 Eq. 10; *Dreger (Litigation Guardian of) v. Dreger* (1994), 5 E.T.R. (2d) 250; *Cooper v. Cooper Estate* (1999), 27 E.T.R. (2d) 170; *McLear v. McLear Estate* (2000), 33 E.T.R. (2d) 272; *Saylor v. Madsen Estate* (2005), 261 D.L.R. (4th) 597; *Young v. Young* (1958), 15 D.L.R. (2d) 138; *Oliver Estate v. Walker*, [1984] B.C.J. No. 460 (QL); *Dagle v. Dagle Estate* (1990), 38 E.T.R. 164; *Christmas Estate v. Tuck* (1995), 10 E.T.R. (2d) 47; *Reain v. Reain* (1995), 20 R.F.L. (4th) 30; *Sodhi v. Sodhi*, [1998] 10 W.W.R. 673; *Re Wilson* (1999), 27 E.T.R. (2d) 97; *Kappler v. Beaudoin*, [2000] O.J. No. 3439 (QL); *Clarke v. Hambly* (2002), 46 E.T.R. (2d) 166, 2002 BCSC 1074; *Plamondon v. Czaban* (2004), 8 E.T.R. (3d) 135, 2004 ABCA 161; *Re Mailman Estate*, [1941] S.C.R. 368; *Niles v. Lake*, [1947] S.C.R. 291; *Edwards v. Bradley*, [1957] S.C.R. 599.

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APPEAL from a judgment of the Ontario Court of Appeal (Weiler, Rosenberg and Lang JJ.A.) (2005), 19 E.T.R. (3d) 162, 17 R.F.L. (6th) 261, 202 O.A.C. 158, [2005] O.J. No. 3712 (QL), affirming a decision of Karam J. (2004), 7 E.T.R. (3d) 113, 48 R.F.L. (5th) 89, [2004] O.J. No. 695 (QL). Appeal dismissed.

Andrew M. Robinson and *Megan L. Mackey*, for the appellant.

Bryan C. McPhadden and *Fabrice Gouriou*, for the respondents.

The judgment of McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Charron and Rothstein JJ. was delivered by

ROTHSTEIN J. —

I. Introduction

1 This appeal involves questions about joint bank and investment accounts where only one of the account holders deposits funds into the account. These types of joint accounts are used by many Canadians for a variety of purposes, including estate-planning and financial management. Given their widespread use, the law relating to how these accounts are to be treated by courts after the death of one of the account holders is a matter appropriate for this court to address.

2 Depending on the terms of the agreement between the bank and the two joint account holders, each may have the legal right to withdraw any or all funds from the accounts at any time and each may have a right of survivorship. If only one of the joint account holders is paying into the account and he or she dies first, it raises questions about whether he or she intended to have the funds in the joint account go to the other joint account holder alone or to have those funds distributed according to his or her will. How to answer this question is the subject of this appeal.

3 In the present case, an ageing father gratuitously placed his mutual funds, bank account and income trusts in joint accounts with his daughter, who was one of his adult children. The father alone deposited funds into the accounts. Upon his death, a balance remained in the accounts.

4 It is not disputed that the daughter took legal ownership of the balance in the accounts through the right of survivorship. Equity, however, recognizes a distinction between legal and beneficial ownership. The beneficial owner of property has been described as "[t]he real owner of property even though it is in someone else's name": *Csak v. Aumon* (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.), at p. 570. The question is whether the father intended to make a gift of the beneficial interest in the accounts upon his death to his daughter alone or whether he intended that his daughter hold the assets in the accounts in trust for the benefit of his estate to be distributed according to his will.

5 While the focus in any dispute over a gratuitous transfer is the actual intention of the transferor at the time of the transfer, intention is often difficult to ascertain, especially where the transferor is deceased. Common law rules have developed to guide a court's inquiry. This appeal raises the following issues:

1. Do the presumptions of resulting trust and advancement continue to apply in modern times?

2. If so, on what standard will the presumptions be rebutted?

3. How should courts treat survivorship in the context of a joint account?

4. What evidence may courts consider in determining the intent of a transferor?

6 In this case, the trial judge found that the father actually intended a gift and held that his daughter may retain the assets in the accounts. The Court of Appeal dismissed the appeal of the daughter's ex-husband.

7 I conclude that there is no basis to overturn this result. The appeal should be dismissed.

II. Facts

8 The dispute is between Paula Pecore and her ex-husband Michael Pecore regarding who is entitled to the assets held in joint accounts between Paula and her father upon her father's death. The assets in the joint accounts in dispute totalled almost $1,000,000 at the time Paula's father died in 1998.

9 Paula has two siblings but of the three, she was the closest to their father. In fact, her father was estranged from one of her sisters until shortly before his death in 1998. Unlike her siblings who were financially secure, Paula worked at various low-paying jobs and took care of her quadriplegic husband Michael. Her father helped her and her family financially by, for example, buying them a van, making improvements to their home, and assisting her son while he was attending university.

10 In 1993, Paula’s father was told by a financial advisor that by placing his assets in joint ownership, he could avoid “the payment of probate fees and taxes and generally make after-death dispositions less expensive and less cumbersome” ((2004), 7 E.T.R. (3d) 113, at para. 7). In February of 1994, he began transferring some of his assets which were mainly either in bank accounts or in mutual funds to himself and to Paula jointly, with a right of survivorship (*ibid*., at para. 6). In 1996, Paula’s father was advised by his accountant that for tax purposes, transfers to his daughter (as opposed to a spouse) could trigger a capital gain, with the result that tax on the gain would be due as of the year of disposition. As a result, Paula’s father wrote letters to the financial institutions purporting to deal with the tax implications. In these letters he stated that he was “the 100% owner of the assets and the funds are not being gifted to Paula” (*ibid*., at para. 10).

11 Paula’s father continued to use and control the accounts after they were transferred into joint names. He declared and paid all the taxes on the income made from the assets in the accounts. Paula made some withdrawals but was required to notify her father before doing so. According to her, this was because her father wanted to ensure there were sufficient funds available for her to withdraw.

12 In early 1998, Paula’s father drafted what was to be his last will. By this time, he had already transferred the bulk of his assets into the joint accounts with Paula. For the first time, he named Michael in his will. The will left specific bequests to Paula, Michael and her children (whom Michael had adopted), but did not mention the accounts. The residue of the estate was to be divided equally between Paula and Michael.

13 The lawyer who drafted the will testified that he asked Paula's father "about such things as registered retirement savings plans, R.R.I.F.s, registered pension plans, life insurance, and in each case satisfied [him]self that they were not items which would pass as the result of a will and so that they needn't be included in the will" (*ibid.*, at para. 37). There was no discussion about the joint investment and bank accounts.

14 In 1998, Paula's father moved into Paula and Michael's house. In 1997 and 1998, the father had expressed to others, including one of Paula's sisters, that he was going to take care of Paula after his death, but said the "system" would take care of Michael.

15 Paula's father died in December 1998. His estate paid tax on the basis of a deemed disposition of the accounts to Paula immediately before his death.

16 Paula and Michael later divorced. The dispute over the accounts arose during their matrimonial property proceedings.

III. Judicial History

A. *Ontario Superior Court of Justice* (2004), 7 E.T.R. (3d) 113

17 The trial judge looked at the operation of the presumption of a resulting trust and the presumption of advancement and found that the latter applied given Paula's relationship with her father. Karam J. concluded that the evidence failed to rebut the presumption of advancement and held that the money in the joint accounts therefore belonged to Paula. He found that the evidence clearly indicated that Paula's father

intended to gift the beneficial ownership of those assets held in joint ownership to her while he continued to manage and control them on a day-to-day basis before his death.

B. *Ontario Court of Appeal* (2005), 19 E.T.R. (3d) 162

18 The Court of Appeal agreed with the trial judge that there was ample evidence to show that Paula's father intended to give Paula beneficial interest in his investments when he placed them in joint ownership. As a result, Lang J.A. found that it was not necessary to rely on the presumption of advancement, saying that a presumption is only relevant when evidence of actual intention is evenly balanced or when there is no evidence of actual intention.

IV. <u>Analysis</u>

A. *Do the Presumptions of Resulting Trust and Advancement Continue to Apply in Modern Times?*

19 A discussion of the treatment of joint accounts after the death of the transferor must begin with a consideration of the common law approach to ascertaining the intent of the deceased person.

20 A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner: see D.W.M. Waters, M.R. Gillen and L.D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 362. While the trustee almost always has the legal title, in exceptional circumstances it is also possible

that the trustee has equitable title: see *Waters' Law of Trusts*, at p. 365, noting the case of *Carter v. Carter* (1969), 70 W.W.R. 237 (B.C.S.C.).

21 Advancement is a gift during the transferor's lifetime to a transferee who, by marriage or parent-child relationship, is financially dependent on the transferor: see *Waters' Law of Trusts*, at p. 378. In the context of the parent-child relationship, the term has also been used because "the father was under a moral duty to <u>advance</u> his children in the world": A.H. Oosterhoff et al., *Oosterhoff on Trusts: Text, Commentary and Materials* (6th ed. 2004), at p. 573 (emphasis added).

