Boardman v Phipps [1966] UKHL 2 (03 November 1966)

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Die Jovis, 3° Novembris 1966

Upon Report from the Appellate Committee, to whom was referred the Cause Boardman and another against Phipps, that the Committee had heard Counsel, as well on Wednesday the 2d, Thursday the 3d and Monday the 7th, days of March last, as on Monday the 25th and Tuesday the 26th days of April last, as on Tuesday the 7th, Wednesday the 8th, Thursday the 9th and Monday the 13th, days of June last, upon the Petition and Appeal of Thomas Gray Boardman, of The Manor House, Welford, in the County of Northampton and Thomas Edward Phipps, of Farndish Manor, Farndish, near Wellingborough, in the County of Northampton, praying, That the matter of the Order set forth in the Schedule thereto, namely, an Order of Her Majesty's Court of Appeal of the 26th of January 1965, might be reviewed before Her Majesty the Queen, in Her Court of Parliament, and that the said Order might be reversed, varied or altered, or that the Petitioners might have such other relief in the premises as to Her Majesty the Queen, in Her Court of Parliament, might seem meet; as also upon the Case of John Anthony Phipps lodged in answer to the said Appeal; and due consideration had this day of what was offered on either side in this Cause:

It is *Ordered* and *Adjudged,* by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, That the said Order of Her Majesty's Court of Appeal, of the 26th day of January 1965, complained of in the said Appeal, be, and the same is hereby, **Affirmed,** and that the said Petition and Appeal be, and the same is hereby, dismissed this House: And it is further *Ordered,* That the Appellants do pay, or cause to be paid, to the said Respondent the Costs incurred by him in respect of the said Appeal, the amount thereof to he certified by the Clerk of the Parliaments.

Boardman and
another v.
Phipps

Dd 196966 25 11/66 St.s/PA/20

HOUSE OF LORDS

BOARDMAN and Another

v.

PHIPPS

Viscount Dilhorne

Lord Cohen

Lord Hodson

Lord Guest

Lord Upjohn

31334

Viscount Dilhorne

my lords.

On the 1st March, 1962, the Respondent John Anthony Phipps commenced an action against his younger brother, Thomas Edward Phipps and Mr. T. G. Boardman, a solicitor and partner in the firm of Messrs. Phipps & Troup. In that action he claimed a declaration that they held shares in a private company called Lester & Harris, Ltd. as constructive trustees for him, an account of the profits made by them and transfer to him of the shares held by them as constructive trustees for him and 5/18ths of the profits made by them.

The action was tried by Wilberforce, J., as he then was. He gave judgment for the Plaintiff. The Defendants appealed to the Court of Appeal (Lord Denning, M.R., Pearson and Russell, L.JJs). The appeal was dismissed and they now appeal to this House.

The estate of Mr. C. W. Phipps, the father of the Appellant Phipps and the Respondent, included 8,000 shares in Lester & Harris, Ltd. which was engaged in the textile business. Its issued capital was 30,000 £1 Ordinary shares. Mr. Phipps' estate also included a substantial holding in a family company, Phipps *&* Son, Ltd., also engaged in the textile business. The Appellant Phipps was Chairman of this company and Mr. Boardman was one of its directors.

By his Will dated the 23rd December, 1943, Mr. C. W. Phipps left an annuity to his widow and subject thereto 5/18ths of his estate to each of his sons and 3/18ths to his daughter, Mrs. Noble. In the event of a son not

surviving him, that son's 5/18ths was to go to the son's family. His eldest son did not survive him and so one 5/18ths went to his family.

At all relevant times until her death in November, 1958, Mr. C. W. Phipps' widow, Mrs. Ethel Phipps, was a trustee of his Will. She was, when the events which gave rise to this case occurred, over 80 years of age and suffering from senility. Consequently she did not take an active part in the affairs of the trust. The other trustees were Mrs. Noble and a Mr. Fox, an accountant.

In December, 1955, Mr. Boardman, who acted as solicitor to the trust and for several members of the Phipps family, received a letter asking whether the trustees were prepared to sell their holding in Lester & Harris, Ltd. He consulted Mr. Fox on this and as there had been some trade connection between Lester & Harris, Ltd. and Phipps & Son, Ltd., Mr. T. E. Phipps, the Appellant, was also consulted for it was thought that what was done with these shares might affect the Phipps' interests in Phipps & Son, Ltd.

Mr. Fox and Mr. Boardman looked at the accounts of Lester & Harris, Ltd. According to Mr. Boardman they showed that that company was going through a lean time and it was apparently decided to consider the Lester & Harris holding again when the accounts for the current year were published with a view to seeing whether anything could be done to improve the value of the trust's holding.

In his reply to the enquiry he had received, Mr. Boardman wrote on the 13th January, 1956, that he did not imagine that his clients would be prepared to sell except at a price approaching the asset value of the shares which he estimated at £10 a share on the basis of the 1954 Balance Sheet and that his clients were far from satisfied with the return that the shares had yielded during recent years.

On the 17th December, 1956, Mr. Boardman wrote to Mrs. Noble telling her that Mr. Fox had just received the accounts of Lester & Harris, Ltd., that they were very unsatisfactory and that " we all feel that something

"should be done to improve the position". He said that the Appellant Phipps had suggested that he and Boardman should attend the annual general meeting of Lester & Harris, Ltd., on the 28th December and he enclosed proxy forms to be signed by Mrs. Noble and her mother.

The Appellants attended the annual general meeting on the 28th December, 1956, representing the trust holding. Mr. Boardman expressed their dissatisfaction with the position of the company and sought without success to get Mr. Phipps elected a director. He also asked a number of questions. In his evidence at the trial he said that they got no information which was not in the published accounts. The Appellants thought that the attitude of the board of Lester & Harris, Ltd. was hostile.

On their return to Northampton they reported what had happened to Mr. Fox. In the course of their discussion Mr. Boardman suggested that the only way in which the matter could be resolved would be by the purchase of a controlling interest in Lester & Harris, Ltd. Mr. Boardman in his evidence said that Mr. Fox's reaction was to say that " he did not consider " that a take-over bid for shares in a private company was something that " he as a trustee or the trust should take any part in ". Mr. Fox when giving evidence was asked: -—

" Was there ever any question, so far as you were concerned, of the
" Trustees buying all the outstanding shares? "

His answer was: —

" I would not consider the Trustees buying those shares under any
" circumstances."

He was then asked: " Did you consider the matter and reject it? " to which his reply was: " I considered the matter and rejected it."

When Mr. Fox made it clear that he was against the trustees buying the shares, Mr. Boardman suggested that the Appellant Phipps should try to buy them. Phipps refused to do so unless Boardman agreed to come in with him and Boardman agreed to do so. In cross-examination Mr. Fox was asked:

" When Mr. Boardman and Mr. Phipps decided to make an offer for
" the shares themselves, did they ask your consent on behalf of the
" Trust or anything like that? "

His answer was:

" I do not know that they asked my consent. I was only too glad.
" Here was I holding 8,000 shares a minority interest in a company
" where the directors were unfriendly, and, having had experience in
" other cases of the weakness of the Companies Act with regard to
" minority shareholders, as soon as I could see the prospect of getting
" friendly directors and friendly shareholders I was only too glad."

Later, as will be seen, Mr. Boardman entered into an agreement under which the Appellants purchased 14,567 shares in Lester & Harris, Ltd., and Mr. Fox was asked the following question:

" What would your reaction have been if Mr. Boardman and Mr.
" Phipps, having concluded an agreement, had come to you and said
" ' We have agreed to buy the whole of the issued capital of these shares,
" ' and of course we were doing that as agents for the Trustees with
" ' whom you must now complete the agreement' ".

His answer was:

" They were not doing it for the trustees ; that was the whole point."

After the meeting at the end of 1956 Mr. Boardman wrote, on the 11th January, 1957, to Mr. Fox telling him that the Appellants' efforts to buy the shares privately had failed and that they proposed to make an offer to buy the shares personally by circular. He pointed out that this would not involve the trustees who would share in any advantage gained and he asked Mr. Fox to confirm that the circular was in order and that it was in order
" with regard to Mr. Phipps and my position vis-à-vis the trust".

