

AGENCY AND SECRET PROFITS

The agency is a fiduciary relationship, and that such a relationship involves fidelity are trite pieces of learning. Equity demands that those who occupy positions or offices of trust, in the widest sense of that word, should maintain the standards of Caesar's wife. In this regard equity transcends the common law prohibition of competition between agent and principal,¹ or servant and master.² Fiduciaries cannot acquire proprietary rights or benefits at the expense of those to whom they owe the duty of fidelity. This is at the root of the cases in which an agent or other fiduciary has been compelled to account for a profitable transaction entered into by him personally, not necessarily with any fraudulent intent, but nonetheless in circumstances in which, in equity, the advantage acquired by the agent or fiduciary had to be passed on. With the notion that such accountability should exist, even where *mala fides* is absent, there can be no disagreement. To hold otherwise is to invite fraud, impropriety and roguery. The problem is to determine the scope of such liability to account: in Stoljar's phrase, "how long do these duties continue?"³ Expressing this differently, it may be asked: at what point is someone who was previously bound by cords of fidelity, free to move and act as he wills, for his own benefit, so as to be no longer obliged to hand over profits to another? This is a problem which has arisen in connection with various kinds of agents and fiduciaries. It was at the core of the recent important case of *Boardman v. Phipps*.⁴

As regards brokers, for example, it has been held that, if effected for the avoidance of loss to the agent through failure of the principal to settle his account, the sale by a broker of his principal's shares and their re-purchase by the broker for himself is not necessarily wrongful, and will not always involve the broker in accounting to the principal for the profit made by the broker on such transactions.⁵ The line between what could, and could not properly be effected by the broker would seem to be a thin one. However, it was recognized by the House of Lords in *Christoforides v. Terry*,⁶ that where a broker indulged in this method of self-protection he was under no obligation to account. It would seem that, once the principal had not paid the broker, the broker was released from the strict duties normally annexed to his

1. *Jasperon v. Dominion Tobacco Co.*, [1923] A.C. 709.

2. *Lamb v. Evans*, [1893] 1 Ch. 218; *Robb v. Green*, [1895] 2 Q.B. 315; *Wessex Davies Ltd. v. Smith*, [1935] 2 K.B. 80; *Sanders v. Parry*, [1967] 2 All E.R. 803. Cp. the American case: *Essex Trust Co. v. Enwright* (1913), 214 Mass. 507; *Scott, Cases on Trusts*, at p. 469.

3. *Stoljar, Law of Agency*, at p. 298.

4. [1964] 2 All E.R. 187; [1965] 1 All E.R. 849 (C.A.); [1966] 3 All E.R. 721 (H.L.).

5. *Macoun v. Erskine, Oxenford & Co.*, [1901] 2 K.B. 493; *Erskine, Oxenford & Co. v. Sacha*, [1901] 2 K.B. 504.

6. [1924] A.C. 566.

position as agent. Other agents have sometimes been treated by the courts more strictly, so that even after the termination of the contractual relationship of principal and agent, the duty of fidelity remained in existence. For example, this happened where an employee made use of knowledge gleaned while in his employment to act to his advantage, and the consequential detriment of the employer, once the contract of employment terminated.⁷ By way of contrast, where the "agency" involved was of a commercial, rather than a personal kind, for example, where the agent was selling products on behalf of the principal, it has been suggested that once the agency relationship ended, no further obligation bound the agent. This arose, obiter only, however, in the case of *Zinc Corp. v. Hirsch*,⁸ where the agency ended on the outbreak of the 1914 war. In a similar case which arose out of the 1939 war, *Nordisk Insulinlaboratorium v. Gorgate Products Ltd.*,⁹ Jenkins, L. J.,¹⁰ took the view that the restriction on the utilisation by the agent of his position as agent to make a profit for himself, without being liable to account to the principal was limited to material which was strictly within the scope of the agency, i.e. insulin in solution in that case, not other forms of insulin, which, in fact, were the kinds of insulin which the agent had bought and sold for himself. Moreover the agent could make use of knowledge which was common to himself and the principal, as opposed to information which was available only to the principal. This approach suggests that, in the type of agency which was involved in that case, a laxer view could be taken of the duty of fidelity, and its concomitant duty to account. Stoljar's explanation would seem to lie in the distinction he draws¹¹ between "agents such as solicitors, parents, guardians and so on (the familiar constructive trustees upon whom equity has cast a severe fiduciary burden) and, on the other hand, agents such as brokers or other middlemen who must have greater commercial freedom". It is difficult to see why such agents should have greater freedom than others, since the freedom they would seem to be claiming is not a freedom to act for the benefit of their principals but freedom to act for themselves. This contravenes the very essence of agency. Furthermore, the suggested distinction does not satisfactorily explain the situation of directors, who, from the standpoint of agency, would seem to be classifiable with brokers, etc., rather than with parents and guardians, yet are treated very strictly indeed, according to the case of *Regal (Hastings) Ltd. v. Gulliver*.¹²