22 In certain circumstances which are discussed below, there will be a presumption of resulting trust or presumption of advancement. Each are rebuttable presumptions of law: see e.g. *Re Mailman Estate,* [1941] S.C.R. 368, at p. 374; *Niles v. Lake*, [1947] S.C.R. 291; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, at p. 451; J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 115. A rebuttable presumption of law is a legal assumption that a court will make if insufficient evidence is adduced to displace the presumption. The presumption shifts the burden of persuasion to the opposing party who must rebut the presumption: see Sopinka et al., at pp. 105-6.

23 For the reasons discussed below, I think the long-standing common law presumptions continue to have a role to play in disputes over gratuitous transfers. The presumptions provide a guide for courts in resolving disputes over transfers where evidence as to the transferor's intent in making the transfer is unavailable or unpersuasive. This may be especially true when the transferor is deceased and thus is unable to tell the court his or her intention in effecting the transfer. In addition, as noted by Feldman J.A.

in the Ontario Court of Appeal in *Saylor v. Madsen Estate* (2005), 261 D.L.R. (4th) 597, the advantage of maintaining the presumption of advancement and the presumption of a resulting trust is that they provide a measure of certainty and predictability for individuals who put property in joint accounts or make other gratuitous transfers.

1. The Presumption of Resulting Trust

24 The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see *Waters' Law of Trusts*, at p. 375, and E. E. Gillese and M. Milczynski, *The Law of Trusts* (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.

25 The presumption of resulting trust therefore alters the general practice that a plaintiff (who would be the party challenging the transfer in these cases) bears the legal burden in a civil case. Rather, the onus is on the transferee to rebut the presumption of a resulting trust.

26 In cases where the transferor is deceased and the dispute is between the transferee and a third party, the presumption of resulting trust has an additional justification. In such cases, it is the transferee who is better placed to bring evidence about the circumstances of the transfer.

2. The Presumption of Advancement

27 The presumption of resulting trust is the general rule for gratuitous transfers. However, depending on the nature of the relationship between the transferor and transferee, the presumption of a resulting trust will not arise and there will be a presumption of advancement instead: see *Waters' Law of Trusts*, at p. 378. If the presumption of advancement applies, it will fall on the party challenging the transfer to rebut the presumption of a gift.

28 Historically, the presumption of advancement has been applied in two situations. The first is where the transferor is a husband and the transferee is his wife: *Hyman v. Hyman*, [1934] 4 D.L.R. 532 (S.C.C.), at p. 538. The second is where the transferor is a father and the transferee is his child, which is at issue in this appeal.

29 One of the earliest documented cases where a judge applied the presumption of advancement is the 17th century decision in *Grey (Lord) v. Grey (Lady)* (1677), Rep. Temp. Finch 338, 23 E.R. 185 (H.C. Ch.):

> ...the Law will never imply a *Trust*, because the natural Consideration of Blood, and the <u>Obligation which lies on the Father in Conscience</u> to provide for his Son, are predominant, and must over-rule all manner of Implications. [Underlining added; p. 187.]

30 As stated in *Grey*, the traditional rationale behind the presumption of advancement between father and child is that a father has an obligation to provide for his sons. See also *Oosterhoff on Trusts*, at p. 575. The presumption also rests on the assumption that parents so commonly intend to make gifts to their children that the law should presume as much: *ibid*., at pp. 581 and 598.

31 While historically the relationship between father and child gave rise to the presumption of advancement, courts in Canada have been divided as to whether the relationship between mother and child does as well. Some have concluded that it does not: see e.g. *Lattimer v. Lattimer* (1978), 18 O.R. (2d) 375 (H.C.J.), relying on Cartwright J.'s concurring judgment in *Edwards v. Bradley*, [1957] S.C.R. 599. Others have found that it does: see e.g. *Rupar v. Rupar* (1964), 49 W.W.R. 226 (B.C.S.C.); *Dagle v. Dagle Estate* (1990), 38 E.T.R. 164 (P.E.I.S.C, App. Div.); *Re Wilson* (1999), 27 E.T.R. (2d) 97 (Ont. Ct. (Gen. Div.)). In concluding that the presumption applies to mothers and children in *Re Wilson*, Fedak J., at para. 50, took into consideration "the natural affection between a mother and child, legislative changes requiring mothers to support their children, the economic independence of women and the equality provisions of the Charter".

32 The question of whether the presumption applies between mother and child is not raised in these appeals, as the transfers in question occurred between a father and daughter, but I shall deal with it briefly. Unlike when the presumption of advancement was first developed, women today have their own financial resources. They also have a statutory obligation to financially support their children in the same way that fathers do. Section 26.1(2) of the *Divorce Act*, R.S.C. 1985 c. 3 (2nd Supp.), for instance, refers to the "principle" that spouses have a "joint financial obligation to maintain the children", and s. 31(1) of the *Family Law Act*, R.S.O. 1990, c. F.3, provides that "[e]very parent has an obligation to provide support for his or her unmarried child who is a minor or is enrolled in a full time program of education, to the extent that the parent is capable of doing so." Oosterhoff et al. have also commented on this issue in *Oosterhoff on Trusts*, saying at p. 575, "Mothers and fathers are now under equal duties to care for their

children and are equally likely to intend to make gifts to them.... In Canada, it is now accepted that mothers and fathers should be treated equally."

33 I agree. As women now have both the means as well as obligations to support their children, they are no less likely to intend to make gifts to their children than fathers. The presumption of advancement should thus apply equally to fathers and mothers.

34 Next, does the presumption of advancement apply between parents and adult independent children? A number of courts have concluded that it should not. In reaching that conclusion, Heeney J. in *McLear v. McLear Estate* (2000), 33 E.T.R. (2d) 272 (Ont. S.C.J.), at paras. 40-41, focussed largely on the modern practice of elderly parents adding their adult children as joint account holders so that the children can provide assistance with the management of their parents' financial affairs:

> Just as Dickson J. considered "present social conditions" in concluding that the presumption of advancement between husbands and wives had lost all relevance, a consideration of the present social conditions of an elderly parent presents an equally compelling case for doing away with the presumption of advancement between parent and adult child. We are living in an increasingly complex world. People are living longer, and it is commonplace that an ageing parent requires assistance in managing his or her daily affairs. This is particularly so given the complexities involved in managing investments to provide retirement income, paying income tax on those investments, and so on. Almost invariably, the duty of assisting the ageing parent falls to the child who is closest in geographic proximity. In such cases, Powers of Attorney are routinely given. Names are "put on" bank accounts and other assets, so that the child can freely manage the assets of the parent.
>
> Given these social conditions, it seems to me that it is dangerous to presume that the elderly parent is making a gift each time he or she puts the name of the assisting child on an asset. The presumption that accords with

> this social reality is that the child is holding the property in trust for the ageing parent, to facilitate the free and efficient management of that parent's affairs. The presumption that accords with this social reality is, in other words, the presumption of resulting trust.

35 Heeney J. also noted that the fact that the child was independent and living away from home featured very strongly in Kerwin C.J.'s reasons for finding that no presumption of advancement arose in *Edwards v. Bradley*. A similar conclusion was reached by Klebuc J., as he was then, in *Cooper v. Cooper Estate* (1999), 27 E.T.R. (2d) 170 (Sask. Q.B.), at para. 19: “I have serious doubts as to whether presumption of advancement continues to apply with any degree of persuasiveness in Saskatchewan in circumstances where an older parent has transferred property to an independent adult child who is married and lives apart from his parent.” Waters et al., too in *Waters' Law of Trusts*, at p. 395, said: “It may well be that, reflecting the financial dependency that it probably does, contemporary opinion would accord [the presumption of advancement] little weight as between a father and an independent, adult child.”

36 I am inclined to agree. First, given that a principal justification for the presumption of advancement is parental obligation to support their dependent children, it seems to me that the presumption should not apply in respect of independent adult children. As Heeney J. noted in *McLear*, at para. 36, parental support obligations under provincial and federal statutes normally end when the child is no longer considered by law to be a minor: see e.g. *Family Law Act*, s. 31. Indeed, not only do child support obligations end when a child is no longer dependent, but often the reverse is true: an obligation may be imposed on independent adult children to support their parents in accordance with need and ability to pay: see e.g. *Family Law Act*, s. 32. Second, I agree

with Heeney J. that it is common nowadays for ageing parents to transfer their assets into joint accounts with their adult children in order to have that child assist them in managing their financial affairs. There should therefore be a rebuttable presumption that the adult child is holding the property in trust for the ageing parent to facilitate the free and efficient management of that parent's affairs.

37 Some commentators and courts have argued that while an adult, independent child is no longer financially dependent, the presumption of advancement should apply on the basis of parental affection for their children: see e.g., *Madsen Estate*, at para. 21; *Dagle*; *Christmas Estate v. Tuck* (1995), 10 E.T.R. (2d) 47 (Ont. Ct. (Gen. Div.)); and *Cho Ki Yau Trust (Trustees of) v. Yau Estate* (1999), 29 E.T.R. (2d) 204 (Ont. S.C.J.). I do not agree that affection is a basis upon which to apply the presumption of advancement to the transfer. Indeed, the factor of affection applies in other relationships as well, such as between siblings, yet the presumption of advancement would not apply in those circumstances. However, I see no reason why courts cannot consider evidence relating to the quality of the relationship between the transferor and transferee in order to determine whether the presumption of a resulting trust has been rebutted.