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Mr. Fox raised no objection to this, but suggested that Mr. Boardman should write to Mrs. Noble and tell her what was proposed. Mr. Boardman did so on the 17th January, 1957, and in his letter, said:

"We" (i.e. the Appellants) "both feel that the only real hope of
" getting the true value of the shares is by acquiring a controlling holding
" so that a large part of the assets can be liquidated and only those
" parts of the business retained that are profitable. By so doing we
" should be able to put up the value of the shares and get some cash
" out. This involves making an offer for all the remaining shares and

" hoping that we will get sufficient acceptances to get control. The
" making of an offer in this form is not a matter which Trustees should
" properly do and Tom and I have, therefore, agreed to make an offer
" personally. Our offer price is £2 5s. 0d. per share, which exceeds
" the value of the shares on an earnings and dividend basis, but is
" below their value on an asset basis. Although the offer is formally
" made to the Trustees it is not intended, of course, that they should
" accept, as we hope that they will join with us in putting the Company
" in order and getting full value for their holding.

" Our intention is that if we acquire sufficient shares which, with the
" Trusts holding, will give us control, to reorganise the Boards and see
" to what extent a repayment of capital can be made. It will depend
" upon the number of acceptances whether Phipps & Son are also asked
" to support the offer, but initially the proposal is that it should be a
" personal one. I have discussed this with Mr. Fox who is in agree-
" ment with the proposal, which as I have said does not involve the
" Trustees in any liability and will I hope be to their advantage."

In the same letter he said that the profits of the company had gone down in the last few years, that the dividend for the year to December, 1955, was 71/2 per cent, instead of a previous 10 per cent., that no dividend was paid for the six months to June, 1956, and that the company's assets on the balance sheet came out at a net surplus of £314,000.

Mrs. Noble replied on the 27th January and said that she thought that the line the Appellants were taking was the only possible one and asked where the money to pay for the shares was coming from. Boardman replied on the 28th saying that he did not think that the trustees could properly make an offer of this nature and for that reason he and Mr. T. E. Phipps were making it personally " with the object of taking such shares as we can and " the balance being taken by Phipps & Son Ltd."

Messrs. Phipps & Troup sent an advance copy of the circular letter to Lester & Harris, Ltd., with a letter which made it clear that the offer was by the Appellants. In the same letter they said that they were instructed to ask on behalf of the Executors of C. W. Phipps for a list of the members of the company and their addresses. This information was obviously wanted so that the circular might be sent to them.

The directors of Lester & Harris, Ltd., advised their shareholders not to sell. The Appellants then increased their offer to £3 per share. This offer was conditional upon acceptance by the holders of not less than 7,500 shares. It was accepted by the holders of 2,925 shares. It was not until June, 1959, that it was declared unconditional and the shares were then transferred to the Appellants.

In the course of his judgment Wilberforce J. (as he then was) expressed the opinion that Mrs. Noble accepted the Appellants' " action as a trust " action, and the transaction and proposed action as trust matters ". If by this he meant that Mrs. Noble thought that they were proposing to buy the shares on behalf of the trust, with the greatest respect I must venture to disagree with him. In his letter of the 17th January to which I have referred, Mr. Boardman clearly stated that the Appellants were going to make an offer for the shares personally and not for the Trust. Her answer of the 27th January shows that she did not appreciate this but Mr. Boardman's letter to her of the 28th January put the matter beyond all doubt.

Wilberforce, J. went on to say: " It seems to me that the true interpretation " of this initial phase is that the agency of Phipps and Boardman was con- " tinued, the nature of it being to use and exploit the trust holding and its " voting power to obtain information and, if possible, to strengthen the " management of the company by securing representation on the board of " the trust holding. Added to this was an intention that Boardman and Phipps " should acquire additional shares with a view to obtaining control. This " was no departure from the agency."

I regret that I do not agree with this conclusion. It is, I think, clear both from the correspondence and from the evidence to which I have referred that Mr. Fox would not agree to the trustees seeking to buy the shares and that, in seeking to do so, the Appellants were acting on their own behalf. Far from the proposed acquisition being no departure from the agency, it was, in my opinion, wholly outside the scope of any agency. As Mr. Fox said: " They were not doing it for the trustees: that was the whole point."

The trust could not in fact have bought the shares without the sanction of the Court and whether the Court would have sanctioned this speculation at a time when on the death of his widow, then in failing health, Mr. C. W. Phipps' estate would have become divisible among the beneficiaries of his Will and when the proposed investment was in a private company which was not doing well, and the trust had no money available for investment, may well be open to doubt.

In my opinion, the position was that from the time of the meeting in December, 1956, when Mr. Fox stated that he as trustee would not take any part in a take-over bid for the shares, the Appellants' efforts to acquire the shares were wholly outside the scope of their agency; and that Mr. Fox, as trustee, believing that it was in the interests of the trust that they should do so, gave them such assistance as he could. In one sense it was a joint operation for the benefit of the trust but there is no doubt that the efforts of the Appellants to buy the shares were made solely on their own behalf. If they succeeded in doing so, it must have been clear to Mr. Fox and Mrs. Noble that the Appellants would make a profit if the speculation was successful.

The failure to secure sufficient acceptances of their offer of £3 a share did not lead Mr. Boardman and Mr. Phipps to abandon their efforts. On the 26th April, 1957, Mr. Boardman wrote to Mr. Smith, the chairman of Lester & Harris Ltd., pointing out that Mr. Smith and his colleagues held just under 50 per cent, of the shares and that most of the other shares are " held by my " clients or on offer to them ". It is not clear to whom Mr. Boardman was referring. The Appellants held no shares at that time in Lester & Harris, Ltd.: though some were on offer to them. The Trustees held shares but none were on offer to them. Mr. Boardman suggested that to avoid difficulties in the future a possible solution might be to divide the Lester & Harris " group " so that " the Harris family and the directors own the whole " of one part, and the Phipps interests own the balance with suitable adjust- " ments, of course, for the few shareholders who may be ' in neither camp '."

This letter marks the commencement of the second phase of the negotiations that took place with the directors of Lester & Harris, Ltd.

Mr. Smith and his colleagues on the board of Lester *&* Harris did not reject this suggestion and from this time until October, 1958, negotiations were continued with a view to finding an acceptable basis for splitting up the business of Lester & Harris, Ltd. In the course of these negotiations the Appellants obtained information as to the property Lester & Harris owned in Australia and as to Lester & Harris's factory at Nuneaton and the nature of the business carried on at each place. They inspected the factory at Nuneaton and the Park Street premises of Lester & Harris. A valuation of their property was made by valuers employed by Lester & Harris, Ltd., and valuers employed by the Appellants were also allowed to make a valuation.

Lester *&* Harris, Ltd., also sent them a valuation of their property and fixed assets in Australia. Lester & Harris also had a factory at Coventry. The

value placed on the factories at Coventry and Nuneaton by Lester & Harris's valuers was £215,675 whereas the Appellants' valuers valued them at £90,650. After further correspondence, on the 3rd October, 1958, Mr. Boardman wrote to Mr. Smith saying that the Appellants were " able to control about 12,000 shares. These, on the asset values submitted with your letter would require an allocation of assets valued at £126,000. Such proportion might be satisfied by either: —

1. the transfer to us of the Nuneaton factory and plant, at a value of £88,000 plus net current assets adjusted to produce £38,000; or
2. the transfer of the whole of the Australian company plus U.K. assets of the value of £26,000."

On the 13th October, 1958, Mr. Smith suggested that they should make an offer for the whole of the remaining share capital, and on the 17th October told Mr. Boardman that he would be prepared to recommend a figure of £5 a share.

On the 21st October Mr. Boardman wrote to Mr. Smith saying that he and Phipps would like to give further consideration to obtaining the whole share capital. He said that so far they had only seen the Balance Sheet and summarised accounts, and he asked to be supplied with copies of " the " detailed Trading and Profit and Loss Accounts for the last five years or " so, both for the English company and for the Australian company ". At first Mr. Smith refused to agree to this, but after a further letter from Mr. Boardman pointing out that although they had received " a good deal of " information as to the assets " the figures they had been given and the published accounts gave no real guidance to the " going concern " value of the business, Mr. Smith agreed that their accountants should meet. Mr. Fox was employed for this purpose by the Appellants and examined the trading accounts for five years. After receipt of his report, on the 5th January, 1959, Boardman made an offer of £4 5s. 0d. a share. A little later after a discussion with Mr. Smith, he agreed with Mr. Smith a price of £4 10s. 0d. a share, " subject to various safeguards and escape clauses ".

