CHAPTER NINE

THE CONSTRUCTIVE TRUST

I. INTRODUCTION

In one form or another, the constructive trust has been recognized in English law since the 17th century.[1] Given its long lineage, it is extraordinary that there is still uncertainty today in Canada and other jurisdictions about the exact nature of the constructive trust and how it arises. To a considerable extent, the uncertainty arises because of equity's flexibility

1 See generally Albert Oosterhoff, Robert Chambers & Mitchell McInnes, *Oosterhoff on Trusts*, 9th ed (Toronto: Thomson Reuters, 2019) at 674-75 [Oosterhoff]; Donovan WM Waters, Mark Gillen & Lionel Smith, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) at 477ff [*Waters*]; Dennis Pavlich, *Trusts in Common-Law Canada,* 3rd ed (Markham, Ont: LexisNexis, 2019) ch 11.

in responding to new social needs, but also because some of the earlier iterations of the constructive trust have been recharacterized by some, but not all, courts in common law jurisdictions as responses to the umbrella cause of action—unjust enrichment.

Most definitions of the constructive trust start with the proposition that the constructive trust, unlike the express trust and perhaps the resulting trust, arises independently of the express or implied wishes of the parties. Even this, however, is a somewhat dubious proposition when the constructive trust is imposed as a means to carry out the intention of testators in, for example, the cases of mutual wills and secret trusts (as described in Section V, below).

The constructive trust provides a claimant with proprietary rights. Proprietary rights are rights *in rem* in the subject matter of the trust; they are rights in property against the whole world. Proprietary rights may be contrasted with rights *in personam*; these are rights not in the property, but against particular persons.

Before we attempt to tackle the theories underlying the constructive trust, however, it is necessary to state three basic propositions. First, there can be no constructive trust unless there is a property to which the trust can attach. As we shall see, one of the challenges in determining whether a constructive trust arises is in identifying the property. Second, the constructive trust is an equitable discretionary remedy. Therefore, notwithstanding the availability of a constructive trust, the courts will generally prefer to award an *in personam* monetary remedy. This is understandable because a monetary award supports individual choice—that is, how the obligation is to be met—and may be less disruptive to existing property rights. This chapter attempts to describe not only in what circumstances a right arises in which a constructive trust is a possibility, but also when a constructive trust will be recognized or awarded in preference to a constellation of other "remedies." Third, there are no formal requirements necessary to create a constructive trust. To hold that a constructive trust has to be in writing would be to undermine the essence of a trust based in equity and good conscience, and could allow the requirement of writing to become an engine for fraud.[2] It is therefore not required.

From a claimant's perspective, the constructive trust has a number of important advantages. On the recognition of a constructive trust, the claimant can assert a right to a particular thing. This is important if the thing is unique or has some special significance for the claimant. Further, because the claimant has property rights to the particular thing, it follows that the recognition or imposition of a constructive trust may be able to capture any increase in the value of the property and the profits therefrom from the moment the trust arises.

The recognition of a constructive trust may also be advantageous from a practical and process perspective. *Lac Minerals Ltd v International Corona Resources Ltd*[3] (discussed in Section III.D, below) is a case where at least some members of the Court sought to impose a constructive trust on a mining property because of the difficulty of valuing the property and future profits for the purpose of determining a monetary award. Also, it may be easier for a claimant to execute a judgment if that claimant acquires proprietary rights. Although, as we will see in *Pettkus v Becker*[4] (extract in Section IV.A, below), even a proprietary remedy did not help Ms Becker to secure the proceeds of her judgment against an obstructive former partner. Limitation periods, too, may be different—and longer—in some jurisdictions for interests in a trust. This varies from province to province, so it is important to consult the wording of

2 See *Bannister v Bannister*, [1948] 2 All ER 133, [1948] WN 261 (CA).

3 [1989] 2 SCR 574 [*Lac Minerals*].

4 [1980] 2 SCR 834 [*Pettkus*].

the particular legislation.[5] The equitable proprietary interest also means that when the defendant transfers or exchanges the original property upon which a trust has been imposed, the tracing rules can be used to follow, or identify a substitute, for the original property.[6] The tracing rules are briefly described in Chapter 10 on Remedies. Sometimes courts fail to fully articulate this process. See, for example, *Attorney-General for Hong Kong v Reid*,[7] discussed in Section III.C.

Perhaps the most important attribute of the constructive trust is its ability to preserve the assets of the trust from the unsecured creditors of the defendant in insolvency. In other words, the constructive trust holds its assets on behalf of the claimant, not the defendant, and therefore the asset cannot be attached by the defendant's creditors. As we shall see, the balancing of the rights of the claimant "against" those of the defendant's creditors has been the subject of debate in both the courts and academia.[8]

There are two ways to think of a constructive trust. First there is the traditional "institutional" (or substantive) constructive trust. The second is as a "remedial" constructive trust. The institutional constructive trust is described in English and Canadian jurisprudence as a trust that arises in generally predictable fact situations based on precedent. Thus, the key to knowing when an institutional constructive trust arises is to know in which factual situations the courts have found it to have arisen in the past. The law also has evolved over time to apply to new situations prescribed by judges through the process of inductive logic.

This model of the institutional constructive trust contemplates trustees as having the same powers and duties, modified for the particular circumstances, as an ordinary trustee. As one commentator has written, the institutional constructive trust is neither a cause of action nor a remedy.[9] The institutional constructive trust has often been imposed for breach of a fiduciary duty. The connection is obvious: a fiduciary improperly secures trust property and is considered to be holding it for the true beneficiaries on a constructive trust.

The courts have also recognized the institutional constructive trust as a means to perfect the intention of a settlor by enforcing secret trusts and mutual wills. Constructive trusts have also been imposed to prevent fraud under the *Statute of Frauds*[10] and other legislation. These trusts will be reviewed in Section V of this chapter. This chapter will not consider specifically enforceable contracts for sales, especially where the vendor of land has been held to hold the land on a constructive trust for the purchaser, or the mortgagee of reality who holds the equity of redemption for the mortgagor. These trusts are rarely referred to nowadays by the courts in trust terms.[11]

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5 See generally *Limitation Act*, SBC 2012, c 13, s 5; British Columbia, Ministry of Justice, "The New Limitation Act Explained," online (pdf): <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/legislation-policy/limitation-act/la_explained.pdf>; *Limitations Act*, SO 2002, c 24 (actions against trustees, will be treated in the same manner as claims against other defendants except for cases regarding beneficiary's rights in respect of land and certain rents upon an express trust); *Limitation of Actions Act*, RSNS 1989, c 258, s 27(1). But see Peter D Maddaugh & John D McCamus, *The Law of Restitution* (Toronto: Thomson Reuters, 2004) (loose-leaf) at para 3:500.30. [*McCamus*].