38 The remaining question is whether the presumption of advancement should apply in the case of adult dependent children. In the present case the trial judge, at paras. 26-28, found that Paula, despite being a married adult with her own family, was nevertheless dependent on her father and justified applying the presumption of advancement on that basis.

39 The question of whether the presumption applies to adult dependent children begs the question of what constitutes dependency for the purpose of applying the

presumption. Dependency is a term susceptible to an enormous variety of circumstances. The extent or degree of dependency can be very wide ranging. While it may be rational to presume advancement as a result of dependency in some cases, in others it will not. For example, it is not difficult to accept that in some cases a parent would feel a moral, if not legal, obligation to provide for the quality of life for an adult disabled child. This might especially be the case where the disabled adult child is under the charge and care of the parent.

40 As compelling as some cases might be, I am reluctant to apply the presumption of advancement to gratuitous transfers to "dependent" adult children because it would be impossible to list the wide variety of the circumstances that make someone "dependent" for the purpose of applying the presumption. Courts would have to determine on a case-by-case basis whether or not a particular individual is "dependent", creating uncertainty and unpredictability in almost every instance. I am therefore of the opinion that the rebuttable presumption of advancement with regards to gratuitous transfers from parent to child should be preserved but be limited in application to transfers by mothers and fathers to minor children.

41 There will of course be situations where a transfer between a parent and an adult child was intended to be a gift. It is open to the party claiming that the transfer is a gift to rebut the presumption of resulting trust by bringing evidence to support his or her claim. In addition, while dependency will not be a basis on which to apply the presumption of advancement, evidence as to the degree of dependency of an adult transferee child on the transferor parent may provide strong evidence to rebut the presumption of a resulting trust.

B. *On What Standard Will the Presumptions Be Rebutted?*

42 There has been some debate amongst courts and commentators over what amount of evidence is required to rebut a presumption. With regard to the presumption of resulting trust, some cases appear to suggest that the criminal standard, or at least a standard higher than the civil standard, is applicable: see e.g. *Bayley v. Trusts and Guarantee Co.*, [1931] 1 D.L.R. 500 (Ont. C.A.), at p. 505; *Johnstone v. Johnstone* (1913), 12 D.L.R. 537 (Ont. C.A.), at p. 539. As for the presumption of advancement, some cases seem to suggest that only slight evidence will be required to rebut the presumptions: see e.g. *Pettitt v. Pettitt*, [1970] A.C. 777 (H.L.), at p. 814; *McGrath v. Wallis*, [1995] 2 F.L.R. 114 (Eng. C.A.), at pp. 115 and 122; *Dreger (Litigation Guardian of) v. Dreger* (1994), 5 E.T.R. (2d) 250 (Man. C.A.), at para. 31.

43 The weight of recent authority, however, suggests that the civil standard, the balance of probabilities, is applicable to rebut the presumptions: *Burns Estate v. Mellon* (2000), 48 O.R. (3d) 641 (C.A.), at paras. 5-21; *Lohia v. Lohia*, [2001] EWCA Civ 1691, at paras. 19-21; *Dagle*, at p. 210; *Re Wilson*, at para. 52. See also Sopinka et al., at p. 116. This is also my view. I see no reason to depart from the normal civil standard of proof. The evidence required to rebut both presumptions, therefore, is evidence of the transferor's contrary intention on the balance of probabilities.

44 As in other civil cases, regardless of the legal burden, both sides to the dispute will normally bring evidence to support their position. The trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention. Thus,

as discussed by Sopinka et al. in *The Law of Evidence in Canada*, at p. 116, the presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities.

C. *How Should Courts Treat Survivorship in the Context of a Joint Account?*

45 In cases where the transferor's proven intention in opening the joint account was to gift withdrawal rights to the transferee during his or her lifetime (regardless of whether or not the transferee chose to exercise that right) and also to gift the balance of the account to the transferee alone on his or her death through survivorship, courts have had no difficulty finding that the presumption of a resulting trust has been rebutted and the transferee alone is entitled to the balance of the account on the transferor's death.

46 In certain cases, however, courts have found that the transferor gratuitously placed his or her assets into a joint account with the transferee with the intention of retaining exclusive control of the account until his or her death, at which time the transferee alone would take the balance through survivorship: see e.g. *Standing v. Bowring* (1885), 31 Ch. D. 282, at p. 287; *Edwards v. Bradley*, [1956] O.R. 225 (C.A.), at p. 234; *Yau Estate*, at para. 25.

47 There may be a number of reasons why an individual would gratuitously transfer assets into a joint account having this intention. A typical reason is that the transferor wishes to have the assistance of the transferee with the management of his or her financial affairs, often because the transferor is ageing or disabled. At the same time,

the transferor may wish to avoid probate fees and/or make after-death disposition to the transferee less cumbersome and time consuming.

48 Courts have understandably struggled with whether they are permitted to give effect to the transferor's intention in this situation. One of the difficulties in these circumstances is that the beneficial interest of the transferee appears to arise only on the death of the transferor. This has led some judges to conclude that the gift of survivorship is testamentary in nature and must fail as a result of not being in proper testamentary form: see e.g. *Hill v. Hill* (1904), 8 O.L.R. 710 (H.C.), at p. 711; *Larondeau v. Laurendeau*, [1954] O.W.N. 722 (H.C.); Hodgins J.A.'s dissent in *Re Reid* (1921), 64 D.L.R. 598 (Ont. S.C., App. Div.). For the reasons that follow, however, I am of the view that the rights of survivorship, both legal and equitable, vest when the joint account is opened and the gift of those rights is therefore *inter vivos* in nature. This has also been the conclusion of the weight of judicial opinion in recent times: see e.g. *Mordo v. Nitting*, [2006] B.C.J. No. 3081 (QL), 2006 BCSC 1761, at paras. 233-38; *Shaw v. MacKenzie Estate* (1994), 4 E.T.R. (2d) 306 (N.S.S.C.), at para. 49; and *Reber v. Reber* (1988), 48 D.L.R. (4th) 376 (B.C.S.C.); see also *Waters' Law of Trusts*, at p. 406.

49 An early case that addressed the issue of the nature of survivorship is *Re Reid* in which Ferguson J.A. of the Ontario Court of Appeal found that the gift of a joint interest was a "complete and perfect *inter vivos* gift" from the moment that the joint account was opened even though the transferor in that case retained exclusive control over the account during his lifetime. I agree with this interpretation. I also find MacKay J.A.'s reasons in *Edwards v. Bradley* (C.A.), at p. 234, to be persuasive:

> <u>The legal right to take the balance in the account if A predeceases him being vested in B on the opening of the account, it cannot be the subject of a</u>

> testamentary disposition. If A's intention was that B should also have the beneficial interest, B already has the legal title and there is nothing further to be done to complete the gift of the beneficial interest. If A's intention was that B should not take the beneficial interest, it belongs to A or his estate and he is not attempting to dispose of it by means of the joint account. In either event B has the legal title and the only question that can arise on A's death is whether B is entitled to keep any money that may be in the account on A's death or whether he holds it as a trustee under a resulting trust for A's estate. [Emphasis added.]

Edwards v. Bradley was appealed to the Supreme Court of Canada but the issue of survivorship was not addressed.

50 Some judges have found that a gift of survivorship cannot be a complete and perfect *inter vivos* gift because of the ability of the transferor to drain a joint account prior to his or her death: see e.g. Hodgins J.A.'s dissent in *Re Reid*. Like the Ontario Court of Appeal in *Re Reid*, at p. 608, and *Edwards v. Bradley*, at p. 234, I would reject this view. The nature of a joint account is that the balance will fluctuate over time. The gift in these circumstances is the transferee's survivorship interest in the account balance — whatever it may be — at the time of the transferor's death, not to any particular amount.

51 Treating survivorship in these circumstances as an *inter vivos* gift of a joint interest has found favour in other jurisdictions, including the United Kingdom and Australia: see *Russell v. Scott* (1936), 55 C.L.R. 440, at p. 455; *Young v. Sealey*, [1949] 1 All E.R. 92 (Ch. Div.), at pp. 107-8; (in *obiter*) *Aroso v. Coutts*, [2002] 1 All E.R. (Comm) 241, [2001] EWHC Ch 443, at paras. 29 and 36.

52 While not entirely analogous, the American notion of the "Totten trust" (sometimes referred to as the "Bank account trust") is now recognized as valid in most states in the United States; an individual places money in a bank account with the

instruction that upon his or her death, whatever is in that bank account will pass to a named beneficiary: see *Restatement (Third) of Trusts* (2003), at para. 26 of Part 2, Chapter 5. The Totten trust is so named for the leading case establishing its validity: see *Matter of Totten*, 179 N.Y. 112 (1904). While a Totten trust does not deal with joint accounts as such, it recognizes the practicality of the depositor having control of an account during his or her lifetime but allowing the depositor's named beneficiary of that account to claim the funds remaining in the account upon the death of the depositor without the disposition being treated as testamentary: see e.g. *Matter of Berson*, 566 N.Y.S.2d 74 (1991); *Matter of Halpern*, 303 N.Y. 33 (1951).

53 Of course, the presumption of a resulting trust means that it will fall to the surviving joint account holder to prove that the transferor intended to gift the right of survivorship to whatever assets are left in the account to the survivor. Otherwise, the assets will be treated as part of the transferor's estate to be distributed according to the transferor's will.