The making of this agreement may be taken to mark the conclusion of the second phase of the negotiations during which the Appellants were seeking to secure the division of the assets of Lester & Harris, Ltd. between the two groups of shareholders.

During the whole of this time the Appellants kept open the possibility of acquiring the 2,295 shares by extending the period within which the offers might be made unconditional.

In what capacity was Mr. Boardman acting during this second phase? He was, no doubt, acting on behalf of the Appellant Phipps as well as for himself, and it is clear that he was not instructed to seek to secure a division of the assets by the trustees. Nevertheless, he clearly represented to Mr. Smith that he was acting on their behalf. In a letter dated the 30th April, 1958, he told Mr. Smith that the Appellants had " been required by the Trustees "to look after their interests in the company". On the 12th June, 1958, he wrote to Mr. Smith asking, if no progress in the negotiations could be made, that the Phipps interest should be represented on the board of Lester & Harris and saying that if they could not reach agreement " either as to " a division or as to representation " they would be forced to exercise their legal remedies to protect the minority interest.

In his letter of the 19th June, 1958, to Mr. Smith, he stated: "Our " primary interest is, and always has been, to increase the value of *our* " investment by endeavouring to secure a greater profitability for the business, " and only if the directors were not prepared to accept our co-operation in " this, to have some form of division of the assets ".

In a letter to Mr. Fox on the 24th January, 1958, he thanked him for sending him the notice convening the annual general meeting of Lester & Harris, and said: " I shall be glad if I can receive any communications " from that company as soon as they arrive because, as you know, I am " involved in some rather delicate negotiations with them ". He went on to

say that it would be helpful if the Appellants were registered as shareholders and suggested that one share should be transferred by the trustees into his name and that of the trustees and another into the names of Phipps and the trustees to ensure that notices were sent direct to them and that they would have the right to speak at any meeting. On the 11th February he wrote to Mrs. Noble telling her of the proposal that Lester & Harris should be divided and part of it allocated in satisfaction of the estate shares. " This " he wrote " should produce much more capital for those shares than they are ever likely " to realise as a minority holding . . ." He sent her transfers for two shares with the request that they should be executed by her and her mother so as to give the Appellants greater rights to enquire into the company's affairs than they had at that moment.

Mr. Fox, Mrs. Noble and her mother executed the transfers, but the directors of Lester & Harris refused to accept them. The Appellants attended the annual general meeting as holders of proxies signed by the three trustees. In so doing they acted as agents for the trustees but, as I have said, they were not authorised to act for them in seeking a division of the assets. The trustees were not asked to pay and did not pay for the valuation procured by the Appellants. The Appellants paid for that and they paid Mr. Fox for the work he had done at their request.

I do not doubt that the Appellants' primary interest was, as Mr. Boardman stated in his letter of the 19th June, 1958, to increase the value of the trust investment. The only profit that they would have made on a division of the assets among the shareholders would have been on the 2,295 shares offered to them if they had acquired those shares.

I think that throughout this phase the Appellants were continuing to act in pursuance of the common design agreed with Mr. Fox at their meeting in December, 1956, on their return from Lester & Harris's annual general meeting and assented to by Mrs. Noble in January, 1957, namely, to seek to improve the value of the trust holding.

One question for consideration is whether, having got the information about Lester & Harris in the way they did, they were in breach of any duty they owed to the trustees in making use of it to increase their offer for the shares from £3 to £4 5s. 0d. a share and when agreeing to the price of £4 10s. 0d. per share. I shall revert to this question later.

On the 10th March, 1959, an agreement was made between Mr. Smith and the Appellants for the sale to them of 14,567 shares in Lester & Harris at £4 10s. 0d. a share. Completion was to be on the 30th May, 1959, but provision was made for the rescission of the agreement by the Appellants by notice given before a specified date. The Appellants also agreed to offer the other shareholders £4 10s. 0d. a share.

In April, 1959, the Appellants went to Australia at their own expense to get an assessment of the realisable value of the business there. In a letter dated the 5th March, 1959, Mr. Boardman said that Mr. Phipps took the view that neither party should be bound until after their return from Australia. " By that time" he wrote " we should have a much clearer picture as to what is involved and the risks and we hope also to know a little more about the prospects of a rapid sale of the English interests ".

The same day Mr. Boardman wrote to Mr. Phipps a letter which contained the following paragraph:

> " I think we should have a meeting with your brother" (the Respondent) " and sister and Mrs. F. M. Phipps" (representing the estate of the dead brother) "as soon as possible after your return to " Northampton to inform them of the proposals and to get their views " on the family holding. They may wish to sell their shares, but if " they wish to retain them, we should like to know that they will vote " with us. I should also like to know that they have no objection to " my taking a personal interest in this despite the fact that my " knowledge of the company came through my professional connection " with the family trust."

Mrs. Ethel Phipps the widow of Mr. C. W. Phipps having died in November, 1958, the beneficiaries under his Will were entitled to their respective shares in Lester & Harris on the distribution of his estate. For reasons unconnected with this case, that distribution did not take place until April, 1960.

The suggested meeting did not take place, but on the 10th March, 1959, Mr. Boardman wrote to the Respondent, Mrs. Noble and Mrs. F. M. Phipps (representing the estate of the dead brother) letters in identical terms, telling them of the offer to sell the shares to Mr. Phipps and to him at £4 10s. 0d. per share " about twice the price at which they acquired them ", and saying:

> " Whilst we consider this to be a high price, we feel that there is " probably quite a lot of asset value in the company and that we may " well be able, by better management or by liquidation, to make the " shares worth a good deal more than this. We are proposing,

" therefore, subject to this letter, to accept the conditional offer of
" these shares and to see whether we can effect some sales of the
" Australian interest, and possibly some of the English interest to yield
" a profit above the price at which the shares are now offered. We
" are proposing to go to Australia next month. . . .

" If we are successful in making the shares worth more than
" £4 10s. 0d. the increased value will, of course, equally reflect upon
" the shares which are held in the estate of the late C. W. Phipps, and
" to that extent you will benefit by them. Both of us, however, would
" like to be re-assured on two points:

" 1. The first point, which really concerns me, alone, is whether you
" have any objection to my taking a personal interest in this purchase,
" bearing in mind that my initial enquiry with regard to it was on
" behalf of the C. W. Phipps estate. At that time the trustees did not
" wish to purchase any shares themselves and expressed their agreement
" to my taking a personal interest. However, as the shares will shortly
" be distributed amongst each of you, I should like to have your
" approval of the proposals. They do not, of course, involve you in
" any liability and there is no conflict of interest, as it will of course
" be in the interests of yourself as much as it will be for Tom and me,
" that we should try to realise the maximum value possible for these
" shares."

It must have been obvious to the recipients of this letter that approval of the proposals must involve, if their efforts were successful, the Appellants obtaining a profit for themselves. Mr. Boardman was not entirely accurate in saying that the trustees had expressed their agreement to his taking a personal interest, for Mrs. Ethel Phipps, the widow, had not been approached and had not, therefore, agreed though the other trustees, Mr. Fox and Mrs. Noble, had done so.

In an earlier letter on the 25th February, 1959, to a gentleman through whom he was seeking to obtain finance for the purchase of the shares, Mr. Boardman had stated that, on their valuer's valuation, the equity was worth approximately £250,000 and if the values put forward by Lester *&* Harris's valuers were obtained, the equity would be worth over £380,000. He went on to say: " At the agreed price of £4 10s. 0d. the equity is costing
" us £135,000. . . . and I feel that there is a most attractive margin to go
" for. It is of course true that the earnings do not support a figure as high
" as the asset values, but I think that this is largely due to bad management." On the figure of Lester & Harris's valuers, this meant that each share was worth £12 6s. 8d. In his letter of the 13th January, 1956, Mr. Boardman had put their value, based on the 1954 Balance Sheet, at £10 a share.

Mr. Boardman's letter to the Respondent was followed by a meeting at which he, the Respondent and the Respondent's wife were present. Mr. Boardman's note of that meeting records that the Respondent agreed to the Appellants " undertaking the adventure on their own behalf ".

Then the Appellants went to Australia. On the 3rd June the purchase of the 14,567 shares was completed. By the 19th June the Appellants

had paid for 16,442 shares and were about to acquire a further 1,400 shares. Taking into account the trust holding of 8,000, this left a balance

of 4,158 shares to be acquired. They eventually made up their holding to 21,986 shares.

