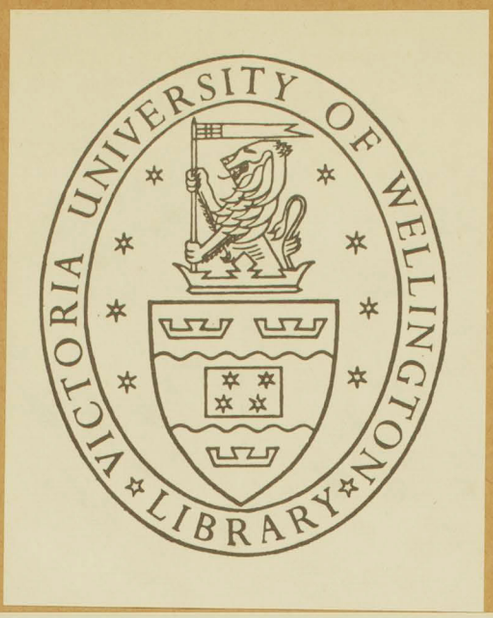
LxTH THORP, F. J. Boardman v. Phipps

THORP



FREDERICK JOHN THORP

yes to SIR

"BOARDMAN v PHIPPS" An injustice to the modern-fudiciary?"

Submitted for the LLB (Honours) degree of Victoria University of Wellington.

September 1st, 1977.

Boardman v Phipps [1967] 2 A.C. 47

1. The Facts

The estate of Mr C.W. Phipps, father of the appellant, Tom Phipps, and the respondent, included 8,000 shares in Lester & Harris Ltd., a Company engaged in the textile business. Mr Phipps' estate also included a substantial holding in a family company, Phipps & Son Ltd., also engaged in the textile business. Tom Phipps was chairman of this company and Mr Boardman was one of its directors.

In his will, Mr C.W. Phipps left an annuity to his widow. Subject thereto each of his three sons was to receive 5/18ths of his estate with the remaining 3/18ths going to his daughter, Mrs Noble. (These proportions were not altered by the testators eldest son predeceasing him - his 5/18ths going to his widow and family.) The three trustees of the will were Mrs Noble, an accountant named Mr Fox, and up until her death in November, 1958, the testators widow, Mrs Ethel Phipps. However because of her age (she was over 80 and suffering from senility when the events relevant to this case occurred) the last mentioned took no active part in the affairs of the trust.

In December, 1955 Mr Boardman, who acted as solicitor to the trust as well as several members of the Phipps family, received a letter from a third party asking whether the trustees were prepared to sell their holding in Lester & Harris Ltd. Subsequent investigation of that Company's accounts by both he and Mr Fox showed the asset value of the 30,000 ordinary £1 shares to be approximately £10 a share. On December 17, 1956, Mr Boardman wrote to Mrs Noble

informing her of this fact and of the low yield returned by the shares, stating that they all felt something should be done to improve the position. Tom Phipps had suggested that he and Boardman should attend the Annual General Meeting of Lester & Harris Ltd. and towards this end Boardman enclosed a proxy form to be signed by Mrs Noble and her mother.

Their attendance at this meeting as representatives of the trust holding was unfruitful. They failed in a bid to get Tom Phipps elected director, and could gain little information of any significance over and above that published in the accounts. In the course of reporting this to Mr Fox, Boardman suggested that the only way in which the matter could be satisfactorily resolved would be by purchasing a controlling interest in Lester & Harris Ltd. Fox replied that he did not consider that a takeover bid for shares in a private company was something that he, as a trustee, or the trust, shouldtake any part in, later stating in evidence that he would not have considered the trustees buying those shares under any circumstances. In order to buy the shares, the trust would have required the approval of the court, and as noted by Lord Dilhorne,

> "..... whether the court would have sanctioned this speculation at a time when on the death of his widow, then in failing health, the estate would have become divisible among the beneficiaries of his will, and when the proposed investment was in a private company which was not doing well, and the trust had no money available for investment, may well be open to doubt" - (1)

In any event, on Fox's refusal Boardman then suggested that the appellant Phipps should try to buy the shares, and

---

(1) Boardman v Phipps [1967] 2 AC 47 @ 76

when Phipps refused unless Boardman would go in with him, Boardman agreed to do so. After an initial attempt to buy the share privately had failed, Boardman contacted Fox, saying that they proposed to make an offer to buy the shares personally by circular. He pointed out that this would not involve the trustees, who would share in any advantage gained, and asked Fox to confirm that the circular was in order with regard to both his and Tom Phipps' positions vis-a-vis the trust.