6 *Re Diplock*, [1948] ch 465 (CA). In Canada today, it is not thought necessary for there to be a pre-existing fiduciary relationship for an equitable proprietary right that can be traced to exist. See McCamus, *ibid* at 7:200.

7 [1994] 1 AC 324, [1994] 1 All ER 1 (PC) [*Hong Kong v Reid*].

8 Among the cases below, see in particular the approaches of McLachlin J in *Soulos v Korkontzilas*, [1997] 2 SCR 217 [*Soulos*] in Section II, which can be contrasted with the approach of La Forest J in *Lac Minerals*, *supra* note 3, in Section III.D.

9 Waters, *supra* note 1 at 481.

10 29 Car 2 c 3 (1677) (UK) and the provincial statutes that have replaced it in most Canadian jurisdictions.

11 But see Oosterhoff, *supra* note 1 at 814-17; McCamus, *supra* note 5 at para 5:200.

The second way to view a constructive trust is as a remedy for unjust enrichment—hence the remedial constructive trust. To quote Dickson J in the seminal case of *Pettkus v Becker* regarding property rights between a conjugal couple, "the principle of unjust enrichment lies at the heart of the constructive trust."[12] He continued, "there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for an enrichment."[13] The only function of a remedial constructive trust in this formulation is to transfer property from a person unjustly enriched to a person unjustly deprived.

Not unexpectedly, the time the constructive trust arises has been an issue of some controversy before the courts. The property covered and the rights of third parties, especially in insolvency, are affected by the time at which the constructive trust is recognized. One view is that an institutional constructive arises through operation of law when the events giving rise to it have occurred.[14] On the other hand, the remedial constructive trust, being remedial, should take effect when it is declared by the court.[15] The best view would appear to be that the remedial constructive trust arises at the date of its decree by the court, but that the court can apply it at whatever date it deems appropriate.[16]

The discussion in this chapter is divided into seven sections. Section II examines the influences on the present Canadian model of the constructive trust and reproduces the part of *Soulos v Korkontzilas*[17] that suggests, controversially, that there is a Canadian "third way" regarding the constructive trust. Section III looks at the "wrongs" for which the English courts have traditionally recognized a constructive trust. Canadian courts have developed rules to determine when a constructive trust will be recognized in those circumstances and these rules are analyzed. Section IV addresses the cause of action of unjust enrichment and when the exceptional remedy of a constructive trust will be awarded. This section also compares the rules for awarding the constructive trust for wrongs and unjust enrichment when a defendant is insolvent. Section V examines constructive trusts that arise because of equitable fraud and attempts to perfect parties' intentions. Section VI briefly considers the legal position of an individual who is involved in a breach of a fiduciary duty, but who is not a fiduciary herself. The stranger is treated "as if" she is a constructive trustee. Finally, Section VII looks at the jurisdiction of the Tax Court of Canada and whether possible equitable remedies can be recognized by the Court for the purposes of determining the tax position of taxpayers.

II. TOWARD A CANADIAN THEORY OF THE CONSTRUCTIVE TRUST

According to McLachlin J (as she then was) in *Soulos v Korkontzilas*, the constructive trust arises "where good conscience so requires."[18] What does that mean? You may be excused if you find this rubric impossibly vague. Was the law arising from the institutional constructive

12 *Pettkus*, *supra* note 4 at 846.

13 *Ibid*.

14 *Westdeutsche Landesbanke Girozentrale v Islington LBC*, [1996] AC 669 (HL) at 714.

15 See *Atlas Cabinets & Furniture Ltd v National Trust Co* (1990), 68 DLR (4th) 161 at 173, 45 BCLR (2d) 99 (CA) in which Lambert JA stated: "The remedial constructive trust must be distinguished from the substantive constructive trust which the court declares to have arisen, as a result of the conduct of the parties, and by the force of that conduct alone, at the earlier time when the relevant conduct occurred."

16 For a discussion of this issue see McCamus, *supra* note 5 at para 5:200.70.

17 *Supra* note 8.

18 *Supra* note 8 at para 34.

trust still relevant? Or did the rules relating to the remedial constructive trust now apply? Or is there a Canadian third way, which is an amalgam of both approaches?

Soulos v Korkontzilas
[1997] 2 SCR 217

[The trial judge held that the defendant had breached his fiduciary duty to the plaintiff, but that the plaintiff could not succeed in obtaining a constructive trust remedy because the constructive trust was an alternative to damages, and the plaintiff had not suffered any damages. The Ontario Court of Appeal, by a majority, reversed the trial judge's decision, holding that he had based his discretion on a wrong principle, and instead imposed a constructive trust. The Ontario Court of Appeal did not question the trial judge's finding that the real estate broker was in breach of a fiduciary duty in failing to refer the owner's counteroffer to the plaintiff. Thus, the main issue was the appropriate remedy.

In the Supreme Court, McLachlin J held that the appeal should be dismissed. Sopinka and Iacobucci JJ dissented.]

McLACHLIN J (La Forest, Gonthier, Cory, and Major JJ concurring): ...

[14] The appeal thus presents two different views of the function and ambit of the constructive trust. One view sees the constructive trust exclusively as a remedy for clearly established loss. On this view, a constructive trust can arise only where there has been "enrichment" of the defendant and corresponding "deprivation" of the plaintiff. The other view, while not denying that the constructive trust may appropriately apply to prevent unjust enrichment, does not confine it to that role. On this view, the constructive trust may apply absent an established loss to condemn a wrongful act and maintain the integrity of the relationships of trust which underlie many of our industries and institutions.

[15] It is my view that the second, broader approach to constructive trust should prevail. This approach best accords with the history of the doctrine of constructive trust ... and the purposes which the constructive trust serves in our legal system.

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[17] The history of the law of constructive trust ... suggests that the constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in "good conscience" they should not be permitted to retain. This served the end, not only of doing justice in the case before the court, but of protecting relationships of trust and the institutions that depend on these relationships. These goals were accomplished by treating the person holding the property as a trustee of it for the wronged person's benefit, even though there was no true trust created by intention. In England, the trust thus created was thought of as a real or "institutional" trust. In the United States and recently in Canada, jurisprudence speaks of the availability of the constructive trust as a remedy, hence the remedial constructive trust.

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[19] The situations in which a constructive trust was recognized in England include constructive trusts arising on breach of a fiduciary relationship, as well as trusts imposed to prevent the absence of writing from depriving a person of proprietary rights, to prevent a purchaser with notice from fraudulently retaining trust properties, and to enforce secret trusts and mutual wills. ... The fiduciary relationship underlies much of the English law of constructive trust. As Waters ... [*The*

Constructive Trust: The Case for a New Approach in English Law (London: University of London, Athlene Press, 1964) at 33] writes: "[T]he fiduciary relationship is clearly wed to the constructive trust over the whole, or little short of the whole, of the trust's operation." At the same time, not all breaches of fiduciary relationships give rise to a constructive trust. ... Nor does the absence of a classic fiduciary relationship necessarily preclude a finding of a constructive trust; the wrongful nature of an act may be sufficient to constitute breach of a trust-like duty ... .