7. *Carter v. Palmer* (1842) 8 Cl. & F. 657; *Measures Bros. v. Measures*, [1910] 1 Ch. 336. See the cases cited in note 2, supra. Cf. *Scott on Trusts*, Vol. IV, ss 505, 505.1.

8. [1916] 1 K.B. 541.

9. [1953] 1 Ch. 430.

10. *Ibid.*, at pp. 445 et seq.

11. *Op. cit.*, supra. Note 3, at p. 298.

12. [1942] 1 All E.R. 378 (which was distinguished on slightly different facts in *Lindgren v. L. & P. Estates Co. Ltd.* [1968] 1 All E.R. 917).

There, because the landlord of premises which were to have been leased by a subsidiary company of the Regal company would not lease them to the subsidiary unless certain conditions as to the financial state of the subsidiary company were fulfilled, the directors of the Regal company decided that the Regal company should invest part of the sum required by the landlord in the subsidiary company and the rest, which was the bulk of the sum, should be subscribed by the directors of the Regal company and its solicitor. As a result the subscribers became owners of shares in a subsidiary of the Regal company, which shares ought to have been the property of the Regal company. When those shares were later sold at a profit, it was held by the House of Lords that the directors were in a fiduciary relationship to the Regal company; that they made a profit on the shares in the course of their execution of their office as directors: and therefore the profiteering directors were liable to account to the company. It is relevant to point out that, in the Court of Appeal, Lord Greene, M.R., refused to accept as authoritative a proposition to the effect that: "Where a Board of Directors considers an investment which is offered to their Company and bona fide comes to the conclusion that it is not a investment which their Company ought to make, any Director, after that Resolution is come to and bona fide come to, who chooses to put up the money for that investment himself must be treated as having done it on behalf of the Company, so that the Company can claim any profit that results to him from it."

The language of Lord Russell in the House of Lords in which he commented on this passage in the judgment of Lord Greene,¹³ has been interpreted in England and Canada as indicating that, within the limits mentioned by Lord Greene, a director of a company can make a personal profit although he is utilising an opportunity derived from his tenure of the office of director of a company.

This, indeed, is the basis of the distinction drawn between the facts of the *Regal* case and those of the case before them, by the Supreme Court of Canada in *Peso Silver Mines Ltd., (N.P.L.) v. Cropper*.¹⁴ An investment in some mining claims was offered to the board of directors of a mining promotion company and rejected, on the ground that it was not in the interests of the company to undertake the investment. No personal or ulterior motive on the part of any director was involved. Subsequently, one of the directors, who was employed at a substantial salary by the company, eventually becoming Executive Vice-President, was approached by a geologist who was

13. *Ibid.*, at p. 391.

14. (1966) 58 D.L.R. (2d) 1.

retained by the company and as a result he and some other persons subscribed money to take up the claims in question. A company was formed to do so and the director in question became a shareholder in and director of such company. Later the company which had previously rejected the investment concerned was taken over by another company. Friction developed between the directors. Eventually, the director who had invested in the mining claims in issue resigned and an action was brought to claim the benefit of his holding in the company which had taken up those claims. The Supreme Court of Canada, holding that the director in question was not liable to account for the shares in the company which had invested in the mining claims, distinguished the *Regal* case. After quoting extensively therefrom to prove the principle enshrined in the case, Cartwright, J., delivering the judgment of the court, stated¹⁵ that it was impossible to say that the director in question had obtained the interests he held in the other company by reason of the fact that he was a director of the *Peso Silver Mines* company and in the course of the execution of that office. Proof of this, according to the *Regal* case, was necessary before accountability could arise. Moreover, there was no suggestion that the original offer to the *Peso Mines* company was accompanied by any confidential information, so as to make it possible for the director who invested in the mining claims to decide on such a policy by virtue of some secret knowledge gleaned as a consequence of his position as a director of the original offeree. Thus, according to the Supreme Court of Canada, affirming the majority of the British Columbia Court of Appeal,¹⁶ what the ex-director of the *Peso Mines* company had done was quite outside the range and scope of his activities as a director of such company.