Fox raised no objection, but suggested that they write to Mrs Noble. This was done, Boardman stating inter alia

> "the making of an offer in this form is not a matter which Trustees should properly do, and Tom and I have, therefore, agreed to make an offer personally" - (2)

So with her assent as well, an advance copy of the circular was sent to Lester & Harris Ltd., indicating that the offer was made by the appellants, and at the same time stating that they were instructed to ask on behalf of the executors of Mr C.W. Phipps for a list of the members of the Company and their addresses. (This information was needed in order that the appellants could distribute them effectively.)

The Directors of Lester & Harris Ltd. advised their shareholders not to sell, whereupon the appellants raised their original offer of £2.5.0. a share to £3, conditional upon acceptance by the holders of not less than 7,500 shares. Only 2925 shares were forwarded, and despite the fact that the offer was later declared unconditional and the shares appropriated by the appellants, this was not until 1959, and so for the moment that plan too was ineffectual.

---

(2) ibid p.78

Undeterred the appellants wrote to Mr Smith, chairman of the Company suggesting that a possible solution might be to divide the Lester & Harris Ltd group so that the Harris family and directors owned the whole of one part, and the Phipps interests owned the balance. Mr Smith and his associates seemed to support in principle this suggestion and henceforth until October 1958, negotiations were continued with a view to finding an acceptable basis for splitting the Company. The most notable feature of these negotiations was that the appellants represented to Mr Smith that they were acting on behalf of the trust.

Then in October, 1958 Mr Smith suggested that they make an offer for the whole of the remaining share capital. Subsequently on March 10, 1959 an agreement was made between Mr Smith and the appellants for the sale of their sahres in Lester & Harris Ltd. for £4/10/- a share. On the same day Boardman wrote to the respondent, Mrs Noble and Mrs F.M. Phipps (the widow of the dead son) telling them of the situation. That letter was the first communication Boardman had had with the respondent in relation to this matter of the trust holding of 8,000 shares. The respondent knew nothing about the intentions of trustees or Boardman in relation to these shares or of any negotiations which had taken place.

Boardman then sold all the Australian interests of the Company, and later their Coventry factory, transactions which resulted in capital distributions of £3 and £2/17/6 a share respectively. At this stage Tom Phipps telephoned the

respondent and offered him £2 per share for his proportionate holding in the trust shares. The respondent consulted his solicitor and as a result issued a warrant claiming, firstly that the appellants held 5/18ths of their ordinary £1 shares in the company as constructive trustees for the respondent, secondly, an account of the profits made by them from this holdings, and thirdly an order that they should transfer to the respondent the shares which they held as constructive trustees for him, as well as 5/18ths of the profit from the whole venture.

2. Their Lordships Decisions

At the Court of first instance (3) Wilberforce J found the two defendants liable as constructive trustees, holding that the knowledge they acquired of the affairs of Lester & Harris Ltd was in the circumstances trust property, and that the acts which brought about the profit were acts within the scope of their agency for the trust, and therefore in breach of their fiduciary duty to the same. On Appeal, the Court of Appeal (Lord Denning, M.R., Pearson and Russell L.J.J.) unanimously upheld the verdict of Wilberforce J. (4)

In the further appeal to the House of Lords, John Phipps based his case on three grounds. He alleged Boardman (and therefore Tom Phipps, who requested to be treated in an identical manner) to be accountable as constructive trustee for one or all of the following reasons.

(a) That he made a profit by using trust property (information which belonged to the trust).

(b) That he had made a profit by way of his fiduciary position.

---

(3) Phipps v Boardman [1964] 2 All E R 187

(4) Boardman v Phipps [1965]] All E R 849

(c) That a conflict had existed between the respondents duty to the trust and his personal interest.

(a) Use of Trust Property

Any discussion or evaluation of their Lordships reasoning on this ground necessarily involves lengthy arguments which are substantially tangential to the aims of this paper. The instancing of those situations in which confidential information should be categorised as equitable property is of little import when one is attempting to answer the more general question as to what type of duties or standards should be imposed upon a fiduciary when dealing with a trust or trust assets and to this end it is proposed to deal only with the remaining two grounds outlined above. Suffice to say that Lord Upjohn and Viscount Dilhorne dissenting the majority held that the information and knowledge gained by the appellants was trust property because it came to them whilst they were acting in a fiduciary capacity.(5) Liability, therefore, did attach to the appellants under this ground.