54 Should the avoidance of probate fees be of concern to the legislature, it is open to it to enact legislation to deal with the matter.

D. *What Evidence May a Court Consider in Determining Intent of the Transferor?*

55 Where a gratuitous transfer is being challenged, the trial judge must begin his or her inquiry by determining the proper presumption to apply and then weigh all the evidence relating to the actual intention of the transferor to determine whether the presumption has been rebutted. It is not my intention to list all of the types of evidence

that a trial judge can or should consider in ascertaining intent. This will depend on the facts of each case. However, I will discuss particular types of evidence at issue in this appeal and its companion case that have been the subject of divergent approaches by courts.

1. Evidence Subsequent to the Transfer

56 The traditional rule is that evidence adduced to show the intention of the transferor at the time of the transfer "ought to be contemporaneous, or nearly so," to the transaction: see *Clemens v. Clemens Estate*, [1956] S.C.R. 286, at p. 294, citing *Jeans v. Cooke* (1857), 24 Beav. 513, 53 E.R. 456 (Rolls Ct.). Whether evidence subsequent to a transfer is admissible has often been a question of whether it complies with the Viscount Simonds' rule in *Shephard v. Cartwright*, [1955] A.C. 431 (H.L.), at p. 445, citing *Snell's Principles of Equity* (24th ed. 1954), at p. 153:

> The acts and declarations of the parties before or at the time of the purchase, [or of the transfer] or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration.... But subsequent declarations are admissible as evidence only against the party who made them....

The reason that subsequent acts and declarations have been viewed with mistrust by courts is because a transferor could have changed his or her mind subsequent to the transfer and because donors are not allowed to retract gifts. As noted by Huband J.A. in *Dreger*, at para. 33: "Self-serving statements after the event are too easily fabricated in order to bring about a desired result."

57 Some courts, however, have departed from the restrictive — and somewhat abstruse — rule in *Shephard v. Cartwright.* In *Neazor v. Hoyle* (1962), 32 D.L.R. (2d) 131 (Alta. S.C., App. Div.), for example, a brother transferred land to his sister 8 years before he died and the trial judge considered the conduct of the parties during the years after the transfer to see whether they treated the land as belonging beneficially to the brother or the sister.

58 The rule has also lost much of its force in England. In *Lavelle v. Lavelle*, [2004] EWCA Civ 223, at para. 19, Lord Phillips, M.R., had this to say about *Shephard v. Cartwright* and certain other authorities relied on by the appellant in that case:

> It seems to me that it is not satisfactory to apply rigid rules of law to the evidence that is admissible to rebut the presumption of advancement. Plainly, self-serving statements or conduct of a transferor, who may long after the transaction be regretting earlier generosity, carry little or no weight. [Emphasis added.]

59 Similarly, I am of the view that the evidence of intention that arises subsequent to a transfer should not automatically be excluded if it does not comply with the *Shephard v. Cartright* rule. Such evidence, however, must be relevant to the intention of the transferor at the time of the transfer: *Taylor v. Wallbridge* (1879), 2 S.C.R. 616. The trial judge must assess the reliability of this evidence and determine what weight it should be given, guarding against evidence that is self-serving or that tends to reflect a change in intention.

2. Bank Documents

60 In the past, this Court has held that bank documents that set up a joint account are an agreement between the account holders and the bank about legal title; they

are not evidence of an agreement between the account holders as to beneficial title: see *Niles* and *Re Mailman*.

61 While I agree that bank documents do not necessarily set out equitable interests in joint accounts, banking documents in modern times may be detailed enough that they provide strong evidence of the intentions of the transferor regarding how the balance in the account should be treated on his or her death: see B. Ziff, *Principles of Property Law* (4th ed. 2006), at p. 332. Therefore, if there is anything in the bank documents that specifically suggests the transferor's intent regarding the beneficial interest in the account, I do not think that courts should be barred from considering it. Indeed, the clearer the evidence in the bank documents in question, the more weight that evidence should carry.

3. Control and Use of the Funds in the Account

62 There is some inconsistency in the caselaw as to whether a court should consider evidence as to the control of joint accounts following the transfer in ascertaining the intent of the transferor with respect to the beneficial interest in the joint account. In the present case, for example, Paula's father continued to manage the investments and to pay the taxes after establishing the joint accounts. The Court of Appeal, at para. 40, held that this factor was not determinative of Paula's father's intentions: "[w]hile control can be consistent with an intention to retain ownership, it is also not inconsistent in this case with an intention to gift the assets." In contrast, in *Madsen Estate*, at para. 34, one of the main factors the Court of Appeal relied on to show that the father did not intend to create a beneficial joint tenancy was that he remained in control of the accounts, and that he paid the taxes on the interest earned on the funds in the accounts.

63 I am of the view that control and use of the funds, like the wording of the bank documents, should not be ruled out in the ascertainment of the transferor's intention. For example, the transferor's retention of his or her exclusive beneficial interest in the account in his or her lifetime may support the finding of a resulting trust, unless other evidence proves that he or she intended to gift the right of survivorship to the transferee. However, evidence of use and control may be of marginal assistance only and, without more, will not be determinative for three reasons.

64 First, it may be that the dynamics of the relationship are such that the transferor makes the management decisions. He or she may be more experienced with the accounts. This does not negate the beneficial interest of the other account holder. Conversely, evidence that a transferee controlled the funds does not necessarily mean that the transferee took a beneficial interest. Ageing parents may set up accounts for the sole purpose of having their adult child manage their funds for their benefit.

65 Second, in cases involving an ageing parent and an adult child, it may be that the transferee, although entitled both legally and beneficially to withdraw funds, will refrain from accessing them in order to ensure there are sufficient funds to care for the parent for the remainder of the parent's life.

66 Finally, as previously discussed, the fact that a transferor controlled and used the funds during his or her life is not necessarily inconsistent with an intention at the time of the transfer that the transferee would acquire the balance of the account on the transferor's death through the gift of the right of survivorship.

4. Granting of Power of Attorney

67 Courts have also relied to varying degrees on the transferor's granting of a power of attorney to the transferee in determining intent. The Court of Appeal in *Madsen Estate*, at para. 72, noted that the transferor had granted the transferee power of attorney but did not view it "as a factor that suggested that the joint account was not set up merely as a tool of convenience for mutual access to funds". The Court of Appeal in the present case, on the other hand, placed substantial weight on Paula's father having given her both joint ownership of the accounts and power of attorney in finding that he intended to gift the assets to her. Lang J.A. reasoned, at para. 34, that had Paula's father intended only for Paula to assist in the managing of the accounts, this could have been accomplished solely by giving her power of attorney: "With that power of attorney, joint ownership of the investments was unnecessary unless [Paula's father] intended something more: to ensure the investments were given to Paula and to avoid probate fees, both entirely legitimate purposes." Lang J.A. also found, at para. 35, that the weight to be afforded a particular piece of evidence is a matter within a trial judge's discretion.

68 I share Lang J.A.'s view that the trier of fact has the discretion to consider the granting of power of attorney when deciding the transferor's intention. This will be especially true when other evidence suggests that the transferor appreciated the distinction between granting that power and gifting the right of survivorship. Again however, this evidence will not be determinative and courts should use caution in relying upon it, because it is entirely plausible that the transferor granted power of attorney and placed his or her assets in a joint account but nevertheless intended that the balance of the account be distributed according to his or her will. For example, the transferor may have granted

power of attorney in order to have assistance with other affairs beyond the account and may have made the transferee a joint account holder solely for added convenience.

5. Tax Treatment of Joint Accounts

69 Courts have relied to varying degrees on the transferor's tax treatment of the account in determining intent. In *Madsen Estate*, the trial judge relied in part on the fact that the transferor was the one who declared and paid income tax on the money in the joint accounts in finding that the transferor intended a resulting trust ((2004), 13 E.T.R. (3d) 44, at para. 29). In the present case, at para. 44, the trial judge noted that Paula's father continued to pay taxes on the income in joint accounts but nevertheless found that he intended to gift the joint accounts to her. I do not find either of these approaches inappropriate. The weight to be placed on tax-related evidence in determining a transferor's intent should be left to the discretion of the trial judge. However, whether or not a transferor continues to pay taxes on the income earned in the joint accounts during his or her lifetime should not be determinative of his or her intention in the absence of other evidence. For example, it may be that the transferor made the transfer for the sole purpose of obtaining assistance in the management of his or her finances and wished to have the assets form a part of his or her estate upon his or her death. Or, as discussed above, it is open to a transferor to gift the right of survivorship to the transferee when the joint accounts are opened, but to retain control over the use of the funds in the accounts (and therefore to continue to pay taxes on them) during his or her lifetime.

70 As for the matter of taxes on capital gains, it was submitted to this Court that for public policy reasons, transferors should not be permitted to transfer beneficial title

while asserting to the tax authorities that such title has not been passed in order to defer or avoid the payment of taxes: appellant's factum, at p. 24. In principle, I agree. Where, in setting up a joint account, the transferor intends to transfer full legal and equitable title to the assets in the account immediately and the value of the assets reflects a capital gain, taxes on capital gains may become payable in the year the joint account is set up. However, where the transferor's intention is to gift the right of survivorship to the transferee but retain beneficial ownership of the assets during his or her lifetime, there would appear to be no disposition at the moment of the setting up of the joint account: see s. 73 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). That said, the issue of the proper treatment of capital gains in the setting up of joint accounts was not argued in this appeal. I can say no more than these are matters for determination between the Canada Revenue Agency and taxpayers in specific cases.