[20] Canadian courts have never abandoned the principles of constructive trust developed in England. They have, however, modified them. Most notably, Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment. ...

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[26] ... As McClean ... ["Constructive Trusts and Resulting Trusts: Unjust Enrichment in a Common Law Relationship—*Pettkus v. Becker*" (1982) 16 UBCL Rev 156 at 168] states: "[H]owever satisfactory [the unjust enrichment theory] may be for other aspects of the law of restitution, it may not be wide enough to cover all types of constructive trust." ...

[27] McClean, among others, regards the most satisfactory underpinning for unjust enrichment to be the concept of "good conscience" which lies at "the very foundation of equitable jurisdiction" (p. 169):

> "Safe conscience" and "natural justice and equity" were two of the criteria referred to by Lord Mansfield in *Moses v. MacFerlan* (1760), 2 Burr. 1005, 97 E.R. 676 (K.B.) in dealing with an action for money had and received, the prototype of a common law restitutionary claim. "Good conscience" has a sound basis in equity, some basis in common law, and is wide enough to encompass constructive trusts where the defendant has not obtained a benefit or where the plaintiff has not suffered a loss. ...

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[34] It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.

[35] Good conscience as a common concept unifying the various instances in which a constructive trust may be found has the disadvantage of being very general. But any concept capable of embracing the diverse circumstances in which a constructive trust may be imposed must, of necessity, be general. Particularity is found in the situations in which judges in the past have found constructive trusts. A judge faced with a claim for a constructive trust will have regard not merely to what might seem "fair" in a general sense, but to other situations where courts have found a constructive trust. The goal is but a reasoned, incremental development of the law on a case-by-case basis.

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SOPINKA J (Iacobucci J concurring) (dissenting):

[53] ... In my view [McLachlin J] errs in upholding the decision of the majority of the Court of Appeal to overturn the trial judge and impose a constructive

trust over the property in question. There are two broad reasons for my conclusion. First, the order of a constructive trust is a discretionary matter and, as such, is entitled to appellate deference. Given that the trial judge did not err in principle in declining to make such an order, appellate courts should not interfere with the exercise of his discretion. Second, even if appellate review were appropriate in the present case, a constructive trust as a remedy is not available where there has been no unjust enrichment.

NOTES AND QUESTIONS

1. Today it is a moot point whether in Canada the institutional constructive trust (1) survives in co-existence with the remedial constructive trust, (2) has been incorporated in some way, or (3) is replaced by it. In the recent Supreme Court of Canada decision in *Moore v Sweet*,[19] Côté J stated:

> This disposition of the appeal renders it unnecessary to determine whether this Court's decision in *Soulos* should be interpreted as precluding the availability of a remedial constructive trust beyond cases involving unjust enrichment or wrongful acts like breach of fiduciary duty. Similarly, the extent to which this Court's decision in *Soulos* may have incorporated the "traditional English institutional trusts" into the remedial constructive trust framework is beyond the scope of this appeal. While recognizing that these remain open questions, I am of the view that they are best left for another day.[20]

2. In *Soulos*, McLachlin J rejected the approach suggested by Sopinka J: that there must be an unjust enrichment for a constructive trust to be recognized. Some commentators have suggested that Sopinka J's conception of unjust enrichment is too narrow. Could it be said that the real estate agent benefited by his breach of fiduciary duty *at the expense* of Mr Soulos?

In the second extract from *Soulos*, below, McLachlin J addresses the problem of determining when the constructive trust might be recognized and when other remedies might be imposed. To repeat her statement in the previous extract: "[A] constructive trust may be imposed where good conscience so requires." She recognizes, however, that the concept has the disadvantage of being very general, even though she insists that "[p]articularity is found in the situations in which judges in the past have found constructive trusts." Below, she adopts an approach suggested by the English commercial lawyer Roy Goode, which would limit the ability of the courts to impose a constructive trust.

Soulos v Korkontzilas
[1997] 2 SCR 217

McLACHLIN J: ...

[45] ... Extrapolating from the cases where courts of equity have imposed constructive trusts for wrongful conduct, and from a discussion of the criteria considered in an essay by Roy Goode, "Property and Unjust Enrichment," in Andrew Burrows, ed., *Essays on the Law of Restitution* ([Oxford: Clarendon Press,] 1991), I would identify four conditions which generally should be satisfied:

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;

19 [2018] 3 SCR 303 [*Moore*].

20 *Ibid* at para 95. See also the comments of McCamus, *supra* note 5 at para 2:400.

(2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
(3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and
(4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

[46] Applying this test to the case before us, I conclude that Mr. Korkontzilas's breach of his duty of loyalty sufficed to engage the conscience of the court and support a finding of constructive trust for the following reasons.

[47] First, Mr. Korkontzilas was under an equitable obligation in relation to the property at issue. His failure to pass on to his client the information he obtained on his client's behalf as to the price the vendor would accept on the property and his use of that information to purchase the property instead for himself constituted breach of his equitable duty of loyalty. He allowed his own interests to conflict with those of his client. He acquired the property wrongfully, in flagrant and inexcusable breach of his duty of loyalty to Mr. Soulos. This is the sort of situation which courts of equity, in Canada and elsewhere, have traditionally treated as involving an equitable duty, breach of which may give rise to a constructive trust, even in the absence of unjust enrichment.

[48] Second, the assets in the hands of Mr. Korkontzilas resulted from his agency activities in breach of his equitable obligation to the plaintiff. His acquisition of the property was a direct result of his breach of his duty of loyalty to his client, Mr. Soulos.

[49] Third, while Mr. Korkontzilas was not monetarily enriched by his wrongful acquisition of the property, ample reasons exist for equity to impose a constructive trust. Mr. Soulos argues that a constructive trust is required to remedy the deprivation he suffered because of his continuing desire, albeit for non-monetary reasons, to own the particular property in question. No less is required, he asserts, to return the parties to the position they would have been in had the breach not occurred. That alone, in my opinion, would be sufficient to persuade a court of equity that the proper remedy for Mr. Korkontzilas's wrongful acquisition of the property is an order that he is bound as a constructive trustee to convey the property to Mr. Soulos.

[50] But there is more. I agree with the Court of Appeal that a constructive trust is required in cases such as this to ensure that agents and others in positions of trust remain faithful to their duty of loyalty ... . If real estate agents are permitted to retain properties which they acquire for themselves in breach of a duty of loyalty to their clients provided they pay market value, the trust and confidence which underpin the institution of real estate brokerage will be undermined. The message will be clear: real estate agents may breach their duties to their clients and the courts will do nothing about it, unless the client can show that the real estate agent made a profit. ...