(b) Profit Made By Way Of Fiduciary Position

All five of the Law Lords accepted that the appelants were in a fiduciary position with regard to the trust, although

(5) Lord Cohen was not prepared to state that this would always be the case, but held in light of the existing circumstances that such a conclusion was warranted in this instance. Boardman v Phipps (supra) at p 103

the exact nature of this relationship is never agreed upon. Viscount Dilhorne forwarded perhaps the most attractive description.

> ".... that relationship arose from their being employed as agents of the trust on the occasions I have mentioned. [The authorised representation of the trust at the two general meetings, Boardman as trust solicitor dealing with the inquiry as to whether the trust would sell their holding, and Boardman, as solicitor, and Phipps discussing with Mr Fox in December 1956 the accounts of Lester & Harris Ltd. and what should be done to improve the value of the trust holding] and continued throughout" (6)

Yet Lord Cohen would have them not as general agents, but "agents for limited purposes".(7) And Lord Guest would go no further than saying

> "the defendants placed themselves in a special position which was of a fiduciary character." (8)

Despite this initial uncertainty, having found that a fudiciary relationship did exist the majority (Lords Hodson, Guest and Cohen) showed no hesitancy in holding the respondents liable.

> "The knowledge and information obtained by Boardman was obtained in the course of the fiduciary position in which he placed himself. The only defence available to a person in such a fiduciary position is that the made the profit with the knowledge and assent of the trustees. It is not contended that the trustees had such knowledge or gave such consent." (9)

and

> "... whether or not the trust or the beneficiaries in their stead could have taken advantage of the information is immaterial as the authorities clearly show" (10)

---

(6) Boardman v Phipps supra at p.88

(7) ibid at 103

(8) ibid at 118

(9) Boardman v Phipps

(10) ibid per Lord Hodson at p.11

In reaching the opposite conclusion, Viscount Dilhorne relied heavily on the words of Lord Russell in the similar case of Regal Hastings Ltd v Gulliver.(11) In the case the profit arose through the application by four of the directors of the appellant Company for shares in a subsidary company which the Board had intended should be subscribed for by the company itself. Lord Russell held that the directors had acquired the shares

> "... by reason, and only by reason of the fact that they were directors of Regal, and in the course of their execution of that office" (12)

Viscount Dilhorne was of the view that the shares obtained by the appellants in this instance were not acquired only by use of their fiduciary position, or by reason and only by reason of the fact that they were agents of the trust for certain limited purposes. Because of this, the liability which attached to the directors in Regal, would not, in his view, be attached here to Boardman and Tom Phipps.

Lord Upjohn, who also dissented, went further than this, disagreeing with the basic premise of the majority.

> "Knowledge learned by a trustee in the course of his duties 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 unless it is confidential information which is given to him (a) in circumstances which regardless of his position as a trustee would make it a breach of confidence for him to communicate to anyone for it has been given to him expressly or impliedly as confidential information or (b) in a fiduciary capacity and its use would place him in a position where his duty and his interest might possibly conflict." (13)

---

(11) [1967] 2 A.C. 134

(12) Regal Hastings (supra) at p.186

(13) Boardman v Phipps (supra) at p.128

This by a three to two majority the appellants were held to be constructive trustees for a profit made by way of their fiduciary position.

(c) Conflict Between Duty and Interest

On this third issue liability was also attached to the appellants and by a similar margin. All five Lords agreed to the extent that if the appellants could be seen to have entered into engagements in which they had or could have had a personal interest conflicting, or which possibly may have conflicted with the interests of those whom they were bound to protect, then they were liable. Unfortunately they differed as to the degree to which the test should be applied.

Lord Upjohn saw "possibly may conflict" as meaning that -

> "A reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict - not that you would imagine some situation arising which might in some conceivable events not contemplated as real sensible possibilities by any reasonable person, result in conflict. (14)

He supported Viscount Dilhorne's finding in the case.

> "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." (15)

The majority on the other hand were more demanding.