E. *Should the Decision of the Trial Judge Be Overturned?*

71 The trial judge in the present case found that, at the time of the transfers, Paula and her father had a very close relationship and that Paula "clearly was the person, other than his wife, that he was closest to and most concerned about" (para. 32). Given this relationship and her financial hardships, her father preferred her over her siblings. Indeed, he was estranged from one of his daughters at the time the accounts were set up (para. 25). While he may have grown close to his son-in-law, the trial judge concluded they were simply "good friends" (para. 38). Moreover, his wife was seriously ill and not expected to outlive him.

72 Paula and her family relied on her father for financial assistance. While he maintained control of the accounts and used the funds for his benefit during his life, the

trial judge found his concern lay with providing for Paula after his death. This is consistent with an intention to gift a right of survivorship when the accounts were set up.

73 The statements of Paula's father while drafting his last will are also an important indicator of intention. Although the statements were made in years subsequent to the transfer, the trial judge considered the lawyer's testimony about them reliable. The lawyer had nothing to gain from his testimony. This evidence indicates that Paula's father was of the view that the accounts had already been dealt with and understood these assets would not form part of the estate. I agree with the trial judge that "if [the father's] intention was to have his jointly held assets devolve through the estate, they were of such magnitude that he would have at least discussed that matter with his solicitor, since they constituted a substantial proportion of what he owned" (para. 43), particularly after the lawyer asked him about life insurance policies, RRIFs and other assets. All of this evidence is consistent with Paula's father having gifted away the right of survivorship when the joint accounts were opened, and thus is relevant to his intention at the time of the transfer.

74 There is of course the issue of Paula's father writing to financial institutions saying that the transfers were not gifts to Paula. Consistent with these letters, Paula's father continued to control the funds in the accounts and paid income tax on the earnings of the investments before his death. The trial judge found that Paula's father's intention when he wrote the letters was "simply to avoid triggering an immediate deemed disposition of the assets in question, and therefore avoid capital gains taxes" (para. 39). I agree with the trial judge that this is not inconsistent with an intention that the balance remaining in the accounts would belong to Paula on his death.

75 The trial judge erred in applying the presumption of advancement. Paula, although financially insecure, was not a minor child. Karam J. should therefore have applied the presumption of a resulting trust. Nonetheless, this error does not affect the ultimate disposition of the appeal because the trial judge found that the evidence "clearly demonstrate[d] the intention" on the part of the father that the balance left in the joint accounts he had with Paula were to go to Paula alone on his death through survivorship (para. 44). I am satisfied that this strong finding regarding the father's actual intention shows that the trial judge's conclusion would have been the same even if he had applied the presumption of a resulting trust.

V. Disposition

76 For the reasons above, I would dismiss this appeal, with costs. Michael Pecore asked this Court for costs throughout from Paula or the estate. As noted in the judgment of the Ontario Court of Appeal, at para. 48, the trial judge denied Michael costs out of the estate or from Paula. He did so because he found that on the issues raised in the divorce proceeding, success was divided, Paula made an offer to settle that exceeded the result, and Michael's conduct was "less than candid". I see no reason to interfere with that disposition, or that costs should not follow the event in this Court.

Version française des motifs rendus par

77 ABELLA J. — Tolstoy wrote at the beginning of *Anna Karenina* that "Happy families are all alike, every unhappy family is unhappy in its own way". That unhappiness often finds its painful way into a courtroom.

78 This appeal involves a father who opened joint bank accounts with his daughter, signing documents that specifically confirmed that the daughter was to have a survivorship interest. The daughter's entitlement to the remaining funds in the accounts was challenged by her ex-husband. The trial judge, who was upheld in the Court of Appeal ((2005), 19 E.T.R. (3d) 162), applied the presumption of advancement and concluded that the father's intention was to make a gift of the money to his daughter ((2004), 7 E.T.R. (3d) 113). In the companion appeal, *Madsen Estate v. Saylor*, 2007 SCC 18, the daughter's entitlement to the funds was challenged by her siblings. The trial judge applied the presumption of resulting trust rather than the presumption of advancement, and concluded that the father had *not* intended to make a gift to his daughter ((2004), 13 E.T.R. (3d) 44). The issue in both appeals is which presumption applies and what the consequences of its application are.

Analysis

79 Historically, the presumption of advancement has been applied to gratuitous transfers to children, regardless of the child's age. If we are to continue to retain the presumption of advancement for parent-child transfers, I see no reason, unlike Rothstein J., to limit its application to non-adult children. I agree with him, however, that the scope of the presumption should be expanded to include transfers from mothers as well as from fathers.

80 The presumptions of advancement and resulting trust are legal tools which assist in determining the transferor's intention at the time a gratuitous transfer is made. The tools are of particular significance when the transferor has died.

81 If the presumption of advancement applies, an individual who transfers property into another person's name is presumed to have intended to make a gift to that person. The burden of proving that the transfer was not intended to be a gift, is on the challenger to the transfer. If the presumption of resulting trust applies, the transferor is presumed to have intended to retain the beneficial ownership. The burden of proving that a gift *was* intended, is on the recipient of the transfer.

82 There is an ongoing academic and judicial debate about whether the presumptions, and particularly the presumption of resulting trust, ought to be removed entirely from the judicial tool box in assessing intention. E. E. Gillese and M. Milczynski offer the following criticism, echoed by others, in *The Law of Trusts* (2nd ed. 2005):

> ... modern life has caused many to question the utility of the presumptions. When I voluntarily transfer title to property to another, is it more sensible to assume that I have made a gift or that I transferred title under the assumption that the transferee would hold title for me? Surely, it is more likely that, had I intended to create a trust, I would have taken steps to expressly create the trust and document it. It is more plausible to presume the opposite to that which equity presumed. If someone today gives away property, it is at least as likely that he intended a gift as that they intended to create some type of trust. And, if they did intend to create a trust, they should be held to the requirements that exist for express trusts and not be favoured by the presumption of a resulting trust. The fact that the presumption is out of step with modern thought explains the courts' new approach to such cases, which is to look at all the evidence with an open mind and attempt to determine intention on that basis. If that were the end of the matter, we could say that the presumption of resulting trust had been eradicated. Unfortunately, the courts have not gone that far, and the presumption will operate where the evidence is unclear. [pp. 109-10]

83 Similarly, in *Nelson v. Nelson* (1995), 184 C.L.R. 538, the High Court of Australia dealt with a case involving a mother's purchase of a house which she then

transferred into the names of her children. In his concurring reasons, McHugh J. made the following comments about the presumption of resulting trust:

> No doubt in earlier centuries, the practices and modes of thought of the property owning classes made it more probable than not that, when a person transferred property in such circumstances, the transferor did not intend the transferee to have the beneficial as well as the legal interest in the property. But times change. To my mind — and, I think, to the minds of most people — <u>it seems much more likely that, in the absence of an express declaration or special circumstances, the transfer of property without consideration was intended as a gift to the transferee</u>. ...
>
> A presumption is a useful aid to decision making only when it accurately reflects the probability that a fact or state of affairs existed or has occurred. ... If the presumptions do not reflect common experience today, they may defeat the expectations of those who are unaware of them. [Emphasis added; p. 602]

84 McHugh J.'s allusion to "earlier centuries" reflects the origins of the presumption of resulting trust. In the 15th century, it was not uncommon for landowners in England to have title to their property held by other individuals on the understanding that it was being held for the "use" of the landowner and subject to his direction. This had the effect of separating legal and beneficial ownership. The purpose of the scheme was to avoid having to pay feudal taxes when land passed from a landowner to his heir.

85 It became so common for owners to transfer land to be held for their own use, that the courts began to *presume* that a transfer made without consideration, or gratuitously, was intended to be for the transferor's own use, giving rise to the presumption of resulting use. Because these nominal transfers caused a significant loss of revenue to the Crown, the *Statute of Uses, 1535* was enacted, which "executed the use", reuniting legal and equitable title (R. Chambers, "Resulting Trusts in Canada" (2000), 38 *Alta. L. Rev.* 378; *Cho Ki Yau Trust (Trustees of) v. Yau Estate* (1999), 29 E.T.R. (2d) 204 (Ont. S.C.J.)).

86 The presumption of resulting trust is the vestigial doctrine that emerged from the evolutionary remains of the executed use. The presumption of advancement, on the other hand, evolved as a limited exception to the presumption of resulting trust, generally arising in two situations: when a gratuitous transfer was made by a father to his child; and when a gratuitous transfer was made by a husband to his wife.

87 The traditional presumption of advancement as between husband and wife has been largely abandoned, both judicially (*Pettitt v. Pettitt*, [1970] A.C. 777 (H.L.), and *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436) and legislatively (New Brunswick, *Marital Property Act*, S.N.B. 1980, c. M-1.1, s. 15(1); Prince Edward Island, *Family Law Act*, R.S.P.E.I. 1988, c. F-2.1, s. 14(1); Nova Scotia, *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, s. 21(1); Newfoundland and Labrador, *Family Law Act*, R.S.N.L. 1990, c. F-2, s. 31(1); Ontario, *Family Law Act*, R.S.O. 1990, c. F.3, s. 14; Northwest Territories and Nunavut, *Family Law Act*, S.N.W.T. 1997, c. 18, s. 46(1); Saskatchewan, *The Family Property Act*, S.S. 1997, c. F-6.3, s. 50(1); Yukon, *Family Property and Support Act*, R.S.Y. 2002, c. 83, s. 7(2)).