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[52] I conclude that a constructive trust should be imposed. I would dismiss the appeal ... .

NOTES AND QUESTIONS

1. Justice McLachlin's adoption of Roy Goode's four conditions works on the facts in *Soulos*. Goode's conditions do not seem to apply to the question of whether a constructive trust should be imposed in response to unjust enrichment (as narrowly construed). For example, in an action based on unjust enrichment, the defendant does not necessarily owe an equitable obligation to the claimant and the reference to deemed or agency activities often will not apply. Should the criteria for the recognition of a constructive trust be different when the cause of action is unjust enrichment? See *Tracy v Instaloans Financial Solutions Centres (BC) Ltd*[21] (extracted in Section IV.B, below), where the BC Court of Appeal reviews Goode's criteria as it relates to a cause of action characterized as unjust enrichment. Note that *Instaloans* also deals with the requirement of "connection" between the claimant and the target property.

2. Goode's concern for the defendant's creditors on an insolvency is reflected in the following excerpt from his essay on proprietary restitutionary claims:

> [It is] necessary to distinguish three categories of case:
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> (1) Cases of true subtractive enrichment, where D's gain flows from an asset originally held by P … . Only in such cases does P's claim have a proprietary base so as to found a proprietary claim based on the institutional constructive trust.
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> (2) Cases where D's gain derives not from an asset held by … P but from activity undertaken by D for his own benefit which he was under an equitable duty, if he undertook it at all to pursue for P, not for himself. I have referred to this type of enrichment as "deemed agency gains," reflecting the fact that D was required and is presumed to have acted for P, not for himself. Such cases involve no subtraction from P's estate, but since P would have received the benefit of D's activity if D had carried out his obligations, equity should in a proper case impose a remedial constructive trust in favour of P on terms which safeguard the interests of unsecured creditors and other third parties who have dealt with D, e.g. by an order which is declared to operate *pro nunc*, not *pro tunc*.
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> (3) Cases where D's gain results from some other form of wrong, that is, from an activity which ought not to have been undertaken at all, e.g. the taking of a bribe. Here there is no basis for treating P as having any claim to an identified asset.[22]

Compare Goode's point (2) with *Boardman v Phipps*[23] in Section III.B, and point (3) with *Hong Kong v Reid*[24] in Section III.C.

3. In an article on the constructive trust and insolvency in the commercial sphere,[25] Anthony Duggan addresses three possible approaches in Canada regarding priorities between the claimant and the defendant's creditors in cases of unjust enrichment (in contrast to wrongs such as breach of fiduciary duty and non-commercial transactions). The first is

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21 2009 BCCA 110, 309 DLR (4th) 236.

22 Roy Goode, "Proprietary Restitutionary Claims" in WR Cornish et al., eds, *Restitution: Past, Present and Future—Essays in Honour of Gareth Jones* (Oxford: Hart Publishing, 1998) 63 at 63 [Goode].

23 [1967] 2 AC 46, [1966] 3 All ER 721 (HL) [*Boardman*].

24 *Supra* note 7.

25 Anthony Duggan, "Constructive Trusts in Insolvency: A Canadian Perspective" (2016) 94:1 Can Bar Rev 85 [Duggan]. Duggan opines at para 3 that "[d]espite some statements in the cases to the contrary, there are strong grounds for arguing that the considerations governing constructive trusts in the family context are different from those which apply in commercial cases." See *Peter v Beblow*, [1993] 1 SCR 980 [*Beblow*].

where a trust/proprietary remedy would almost always be imposed in a competition between the claimant and the defendant's unsecured creditors. The lack of protection for unsecured creditors is founded on a theory of resulting trusts espoused by Robert Chambers, although so far it has not been adopted by the courts.[26] Chambers argues that the constructive trust can be recharacterized as a resulting trust. He sees no difference between a resulting trust and a constructive trust, since both arise from a voluntary transfer of property to the defendant in which the claimant did not intend to benefit the defendant.

4. The "voluntary creditor" approach, which has often been referred to and adopted by Canadian courts, is based on an oft-quoted article by David Paciocco (now Paciocco J of the Ontario Court of Appeal) in 1989.[27] Under Paciocco's theory of priorities, courts should impose a proprietary remedy only if the claimant has not voluntarily accepted the risk of the defendant's insolvency. Fairness is preserved when a person who has never accepted exposure to the risk of the defendant's insolvency is protected by a proprietary remedy. The difficulty is, of course, to determine whether the claimant has or has not accepted the risk. This can be an expensive legal process, so that in the result there is less to distribute among claimants and creditors alike. Even when a person is clearly in the position of a "voluntary creditor," such as a small unsecured creditor or an employee of the defendant, it is difficult to insist that these individuals are truly "voluntary" creditors.

In the last category, Duggan proposes that the appropriate policy is the position that the courts should impose a constructive trust only sparingly.[28] An important reason is that, by doing so, the courts disrupt as little as possible the legislative imposition of priorities in bankruptcy and its underlying principle of *pari passu* (all creditors be treated alike). If the system for the administration of insolvency legislation is kept simple, the costs of its administration will be lower, and therefore there will be more for all the creditors. Thus, Duggan quotes Oosterhoff approvingly as follows:

> [A]ll else being equal, society as a whole has an interest in a system that minimizes the costs associated with restitutionary claims and the effects of insolvency. Consequently, a complicated regime that turns largely on judicial discretion may be undesirable insofar as it inhibits settlements and encourages litigation."[29]

5. In the leading Canadian case of *Ellingsen (Trustee of) v Hallmark Ford Sales Ltd*,[30] a car dealer permitted a potential buyer to obtain possession of a truck before financing was arranged. In the meantime, the buyer went into bankruptcy. Was the dealer a voluntary creditor of the buyer? In the interest of good customer relations, did he simply accept the possibility of eventually having to accept back a used truck, or did he also intend to accept the risk of the buyer's insolvency? In other words, did the dealer intend to extend credit to the buyer? What about the unsecured creditors? Did they rely on the buyer's possession of the truck as one of the bases of extending credit to him?

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26 Duggan, *ibid* at paras 27-29.

27 David M Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors" (1989) 68:2 Can Bar Rev 315 [Paciocco].

28 Duggan, *supra* note 25 at para 35.

29 AH Oosterhoff, Robert Chambers & Mitchell McInnes, eds, Oosterhoff on Trusts, 8th ed (Toronto: Thomson Reuters, 2014) at 748, cited by Duggan, *ibid* at para 36.

30 2000 BCCA 458, 190 DLR (4th) 47.

III. THE CONSTRUCTIVE TRUST IN RESPONSE TO WRONGFUL CONDUCT

A. BREACH OF FIDUCIARY DUTY

In *Soulos*, McLachlin J alluded to the importance of "the larger public concern of the courts to maintain the integrity of institutions like fiduciary relationships which the courts of equity supervised."[31] Breaches of fiduciary duty can engender the recognition of a constructive trust (assuming that there is property to which the trust can attach) but it is important to remember that equitable remedies are at the discretion of the court.