> "No doubt it was but a remote possibility that Mr Boardman would ever be asked by the trustees to advise on the desirability of an application to the court in order that the trustees might avail themselves of the information obtained. Nevertheless, even if the possibility of conflict is present between personal interest and the fiduciary position, the rule of equality must be applied" (16)

---

(14) ibid at p 124

(15) ibid at p 88

(16) Boardman v Phipps (supra) at p 111

The existence of a remote possibility was held sufficient, therefore, to warrant the court upholding the respondents claim on this ground.

3. The Basis of the Rule

At its strictest, the effect of this decision is that a fiduciary will be held accountable as a constructive trustee for any profit he makes arising out of his position as trustee, or whenever a possible conflict (no matter how remote) exists between his duty to the trust and his personal interest. That the trust has suffered no loss, (it may as in the present case have actually gained substantially) is irrelevant to the operation of the rule. The fact that the fiduciary has acted with complete honesty, or that he risked his own time and many to gain that profit, is similarly ineffectual.

What then is the basis for such a doctrine? Why has the court here persisted with a principle recognised by other courts as one which in many situations can inflict inequities and hardship? Rules of inequity were evolved for the purpose of mitigating the harshness of the common law. Is it then folly for the House of Lords to entrench such an effect when they could have guessed the chance to introduce a more flexible ruling in line with modern practices in this area?

Keech v Sandford [17] is the leading case dealing with this steadfast rule.

---

(17) (1726) Sel Cas.ch. 61

> "no man who stands in a position of trust towards another can in matters affected by that position, advance his own interests at that others expense" (18)

There the defendant was a trustee for an infant of a renewable lease. Upon being informed by the landlord that he was not prepared to renew the lease to the infant, the defendant took a new lease for himself. He was subsequently compelled by the court to hold the renewed lease on the terms of the trust. Reasons of policy, as in modern day decisions, were even then very much to the fore.

> "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 persued and not in the least relaxed, for it is very obvious what would be the consequences of letting trustees have the lease on refusal to renew the cestui que use" (19)

Later courts were prepared to extend this rule from express trusts to cover other situations, the requirement being that the particular claiment could prove a fiduciary relationship between himself and the person who had allegedly taken advantage of him.

> "Such a fiduciary relationship gives rise to the placing of trust and confidence by the claimant in the fiduciary, and equity would impose express trust obligations upon the fiduciary who abused that trust and confidence." (20)

Thus the fiduciary became and was described as a constructive trustee.

In conjunction with its widening, the courts took, and have continued to take, pains to emphasis the inexorable nature of this principle.

---

(18) Robinson v Randfontein Estates Gold Mining Co Ltd [1921] A.D. 168 at 171

(19) Keech v Sandford (supra) per Lord Chancellor King

(20) D.W.M. Waters "The Law of Trusts in Canada" p.343

> "... tradition that is unbending and inverterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undetermine the rule of undivided loyalty by the disintegrating erosion of particular exceptions ... only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd" (21)

and

> "that rule is an inflexible rule and must be applied inexorably by this court which is not entitled, in my judgement, to receive evidence or suggestion or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent." (22)

Faced with over 200 years of such staunch and unbending precedent, the House of Lords, by the narrowest margin possible, chose to follow in the footsteps of their predecessors. The question to be asked, therefore, is was this decision the result of ultra-conservatism so often attributed to the judiciary, a body too afraid to question a doctrine of such long standing and out of touch with the practicalities of modernday trust work? Or can in fact a reasoned line of thought be found to lie behind the reinforcement of such a strict doctrine?

4. The Validity of the Rule

The approach taken by the court in reaffirming the old rule is, as stated by Gareth Jones [23] clearly a prophylactic one. And put bluntly it is a rule of simplistic certainty. viz.

---

(21) Meinhard v Salmon 249 N.Y. 456 at 464

(22) Parker v McKenna (1874) L.R. 10 Ch 96 at 124

(23) "Unjust Enrichment and the fiduciaries duty of loyalty" 84 L.Q.R. 472.

> "[Liability] in no way depends on fraud or on absence of bona fides. The liability arises from the mere fact of a profit having, in the stated circumstances been made." (24)

Yet its rigid application, it is said, has been and will continue to be the source of unjust hardship. Why then is it peristed with, especially in view of the efforts to mitigate rules of similar effect in other areas of the law?

Areas of the law where a strict approach has been modified

Prior to the case of Holder v Holder (25) it had been a steadfast fule of equity for 200 years, (26) that a trustee was debarred from purchasing trust property.