88 But in the case of gratuitous transfers to children, the presumption "appears to retain much of its original vigour" (D.W.M. Waters, M.R. Gillen and L.D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 381). As noted by Cullity J. in *Yau Estate*, at para. 35:

> [I]t would be a mistake to extrapolate the treatment of the equitable presumptions in *Rathwell* out of their matrimonial property context to other situations including those involving the acquisition, or transfer, of property between strangers and between parents and their children.

89 Rothstein J. rejects parental affection as being a basis for the presumption, stating that "a principal justification for the presumption of advancement" in the case of gratuitous transfers to children was the "parental obligation to support their dependent children" (para. 36). With respect, this narrows and somewhat contradicts the historical rationale for the presumption. Parental affection, no less than parental obligation, has always grounded the presumption of advancement.

90 It is in fact the rationale of parental affection that was cited in *Waters' Law of Trusts in Canada* as an explanation for the longevity of the presumption of advancement in transfers to children:

> The presumption of advancement between father and child has not been subjected to the same re-evaluation which in recent years has overtaken the presumption between husband and wife. ... <u>The factor of affection continues to exist, something which cannot be presumed in the relationship between strangers, and possibly for this reason the courts have seen no reason to challenge its modern significance.</u> [Emphasis added; p. 395.]

91 In his article, "Reassessing Gratuitous Transfers by Parents to Adult Children" ((2006), 25 *E.T.P.J.* 174), Prof. Freedman acknowledges that while the "original rationale of the advancement rule is somewhat difficult to pin down" (p. 190), it did not arise only from the parental obligation to provide support for dependent children:

> Would that satisfaction of legal obligations was the explicit rationale of the presumption of advancement in the older cases; unfortunately, the authorities are inconsistent in approach and lead to little certainty in justifying doctrine. Indeed, this was decidedly an inquiry into gifting, not compelling support payments, and gratuitous transfers were recognized as advancements in a number of situations that are problematic for this elegant explanation of the equitable doctrine — for example, where the donee was of legal age and even independent of his father, or was already provided for, or was illegitimate, or where the *loco parentis* principle was liberally applied to a

> wider class of people that would not be the object of any enforceable legal obligation. While later cases have gone on to demonstrate the highly refined skills of both counsel and judges in distinguishing one case from another based on factual considerations in determining whether the presumption ought to apply in any given circumstance, I would suggest that no uniform principle can be found in the cases. The simple fact is that the extent of the obligation between the transferor and transferee was never the focus of the inquiry, only the probable intent of the transferor in seeking to retain the beneficial interest for himself in the context of a given relationship that on its face gave rise to reasonable expectations that such gifts might be forthcoming. [Emphasis added; pp. 190-91.]

92 Even at the elemental stage in the development of the doctrine, the court in *Grey (Lord) v. Grey (Lady)* (1677), 2 Swans. 594, 36 E.R. 742 (H.C. Ch.), identified natural affection as a rationale for the application of the presumption of advancement:

> ... For the natural consideration of blood and affection is so apparently predominant, that those acts which would imply a trust in a stranger, will not do so in a son; and, *ergo*, the father who would check and control the appearance of nature, ought to provide for himself by some instrument, or some clear proof of a declaration of trust, and not depend upon any implication of law. ... [Emphasis added; p. 743.]

93 In *Yau Estate*, Cullity J. also observed that parental affection is a rationale for the presumption, leading Prof. Freedman in his article to conclude:

> In other words, parental affection grounds the presumption and is the greatest indicator of the probable intent of the transferor. This is an attractive argument which I suggest most would agree accords with common experience. [p. 196]

94 Because parental affection has historically been seen as a basis for the presumption of advancement, it was routinely applied to adult as well as to minor children. In *Sidmouth v. Sidmouth* (1840), 2 Beav. 447, 48 E.R. 1254 (Rolls Ct.), for

example, the court applied it in the case of a gratuitous transfer to an adult son, explaining:

> As far as acts strictly contemporaneous appear, there does not appear to be anything to manifest an intention to make the son a trustee for the father. <u>The circumstance that the son was adult does not appear to me to be material.</u> It is said that no establishment was in contemplation, and that no necessity or occasion for advancing the son had occurred, but in the relation between parent and child, it does not appear to me that an observation of this kind can have any weight. The parent may judge for himself when it suits his own convenience, or when it will be best for his son, to secure him any benefit which he voluntarily thinks fit to bestow upon him, and it does not follow that because the reason for doing it is not known, there was no intention to advance at all. [Emphasis added; p. 1258.]

(See also *Scawin v. Scawin* (1841), 1 Y. & C.C.C. 65, 62 E.R. 792 (Ch. Ct.), and *Hepworth v. Hepworth* (1870), L.R. 11 Eq. 10.)

95 It is true, as was noted in *Oosterhoff on Trusts: Text, Commentary and Materials* (6th ed. 2004), at pp. 581-86, that some courts in the mid-90s began questioning whether the presumption of advancement should apply to transfers between parents and their adult children (see *Dreger (Litigation Guardian of) v. Dreger*, ((1994), 5 E.T.R. (2d) 250 (Man. C.A.), *Cooper v. Cooper Estate* (1999), 27 E.T.R. (2d) 170 (Sask. Q.B.), and *McLear v. McLear Estate* (2000), 33 E.T.R. (2d) 272 (Ont. S.C.J.)).

96 But in most cases, the presumption of advancement continues to be applied to gratuitous transfers from parents to their children, regardless of age. In *Madsen Estate v. Saylor*, for example, the companion appeal, the Ontario Court of Appeal found that the trial judge erred in applying the presumption of resulting trust, concluding that “the presumption of advancement can still apply to transfers of property from a father to a child, including an independent adult child” ((2005), 261 D.L.R. (4th) 597, at para. 21).

97 And in this appeal, the Ontario Court of Appeal took no issue with the trial judge's application of the presumption of advancement to the transfer by the father, notwithstanding that the beneficiary of the transfer, his daughter, was an adult at the time. (See also *Young v. Young* (1958), 15 D.L.R. (2d) 138 (B.C.C.A.); *Oliver Estate v. Walker*, [1984] B.C.J. No. 460 (QL) (S.C.); *Dagle v. Dagle Estate* (1990), 38 E.T.R. 164 (P.E.I.S.C., App. Div.); *Christmas Estate v. Tuck* (1995), 10 E.T.R. (2d) 47 (Ont. Ct. (Gen. Div.)); *Reain v. Reain* (1995), 20 R.F.L. (4th) 30 (Ont. Ct. (Gen. Div.)); *Sodhi v. Sodhi*, [1998] 10 W.W.R. 673 (B.C.S.C.); *Re Wilson* (1999), 27 E.T.R. (2d) 97 (Ont. Ct. (Gen. Div.)); *Yau Estate*; *Kappler v. Beaudoin*, [2000] O.J. No. 3439 (QL) (S.C.J.); *Clarke v. Hambly* (2002), 46 E.T.R. (2d) 166, 2002 BCSC 1074; and *Plamondon v. Czaban* (2004), 8 E.T.R. (3d) 135, 2004 ABCA 161.

98 The origin and persistence of the presumption of advancement in gratuitous transfers to children cannot, therefore, be attributed only to the financial dependency of children on their father or on the father's obligation to support his children. Natural affection also underlay the presumption that a parent who made a gratuitous transfer to a child of any age, intended to make a gift.

99 Rothstein J. relied too on the argument made in *McLear*, at paras. 40-41, against applying the presumption of advancement to adult children, namely, that since people are "living longer" and there are more aging parents who will require assistance in the managing of their daily financial affairs, it is "dangerous to presume that the elderly parent is making a gift each time he or she puts the name of the assisting child on an asset".

100 This, with respect, seems to me to be a flawed syllogism. The intention to have an adult child manage a parent's financial affairs during one's lifetime is hardly inconsistent with the intention to make a gift of money in a joint account to that child. Parents generally want to benefit their children out of love and affection. If children assist them with their affairs, this cannot logically be a reason for assuming that the desire to benefit them has been displaced. It is equally plausible that an elderly parent who gratuitously enters into a joint bank account with an adult child on whom he or she depends for assistance, intends to make a gift in gratitude for this assistance. In any event, if the intention is merely to have assistance in financial management, a power of attorney would suffice, as would a bank account without survivorship rights.

101 The fact that some parents may enter into joint bank accounts because of the undue influence of an adult child, is no reason to attribute the same impropriety to the majority of parent-child transfers. The operative paradigm should be based on the norm of mutual affection, rather than on the exceptional exploitation of that affection by an adult child.

102 I see no reason to claw back the common law in a way that disregards the lifetime tenacity of parental affection by now introducing a limitation on the presumption of advancement by restricting its application to minor children. Since the presumption of advancement emerged no less from affection than from dependency, and since parental affection flows from the inherent nature of the relationship, not of the dependency, the presumption of advancement should logically apply to all gratuitous transfers from parents to any of their children, regardless of the age or dependency of the child or the parent. The natural affection parents are presumed to have for their adult children when both were younger, should not be deemed to atrophy with age.