At the end of July Mr. Boardman made a further visit to Australia with a view to the sale of the Australian business.

On the 13th January, 1960, Mr. Boardman who had become chairman of Lester & Harris, Ltd., informed the shareholders of that company that the Australian business had been sold for £88,000 and announced the distribution of a capital bonus of £3 a share.

On the 20th January Mr. Boardman wrote a long letter to the Respondent telling him what the Appellants had done, of " the sale of the Australian " business " at twice the amount that " had at one time seemed obtainable ", that the Appellants were on the board of the English company and that they had had a very busy six months reorganising it, and that apart from the capital bonus of £3 a share which meant that C. W. Phipps' estate benefited to the extent of £24,000, his holdings remained unchanged and that they hoped that they could produce a level of profit which would make the shares worth considerably more than their previous value. To this the Respondent replied on the 24th January:

> " This is indeed welcome news. You must be feeling very satisfied " that your hunch backed by much hard work and perspicacity has " turned out so well for all concerned."

In April, 1960, transfers for the shares in Lester & Harris, Ltd., to which the Respondent was entitled on the distribution of Mr. Phipps' estate were sent to him by Mr. Boardman, and shortly thereafter the Lester *&* Harris shares held by the estate were distributed. Mr. Boardman appears to have acted at this time professionally for the Respondent in connection with the transfer of some shares in Phipps & Son, Ltd. by the Respondent to his wife. The correspondence shows that Mr. Boardman and the Respondent were then on good terms.

Later in the year the Appellants sold the Coventry factory of Lester *&* Harris and secured a very substantial capital profit. They then made a further capital distribution of £2 17s. 6d. a share and so the Respondent received £5 17s. 6d. in respect of each share which came to him as against the original probate value of £2 7s. 6d. while retaining the shares which were still worth more than £2 a share.

Nearly two months after the receipt by the Respondent of this good news, Mr. Boardman received a letter from solicitors employed by the Respondent alleging that at all times he had been acting in a fiduciary capacity and was therefore accountable to the beneficiaries for any profit he had made. A similar letter was sent to the Appellant Phipps.

Mr. Boardman, on the 28th July, 1961, sent a long letter in reply, denying liability and pointing out " there was not at any stage any possible conflict " of duty and personal interest ". It included the following paragraph:

> " Although I am not aware of any duty or moral obligation requiring " me to do so, I did not contemplate taking any personal interest in " the affairs of Lester *&* Harris except with the full knowledge and " approval of the trustees and beneficiaries under the Will of C. W. " Phipps deceased (the trustees include a chartered accountant who had

" as full information as I had on the affairs of Lester & Harris Ltd.).
" Approval was obtained."

Mr. Boardman also pointed out that the vendors of the controlling holding, the then directors of Lester & Harris, were the then chairman, a solicitor in Coventry with wide commercial experience, the then managing director who had spent most of his life in the business, the son of the founder who had been in the business all his working life and a practising chartered accountant

who had detailed knowledge of all the affairs of the company and its underlying value. He then wrote:

" You may, therefore, think that these experienced men, who collec-
" tively held control, were not likely to sell at an undervaluation, that
" they extracted from us the full worth of the shares at that time, and
" that the substantial appreciation in value is due to the ability brought
" into the Company by the new purchasers."

This did not satisfy the Respondent and after some further correspondence the writ in this action was issued on the 1st March, 1962.

Throughout this long history the Appellants acted with the object of securing an improvement in the value of the trust's holding in Lester & Harris, Ltd. Throughout they thought that they were acting with the approval of the active trustees, Mr. Fox and Mrs. Noble, and, in relation to the purchase of the shares at £4 10s. 0d. a share, with the approval of the beneficiaries under the Will of C. W. Phipps. At the outset they thought that if they could get control, they would be able to increase the value of the holding but it was not until a considerable time later that Mr. Boardman, as a result of information they had received from Lester & Harris, their valuer's report and the report of Mr. Fox, was able to write to the gentlemen through whom he sought financial aid, saying that he felt that there was a most attractive margin to go for.

When they offered to buy the shares in 1957 and when they bought them in 1959, they did not act or purport to act as agents for the trustees. The acquisition of the shares brought no immediate profit. The substantial profits that were obtained were made as a result of the Appellants' work when they had gained control of Lester & Harris.

Does equity require the Appellants to account at the instance of one of the four beneficiaries under C. W. Phipps' Will for the profits that they made?

Equity, may, where there has been some impropriety of conduct on the part of a person in a fiduciary relationship as, for instance, a trustee purchasing trust property, require that person to account.

Mr. Walton, for the Respondent, argued that as the Appellants had acquired knowledge and information about Lester & Harris, Ltd., in the course of acting as agents of the trustees and had used this knowledge and information when making their offers for the shares, they were liable to account. He relied strongly on the decision in this House in *Regal (Hastings) Ltd.* v. *Gulliver* [1942] 1 All E.R. 378. The facts of that case were very different from those of this. In that case the directors of the Regal company had formed a subsidiary company with the intention that all the shares in the subsidiary company should be held by Regal. When the landlord of

two cinemas was not prepared to grant a lease of them to the subsidiary company without either the rent being guaranteed by the directors of Regal or the subsidiary company having a paid-up capital of £5,000, the directors of Regal decided that Regal should invest £2,000 in the subsidiary company any that the balance of £3,000 should be found by each of the directors and Regal's solicitor investing £500.

Thus the directors of Regal and Regal's solicitor became the owners of shares which were to have been the property of the Regal company. These shares were later sold at a profit. This House held that the directors were in a fiduciary relationship to the company; that they had made a profit on the shares in the course of their execution of their office as directors; and that those directors who had made a profit on the shares were liable to account.

In this case the Appellants did not make a profit out of buying shares which it was intended that the trust should acquire or which, unless Mr. Fox changed his mind and the sanction of the Court was obtained, there was any possibility of the trust acquiring.

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There are, however, passages in the opinions delivered in that case which are very relevant to the issues your Lordships have to determine. Lord Sankey at page 381 said:

> "The general rule of equity is that no one who had duties of a
> " fiduciary nature to perform is allowed to enter into engagements in
> " which he has or can have a personal interest conflicting with the
> " interests of those whom he is bound to protect."

Lord Russell of Killowen at page 386 said:

> " 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 ques-
> " tions or considerations as whether the profit would or should other-
> " wise 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 to
> " account."

He held that the directors were in a fiduciary relationship to the company and that they had acquired the shares " by reason and only by reason of " the fact that they were directors of Regal and in the course of their " execution of that office ". Lord Macmillan at page 391 said.

> " We must take it that they entered into the transaction lawfully, in
> " good faith and indeed avowedly in the interests of the company.
> " However that does not absolve them from accountability for any
> " profit which they made, if it was by reason and in virtue of their
> " fiduciary office as directors that they entered into the transaction "....

" The issue thus becomes one of fact. The plaintiff company has to
" establish two things: (1) that what the directors did was so related
" to the affairs of the company that it can properly be said to have
" been done in the course of their management and in utilisation of
" their opportunities and special knowledge as directors: and (2) that
" what they did resulted in a profit to themselves."

Lord Wright at page 392 said that the question to be decided was:

" Whether an agent, director, a trustee or other person in an
" analogous fiduciary position, when a demand is made upon him by
" the person to whom he stands in a fiduciary relationship to account
" for profits acquired by him by reason of his fiduciary position and
" by reason of the opportunity or knowledge, or either resulting from
" it, is entitled to defeat the claim upon any ground save that he made
" the profits with the knowledge and assent of the other person. The
" most usual and typical case of this nature is that of principal and
" agent. The rule in such cases is compendiously expressed to be that
" an agent must account for net profits secretly (that is, without the
" knowledge of his principal) acquired by him in the course of his
" agency."

and a little later:

" both in law and equity, it has been held that, if a person in a fiduciary
" relationship makes a secret profit out of the relationship, the court
" will not enquire whether the other person is damnified or has lost a
" profit which otherwise he would have got. The fact is itself a
" fundamental breach of the fiduciary relationship."

And Lord Porter at page 395 said:

" The legal proposition may, I think, be broadly stated by saying
" that one occupying a position of trust must not make a profit which he
" can acquire only by use of his fiduciary position, or, if he does, he
" must account for the profit so made."

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In the light of these passages, the first question to be decided is whether the Appellants were throughout the negotiations or during any part of them in a fiduciary relationship to the trust.