> "the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance" (27)

The defendant in the case was one of three executors named in his fathers estate. On informing the other two that he wanted to buy two farms forming part of the estate, the defendant was advised that he should cease acting as executor. He purported to renounce, having taken no part in the administration of the estate apart from signing four cheques and some insurance documents. The farms were subsequently sold at public auction and bought by the defendant.

The defendant conceeded, erronously in the eyes of the Appellate Court, that the renunciation was ineffective. However, even assuming the defendant still to have been an executor, the court held against the plaintiff on the ground that he had acquiesed in the sale, and that in the circumstances of

---

(24) Regal Hastings (supra) per Lord Russell at 156

(25) [1968] Ch 353

(26) Since exparte James (1808) 8 Ves. 337

(27) exparte James (supra) at p 344

the case the rule against a trustee buying the trust estate ought not to be applied.

Harmen L.J. acknowledged that the defendant, by remaining an executor, came within the scope of the rule, but not it would seem within its intent.

"a case where the reasons behind the rule do not exist"(28) In other words he looked to these reasons (that a man may not be both vendor and purchaser, and that there must never be a conflict of duty and interest), and held that because these situations did not exist, because the beneficiaries never looked to the defendant to protect their interests, he could not be prevented from purchasing the property.

The law of partnership has witnessed a similar divergence. A partner has always been held accountable to his firm for any benefit derived by him, without the consent of the other partners, from any transaction concerning the partnership, or from any use by him of the partnership property, name or business connections. Yet in Aas v Benham (29) the Court of Appeal held that a partner who made use of information obtained by him as a member of the firm did not have to account for any benefit he may have derived from such information, because it was used for purposes which were wholly without the scope of the firm business.

> "It is not the source of the information, but the use to which it is applied which is important in such matters" (30)

---

(28) Holder v Holder (supra) at p 365

(29) [1891] 2 Ch 244

(30) Aas v Benham (supra) at 262

Thus the case became another instance where the court refused to apply carte-blanche a broad principle to a situation which although applicable on its facts was not within the purpose of the rule.

Extending the logic behind these exceptions to the present case, those in favour of a relaxing of the rule assert that it was open to the court, as was done by Viscount Dilhorne, to find that because the trust could not have used the information to acquire the shares, (i.e. such a venture was outside the scope of the trust business), there could be no conflict of duty and interest, and therefore the appellants could not be liable for any subsequent use they put it to.

In fact a recent Canadian court was prepared to do just that.(31) The Board of Directors of a mining promotion company had considered, and in the eyes of the court, bona fides rejected an offer of a new venture made to the company by an outsider, on the grounds that it was not an investment which the company ought to have made. Individual directors, the defendant among them, then chose to contact the outsider and put up their own money for the speculation.

They were held by the court not to have violated any duty to the company, nor to have profited by reason of and in the course of their fiduciary position in the Company. This despite the fact that the new acquisitions were mining claims neighbouring the company's holdings, and were purchased by the individual directors upon the advice of the company's geologist.

---

(31) Peso Silver Mines N.P.L. Ltd. v Cropper (1966) 58 DLR 1

In so holding, Cartwright J. relied completely on the fact that the circumstances in Peso were identical to a hypothetical considered by Lord Greene in Regal Hastings.

> "When a Board of Directors considers an investment which is offered to their company and bona fides 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 fides comes 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" (32)

Lord Greene emphatically rejected such a conclusion.

> "... far beyond anything that has ever been suggested as to the duty of the directors, agents or persons in a position of that kind." (33)

This case was decided contemporaneously with Boardman v Phipps and consequently neither case was referred to by the other. Reference is made in Peso, however, to Lord Dennings Court of Appeal decision in which he approved the above hypothetical of Lord Greene's.(34)

How is it that Lord Denning supports Lord Greene's example and yet still find Boardman liable. Is there an inherent difference between the duties of a director of a company and those of an agent to his principal? Or does there exist in Boardman's case some circumstance which takes it outside the hypothetical and justifies the use of the stricter approach?

At the least then, decisions and exceptions such as these show that an argument can be made for the introduction of a burden of proof test to replace the absolute rule at present in force. Yet before comparing the relative merits of the 'flexible' and 'absolute' approaches, there is a third approach forwarded by a number of writers (35) to solve the problem of the injustices said to occur under the present system which deserves attention.