Criticism of this decision had been voiced. The approach in this case to the problem of deciding whether or not a director should be made to account for profits accruing from the exploitation of a 'business opportunity' (to use the American phrase)¹⁷ has met with disapproval on the ground that it failed to differentiate between a failure by the company to utilise the opportunity originally to its own advantage because of unwillingness to undertake the risk involved or because of impediments such as financial inability. Whereas it might be improper to penalise a director who profited in the former situation, it would not be as harsh to do so where it was the company's lack of means, or some similar reason, which enabled the director to seize the chance to make something for himself.¹⁸ This distinction could be

15. *Ibid.*, at p. 8.

16. (1965) 56 D.L.R. (2nd) 117, Norris, J. A., dissenting.

17. *Corporate Opportunity* (1960) 74 H.L.R. 765, in which it is said, at p. 768, that the applicable test is whether the opportunity is closely associated with the existing and prospective activities of the corporation—the so-called "line of business" test.

18. Prentice, (1967) 30 M.L.R. 450 at p. 454.

said to be vital in the *Regal* case, and, as will be seen, in the case of *Boardman v. Phipps*. Furthermore, the *Peso Mines* decision does not clarify whether the director was free to retain his benefit because the company's rejection of the opportunity removed any conflict of interest on the part of the director or could be interpreted as being tantamount to condonation or authorisation of the director's conduct.¹⁹ Again this could be important, more especially perhaps in relation to directors of companies, but, possibly, also in the context of the facts in *Boardman v. Phipps*. With all respect to the cogent arguments of the learned commentator in the pages of the *Modern Law Review*, it is an exaggeration to say with him²⁰ that "the *Peso* decision is retrogressive because it further dilutes the efficacy of . . . negative techniques for enforcing directors' duties." Looked at in the wider context of a fiduciary's accountability, it may be suggested that the rationale of the *Peso Mines* case is a step in the right direction, away from a somewhat strict attitude and towards greater flexibility in the law and more freedom for agents and others similarly placed. So far from it being necessary to make directors more strictly accountable, as the criticism of the *Peso Mines* case appears to suggest, a better way of protecting shareholders in companies, as pointed out in a fairly recent American discussion,²¹ would appear to be to guarantee the fair utilisation of the corporate electoral process, in other words to involve the shareholders more directly in the decision-making process. Of course, underlying this is the distinction between personal use of information or knowledge gained whilst acting as a director and personal use of the company's property, including its intangible, incorporeal property. The latter should never be permitted to lead to personal profit. The former need not be considered quite as strictly.

Seen against this background of variation in the way fiduciaries in general are regarded, and the distinctions that can be, even if they are not always drawn, the decision in *Boardman v. Phipps*²² appears to the present writer to be harsh, restrictive and retrogressive. It seems to make the fiduciary duties and responsibilities of an agent extend and endure beyond the limits which have been suggested by the cases which have been considered in the preceding pages. How and why this comes about demands a detailed review of the facts of the case and the judgments that were delivered in the three courts before which it came.

A quantity of shares in a private company were purchased by a solicitor and one of the beneficiaries under the will of a testator. The

19. *Ibid.*, at p. 453.

20. *Ibid.*, at p. 455.

21. *Loc. cit supra*, note 17 at p. 778.

22. *Supra.*, note 4.

solicitor (B) had acted as solicitor to the trustees of the will. As such he had been involved in an attempt to increase the holding of the trust of shares in the company in question. The purpose of this was to improve the company, and thus improve the financial position of the trust. This attempt failed. Following this, further negotiations were undertaken by B (and a beneficiary, T.P.), with the knowledge of some, but not all of the trustees (one of them being the senile widow of the testator). It was pointed out that, for practical reasons, the shares would be purchased in the names of B and T.P. A reply from one trustee suggested that there was some doubt about the source of the finance for this purchase. Another letter from B raised the question whether the trustees had any objection to purchase by B and T.P., in view of the fact that the trustees had earlier declined to buy the shares themselves, because, according to one of the trustees, an accountant intimately connected with the affairs of the company, this could have been to throw good money after bad. Two of the trustees raised no objection to the personal acts of B and T.P. It must be pointed out that, in consequence of the investigations of the company by B when he was seeking to improve the position of the trust, he and T.P. realized that, if enough shares were obtained, improvements could be made which would make the company more profitable, and therefore render the shares more valuable. In the light of the apparent approval of the trustees who had been consulted, B and T.P. bought shares, which subsequently appreciated. One of the beneficiaries under the trust then claimed that B and T.P. held a certain proportion of the shares, i.e. five-eighteenths, which was the extent of his interest in the testator's property under the will, in trust for him. He therefore demanded a declaration of such trust and an account of the profits made by B and T.P. from the purchase of the shares.