It is impossible here to describe every possible breach by a fiduciary that might give rise to a remedy including a constructive trust. Keep in mind that the primary duty of a fiduciary is the duty of utmost loyalty. This duty can be further articulated as the duty not to put oneself in a conflict of interest with a beneficiary and the duty not to profit from one's fiduciary position. These duties are often referred to as the conflict rule and the profit rule. It has been argued that these two rules constitute the whole of the duties of the fiduciary; nonetheless, the categories enumerated by AJ Oakley for trustees in *Constructive Trusts*[32] are illuminating. Oakley summarizes breaches of these duties under the following headings:

- unauthorized benefits obtained by a fiduciary as a result of his position (unauthorized remuneration, fees, and secret profits);
- transactions into which a fiduciary has entered in a double capacity—that is, purchases and sales by the fiduciary to the trust; and
- benefits obtained by a fiduciary as a result of his position to the exclusion of his principal (utilization of an opportunity to profit for his benefit).[33]

Keech v Sandford[34] is an early case that lays down the rule that a trustee cannot profit from her position as trustee, even where the beneficiary has suffered no loss. Note that in *Keech* the trust beneficiary could not have taken up the opportunity, and hence suffered no loss. Nevertheless, the Court held that the trustee held the lease as a constructive trustee for the underage beneficiary.

In *Keech*, trustee held a lease of the profits of a market for an infant. Just before the lease ran out, the trustee sought to renew it for the benefit of the infant. The lessor declined to renew the lease because the infant could not grant a necessary covenant. The trustee subsequently obtained the benefit of the lease for himself. Proceedings were launched in the name of the infant as plaintiff to seek the transfer of the lease into his name and for an accounting for any profits made.

According to the Lord Chancellor:

> [I]f a trustee, on the refusal to renew, might have a lease for himself, few trust estates would be renewed to *cestui que use* [beneficiary]; though I do not say there is 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

31 *Soulos, supra* note 8 at para 33.

32 AJ Oakley, *Constructive Trusts*, 2nd ed (London: Sweet & Maxwell, 1987).

33 *Ibid* at 48ff.

34 (1726), EWHC Ch J76, 25 ER 223.

that the trustee should be indemnified from any covenants comprised in the lease, and an account of the profits made since the renewal.

NOTES AND QUESTIONS

1. The assumption in *Keech v Sandford* seems to be that without holding trustees to strict rules of probity, equity cannot be certain that they will use their best endeavours to advance and protect the interest of the beneficiary. There also seems to be an implication that the trustees might not have been in a position to take over the lease *but for* their position as trustee. This rule also applies where the trustee buys property from the trust or sells property to the trust. In such cases, there is a real risk that the trust will not get the best bargain. There is an apparent conflict of interest between the trustee's duty to protect the beneficiary and the trustee's desire to protect her own interests.

2. Not every appropriation of an opportunity or benefit by a fiduciary requires the fiduciary to disgorge the profit. The benefit must arise from or in the course of the fiduciary relationship. Justice Finn, in *Fiduciary Obligations*,[35] writing about appropriation of corporate opportunity, has suggested that two rules distinguish between the appropriation of corporate opportunity by a fiduciary during the course of his fiduciary duties and the appropriation of corporate opportunity outside the scope of his duties:

> These rules, though interlocking, have distinct applications which illustrate both the conflict and profiting facets of the general rule. They are: (1) a fiduciary cannot, on his own account, derive any benefit which his undertaking authorizes or requires him to pursue in his representative capacity; and (2) a fiduciary, even though acting in a matter outside the scope of his undertaking to his beneficiary, cannot retain a private profit made, if it has been made only through some actual misuse of his representative position.[36]

3. The result in *Keech* may have been an appropriate result in the 18th century in the context of a trust relationship, but what about today? In the business and law arenas, many individuals find themselves in possible positions of conflict. What effect might this have on the ability to procure individuals to serve in fiduciary positions? Is this something the courts should consider? What happens if a fiduciary acquires duties to two or more different entities and the duties conflict? It is not prohibited to be a fiduciary for more than one "master," but, generally, the informed consent of the parties must be obtained.[37] A fiduciary cannot excuse a breach of duty to one party by saying it was necessary to fulfill an obligation to another party.[38] At the same time, a fiduciary is not required to fulfill a fiduciary duty to one if it would mean a breach of her duty to another. What should the fiduciary do?

35 PD Finn, *Fiduciary Obligations* (Sydney: Law Book Co, 1977).

36 *Ibid* at para 535.

37 See e.g. The Law Society of British Columbia, *Code of Professional Conduct for BC* (Vancouver: Law Society of British Columbia, 2013), ch 3, s 3.4-2, online: <https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia>; Law Society of Ontario, *Rules of Professional Conduct* (Toronto: Law Society of Ontario, 2019), ch 3, s 3.4-2, online: <https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/chapter-3>; Nova Scotia Barristers' Society, *Nova Scotia Barristers' Society Code of Professional Conduct* (Halifax: Nova Scotia Barristers' Society, 2020), ch 3, s 3.4-2, online (pdf): <https://nsbs.org/wp-content/uploads/2019/11/CodeofProfessionalConduct.pdf>.

38 See Oosterhoff, *supra* note 1 at 799.

B. APPROPRIATION OF CORPORATE AND OTHER OPPORTUNITIES

Directors of a corporation are in a presumptive fiduciary relationship with the corporation of which they are directors.[39] Directors are generally not permitted to take advantage of business opportunities otherwise available to the corporation that arise in the course of the directors' duties or by reason of them. The concern is, of course, their possible conflict of interest. This holds true even if the corporation itself, for whatever reason, is not able to take advantage of the opportunity and even if the directors are acting honestly and in good faith.

Employees of corporations (businesses), depending on their seniority or special status, also may owe fiduciary duties to their employers, and those duties are considered in *Canadian Aero v O'Malley*[40] in this section. In *Boardman v Phipps*,[41] below, the non-employee solicitor to a trust was held to owe a fiduciary obligation to the trust. Indeed, one of the beneficiaries of the trust, perhaps because of his intermeddling, was also held to be liable to the trust.

Regal (Hastings) Ltd v Gulliver[42] is a seminal case that lays out the duties of corporate directors not to put themselves in a conflict of interest or to benefit from their position. The facts were that a subsidiary of Regal (Hastings) Ltd attempted to lease some cinemas to a landlord, who refused because the landlord thought that the subsidiary was undercapitalized. The directors of Regal (Hastings) did not think that Regal (Hastings) had the financial wherewithal to inject more funds into the subsidiary. After the directors of the board declined to guarantee the lease personally, they opted instead to subscribe (with the company's solicitor) for shares in the subsidiary. As a result, the lease was concluded, and the shares of both the parent and subsidiary were profitably sold to new owners. Shortly afterward, the corporation Regal (Hastings) sued its old directors for breach of fiduciary duty. It alleged that the old directors had put themselves in a conflict of interest with the corporation and profited by reason of their position as fiduciaries.