---

(33) ibid at p.9
(34) ibid
(35) See Goff & JOnes "The Law of Restitution"
D.W.M. Waters "The English Constructive

Unjust Enrichment. A Third Alternative ?

This third approach is the principle of unjust enrichment as found in the American law of Restitution. Nearly all of the major legal systems in the world have found it necessary to provide, quite apart from the fields of contractual and civil wrongs, for the restoration of benefits on the grounds of unjust enrichment. The principle of unjust enrichment presupposes three things

(i) That the defendant has been enriched by the receipt of a benefit

(ii) That he has been enriched at the plaintiffs expense

(iii) That it would be unjust to allow him to retain the benefit.

It can be seen that restitutionary claims made under our presenr system are based generally on this principle. But the trouble is said to be that the constructive trust in English law is viewed not as a remedy but as a part of substantive law. Hence the preoccupation with trying to prove a fiduciary relationship, because once proven a constructive trust will automatically be imposed.

Waters, in particular, argues that it would be advantageous if the term constructive trustee were used to mean

"(a) That every unjustly benefiting party is under an obligation to the deprived, and

(b) That equity compels him to discharge that obligation by the payment of equivalent monetary value, or if preferable the restitution of the withheld sum, chattel, chose or land."(36)

(36) DWM Waters (supra) on p.1221

The great advantage of this definition is that the courts could then concentrate on the equitable obligation of the defendant, rather than the approximate character of the remedy which is to be available to the plaintiff. Such reasoning has received a deal of support.

> "In our view the courts should in the present context, abandon the requirement of a fiduciary relationship and recognise that equitable proprietary rights may be granted to prevent unjust enrichment. Each case should be considered on its merits to decide whether the claiment should have the additional benefits which proprietary rights afford." (37)

Another reason forwarded for instituting such a change is that it is illogical to place obligations on the constructive trustee which are the same as the fundamental obligations of the express trusts. The deterrent policy does not necessary apply when one is not dealing with express trustees.

> "For one thing there is a wide range of fiduciaries, only some of whom could be expected to show or need show the trustees ultra-exclusion of self in any form." (38)

Yet in the clamour for the abolition of this magical touch-stone, "the fiduciary relationship", the point is often over-looked that in actual fact the difference in practice between the effect of the two systems is not very substantial. This for the simple reason that the process of deciding whether there has been an unjust retention of a benefit necessarily involves the search for an obligation towards the deprived party, some form of tangible duty. In practice, the level of this "duty" would seem to differ little if any from that inherent in the fiduciary relationship sought for in the English cases.

---

(37) Goff & Jones (supra) on p.43

(38) DWM Waters (supra) on p.1253

What the unjust enrichment principle does seem to involve, however, is a looser application of and adherence to the deterence factors. In Manufacturing Trust Co. v Becker [39] the directors of the co-operative had purchased company debentures at a discount price varying from 3 to 14 percent of their face value. At the time of this purchase the co-operative was a going concern but the value of its assets was insufficient to cover its outstanding debts. It was found that the debentures were acquired without failure to disclose any material fact to the selling bond-holders, that the purchase was not unfair to the debtor company, and that the assistance rendered to the company by the respondents materially aided it in its grave financial siatuation. Some form of deterrence policy was recognised by the court.

> "equity must apply not only the doctrine of unjust enrichment when fiduciaries have yielded to the temptation of self interest, but also a standard of loyalty which will prevent a conflict of interest from arising." (40)

In fact that a real possibility of a conflict of interests did exist. Yet he was prepared to balance against the potentiality of conflict the practical desirabilities of allowing the directors in that instance to bolster the failing economic position of the company, one decided that the batle policy should prevail.

In a number of respects, then, the principle of unjust enrichment can be seen as offering improved methods of approach to the problem of a fiduciary profiting through his position of trust. But as mentioned earlier. Its use presents the courts

---

(39) 338 U.S. 304

(40) ibid on 312

with very much the same type of problem as can be envisaged arising out of a burden of proof test - a problem weighing and balancing interests and possibilities. With this in mind it is perhaps best of a comparison is made between this flexible test and the strict approach before passing final comment on the suitability of introducing such a scheme into our legal system.

The relative merits of the "absolute" and "flexible" approaches.

What does a comparison of thoese two approaches reveal ? Can the interests of beneficiaries as a group be adequately protected by the imposition of a stringent burden of proof test rather than an absolute rule, and if so would the decision in Boardmans case be reversed under such a test ?