They had been authorised by the trustees to represent the trust holding at two annual general meetings of Lester & Harris, Ltd., Boardman as trust solicitor had dealt with the enquiry whether the trust would sell their holding and Boardman as solicitor and Phipps had discussed with Mr. Fox in December, 1956, Lester & Harris's accounts and what should be done to improve the value of the trust holding. Apart from these occasions, I agree with Lord Denning that there was not any contract of employment of the Appellants made by the trustees or any of them.

Wilberforce J. held that in 1956 the Appellants assumed the character of self-appointed agents of the trustees; that the agency continued throughout the negotiations ; and, as I have said in my view wrongly, that the acquisition of shares by them was no departure from the agency.

In the Court of Appeal Lord Denning, M.R. agreed with Wilberforce, J. that they had assumed this character and said that they had taken upon themselves an authority they did not possess. Pearson, L.J. (as he then was)

held that they were acting with the authority of the trustees and Russell, L.J. expressed the view that two out of three trustees could come to an arrangement with a third party which would have the effect of placing the latter in a fiduciary position.

In my opinion, despite the able arguments advanced by Mr. Bagnall for the Appellants the unanimous opinion of the Court of Appeal and of Wilberforce, J., that their relationship to the trust was fiduciary is correct. In my opinion that relationship arose from their being employed as agents of the trust on the occasions I have mentioned and continued throughout.

It does not, however, necessarily follow that they are liable to account for the profit they made. If they had entered into engagements in which they had or could have had a personal interest conflicting with the interests of those they were bound to 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.

If in February, 1957, their offer of £3 0s. 0d. a share had then led to their acquisition of 7,500 shares in Lester & Harris, Ltd., that acquisition would not and could not have involved any conflict of interest. If then they had raised their offer to £4 10s. 0d. a share and that offer had been accepted, the position would have been the same.

Lord Russell of Killowen in the Regal case held that the directors had acquired the shares " by reason and only by reason of the fact that they were " directors of Regal and in the course of their execution of that office ". Lord Macmillan, at p. 391, said that the directors were accountable for any profit which they made if it was by reason and in virtue of their office. Lord Wright, at p. 392, said that an agent must account for profits secretly acquired " in the course of his agency ", and Lord Porter, at p. 395, said that " one occupying a position of trust must not make a profit which he can " acquire only by use of his fiduciary position, or, if he does, he must " account for the profit so made ".

If the profits made by the Appellants had been made as a result of the acquisition of shares by them in 1957, it could not, in my view, be said that the shares were acquired " only by use of " their " fiduciary position ", or " in the course of " their " agency " or by reason and only by reason of the fact that they were agents of the trust for certain limited purposes.

Between 1957 and 1959 when they acquired the shares did anything occur which altered the position? In my view, nothing occurred during this period which gave rise or could have given rise to a conflict of interest. Mr. Fox is a chartered accountant. He had, according to Boardman—and it was

not disputed—as much information as Boardman possessed of the affairs of Lester & Harris. He had seen their trading accounts for the past five years. In his evidence at the trial he stated that he would not consider the trustees buying the shares under any circumstances. This being his attitude, there was no possibility of a conflict of interest arising through purchase of the shares by the Appellants either in 1957 or in 1959. In fact, as his evidence shows, far from there being a conflict of interest, Mr. Fox thought

that it would be to the advantage of the trust if the Appellants bought the shares.

Between 1957 and 1959 the Appellants obtained a mass of information about Lester & Harris, Ltd. They had been shown the valuation made by Lester & Harris's valuers. They had been allowed to employ their own valuers. As I have said, Mr. Fox examined Lester & Harris's trading accounts for the past five years at the request of the Appellants. At the start of the negotiations they had obtained some information, a small part of the total, when acting as agents of the trust. A great deal of it was obtained during the second phase of the negotiations when Boardman was representing that he was acting for the trust, but it was not until their return from Australia and after they had seen for themselves the position there that the Appellants finally committed themselves to the purchase of the 14,567 shares at £4 10s. 0d. a share.

The information they obtained during the second phase was clearly of great value to the Appellants for it enabled them to form an estimate of the profits that they might secure if all went well. Without it they might not have been prepared to pay £4 10s. 0d. a share and without it they might not have been able to secure the necessary finance.

Was the information they obtained the property of the trust? If so, then they made use of trust property in securing a profit for themselves and they would be accountable.

While it may be that some information and knowledge can 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 properly. Nor do I think that saying that they represented the trust without authority amounted to use of the trust holding.

What was said in *Aas* v. *Benham* [1891] 2 Ch. 244 C.A. throws some light on this question. That was a partnership case and a partner is not only a principal but also an agent of his fellow partners. In his capacity as agent he is in a fiduciary relationship with them. In that case it was claimed that the defendant had made use of information gained by him as a partner for his own use and benefit. Lindley, L.J. said at page 255 :

> " As regards the use by a partner of information obtained by him in " the course of the transaction of partnership business, or by reason of " his connection with the firm, the principle is that if he avails himself " of it for any purpose which is within the scope of the partnership " business, or of any competing business, the profits of which belong to " the firm, he must account to the firm for any benefits which he may " have derived from such information, but there is no principle or " authority which entitles a firm to benefits derived by a partner from " the use of information for purposes which are wholly without the " scope of the firm's business. . . .
>
> " It is not the source of the information but the use to which it is " applied, which is important in such matters.
>
> " To hold that a partner can never derive any personal benefit from " information which he obtains from a partner would be manifestly " absurd."

Bowen, L.J. at page 257 agreed with this and went on to comment on and explain a dicta of Cotton, L.J. in *Dean* v. *MacDowell* (8 Ch. D. 345). He said:

" I think that when Lord Justice Cotton said that a partnership was
" entitled to the profits which arose out of information obtained by one

" of the partners as a partner, he was speaking of information to which
" the partnership was entitled in the sense in which they are entitled to
" property. I think you can only read the sentence in which the
" expression occurs in that way. It is as follows: ' Again, if he makes
" any profit by the use of any property of the partnership, including,
" I may say, information which the partnership is entitled to, there the
" the profit is made out of the partnership property'... . He is speaking
" of information which a partnership is entitled to in such a sense that
" it is information which is the property, or is to be included in the
" property of the partnership—that is to say, information the use of which
" is valuable to them as a partnership, and to the use of which they have
" a vested interest. But you cannot bring the information obtained in
" this case within that definition."

Thus it was held that use by a partner for his own benefit of information obtained by him as a partner did not always render him liable to account for the profits he made and that not all the information gained as a partner was to be regarded as the property of the partnership.

Lindley, L.J., said that if a partner avails himself of information for any purpose which was within the scope of the partnership business, he must account to the firm for any benefit he may have derived from such information.

In this case the acquisition of the shares was outside the scope of the trust and outside the scope of the agency created by the employment of the Apellants to act for the trust.

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 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, Bowen L.J. held that not all information obtained as a partner was the property of the partnership. The test he applied was whether use of the information was valuable to the partnership and a use in which they had a vested interest.

The information obtained by the Appellants was not, in my opinion, of any value to the trust. Wilberforce J. described the 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 Denning said in the Court of Appeal that he thought that Boardman had placed himself in a position where there was a conflict between his

duty to advise an application to the court and his interest to acquire the shares himself.

There can only be two occasions when such a duty arose, if it arose at all; first, when the Appellants were discussing in December, 1956, what should be done about the trust's holding in Lester & Harris, Ltd ; and secondly, when in the light of all the information obtained, Boardman was in a position to forecast that purchase of the shares at £4 10s. 0d. a share could reasonably be expected to yield a profit. I do not consider that Boardman was under any duty to advise an application to the court when Mr. Fox said that he would not consider the trust purchasing the shares under any circumstances. If one takes the second occasion as at the time Boardman wrote on the 25th February, 1959, saying that he thought that there was a most attractive margin to go for, can it be said that Boardman then was under a duty to advise the trustees to apply to the court?

Mr. Fox too, must have known that there was a most attractive margin to go for, and, as a chartered accountant, that it was possible on occasions to secure the sanction of the court to an investment not within the investment clause of the trust. I do not therefore see that it became Boardman's duty to advise him on an application to the court. He was in a position, as good a position as Boardman, to assess the prospects of the speculation being successful and, as so much would depend on what was achieved after control was obtained, it could not be said that there was not some risk involved. He would not consider the trust buying the shares under any circumstances.