Lord Russell stated:

> 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*.[43]
>
> • • •
>
> Other passages in his judgment [referring to the trial judge whose judgement was overruled] 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 fides*, and not *bona fides* 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 in 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.[44]

39 See Chapter 15 on Fiduciary Relationships, Section III.C.

40 [1974] SCR 592.

41 *Supra* note 23.

42 [1942] 1 All ER 378 (HL) [*Regal (Hastings)*].

43 *Ibid* at 387 (emphasis added).

44 *Ibid* at 385.

Lord Russell continued:

> 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.[45]

The Lords unanimously, in separate judgments, held in favour of a disgorgement of the profits made by the former directors to Regal (Hastings) Ltd.

NOTES AND QUESTIONS

1. It is noteworthy that the result of the decision in *Regal (Hastings)* was to give an unmerited windfall to the new shareholders who, having bought the company at what they thought was a fair price, were able, by means of the action taken by Regal (Hastings) Ltd, to reclaim the directors' profit of £21 6s 1d per share. If any persons were entitled to the unauthorized profit, they were surely the original 20 shareholders of Regal (Hastings) (other than the old directors) before the purchase. The *Canada Business Corporations Act*[46] now provides that the court may make an order directing that any amount adjudged payable in a derivative action—that is, an action brought by a shareholder on behalf of the corporation—may be paid in whole or part to former and present shareholders of the corporation or its subsidiary instead of to the corporation.

2. Note that in *Regal (Hastings)*, Lord Russell stated that the old directors could have protected themselves by a resolution of the Regal (Hastings) shareholders in a general meeting before or after the transaction.[47] The effect of shareholder ratification under the *Canada Business Corporations Act* is not determinative on whether a derivative action should be stayed or dismissed, although s 242(1) states that "evidence of [such] approval by the shareholders may be taken into account by the court."

3. In *Regal (Hastings)*, the solicitor to the company was asked by its board of directors to also purchase some of the subsidiary's shares, which he did. He was not held liable. Compare *Boardman*,[48] below.

Regal (Hastings) was cited by Cartwright J in *Peso Silver Mines Ltd v Cropper*.[49] In *Peso*, the director of a company acquired speculative mining properties that the board of directors of the company, on behalf of the company, had previously declined to purchase. Justice Cartwright distinguished *Regal (Hastings)* on the facts. He held that although the director was a fiduciary vis-à-vis the company, he had not acquired the properties *by reason of* the fact that he was a director and in the course of the execution of that office. In *Peso*, Cartwright J held that the director had acted properly in deciding with the other directors for the company not to acquire the mining properties. He found that the matter had "passed out of the director's

45 *Ibid* at 386.

46 RSC 1985, c C-44, s 240.

47 *Regal (Hastings)*, supra note 42 at 380.

48 *Supra* note 23.

49 [1966] SCR 673.

mind"[50] by the time the director was approached in his personal capacity as a purchaser for the properties. Furthermore, any information regarding the properties was public information.

Justice Cartwright stated:

> To say that the Company was entitled to claim the benefit of those shares would involve this proposition: 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 an 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. That is a proposition for which no particle of authority was cited; and goes, as it seems to me, far beyond anything that has ever been suggested as to the duty of directors, agents, or persons in a position of that kind.[51]

Canadian Aero Service v O'Malley[52] was decided after *Peso*. In the *Canadian Aero Service* case, two senior managerial officers of the company (Canaero) were involved in an attempt by Canaero to acquire a contract to map Guyana. The employees subsequently resigned from Canaero, incorporated a new company, and then submitted the winning proposal for the contract in competition with four other companies, including Canaero. The employees were not bound by any contractual provisions with Canaero. Canaero placed far enough back in the competition that even without the bid of its former employees, Canaero would not have won the contract. Nonetheless, the Supreme Court held for the plaintiff Canaero.

Chief Justice Laskin commented:

> 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.[53]

In *Canadian Aero*, Laskin CJ also canvassed the possible remedies. He noted that a lower court had fixed the damages at $125,000 for loss of contract and that Canaero made no other claim.

On the matter of remedy, Laskin CJ stated:

> 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.[54]

50 *Ibid* at 677.

51 *Ibid* at 682-83.

52 *Supra* note 40.

53 *Ibid* at 620.

54 *Ibid* at 621-22.

Notwithstanding Laskin J's comments, the $125,000 awarded appeared to represent Canaero's lost profits (which assumed a 50 percent partner). Generally, it can be expected that the amount of the defendant's gain would be awarded unless the claimant's losses exceeded them. See the discussion in Chapter 10 on Remedies, in Section IV on Personal Remedies.

The scope of an employee's fiduciary duty was considered by the Supreme Court of Canada in the early case of *Pre Cam Exploration & Dev Ltd v McTavish*.[55] In that case, Mr McTavish was employed by Pre Cam to take magnetometer readings at designated points on mineral claims staked by the company's client. Mr McTavish noticed after taking the readings that the mineral stripe continued north and east of his work area. Shortly after completing the assigned readings and sending them to Pre Cam, McTavish quit his employment. Within a month he had staked claims to the adjacent property. The Court allowed the appeal by Pre Cam from the decision of the Saskatchewan Court of Appeal who held McTavish not liable to Pre Cam.

At the Court of Appeal, Hall J (in dissent) referred to the fiduciary obligations of an employee as follows:

> As there was no special agreement entered into, McTavish, when he entered the employment of Pre-Cam as a magnetometer operator, was bound by the terms ordinarily implied in a contract of service or employment. These implied terms imposed upon him an obligation to serve his employer faithfully and honestly; to protect his employer's interests; and not to make use of information which he has gained in confidence during the course of his employment. The restriction on the use of confidential information continues even after the employment has terminated. The termination of the employment entitles the employee to make use of the general knowledge and skill which he has properly acquired during the course thereof. After the employment terminates the employee is no longer bound to look after the interests of the employer, except in so far as his actions involve the use of information gained in confidence. These are principles as I understand them from reading such cases as *Robb v. Green*, [1895] 2 Q.B. 315; *Wessex Dairies, Ltd. v. Smith* (1935), 104 L.J.K.B. 484, and *Hivac Ltd. v. Park Royal Scientific Instruments Ltd.*, [1946] 1 All E.R. 350.[56]

Justice Judson in a short judgment awarded Pre Cam a constructive trust of the property.

The case of *Boardman v Phipps* reflects many of the same themes and problems of the cases cited earlier. It also raises questions that require further consideration.