The primary appeal of the flexible test idea is of course that it would eliminate the chance of an honest fiduciary being found guilty of a breach of trust. But advocates of the more relaxed approach also level severe criticism at the general effect of the absolute rule as it now stands.

> "Boardman v Philips will not encourage men of Boardmans ability and energy to devote themselves whole-heartedly to trust administration." (41)

and

> "In this modern day and country when it is accepted as common place that substantially all business and commercial undertakings, regardless of size or importance, are carried on through the corporate vehicle with the attendant complexities involved by interlocking and associated co=operatives, I do not consider it enlightened to extend the application of those principles beyond their present limits... care should be taken to in the light of modern practice and way of life." (42)

---

(41) Gareth Jones (supra) on p.486

(42) Peso case (supra) per Bull J. on p.154

These criticisms, with respect, cannot rationally be seen to hold much weight. The situation must be put put in its true perspective. We are dealing here with quite a narrow field in the law of equity, those situations in which fiduciaries have made a profit by reason of their position. It must be remembered at all times that the present rule does not involve a total prohibition upon such activities.

Any fiduciary is perfectly free to make such a profit, provided he does so with the full knowledge and approval of those persons to whom he owes the duty - trustee, beneficiary or who ever. So for instance if Boardman had bothered to get the assent of all the trustees then his action could not have arisen. And having regard to the nature of the position of fiduciary, a position of utmost trust, a nagging doubt exists as to just how any fiduciary can be held to be completely honest and bona fides if such assent is not gained.

Any assertion then, that the decision as it stands will discourage full devotion and energy on the part of fiduciaries is wholly misleading. Most fiduciaries are acting as such out of a sense of duty (many no doubt spurred on by the fee they receive). Very few are looking for opportunities for extra self-gain. But if by chance, such opportunity does arise, then, to repeat, so long as they have the informed consent of their principal, it may be utilised.

As to the second assertion, that the intracacies and practicalities of modern business demand a relaxing of the standards imposed, the suggested remedy would seem to aggrevate rather than relieve the problem.

case on its facts.

> "It seems to me that the complexities of modern business are a very good reason why the rule should be enforced strictly in order that such complexities may not be used as a smoke screen or a shield behind which fraud might be perpetuated.... In order that people may be assured of their protection against improper acts of trustees, it is necessary that their activities be circumscribed within rigid limited." (43)

With these supposed defects being unstantiatied, advocates of the burden of proof test are left basing their case on the fact that such a test will ensure that no honest fiduciary will be found guilty of a breach of trust. A worthy result indeed, but achieved at what cost?

One must evaluate the positive effects of the present approach, and the damage which its removal would cause.

If in fact the policy behind the need for this rule was simply to prevent a profit made unjustly, from being retained by the fiduciary, then there would be justification in allowing the fiduciary to prove his innocence by showing why he acted as he did, and the nature of the profit made. But this is not the case. The rule is also, in fact primarily, concerned with the protection of the man to whom the duty is owed.

Those consequences of any relaxation of the rule, which were so 'very obvious' to Lord Chancellor King in Keech v Sandford (44) still exist today. The rule is strictly applied in order to deter fiduciaries from acts which may be both difficult to dicover and hard to prove, as well as being in total opposition to the idea of the trust.

---

(43) Peso case (supra) per Morris J,

(44) Supra

case on its facts.

Also, the fiduciary is in a position of advantage which he could use unscrupulously. There is always the chance of him being surveyed by interest rather than duty. Thus if directors could justify their conduct on the theory that their company was financially unable to undertake a venture, danger arises.

> "There will be a temptation to refrain from exerting their strongest efforts on behalf of the company since if it does not meet the obligations, an opportunity of profit will be open to them." (45)

The absolute rule then, removes temptation and ensures the conduct of fiduciaries, remains at a high level. It creates certainty within the law and removes the burder of protracted litigation over difficult questions of evidence and degree. It also guarantees that complete protection is affected to a person who's property is held on trust by another.