That there was such a conflict of interest and duty was not alleged in the pleadings. It was not an issue at the trial. No evidence was directed to it. If Mr. Fox had been asked about it, he might well have said: " I would not consider the trust buying the shares and so I would not consider an application to the court to allow it to do so ". There is no indication in the evidence or in the correspondence of any change of attitude on the part of Mr. Fox.

In my opinion, there was no conflict between the interests and duties of the Appellants or between the interests of the trust and the Appellants at any time.

Russell, L. J. based his judgment on different grounds to those of Lord Denning, Pearson, L. J. and Wilberforce, J. He held that " the substantial trust holding was an asset of which one aspect was its potential use as a means of acquiring knowledge of the company's affairs, or of negotiating allocations of the company's assets, or of inducing other shareholders to part with their shares. That aspect was part of the trust assets."

He thus held that this potential use of an aspect of an asset was the property of the trust. I do not think that this potential use can properly be so regarded. The fact that the Appellants claimed to represent the trust holding and threatened minority action did not, in my opinion, involve use of any trust property.

Russell, L. J. went on to say: "That aspect was put into the hands of the defendants, B. and T.P. by two only out of three trustees and must in their hands have remained part of the trust assets. The defendants exploited

that aspect—that potential use—and as a result were able to profit by acquiring other shares: for that profit they must on general principle be accountable ".

I do not take the view that Mr. Fox and Mrs. Noble by assenting to the Appellants' proposals and facilitating the obtaining of information by them parted with an asset of the trust. I am for these reasons unable to agree with Russell, L. J.

If the making of the profits by the Appellants constituted a breach of their fiduciary duty, they would be liable to account unless they established that they had done so with the consent of their principals. They could not claim that they had the consent of the trustees for they had not sought and had not obtained the consent of Mrs. Ethel Phipps, nor can it be said that they obtained a binding consent from the Respondent. Wilberforce, J. held that the letter to him, which was expressed to be a summary, did not sufficiently disclose the situation and that the deficiencies were not remedied at the meeting between Boardman, the Respondent and the Respondent's wife. From this finding there was no appeal.

I do not consider that it was ever necessary for the Appellants to obtain the consent of their principals to their course of action for, in my opinion, that course of action did not involve any breach of the fiduciary duty they owed in consequence of their employment as agents.

I have not sought to distinguish between the position of the Appellant Phipps and Boardman. Throughout they acted together both in the negotiations and in this litigation. I see no reason to distinguish between them.

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Nor have I drawn any distinction between the position of the trust and that of the Respondent vis-à-vis the Appellants. The Appellants were not his agents nor did they represent that they were. On occasions they acted for the trust and they represented that they were so acting although not in fact authorised to do so. The trust continued in existence until a very short time before the completion of the purchase of the 14,567 shares. If what they did was not a breach of the duty they owed by reason of the fiduciary relationship to the trust, their principals, I do not see how it can be regarded as a breach of any duty to the beneficiaries of the trust.

I do not think that my conclusion involves any departure from the principles so often and firmly laid down as to the liability of agents to account if there has been a conflict or possibility of conflict between their interests and duties, and in breach of their fiduciary duty they have made profits out of their agency without the knowledge and consent of their principals. In this case, as Lord Macmillan said in the *Regal* case, the result depends on issues of fact. Liability to account must depend on there being some breach of duty, some impropriety of conduct on the part of those in a fiduciary position. On the facts of this case I do not consider that there was any breach of duty or impropriety of conduct on the part of the Appellants,

For the reason I have given I would allow the appeal.

Lord Cohen

MY LORDS,

I would dismiss this appeal. I have been privileged to read the speeches to be delivered by my noble and learned friends, Lord Hodson and Lord Guest, who are of the same opinion. Agreeing, as I do in substance, with the reasons they give for their conclusion I can state my own reasons shortly.

The noble and learned Lord, Viscount Dilhorne, has dealt so fully with the facts that I shall confine myself to repeating only so much as is necessary to explain the conclusion I have reached.

The Respondent claims as one of the residuary legatees under the Will dated 23rd September, 1943, of his father who died in 1944. The residuary estate included 8,000 out of the 30,000 issued shares in a private company Lester & Harris, Ltd., to which I shall hereafter refer as the company. By his Will the testator, Charles William Phipps, bequeathed an annuity of £3,000 per annum to his widow and the 8,000 shares in the company were part of the fund set aside to assure that annuity. At the end of the year 1955 the Trustees of the testator's will were his widow, his daughter, Mrs. Noble, and Mr. William Fox, a chartered accountant. The Appellant, Mr. Boardman, at all material times was solicitor to the Trustees and also to the children of the Testator (other than the Respondent). Mr. Fox was the active trustee of the Trust created by the will, the widow was failing in health and took little or no part in the affairs of the trust.

At the end of December, 1955, the Appellant Mr. Boardman received an enquiry from someone wishing to purchase the said 8,000 shares in the company. This offer was rejected because it was made on behalf of a person who was thought to be in competition with Phipps & Son, Ltd., most of the shares in which were part of the testator's estate. The Appellant Mr. Boardman and Mr. Fox investigated the published accounts of the company and the register of members and directors and they and the Appellant, Tom Phipps, a residuary legatee, became dissatisfied with the conduct of the business of the company. In the result, at the request of Mr. Fox and with proxies signed by him, the Appellants attended the annual general meeting of the company held on the 28th December, 1956. The Appellant Mr. Boardman expressed the dissatisfaction of the Phipps family with the state of the company's affairs. He asked for further information which was given and tried to get the Appellant Tom Phipps elected to the Board of the company, but failed to do so. After the meeting

Mr. Boardman reported to Mr. Fox that he and the Appellant Tom Phipps were agreed that the only way to get results was to get control of the company and that they had therefore decided that they would make an offer for all the outstanding shares in the company other than the 8,000 held by the Trustees.

I pause here to observe (1) that the Trustees could not have made any offer without the sanction of the court, as such shares were not an authorised investment under the testator's will; (2) that Mr. Fox said in evidence that he would not consider the Trustees buying these shares under any circumstances.

At the request of Mr. Fox, Mr. Boardman wrote to Mrs. Noble on the 17th January, 1957, telling her what had happened and that Tom Phipps

and he were making an offer of £2 5s. 0d. per share for the shares in the company not held by the Trustees. He sent a copy of this letter to Mr. Fox. Mrs. Noble appears at first to have thought the Trustees were going to find the money for the purchase if it came off but by letter to her of the 28th January, 1957, Mr. Boardman wrote that the Trustees could not properly make an offer of this nature and for that reason Tom Phipps and he were making it personally.

It is I think clear that both Mr. Fox and Mrs. Noble approved what was being done but there is no evidence that the widow was consulted; so it cannot be said that the making of the offer by Mr. Boardman and Tom Phipps personally was approved by the Trustees if their consent was necessary.

The Appellants afterwards increased their offer to £3 a share but did not obtain sufficient acceptances to induce them to go through with their offer at that time, and by the 26th April, 1957, it seemed clear that they were unlikely to do so. This may be said to be the end of what was described in argument as the first phase of this matter.

During this phase the Appellants acted as proxies of the Trustees and obtained information about the company at the annual general meeting on behalf of the Trustees. They were, however, making the offer to purchase on their own behalf and I do not understand why, in the headnote, (see [1964] 1 A.E.R. page 995) it is said they were making the initial offer as agents for the trustees. They were no doubt seeing what could be done to improve the position of the company and were doing so at the request of or at least with the approval of Mr. Fox, but it is inconsistent with his evidence to conclude that an offer to purchase additional shares in the company was made on behalf of the Trustees.

By a letter of the 26th April, 1957, Mr. Boardman suggested to Mr. Smith, the then chairman of the company, that they should see whether the assets of the company could be divided between the Harris family and the directors on the one hand and the Phipps family on the other. In the second phase, which continued until well into the year 1958, this suggestion was being pursued and it is, I think, clear that throughout it Mr. Boardman was purporting to act on behalf of the Trustees. See, for instance, a letter dated 30th April, 1958, from Mr. Boardman to Mr. Smith in which, dealing with the questions of transfers of one share from the Trustees to Tom Phipps and the Trustees and one share from the Trustees to Mr. Boardman and the Trustees, he says: " the object of the transfer was that as we have been " required by the Trustees to look after their interests in the company we " should be the first-named holders of the shares ".

During this period Mr. Boardman obtained a mass of information about the company which threw light on the potential value of the shares of the company.