In *Boardman*, Mr Boardman, a solicitor, and Tom Phipps, a beneficiary, breached their fiduciary duties to the Phipps Trust *in good faith*, thereby enriching both themselves and all the beneficiaries of the trust. Although the fiduciaries were undoubtedly liable for the breach, Mr Boardman contributed substantial labour and expertise to the enterprise, described below. Can a fiduciary be indemnified for a "good breach" and, if so, on what legal basis?

How can a fiduciary protect herself from legal liability by obtaining "consent"? In *Boardman*, Boardman and Phipps were fiduciaries. To complicate matters, one of the three trustees of the trust was not legally competent.

Views differed at both the trial and appellate level on whether the information obtained by Mr Boardman was property of the trust. If information is not property, would the claimant be without a remedy? Viscount Dilhorne seems to think so: he finds no conflict of interest and no use of trust "property" for which the trust could claim. Alternatively, assuming a remedy, what effect should the characterization of information have on whether a constructive trust is awarded?

The terms of the will of "old Phipps" (in the words of Lord Denning at the Court of Appeal), a testator who died in 1944, after making provision for an annuity for his widow, established

55 55 DLR (2d) 69, 53 WWR 662.

56 *Ibid* at para 26.

trusts that were to hold 8,000 shares in Lester and Harris Ltd, a private company with an issued capital of 30,000 shares. The testator's three sons, one of whom was deceased, obtained a 5/18 share each, and his daughter received 3/18. The trustees of the trust were the testator's widow (who later became senile), his daughter, and Mr Fox, an accountant and professional trustee.

Boardman was the solicitor to the trust. Tom Phipps was one of the sons of the testator. In 1956, Boardman, Tom Phipps, and Mr Fox, the accountant-trustee, decided that the position of Lester and Harris Ltd was unsatisfactory because it was asset rich but generated low returns. The next year, armed with proxies signed by the other trustees, Boardman and Tom Phipps (the appellants) embarked on a campaign to acquire information about the company's operations and to get Tom Phipps a seat on the board (which was unsuccessful). They did this with the full knowledge of the trustees, and during that time held themselves out to the company directors as representing the trustees. Boardman and Phipps also tried twice unsuccessfully to buy shares in the company for themselves. Note that at no time did the trustees have the power to purchase shares in the company without the approval of the court (which was unlikely to have been given, and which Mr Fox, the professional trustee, was unwilling to seek).

In 1957, the appellants approached the board of directors of Lester and Harris Ltd with a proposal to split up the company between the Phipps family and the Harris family (including the then directors of the company). During protracted negotiations in 1957 and 1958, Boardman obtained a great deal of information about the company while still purporting to act for the trustees. Specifically, he obtained financial information about overseas branches and valuations of various company assets. The effort to negotiate a split-up or division of the company's assets during this time was abortive.

Later in 1958, the chairman of Lester and Harris Ltd suggested to Boardman and Phipps that they make an offer at a particular price for the whole of the share capital of the company. At that point in time, it was impossible to obtain the consent of Mrs Phipps to the appellants' activities because of her mental disability and, in any case, she died in November 1958. By July 1959, nearly 22,000 of the shares stood in the appellants' names. However, it appears that it was not until as late as the spring of that year that John Anthony Phipps, the only other surviving son, was briefed in some detail on the appellants' activities. After further briefings, John Anthony wrote to Boardman in January 1960 as follows:

> Thank you so much for your letter. 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.

Boardman became chairman of Lester and Harris Ltd. Rather than continue all the ongoing operations of the company with a view to greater profitability, Boardman embarked on a scheme of liquidation of various business assets, through which a substantial profit was made for the shareholders of the company, including the trust.

In March 1962, John Anthony Phipps commenced an action against the appellants Boardman and Tom Phipps for breach of fiduciary duty. The House of Lords, by a majority, Lord Upjohn and Viscount Dilhorne dissenting, held on various grounds that the appellants were fiduciaries who had breached their fiduciary duties. It appears Boardman and Phipps were to hold the shares on a constructive trust for the trust beneficiaries and pay them the dividends. However, given the effort and expenses that the appellants had incurred in pursuit of their honest but mistaken belief that they had the full approval of the trustees and beneficiaries when they acquired the shares, they were entitled to an award based on *quantum meruit* (calculated on a liberal scale) for their services.

Boardman v Phipps

[1967] 2 AC 46, [1966] 3 All ER 721 (HL)

LORD COHEN (Lords Hodson and Guest concurring in separate judgments): ...

As Wilberforce J. [the trial judge] said ... 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 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. 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 ... were the appellants debarred by their fiduciary position from purchasing ... the 21,986 shares ... without the informed consent of the trustees and the beneficiaries?

[After discussing the *Regal (Hastings)* case, Lord Cohen continued:]

... Mr. Bagnall argued that the present case is distinguishable. ... 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 ... is no, 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.

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 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 ... [was] 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 applies. ...

That is enough to dispose of the case but I would add that an agent is, in my opinion, liable to account for profits [made] 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 shares afforded them by their relations with the directors of the company—an opportunity they got as the result of their introduction 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 could not ... 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 [they] 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 would still be the person they would consult if they wanted advice. 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 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 unprejudiced advice if he had been consulted by the Trustees and was at the same time negotiating for the purchase of the shares 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.

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. ... 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.

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. ...

VISCOUNT DILHORNE (dissenting):

[Having held that the appellants were in a fiduciary relationship to the trust, he continued:]

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 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 of interest arising through the purchase of the shares by the appellants. ...

... 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 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.

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> It is not the source of the information, but the use to which it is applied, which is important in such matters.
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> To hold that a partner can never derive any personal benefit from information which he obtains from a partner would be manifestly absurd.
>
> ... 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 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, ... 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 knowledge they acquired as of "a most extensive and valuable character." 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.
>
> [Lord Upjohn also dissented.]

NOTES AND QUESTIONS

1. Should the fiduciary's (wrongful) efforts be recognized through an award of unjust enrichment? See *Lac Minerals* in Section III.D, below, and note Lord Denning's analysis at the Court of Appeal in *Phipps v Boardman*:

> Only one question remains. Ought Mr. Boardman and Mr. Thomas Phipps to be allowed remuneration for their work and skill in these negotiations? The plaintiff, Mr. Anthony Phipps, is ready to concede it, but in case the other beneficiaries are interested in the account, I think that we should determine it on principle. This species of action is an action for restitution such as Lord Wright described in the case of *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* The gist of it is that the defendant has unjustly enriched himself, and it is against conscience that he should be allowed to keep the money. The claim for repayment cannot, however, be allowed to extend further than the justice of the case demands. If the defendant has done valuable work in making the profit, then the court in its discretion may allow him a recompense. It depends on the circumstances. If the agent has been guilty of any dishonesty or bad faith or surreptitious dealing, he might not be allowed any remuneration or reward; but when, as in this case, the agents acted openly and above board, but mistakenly, then it would be only just that they should be allowed remuneration. As the judge said:
>
> > It seems to me that it would be inequitable now for the beneficiaries to step in and take the profit without paying for the skill and labour which has produced it.
> >
> > I think that there should be a generous remuneration allowed to the agents. I find myself then in agreement with the judge and I would dismiss this appeal.[57]

57 [1965] 1 All ER 849 (CA) at 857-58 (footnotes omitted).