The claim of the plaintiff was founded upon the argument that the solicitor, B, and the beneficiary, T.P., were agents, in a fiduciary position, who could not make a secret profit: that the knowledge which they gained as to the likelihood of financial gain from the company was obtained in their capacity as agents, so that any advantage reaped from its use belonged to the principals, i.e. the beneficiaries under the will. An alternative way of looking at the situation was to say that B and T.P. were like trustees who could not make use of trust property detrimentally to the beneficiaries under the trust: that the knowledge in question was trust property: and that whatever accrued from putting it to use accrued to the benefit of those entitled under the will. Only if the trustees of the will, with full knowledge of what B and T.P. were about to do, had assented to their acting in their own interests would any different result follow. Since only two out of the three trustees, at the very most, knew the full story and could be con-

sidered as having assented to the line of conduct engaged in by B and T.P., it was not possible for the latter to plead that they had acted with the full understanding and consent of the trustees, and, through them, the beneficiaries under the will.

Several problems were raised by these contentions: and these problems in turn involved the different courts in a consideration of some fundamental points. Of these, one, namely, whether, in all the circumstances of the case it was possible to treat B and T.P. as agents of the trustees or the beneficiaries under the will, or of both, I have discussed elsewhere, and in another context.^{22a} Accepting, for present purposes, that the defendants were agents, what fall to be discussed here are first, whether the knowledge obtained about the future prospects of the company could be taken as property, or as something very like property: secondly whether the conduct of B and T.P., though arising out of their earlier connection with the activities of the will and the trust it created, could be said to be still sufficiently close to such duties as were imposed upon them by virtue of that earlier connection, to warrant the conclusion that what they did was within the scope of whatever agency, or similar relationship there existed so as to involve the further decision that the profit which accrued to them was some kind of 'secret profit' for which they were accountable.

All three courts before whom this problem came held that the defendants were liable to account for the profit they had made, on the basis of agency, or, at the very least, some kind of fiduciary relationship by which they were bound, because the knowledge used to make the profit was property belonging to the trust of which the plaintiff was one of the beneficiaries, or was knowledge obtained and utilized by the defendants within the scope of their agency or other fiduciary relationship.

Wilberforce, J., at first instance,²³ discussed the cases relied upon by the defendants as authority for the proposition that the opportunity to make a profit out of the agency or other relationship was not enough to affix them with liability to account,²⁴ but placed greatest reliance upon the decision in *Regal (Hastings) Ltd. v. Gulliver*.²⁵ This decision afforded a modern illustration of the "broad principle of equity developed by this court," i.e. the Court of Chancery, "in order to ensure that trustees and agents shall not retain a profit made in the course

22a. *Fridman, Establishing Agency* (1968) L.Q.R. 224.

23. [1964] 2 All E.R. 187 at pp. 201-202.

24. *Viz. Whitney v. Smith* (1869), L.R. 4 Ch. App. 513; *Re Corselles* (1887), 34 Ch. D. 675; *Aas vs. Benham*, [1891] 2 Ch. 244; *Parker v. McKenna* (1874), L.R. 10 Ch. App. 96.