The negotiations for the division of the assets of the company between the two groups of shareholders in the end broke down and by the 16th August, 1958 (see letter of that date from Mr. Boardman to Mr. Smith), an alternative suggestion had been made that Tom Phipps and Mr. Boardman should buy the shares held by the directors' group and should afterwards sell back

to the directors the Coventry part of the business of the company. This may be said to be the commencement of the third phase. The proposed resale of part of the business to the directors' group was dropped and after protracted negotiation it was agreed on 10th March, 1959, that Tom Phipps and Mr. Boardman should buy the directors holdings at £4 10s. 0d. per share and should make an offer at a similar price for the other shares in the company not held by the directors or by the Trustees or obtained by Tom Phipps and Mr. Boardman as the result of the earlier offer of £3 a share. The agreement contained a clause giving either party a right to call off the deal before a specified date, but this right was not exercised. I should mention that the widow had died in November, 1958, so that the sole Trustees were Mrs. Noble and Mr. Fox and the residuary estate had become distributable among the beneficiaries. Accordingly Mr. Boardman wrote on the 10th March, 1959, to the Respondent, to Mrs. Noble, and to Mrs. P. M. Phipps the widow of a deceased brother of Tom Phipps giving a concise account of what had happened and ending as follows:

" If we are successful in making the shares worth more than £4 10s. 0d.
" the increased value will, of course, equally reflect upon the shares
" which are held in the estate of the late C. W. Phipps, and to that
" extent you will benefit by them. Both of us, however, would like
" to be re-assured on two points.

" 1. The first point, which really concerns me alone, is whether you
" have any objection to my taking a personal interest in this purchase,
" bearing in mind that my initial enquiry with regard to it was on
" behalf of the C. W. Phipps estate. At that time the Trustees did
" not wish to purchase any shares themselves and expressed their agree-
" ment to my taking a personal interest. However, as the shares will
" shortly be distributed amongst each of you, I should like to have your
" approval of the proposals. They do not, of course, involve you in
" any liability and there is no conflict of interest, as it will of course
" be in the interests of yourself as much as it will be for Tom and me,
" that we should try to realise the maximum value for these shares.

" 2. That if you are in agreement with the course we were proposing
" to take, we should like to know that you are equally in agreement that
" the votes on the shares belonging to the estate should be exercised
" as one block with the shares that are offered to us. By doing this
" we should have a combined voting control which I hope will enable
" the maximum value to be got for the shares. Without the assurance
" that these votes would be exercised together it would obviously be
" unwise to pay anything approaching £4 10s. 0d. for the shares, the
" dividend upon which is, for the year to June 1958, likely to be only
" 5 per cent.

" It is difficult to put the issues concisely in a letter, but this will I
" hope give you a summary of what is involved, and if there are any
" special queries which you would like to raise please let me know."

It is to be observed that Mr. Boardman evidently thought that if the consent of the Trustees to his taking a personal interest in the purchase of shares in the company was necessary in January, 1957 it had been obtained. In this he was wrong as the widow was alive and had not been consulted.

The Respondent, after receipt of the letter of the 10th March, expressed his satisfaction at what had been done. The agreement of 10th March was carried through, and in June and July, 1959, transfers of 21,986 shares to

the Appellants were completed. Thereafter parts of the business of the company were sold off and the company made returns of capital amounting in the aggregate to £5 17s. 6d. per share.

The Appellants thus acquired 21,986 shares in the company and still hold the same. They received the said sum of £5 17s. 6d. per share and the shares are probably still worth at least £2 per share as Tom Phipps offered that sum to the Respondent if he wished to sell the shares in the company which he received on the distribution of the residuary estate of the testator.

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The Respondent became critical of the action of the Appellants, and on the 1st March, 1962, issued the writ in this action claiming (1) that the Appellants held 5/18ths of the above mentioned 21,986 shares as constructive Trustees for the Respondent and (2) on account of the profits made by the Appellants out of the said shares.

He based his claim on an allegation that the information as to the said shares and the opportunity to purchase the same and the shares when purchased were assets of the testator's estate and that the Appellants were accountable to him for 5/18ths of the profit made by them in breach of their fiduciary duty. The Appellants denied any breach of duty and alleged that the purchase of the shares personally and for their own benefit was made with the knowledge and consent of the Plaintiff

The action was tried by Wilberforce J. (as he then was) and on the 25th March, 1964, he made an order declaring that the Appellants held 5/18ths of the 21,986 ordinary shares in the Company as constructive trustees for the plaintiff and directed an account of the profits which had come to the hands of the Appellants and each of them from the said shares and an enquiry as to what sum is proper to be allowed to the Appellants or either of them in respect of their or his work and skill in obtaining the shares and the said profits. From this order the Appellants appealed to the Court of Appeal who dismissed the appeal.

The *ratio decidendi* of the trial judge is conveniently summed up in the following passage from the judgment in the Court of Appeal of Pearson, L.J. (as he then was) where he said (see (1965) 2 W.L.R. at page 862):

> "... the defendants were acting with the authority of the trustees
> " and were making ample and effective use of their position as repre-
> " senting the trustees and wielding the power of the trustees, who were
> " substantial minority shareholders, to extract from the directors of the
> " company a great deal of information as to the assets and resources
> " of the company ; and . . . this information enabled the defendants to
> " appreciate the true potential value of the company's shares and to
> " decide that a purchase of the shares held by the directors' group
> " at the price offered would be a very promising venture. The defendants
> " made their very large profit, not only by their own skill and per-
> " sistence and risk-taking, but also by making use of their position as
> " agents for the trustees. The principles stated in *Regal (Hastings) Ltd.*
> " v. *Gulliver* are applicable in this case."

The trial judge also held that the Appellants could not rely by way of defence on the consent of the Respondent given in answer to Mr. Boardman's letter of the 10th March, 1959, as neither in the letter nor in the subsequent

interview did he give sufficient information as to the material facts. This defence was not pressed in the Court of Appeal or raised before your Lordships. Accordingly, only one issue remains for decision, namely, were the Appellants in such a fiduciary relationship *vis-à-vis* the Trustees that they must be taken to be accountable to the beneficiaries for the shares and for any profit derived by them therefrom?

In the statement of claim the Respondent based his claim on an allegation of agency but it is, in my opinion, plain that no contract of agency which included the purchase of further shares in the company was ever made; it is plain for two reasons: first, in 1957 the widow was alive and her approval was not sought or obtained ; secondly, Mr. Fox was clear in his evidence that he would never have given his consent to such acquisition. Wilberforce J. was, I think, of this opinion but he held (see (1964) 1 W.L.R. page 1007) that the Appellants assumed the character of self-appointed agents for the Trustees for the purpose of extracting information as to the company's business from its directors and if possible to strengthen the management of the company by securing representation on the Board of the trust holding. I agree that the Appellants were the agents of the Trustees for this purpose. I doubt, however, whether " self-appointed " is the correct adjective. Fox was the active Trustee and where it is not a question of delegating authority to make binding contracts I agree with Russell, LJ. (see [1965] 1 W.L.R.

page 870) that two trustees, or for that matter one trustee, can come to an arrangement with a third party which will have the effect of placing the latter in a fiduciary position *vis-à-vis* the Trust.

In the case before your Lordships it seems to me clear that the Appellants throughout were obtaining information from the company for the purpose stated by Wilberforce J. but it does not necessarily follow that the Appellants were thereby debarred from acquiring shares in the company for themselves. They were bound to give the information to the Trustees but they could not exclude it from their own minds. As Wilberforce J. said at page 1011 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 at £4 10s. 0d. a share, were the Appellants debarred by their fiduciary position from purchasing on their own behalf the 21,986 shares in the company without the informed consent of the trustees and the beneficiaries?

Wilberforce, J. and, in the Court of Appeal, both Lord Denning, M.R. and Pearson, L.J. based their decision in favour of the Respondent on the decision of your Lordships' House in *Regal (Hastings) Ltd. v. Gulliver* [1942] 1 All.E.R. 378. I turn, therefore, to consider that case: Mr. Walton relied upon a number of passages in the judgments of the learned Lords who

heard the appeal: in particular on (1) a passage in the speech of Lord Russell of Killowen where he says (see page 386):

" 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."