2. In *Regal (Hastings)*, the Court declined to find a breach of fiduciary duty by the company's solicitor, who also subscribed for shares in Regal's subsidiary. It held:

> 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.[58]

On the basis of the limited facts available to you, do you agree?

3. If Boardman and Tom Phipps had sought to obtain an informed consent to their purchase of the shares, should it have been from (1) the trustees, (2) the beneficiaries, or (3) both?

4. See also *MacMillan Bloedel Ltd v Binstead*[59] in Chapter 10, Section IV.B, on Remedies. In that case, the issue was whether certain salaries could be deducted to calculate the amount of profit that had to be disgorged under an *in personam* award for a breach of fiduciary duty.

5. In *Guinness Plc v Saunders*,[60] the Court held that Ward, a director of Guinness who received an unauthorized payment of over £5 million in connection with Guinness's takeover of Distillers Plc, was a constructive trustee of that sum. The money had been authorized by the Guinness remuneration committee, but not, as required by article 91 of the Guinness Articles of Association, by the whole board. Ward's claim for a *quantum meruit*, which might be characterized in Canada as a claim in unjust enrichment for his services, was denied and Lord Templeman pointed out that the claim, based on an implied contract for Guinness to pay reasonable remuneration for the services the director provided, failed because an express decision of the whole board would be needed to justify a director making a profit other than one expressly provided for. A director who performed outstanding services could apply to the whole board of directors for either a contract or special remuneration.

C. BRIBES

Prior to *Attorney-General for Hong Kong v Reid*,[61] it was generally thought that the liability of a fiduciary who accepted a bribe (and hence breached her fiduciary duty to a principal) was in the form of a debt owed to the principal.[62] It was the courts' view that there could be no proprietary remedy where the benefit to which the principal was laying claim could not properly be considered her property. The bribe did not represent (1) property beneficially owned by the principal, (2) property intended for the principal, or (3) property derived from the activity of the fiduciary that the fiduciary should have undertaken for her principal. Hence, in the event of the fiduciary's bankruptcy, the claims of the principal ranked in *pari passu* with those of the unsecured creditors.

The protection of the unsecured creditors may have been a positive aspect of the previous position, but one troubling aspect was that it permitted a fiduciary to profit from her wrongful conduct. It is a basic principle of equity that a fiduciary should not benefit from her breach of duty. As long as the fiduciary had only to disgorge the amount of the bribes to the principal, she was free to keep the profits from the investments of the moneys. The position taken in *Hong Kong v Reid* (on appeal from the New Zealand Court of Appeal) was not immediately

58 *Regal (Hastings)*, *supra* note 42 at 392.

59 [1983] BCJ No 802 (QL), 22 BLR 255 (SC).

60 [1990] 1 All ER 652 (HL).

61 *Supra* note 7.

62 See *Lister v Stubbs* (1890), 45 Ch D 1 (CA); *Sinclair v Versailles*, [2011] EWCA Civ 347; and see generally Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Toronto: LexisNexis, 2014) at 1308ff [McInnes].

adopted in England. However, it is likely the law in Canada and has been embraced elsewhere in the Commonwealth.[63] Eventually, in *FHR European Ventures LLP v Cedar Capital Partners LLC*,[64] the Supreme Court of England reversed the UK position.

In *Hong Kong v Reid*, Reid, a New Zealand national and a senior lawyer and director of public prosecutions in the service of the Hong Kong government, was convicted of receiving bribes to a value of NZ$2.5 million in breach of his duty to the government of Hong Kong and to the Crown. The money was paid for obstructing the prosecution of named persons. The government of Hong Kong, through its attorney general, sought to register caveats against three freehold properties in New Zealand standing in Reid's name (or the name of his wife or solicitor) that could only have been derived from the bribes. These had been purchased for NZ$500,000, but their current value had not been established in evidence in the New Zealand courts. The New Zealand trial judge (who was upheld by the New Zealand Court of Appeal) followed established English Court of Appeal authority that the relationship of a fiduciary who received a bribe and his or her principal was one of debtor and creditor because the principal had no proprietary interest in the bribe or property representing it. The government of Hong Kong was accordingly held to have no arguable case to enter the caveat. The attorney general further appealed to the Privy Council.

Lord Templeman, delivering the judgment of the board, held:

> When a bribe is offered and accepted in money or in kind, the money or property constituting the bribe belongs in law to the recipient. Money paid to the false fiduciary belongs to him. The legal estate in freehold property conveyed to the false fiduciary by way of bribe vests in him. Equity however which acts *in personam* insists that it is unconscionable for a fiduciary to obtain and retain a benefit in breach of duty. The provider of a bribe cannot recover it because he committed a criminal offence when he paid the bribe. The false fiduciary … must pay and account for the bribe to the person to whom the duty was owed. In the present case, as soon as Mr. Reid received a bribe in breach of the duties he owed to the Government of Hong Kong, he became a debtor in equity to the Crown for the value of that bribe. So much is admitted. But if the bribe consists of property which increases in value or if a cash bribe is invested advantageously, the false fiduciary will receive a benefit from his breach of duty unless he is accountable not only for the original amount or value of the bribe but also for the increased value of the property representing the bribe. As soon as the bribe was received it should have been paid or transferred *instanter* to the person who suffered from the breach of duty. Equity considers as done that which ought to have been done. As soon as the bribe was received, whether in cash or in kind, the false fiduciary held the bribe on a constructive trust for the person injured. Two objections have been raised to this analysis. First it is said that if the fiduciary is in equity a debtor to the person injured, he cannot also be a trustee of the bribe. But there is no reason why equity should not provide two remedies, so long as they do not result in double recovery. If the property representing the bribe exceeds the original bribe in value, the fiduciary cannot retain the benefit of the increase in value which he obtained solely as a result of his breach of duty. Secondly, it is said that if the false fiduciary holds property representing the bribe in trust for the person injured, and if the false fiduciary is or becomes insolvent, the unsecured creditors … will be deprived of their right to share in the proceeds of that property. But the unsecured creditors cannot be in a better position than their debtor. The authorities show that property acquired by a trustee innocently but in breach of trust and the property from time to time representing the same belong in equity to the *cestui que trust* and not to the trustee personally whether he is solvent or insolvent. Property acquired by a trustee as a result of a criminal breach of trust and the property from time to time representing the

63 See *FHR European Ventures LLP v Cedar Capital Partners LLC*, [2014] UKSC 45 at para 45.

64 *Ibid.*