25. [1942] 1 All E.R. 378: ante.

of or by means of their office.”²⁶ The case also established: (i) that for the plaintiff in that case to succeed, it was not necessary to show that it was the duty of the directors to secure the shares in question: (ii) that it was no answer to the claim that the plaintiff could not have made the profit himself: (iii) that it was irrelevant that the making of the profit involved the taking of risks.²⁷ Clearly, on that basis, the defendants in the *Boardman* case could not succeed in their argument that they were entitled to retain the profit they had made. However, Wilberforce, J., went on to state that it would be “unsafe to say that the mere use in any circumstances of *any* knowledge or *any* opportunity which came to the trustees or agent in the course of his trusteeship or agency made him liable to account.”²⁸ The cases relied on by the defendants showed that, “in every case,” said the learned judge,²⁹ “it is necessary to consider two things: first, whether the action which brought about the profit was either within or without the scope of the duties of the office or employment Secondly, whether the knowledge of which profitable use was made can be described as the property of the trust or of the business.” Opportunity too had to be considered. Indeed, though opportunity alone might not suffice, if added to the other elements it might add to their weight. Applying these principles and tests to the case before him, Wilberforce, J. held that the defendants were liable to account.

It is interesting to note that the judge admitted that the situation of trustees gave rise to greater difficulty than that of partners or directors, in that the duties of trustees were less capable of definition. Here, indeed, is the core of the problem. How is it possible to state with any sufficient degree of clarity or particularity the extent to which the conduct of a trustee, or an agent, is within the scope of his fiduciary duties? Should this be the aim of the law? Or should the entire question be left so vague as to enable the courts to decide any individual case in the light of what may be thought fair and reasonable, if not equitable, having regard to all the circumstances?

Perhaps the solution is to be found by stressing and employing the idea of property. This would appear to have been the approach favoured by Lord Denning, M. R., in the Court of Appeal,³⁰ as well as by Russell, L. J.,³¹ Pearson, L. J., the third member of the court, not basing his decision on any such ground. Lord Denning, fusing all the various cases and instances of persons in a special relationship,

26. [1964] 2 All E.R. 187 at p. 202.

27. *Ibid.*, at p. 203.

28. *Ibid.*, italics supplied.

29. *Ibid.*

30. [1965] 1 All E.R. 849 at p. 856.

31. *Ibid.*, at p. 864.

whether of agency, service, or otherwise, involving an obligation of some sort to be faithful, founded the liability to account upon the use of property, a position of authority, or information or knowledge which the person liable was employed to collect or discover "*or which he has otherwise acquired*, for the use of his principal".³² He speaks, throughout this passage, in terms of the duty of an agent, even though the cases upon which he relies are not all examples of ordinary, or pure agency. The distinction is drawn between such use and taking advantage of an opportunity of earning money, albeit one arising in consequence of employment as an agent, as long as it does not involve the use of the "master's (*sic*)" property, or a breach of contract. Thus the crucial test is whether the agent, or other fiduciary, has made use of his principal's property. In this respect, Lord Denning was content to accept Wilberforce, J.'s finding that the knowledge of which profitable use was made could properly be described as the 'property' of the trust of which the plaintiff was a beneficiary. That finding was decisive of the case.³³

The House of Lords were divided on this issue, which, in the light of the seeming unanimity of opinion in the lower courts may be considered surprising.

Of the majority, Lord Cohen³⁴ thought that the information about the value of the shares was obtained as a result of acting on behalf of the trustees. Information i.e. knowledge, was not property in the strict sense of the word (as it was for Lord Denning). Yet, because of the source of the information, the defendants were liable to account. Lord Hodson³⁵ regarded information as a kind of property, at any rate where, as in this case, it was confidential information which was capable of being and was turned to account. Information to come within this definition must be special.³⁶ Lord Hodson did not define what he meant by 'special'.³⁷ All he said was that it must include that confidential information given to the defendants, B and T.P., which was detailed in the judgment of Wilberforce, J.,³⁸ (which related to the balance sheet of the company, its Australian and other assets, trading figures, profits, turnover, etc., in fact everything which could possibly affect the value of the company). In other words, this was all information which could have been used by the trustees for

32. *Ibid.*, at p. 856, italics in the original.

33. *Ibid.*, at p. 857.

34. [1966] 3 All E.R. 721 at p. 743.

35. *Ibid.*, at pp. 745-746.

36. *Ibid.*, at p. 747.

37. Cp. Lord Hodson's use of the expression "special relationship", without any definition of what he meant thereby, in his speech in *Hedley Byrne v. Heller & Partners*, [1963] 2 All E.R. 575 at pp. 595-601.