> "If a choice has to be made between a rule which favours the beneficiary who may well start with a real informational disadvantage vis-a-vis the trustee, and a rule which permits a trustee to a-gue his way out of a prima-facie conflict situation where he might have avoided the whole difficulty by gaining an informed consent or court approval before he entered into the situationm that choice cannot be hard to make." (46)

Yet what of the Haldane v Haldane (47) type situation, where circumstances within the scope of a strict rule are exempted because they are not within its intent ? The case of Canadian Aero Services Ltd. v O'Malley (48) acknowledges that such situa tions can occur. Laskin J, whilst accepting that a profit may have to be disgorged, even though not gained at the expense of

---

(45) Irving Trust Co. v Deutsch 73 F 20. p.121 and 124

(46) DWM Waters, (supra) p. 658

(47) Supra

(48) (1974)40 DLR 371. This case reaffirmed the use of the absolute rule in Canada. It discredited the Peso case, raising strong doubts as to whether the judges there had correctly decided the case on its facts.

the person owed a duty, was not however prepared to hold that

> "(either) the conflict test, referred to by Viscount Shanky, or the test of accountability for profits acquired by reason only of being directors and in the course of execution of the office, reflected in the passage quoted from Lord Russell of Killowen, should be considered as the exclusive touchstone of liability." (49)

He continued

> "In this, as in other branches of the law, new fact situations may require a reformulation of the existing principle to maintain its vigour in the new setting." (50)

Laskin J suggests then that the "absolute" rule is not absolute. Lord Greene's hypothetical would support this, as would the following statement of Lord Lohen.

> "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." (51)

The difficulty is that none of the judges indicates conceptually what a fiduciary must show in order to avoid liability. Clearly to show that the principal has suffered no loss is not enough, policy demands more. This, I believe, is the weekness of the unjust enrichment principle as applied in the U.S.A. It concentrates too heavily upon the particular parties in question, at the expense of the general policy considerations which are so much a part of the rule. For this reason I would be hesitant in advocating its use in its present form.

In Boardmans case the court sought to discern whether or not there was a possibility of conflict. An examination of their Lordships judgements, no doubt hindered by the fact that some form of conflict, even if remote will be found in any situation, shows the great difficulties involved in getting a clear inter-

---

(49) Supra on p. 373

(50) Ibid

(51) Boardmans v Phipps (supra) on p.100

pretation of such a phrase. This would suggest that any reformulation of the rule to cover the isolated exceptions that can exist should move away from tests involving degrees of conflict, which invariably lead to frustrating exercises in semantics.

Yet whatever the exact nature of the reformulation (the logical approach of the unjust enrichment approach holds a deal of appeal, if only a healthier regard could be instilled for the policies behind the rule) it is clear that it could not extend to cover the fact situation of Boardman v Phipps[52]. Even Lord Upjohn recognised that a conflict situation did exist in the case.

> "My Lord, I believe the only conflict between the duty and interest of the appellants that can be suggested is that having learnt so much about the Company, and realised that in the hands of someone like Tom the shares were a good buy at £ 3 a share, they should have communicated this fact to the trustees, and suggested that they ought to consider a purchase and an application to the court for that purpose." (53)

Now whether or not this is a real conflict, a sensible conflict, or even a real sensible conflict, it is clear that Boardman did not carry out his duty to inform the trustees to its fullest extent. I suggest that the intent of the rule, the policy requirements inherent in this area of the law necessarily require that even under a formulated rule, the decision of Boardman v Phipps [54] remains unaltered.

The apparent harshness of these decisions then, which on closer examination is not so apparent, can only be averted at a

(52) Supra

(53) ibid on p.131

(54) ibid

cost for greater than the damage, if any, caused through the occasional lack of faith in the present system. In this light Boardman v Phipps [55] must be seen as having been correctly decided.

---

(55) supra

BIBLIOGRAPHY

Goff and Jones	"The Law of Restitution"
Gareth Jones	"Unjust enrichment and the Fiduciaries duty of Loyalty" 84 LQR 472.
D.W.M.Waters	"The English Constructive Trust. A Look into the future" 19 Vanderbilt LR 1215.
D.W.M.Waters	"The Law of Trusts in Canada."
A.J.McClean	"The theoretical basis of the Trustees duty of Loyalty" 7 Alta LR 218.
S.M.Beck	"The Saga of Peso Silver Mines; (corporate opportunity reconsidered" (1971) 49 Can.Bar.Rev.80.
D.W.M.Waters	"The role of the Constructive Trust."
W.G.Mart	"The development of the Rule in Keech v Sandford" (1905) 21 LQR 258.

LxTH THORP, F. J. Boardman v. Phipps