103 While, as Rothstein J. observes, affection arises in many relationships, familial or otherwise, it is not affection alone that had earned the presumption of advancement for transfers between father and child. It was the uniqueness of the parental relationship, not only in the legal obligations involved, but, more significantly, in the protective emotional ties flowing from the relationship. These ties are not attached only to the financial dependence of the child. Affection between siblings, other relatives, or even friends, can undoubtedly be used as an evidentiary basis for assessing a transferor's intentions, but the reason none of these other relationships has ever inspired a legal presumption is because, as a matter of common sense, none is as predictable of intention.

104 It seems to me that bank account documents which specifically confirm a survivorship interest, should be deemed to reflect an intention that what has been signed, is sincerely meant. I appreciate that in *Re Mailman Estate*, [1941] S.C.R. 368, *Niles v. Lake*, [1947] S.C.R. 291, and *Edwards v. Bradley*, [1957] S.C.R. 599, this Court said that the wording of bank documents was irrelevant in determining the intention behind joint bank accounts with respect to beneficial title. Fifty years later, however, I have difficulty seeing any continuing justification for ignoring the presumptive, albeit rebuttable, relevance of unambiguous language in banking documents in determining intention. I think it would come as a surprise to most Canadian parents to learn that in the creation of joint bank accounts with rights of survivorship, there is little evidentiary value in the clear language of what they have voluntarily signed.

105 It is significant to me that even though the presumption of advancement has generally been replaced in the spousal context by the presumption of resulting trust, it has nonetheless been conceptually retained in the case of spousal property which is jointly owned, such as joint bank accounts. Section 14(a) of the Ontario *Family Law Act*, for

example, provides that "the fact that property is held in the name of spouses as joint tenants is proof, in the absence of evidence to the contrary, that the spouses are intended to own the property as joint tenants". Section 14(b) further specifies that "money on deposit in the name of both spouses shall be deemed to be in the name of the spouses as joint tenants for the purposes of clause (a)".

106 Equally, a presumed intention of joint ownership in the case of jointly held property should apply to parent-child relationships, and the appropriate mechanism for achieving this objective, absent legislative intervention, is the application of the presumption of advancement.

107 The trial judge, whose conclusion was upheld by the Court of Appeal, properly applied the correct legal presumption to the facts of the case. Like Rothstein J., therefore, I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: Miller Thomson, Toronto.

Solicitors for the respondents: McPhadden, Samac, Merner, Barry, Toronto.

TAB 11

C

1996 CarswellOnt 3434, 42 C.B.R. (3d) 227, 14 E.T.R. (2d) 218, (sub nom. A.M.K. Investments Ltd. (Bankrupt) v. Kraus) 13 O.T.C. 254

A.M.K. Investments Ltd. (Trustee of) v. Kraus

In the Matter of the Bankruptcy of A.M.K. Investments Limited; Trustee of the Estate of A.M.K. Investments Limited (moving party) and Arthur M. Kraus (respondent)

Ontario Court of Justice (General Division) [In Bankruptcy]

MacPherson J.

Heard: September 6, 1996
Judgment: September 19, 1996
Docket: 31-311088

Counsel: *Karen Earl*, for moving party.

Kenneth Page, for respondent.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

Bankruptcy --- Property of bankrupt — Miscellaneous cases.

Trusts and trustees --- Resulting trust — Creation — Advance of purchase funds.

Bankruptcy — Property of bankrupt — Miscellaneous cases — Bankrupt corporation purchasing licence enabling it to purchase season tickets to sporting event — Licence held in name of officer of corporation — Corporation owning licence on basis of purchase money resulting trust — Officer being trustee holding title for corporation — Corporation paying for licence — Corporation acting throughout as purchaser — Officer not rebutting presumption by alleging that payments made for licence to set off corporation's debt to him.

Trusts and trustees — Resulting trust — Creation — Advance of purchase funds — Bankrupt corporation purchasing licence enabling it to purchase season tickets to sporting event — Licence held in name of officer of corporation — Corporation owning licence on basis of purchase money resulting trust — Officer being trustee holding title for corporation — Corporation paying for licence — Corporation acting throughout as purchase — Officer not rebutting presumption by alleging that payments made for licence to set off corporation's debt to him.

The bankrupt corporation purchased a licence which enabled it to purchase season tickets to professional sporting events. AK was an officer of the corporation, who admitted on an examination that the licence was the property of the bankrupt. The licence stated on its face that it was held by AK, and indicated that the holder was an individual. The bankrupt had made payments for tickets on occasion. AK later alleged that he had erred on the examination, and that the licence was in fact his personal property. The bankrupt corporation had made payments on the account, which AK stated were to be set off against a debt that the bankrupt owed to him. AK was successful on a motion for an order making a declaration of ownership of the licence. The trustee in bankruptcy appealed the decision of the master, and sought a declaration that the licence was in fact the property of the bankrupt.

Held:

The appeal was granted, and the declaration was made.

The bankrupt was entitled to the licence on the basis of a money purchase resulting trust. While the trustee AK held title to the licence, the bankrupt had paid for the licence. The bankrupt also acted throughout as a purchaser. The purchase was done by the bankrupt, and it was also the bankrupt, not AK, who made use of the tickets. The presumption of a resulting trust may be rebutted. However, there was no evidence to support AK's allegation that the monies paid were intended to be set off against a debt of the corporation. There was no evidence of corporate indebtedness.

Cases considered:

Dyer v. Dyer (1788), 30 E.R. 42, 2 Cox Eq. Cas. 92 (Ch.) — *considered*

Fobasco Ltd. v. Cogan (1990), 38 E.T.R. 193, 72 O.R. (2d) 254 (H.C.) — *considered*

Smith v. Barre (1958), 15 D.L.R. (2d) 435 (Ont. H.C.) — *referred to*

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 163*referred to*

s. 163(1)*referred to*

APPEAL from motion denying declaration.

***MacPherson J.*:**

Introduction

1 This is a motion by the trustee in bankruptcy of A.M.K. Investments Limited for a declaration that A.M.K. Investments Limited ("A.M.K.") is the owner of a Raptors Footprint Licence, and an order that Arthur M. Kraus ("Kraus"), the respondent, sign all necessary documents to transfer the Footprint Licence to A.M.K. The motion is an appeal from an order of Master Ferron who held, in a decision dated 13 August 1996, that the Footprint Licence was the property of Kraus.

Factual Background

2 The trustee in bankruptcy, Page and Associates, was appointed on 5 March 1996. It had also been the Receiver and Manager of A.M.K. from 1 February 1996. The trustee had been appointed by Hongkong Bank of Canada pursuant to a general security agreement made between it and A.M.K. The bank had petitioned A.M.K. into bankruptcy.

3 On 29 May 1996, pursuant to s. 163(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as am., the trustee examined Kraus, an officer of the bankrupt corporation. During the examination, Kraus admitted that A.M.K. paid $20,000 to purchase the Footprint Licence. It is this licence which enables the holder to purchase season tickets in assigned seats for home games of Toronto's National Basketball Association team, the Raptors. Kraus also admitted that A.M.K. was licensed to obtain the tickets. However, Kraus stated that he had no idea where the relevant documentation was and that "he had never even thought about it." Kraus further admitted that A.M.K. routinely purchased tickets to Raptors games for clients to foster goodwill. Kraus also stated that "A.M.K. owns the seats."

4 Two months later, Kraus recanted the evidence he gave in May and claimed ownership of the Footprint Licence. In an affidavit dated 31 July 1996 he affirmed:

> 10. As relates to the Raptors Footprint Licence fee, I admit that in my s. 163 examination, I stated that the license in question belonged to the bankrupt corporation. At that examination I did not have the documentation with me and I had just undergone 4 hours of cross-examination. I subsequently searched my records and determined that the license was in fact owned by myself personally. Annexed hereto and marked as Exhibit "A" to this my Affidavit is a copy of the license agreement. The licensee is indicated as myself at my home address and further, it is quite clear that it is held by an individual and not a corporation. The bankrupt corporation made payments in relation to the license on my behalf. It was my intention that these funds should be set off against monies which the corporation owes to me for advances totalling approximately $105,000 which remains outstanding at year end, but the bankruptcy intervened. It is however quite clear that the license belongs to myself and not the Corporation and I made an error at my s. 163 examination.

5 Two weeks later, the matter came before Master Ferron. In his reasons dated 13 August 1996 the learned master concluded that the licence belonged to Kraus personally, not to A.M.K. He reached this conclusion for two reasons. First, he stated that "the licence is clearly shown to be in the name of the individual 'Arthur M. Kraus'. In the place designated to set out the capacity of the purchaser the word 'individual' has been inserted."

6 Second, Master Ferron appears to have concluded that A.M.K.'s role was limited to the purchase of tickets, not the licence. With respect to Kraus' testimony in his s. 163 examination, the master stated: "There is some confusion in the evidence given but in my interpretation Kraus is speaking of the purchase of the tickets themselves while the examiner appears to be referring at least to the licence."