38. See: [1964] 2 All E.R. 187 at p. 205.

the benefit of the trust: therefore it was information which was sufficiently confidential to merit its reservation to the trustees and to make it improper for B and T.P. to employ to their own advantage. In this respect, the facts of this case were distinguishable from those in *Aas v. Benham*,³⁹ where a partner in a firm of shipbrokers used information obtained as a member of the firm to assist in the formation of a joint-stock shipbuilding company, of which he became a salaried director. The Court of Appeal, reversing Kekewich, J., held that he was not liable to account to his partners for the profits and salary made by him in connection with the new company, because the business of that company was beyond the scope of, and did not compete with the business of the partnership. There was only liability to account where a partner made use of information which could be used for the purposes of the partnership, of which the information involved in that case was not an example.⁴⁰ Lord Guest⁴¹ also considered that information and knowledge could be trust property. Since "the weapon used to obtain this information was the trust holding", the proceeds of the information must belong to the trust.

In reaching this conclusion, the majority of the House of Lords were much influenced by the decision in *Regal (Hastings) Ltd. v. Gulliver*.⁴² Lord Cohen⁴³ applied this case to the facts of *Boardman v. Phipps*, and rejected the propounded distinction that the information about the shares in the *Boardman* case could never have been utilised by the trustees to buy shares in the company, whereas the *Regal* company could have bought, and always intended to buy, the shares involved in the *Regal* case. Lord Hodson,⁴⁴ while recognising this distinction on the facts, held that it made no difference. Although the trustees in the *Boardman* case would not have bought the shares, because the accountant-trustees would not advise such purchase, the inability of a trust to purchase made no difference to the liability of agents, or trustees, or directors, i.e. all those in a fiduciary position, if liability arose in some other way. This was the point in the old case of *Keech v. Sandford*.⁴⁵ Here, as in the *Regal* case, there was liability to account based on abuse of information and opportunity. Hence the suggested distinction between the cases was not of any relevance. Lord Guest⁴⁶ also applied the principles relating to the duties of fiduciaries which were enunciated at length in the *Regal* case, with-

39. [1891] 2 Ch. 244.

40. *Ibid.*, at pp. 256, per Lindley, L. J., 258 per Bowen, L. J.

41. [1966] 3 All E.R. 721 at p. 751.

42. [1942] 1 All E.R. 378: discussed ante.

43. [1966] 3 All E.R. 721 at pp. 742-743.

44. *Ibid.*, at p. 747.

45. (1726) Sel. Cas. Ch. 61.

46. [1966] 3 All E.R. 721 at pp. 751-752.

out seeking to distinguish that case from the instant one on any factual ground.

Not so the dissentients. They distinguished the *Regal* case, stating that the facts of that decision were different, "so remote", in Lord Upjohn's phrase,⁴⁷ from those of *Boardman v. Phipps* as to make the earlier case inapplicable. Whereas the *Regal* case was concerned with trust property, the instant case was "one concerned . . . with property which was not trust property or property which was ever contemplated as the subject matter of a possible purchase by the trust".⁴⁸ This view of the facts of the *Regal* and *Boardman* cases depended upon the attitude adopted towards the suggestion that information which may be used to gain a profit could be said to be property. On this the dissentients held very different views from those put forward by Lords Cohen, Hodson and Guest, described above.

Lord Dilhorne⁴⁹ did not think that the information in this instance could be equated with the shares held by the trust, and treated as property. In holding this, his lordship relied on a statement of Lindley, L. J., in *Aas v. Benham*⁵⁰ to the effect that "it is not the source of the information, but the use to which it is applied which is important in such matters." Information could be treated as property, and so subject to a trust, where the use of information was valuable to the trust and was a use in which the trust had a vested interest: relying in this respect upon the language of Bowen, L. J., in *Aas v. Benham*.⁵¹ This test was not applicable in the instant case. Lord Upjohn,⁵² taking a broader view, denied that information was property. But "equity will restrain its transmission to another if in breach of some confidential relationship". Knowledge learned by a trustee in the course of his duties as such is not in the least property of the trust and in general may be used by him for his own benefit or for the benefit of other trusts. To this there were exceptions, i.e. if it were confidential information involving a breach of confidence if it were communicated to another: if it had been acquired in a fiduciary capacity. Neither of these exceptions applied here. Therefore the knowledge and information in question were not subject to any restriction as to their use.

The effect of the judgments of the majority, it is suggested, is to broaden in scope the previous law relating to the position of a person in a fiduciary or quasi-fiduciary situation with regard to knowledge

47. *Ibid.*, at p. 757: cp. Viscount Dilhorne, *ibid.*, at p. 731.

48. *Ibid.*, at p. 757 per Lord Upjohn.

49. *Ibid.*, at pp. 734-735.

50. [1891] 2 Chap. 244 at p. 256.

51. *Ibid.*, at p. 258.

52. [1966] 3 All E.R. 721 at p. 759.

or information acquired by him. Perhaps it was the rather special circumstances of this case: perhaps it was the way that the solicitor and T.P. were able to discover all the secrets, potentialities, and opportunities inherent in the company in which the trust held shares: whatever the reason, it may be suggested that it was unnecessary to formulate the doctrine quite as widely as the majority of the House of Lords did in order to solve the problem. In deciding as they did, however, it may be that the majority of the House of Lords took into account the question of opportunity.

That an agent or trustee may not permit his interest to conflict with his duty was accepted by all their lordships as a basic principle. The division of opinion occurred over the question whether the conduct of the solicitor, B, and the beneficiary T.P., did involve such a conflict. The majority held that it did. The purchase of the shares was an act which occurred within the scope of the 'agency'. The minority thought that no such conflict took place. Indeed Lord Dilhorne⁵³ denied that the question ever arose as an issue in the case. This argument really centred around whether it could be said that the earlier employment of B and T.P., in the negotiations afforded them the opportunity to purchase the shares on a subsequent occasion. Hence they were enabled to enrich themselves at the cost of depriving the trust of the benefits to be derived from such a purchase. Regardless of the fact that the opportunity to enrich the trust had been provided and turned down, it was still incumbent on B and T.P. to disgorge the profits acquired by them upon the trust.

It may be suggested that this approach considerably widens the scope of an agent's duty and the correlative rights of his principal. It may be compared with the converse position of a master in respect of his vicarious liability for his servant's acts. In *Leesh River Tea Co. Ltd. v. British India Steam Navigation Ltd.*,⁵⁴ it seems to have been held that the fact that a servant's employment provided him with the opportunity to commit a crime and so cause damage to a third party, would not of itself involve his master in vicarious liability. More was required than a mere casual connection between the employment and the damage.⁵⁵ Yet the majority of the House in *Boardman v. Phipps* seems to be suggesting that the opportunity to make a profit is enough to affix the agent or trustee with liability to account for such profit.

53. *Ibid.*, at p. 736.

54. [1966] 3 All E.R. 593 distinguishing on the facts the decision of the Court of Appeal in *Morris v. Martin & Sons*, [1965] 2 All E.R. 725.

55. Is this the reason for the decision in *O'Reilly v. National Road and Tramway Appliances*, [1966] 1 All E.R. 499? If so, how can these cases be reconciled with the decision in *Century Insurance Co. Ltd. v. Northern Ireland Road Transport Board*, [1942] A.C. 509?

Whereas the common law appears to adopt a more limited view of the scope of a servant's employment for purposes of vicarious liability, equity, with greater rigidity and rigour, gives the impression of enlarging the scope of an agent's agency in order to render the agent liable to account to his principal for so-called "secret" profits. Is the difference based on the distinction between a servant, whose legal situation is regulated by the common law, and an agent, the rights and liabilities of whom are governed partly by common law and partly by equity? Is the difference between liability of the superior and liability to the superior at the bottom of this divergence? Whatever it be, there can be no denying that these cases afford a striking contrast. The case of *Boardman v. Phipps* seems to represent a high-water mark of an agent's liability, an extension not only of the notion of agency, but also of the scope of agency. One wonders whether their lordships would have taken the same view had the question before them been not the liability of the agent to the principal but the liability of the principal for something done by the agent.⁵⁶

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56. The one ameliorating factor seems to be the willingness of the House to permit the innocent, i.e. non-fraudulent "agents" to be awarded some amount by way of compensation for their work and skill in obtaining the shares and so acquiring a profit for the trust which the trustees were unwilling to acquire by and for themselves. Does this represent a pang of conscience or doubt as to the reasonableness or correctness of the decision on the main issue? In the Court of Appeal, Lord Denning was of the opinion that the "agents" were entitled as of right to some such compensation on the basis of unjust enrichment: [1965] 1 All E.R. 849 at pp. 857-858. Pearson and Russell, L.J.J., seem to have been doubtful: *Ibid.*, at pp. 864, 865. The legal basis for the decision on this aspect of the case is a matter of debate which may be said to call for separate investigation.

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