Issue

7 The trustee seeks to overturn the learned master's decision on a single ground, namely that he erred in not holding that A.M.K. was entitled to the Footprint Licence on the basis of the doctrine of resulting trust. The trustee makes no argument on any other ground, including contract, unjust enrichment, express trust or implied

trust.

Analysis

8 The main factor in favour of Kraus' claim that he, not A.M.K., owns the Footprint Licence is the designation on the licence itself. The licensee is designated as Arthur M. Kraus. Moreover, on the line next to the typed words "Please indicate whether Licensee is an individual, partnership, corporation or other entity", the word "INDIVIDUAL" has been inserted by hand. Finally, the signature at the end of the licence is that of Arthur M. Kraus with no indication that he is signing on behalf of any other entity, including A.M.K.

9 However, although the above designations on the licence are important, they are not determinative of the issue of ownership. That is because of the doctrine of resulting trust. In his classic text, *Law of Trusts in Canada* , 2nd ed. (Toronto: Carswell, 1984), Professor D.W.M. Waters described the doctrine in this fashion, at p. 299:

> Broadly speaking, a resulting trust arises whenever legal or equitable title to property is in one party's name, but that party, because he is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner, or to the person who *did* give value for it. (Emphasis in original)

10 The category of resulting trust in issue on this motion is what has been called the purchase money resulting trust. It can potentially arise when one person pays for something but title is recorded in the name of a different person. The classic definition of a purchase money resulting trust is contained in Chief Baron Eyre's judgment in *Dyer v. Dyer* (1788), 2 Cox Eq. Cas. 92, 30 E.R. 42 (Ch.) at 43:

> The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or *successive* , results to the man who advances the money. (Emphasis in original)

In this case, A.M.K. claims that, although Kraus is formally designated as the holder of the Footprint Licence, it is A.M.K. that has the beneficial interest in the licence because it advanced the $20,000 required to purchase it.

(a) Application

11 There are three requirements in establishing a purchase money resulting trust. The first, which is common to all resulting trusts, is that the trustee has title to the property. Second, the claimant must have "supplied the whole or part of the purchase price when the property was being bought from a third party and transferred into the alleged trustee's name" (Waters, *supra*, at p. 302). Third, the claimant must prove that "he acted throughout as a purchaser" (Waters, *supra*, at p. 305).

12 In my view, A.M.K. has met all three of these requirements. First, the alleged trustee, Kraus, has title to the Footprint Licence. Second, it is clear from the record that A.M.K. paid for the Footprint Licence. It is on this point that, with respect, the learned master erred. In his reasons, he says, correctly, that "the licence to purchase and the actual purchase of tickets are separate matters". However, my reading of his reasons is that he thought that A.M.K. paid only for the tickets, not the Footprint Licence. In fact, as Kraus's. 163 examination confirms, A.M.K. paid for the Footprint Licence as well as the tickets:

> 1253.

Q. My rough understanding is that A.M.K. Investments paid something in the order of $20,000 to enable them acquire seats to Raptors games.

A. That's correct.

13 The third factor requires a somewhat more detailed analysis. What does "acted throughout as a purchaser" mean? In my view, in the context of the licence which serves as the basis for obtaining season tickets for the games of a professional sports franchise, the answer to this question depends on an analysis not only of *the purchase* of the licence but also *the use* that is made of the tickets obtained pursuant to the licence.

14 The purchase of the licence was made by A.M.K. In my view, the evidence establishes that it was also A.M.K., not Kraus, who used the tickets that were bought with the licence. The following excerpts from Kraus' s. 163 examination support this conclusion:

1258. Q. Did A.M.K. Investments go further and pay money to occupy two seats? I gather there are two stages. You buy the licence ...

A. And then you had to buy ...

1259. Q. ... to acquire the seats, then you buy the seats?

A. ... tickets, yeah.

1260. Q. Was A.M.K. Investments routinely doing that?

A. Yeah. We were in the business of selling sports merchandise.

1267. Q. Did you give these out in order to foster the goodwill of A.M.K. Investments with these customers.

A. In the past, that's what I did for years.

1268. Q. I assume that if you were doing this in February of 1996 or prior to that, you were doing it for the same reason; isn't that right?

A. Makes sense.

15 My conclusion is that all three of the requirements for a money purchase resulting trust have been met by the claimant Trustee.

16 The situation here is, in my view, different from the situation in a well-known Ontario case dealing with baseball season tickets, *Fobasco Ltd. v. Cogan* (1990), 72 O.R. (2d) 254 (H.C.). In that case, the defendant Cogan had purchased eight season tickets to Toronto Blue Jays games for many years. The plaintiffs were permitted to use six of the eight tickets purchased by Cogan. After ten years Cogan decided to keep the tickets for himself. The plaintiffs claimed that there was a resulting trust in their favour. Rutherford J. disagreed. He said, at pp. 262-3:

> The plaintiffs take the position that they bought the tickets but had them conveyed into Cogan's name, thereby rendering him a resulting trustee for them of all the interest in the tickets that he took. In order to

succeed in this contention, they must show not only that they advanced the purchase money, but that they acted as purchasers throughout. This, on the facts, they are unable to do. There is no suggestion in the evidence that any of the purchase moneys were paid in advance of Cogan having arranged for the purchase of the tickets. In fact, the purchase moneys were paid to Cogan once he had received the invoice requesting that payment be made. Moreover, it was Cogan and not the plaintiffs who acted as purchaser in the annual dealings with the Toronto Blue Jays organization regarding the renewal of his subscription for season tickets. I find that Cogan, as payor, bought the tickets for himself and agreed with the plaintiffs that upon payment by them of the price therefor they would have use of the tickets in question. In those circumstances, Cogan is not a resulting trustee and I find that a resulting trust has not arisen.

17 In my view, in this case A.M.K. is in Cogan's shoes. A.M.K. paid $20,000 for the Footprint Licence; A.M.K. purchased the basketball tickets under the umbrella of the licence; and A.M.K. purchased the tickets to foster goodwill with its corporate clients. Therefore, the licence had been used throughout by the payor A.M.K. and not by Kraus, the formal holder of the licence. There is also evidence that had it not been for A.M.K. the licence might not even be valid any longer. Clause 5 of the licence agreement states that if the licensee does not purchase season tickets for the licensee's designated seats by a specified date then the licence is terminated and the money already paid is forfeited. Kraus has admitted that it was A.M.K. that paid for the tickets that were given out to the clients. There is nothing to indicate that any tickets were paid for by Kraus. This is consistent with A.M.K.'s ownership interest in the licence because in *Fobasco* it was the owner who annually renewed the licence to maintain its validity. In the present case it is A.M.K. that maintained the status of the property in question and used the licence throughout and, therefore, has the beneficial interest in the licence.

(b) Is the Presumption Rebutted?

18 I have concluded that the claimant trustee has established the three requirements to create the presumption of a resulting trust. That is not, however, the end of the matter. A presumption is, by its very nature, rebuttable. However, the presumption of resulting trust is not lightly rebutted: see *Smith v. Barre* (1958), 15 D.L.R. (2d) 435 at 442 (Ont. H.C., per McRuer C.J.).

19 Kraus' argument in favour of the presumption being rebutted is contained in this assertion in paragraph 10 of his affidavit: "It was my intention that these funds should be set-off against monies which the Corporation owes to me for advances totalling approximately $105,000 which remains outstanding at year end, but the bankruptcy intervened."

20 There is nothing in the record to support this contention. A.M.K. is a corporation. If it had loaned $105,000 to Kraus, one would have expected to see something about such a loan in the records of the corporation. Moreover, if A.M.K. owed Kraus $105,000 - a considerable sum of money - one might have expected that Kraus would remember and mention such an important fact when questioned about the Raptors licence. He did not.

21 My conclusion is that Kraus' argument grounded in loan and set-off is an afterthought. The crucial factors are that A.M.K. paid for the Footprint Licence and purchased and used the tickets derived from the licence.

Disposition

22 The motion is granted. It is declared that A.M.K. Investments Limited is the owner of the Raptors Foot-

print Licence. It is ordered that Arthur M. Kraus sign all necessary documents to transfer the Footprint Licence to A.M.K.

23 The trustee is entitled to its costs, which, by agreement of counsel, are fixed at $1,500, payable forthwith.

Appeal allowed; declaration granted.

END OF DOCUMENT

TAB 12

***Companies Creditor Arrangement Act,* R.S.C. 1985, c. C-36, as amended**

Assignment of Agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(a) an agreement entered into on or after the day on which proceedings commence under this Act;

(b) an eligible financial contract; or

(c) a collective agreement.

Factors to be considered

(3) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

(5) The applicant is to send a copy of the order to every party to the agreement.

Restriction on disposition of business assets

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

TAB 13

Manitoba Regulation 553/88
Court of Queen's Bench Rules

PART XV

ORDERS

RULE 59

ORDERS

AMENDING, SETTING ASIDE OR VARYING ORDER

Amending

59.06(1) An order that,

(a) contains an error arising from an accidental slip or omission; or

(b) requires amendment in any particular on which the court did not adjudicate;

may be amended on a motion in the proceeding.

Setting aside or varying

59.06(2) A party who seeks to,

(a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;

(b) suspend the operation of an order;

(c) carry an order into operation; or

(d) obtain relief other than that originally awarded;

may make a motion in the proceeding for the relief claimed.