(2) a passage in the speech of Lord Wright, where he says, at page 392 :

" That question can be briefly stated to be whether an agent, a
" director, a trustee or other person in an analogous fiduciary position,
" when a demand is made upon him by the person to whom he stands
" in the fiduciary relationship to account for profits acquired by him
" by reason of his fiduciary position, and by reason of the opportunity
" and the knowledge, or either, resulting from it, is entitled to defeat
" the claim upon any ground save that he made profits with the know-
" ledge and assent of the other person. The most usual and typical
" case of this nature is that of principal and agent. The rule in such
" cases is compendiously expressed to be that an agent must account
" for net profits secretly (that is, without the knowledge of his principal)
" acquired by him in the course of his agency. The authorities show
" how manifold and various are the applications of the rule. It does
" not depend on fraud or corruption ".

These paragraphs undoubtedly help the Respondent but they must be considered in relation to the facts of that case. In that case the profit arose through the application by four of the directors of Regal for shares in a subsidiary company which it had been the original intention of the Board should be subscribed for by Regal. Regal had not the requisite money

available but there was no question of it being *ultra vires* Regal to subscribe for the shares. In the circumstances Lord Russell of Killowen said:

" 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 ".

He goes on to consider whether the four directors were in a fiduciary relationship to Regal and concludes that they were. Accordingly, they were held accountable. Mr Bagnall argued that the present case is distinguishable. He puts his argument thus. The question you ask is whether the information could have been used by the principal for the purpose for which it was used by his agents? If the answer to that question is no, the information was not used in the course of their duty as agents. In the present case the information could never have been used by the Trustees for the purpose of purchasing shares in the company; therefore purchase of shares was outside the scope of the Appellants' 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 purported for all purposes except for making the bid to be acting on behalf of the owners of the 8,000 shares in the company. In these circumstances it seems to me that the principle of the *Regal* case applies and that the courts below came to the right conclusion.

That is enough to dispose of the case but I would add that an agent is, in my opinion, liable to account for profits he makes out of trust property if there is a possibility of conflict between his interest and his duty to his principal. Mr. Boardman and Tom Phipps were not general agents of the trustees but they were their agents for certain limited purposes. The information they had obtained and the opportunity to purchase the 21,986 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, I think, use that information and that opportunity to purchase the shares for themselves if there was any possibility that the trustees might wish to acquire them for the trust. Mr. Boardman was the solicitor whom the trustees were in the habit of consulting if they wanted legal advice. Granted that he would not be bound to advise on any point unless he is consulted, he 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. Be that as it may, Mr. Bagnall rightly did not seek at this stage to distinguish between the two. He did, it is true, say that Tom Phipps as a beneficiary would be entitled to any information the Trustees obtained. This may be so, but none the less I find myself unable to distinguish between the two Appellants. They were, I think, in March, 1959, in a fiduciary position *vis-à-vis* the Trust. That fiduciary position was of such a nature that (as the trust fund was distributable) the Appellants could not purchase the shares on their own behalf without the informed consent of the beneficiaries: it is now admitted that they did not obtain that consent. They are therefore, in my opinion, accountable to the Respondent for his share of the net profits they derived from the transaction.

I desire to repeat that the integrity of the Appellants is not in doubt. They acted with complete honesty throughout and the Respondent is a fortunate man in that the rigour of equity enables him to participate in the profits which have accrued as the result of the action taken by the Appellants in March, 1959, in purchasing the shares at their own risk. As the last paragraph of his judgment clearly shows, the trial judge evidently shared this view. He directed an enquiry as to what sum is proper to be allowed to the Appellants or either of them in respect of his work and skill in obtaining the said shares and the profits in respect thereof. The trial judge concluded by expressing the opinion that payment should be on a liberal scale. With that observation I respectfully agree.

In the result I agree in substance with the judgments of Wilberforce, J. and of Lord Denning, M.R. and Pearson, L.J. in the Court of Appeal, and I would dismiss the appeal.

Lord Hodson

MY LORDS,

I will not repeat the facts already set out in the judgment of Wilberforce J. (as he then was) and in the speech of my noble and learned friend, Viscount Dilhorne.

The proposition of law involved in this case is that no person standing in a fiduciary position, when a demand is made upon him by the person to whom he stands in the fiduciary relationship to account for profits acquired by him by reason of his fiduciary position and by reason of the opportunity and the knowledge, or either, resulting from it, is entitled to defeat the claim upon any ground save that he made profits with the knowledge and assent of the other person.

I take the above proposition from the opening words of the speech of Lord Wright in *Regal (Hastings) Ltd.* v. *Gulliver and Others* [1942] 1 All.E.R. 378 where he states the proposition in the form of the question which he answered as had all the members of your Lordships' House in such a way as to affirm the proposition.

It is obviously of importance to maintain the proposition in all cases and to do nothing to whittle away its scope or the absolute responsibility which it imposes.

The persons concerned in this case, namely, Mr. Thomas Boardman and Mr. Tom Phipps are not trustees in the strict sense but are said to be constructive trustees by reason of the fiduciary position in which they stood.

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As Lord Selborne pointed out in *Barnes* v. *Addy 9* Ch. Appeals page 244 at page 251:

> " That responsibility" (viz. that of trustees) " may no doubt be
> " extended in equity to others who are not properly trustees, if they
> " are found either making themselves trustees *de son tort,* or actually
> " participating in any fraudulent conduct of the trustee to the injury
> " of the *cestui que trust.* But, on the other hand, strangers are not to be
> " made constructive trustees merely because they act as the agents of
> " trustees in transactions within their legal powers, transactions, perhaps
> " of which a Court of Equity may disapprove, unless those agents receive
> " and become chargeable with some part of the trust property, or unless
> " they assist with knowledge in a dishonest and fraudulent design on
> " the part of the trustees."

There is no question of fraud in this case; it has never been suggested that the Appellants acted in any other than an open and honourable manner.

If, however, they are in a fiduciary position they are as trustees bound by duty, succinctly stated by Lord Cranworth, L.C. in *Aberdeen Railway v. Blackie* [1854] 1 Macqueen 461 at page 477:

> " And it is a rule of universal application that no one having such
> " duties to discharge shall be allowed to enter into engagements in which
> " he has or can have a personal interest conflicting or which possibly
> " may conflict with the interests of those whom he is bound to protect."

So far as Mr. Tom Phipps is concerned he was not placed in a fiduciary position by reason of his being a beneficiary under his father's will. He was acting as agent for the trustees with Mr. Boardman before any question of acting with him for his own benefit arose. He has not, however, sought to be treated in a different way from Mr. Boardman upon whom the conduct of the whole matter depended and with whom he has acted throughout as a co-adventurer; he does not claim that he should succeed in this appeal if Mr. Boardman fails.

Mr. Boardman's fiduciary position arose from the fact that he was at all material times solicitor to the Trustees of the will of Mr. Phipps senior. This is admitted although counsel for the Appellants has argued, and argued correctly, that there is no such post as solicitor to trustees. The Trustees either employ a solicitor or they do not in a particular case and there is no suggestion that they were under any contractual or other duty to employ Mr. Boardman or his firm. Nevertheless as a historical fact they did employ him and look to him for advice at all material times and this is admitted. It was as solicitor to the Trustees that he obtained the information which is so clearly summarised in the judgment of Wilberforce, J. [1964] 1 W.L.R. at page 1013 and repeated in the speech of my noble and learned friend, Lord Upjohn. This information enabled him to acquire knowledge of a most extensive and valuable character, as the learned judge pointed out, which was the foundation upon which a decision could and was taken to buy the shares in Lester and Harris, Ltd.

This information was obtained on behalf of the Trustees, most of it at a time during the history of the negotiations when the proposition was to divide the assets of the company between two groups of shareholders. This object could not have been effected without a reconstruction of the company and Mr. Boardman used the strong minority shareholding which the Trustees held, that is to say 8,000 shares in the company, wielding this holding as a weapon to enable him to obtain the information of which he subsequently made use.

As to this it is said on behalf of the Appellants that information as such is not necessarily property and it is only trust property which is relevant. I agree, but it is nothing to the point to say that in these times corporate trustees, e.g. the Public Trustee and others, necessarily acquire a mass of information in their capacity of trustees for a particular trust and cannot be held liable to account if knowledge so acquired enables them to operate to their own advantage, or to that of other trusts. Each case must depend on

its own facts and I dissent from the view that information is of its nature something which is not properly to be described as property. We are aware that what is called " know-how " in the commercial sense is property which may be very valuable as an asset. I agree with the learned judge and with the Court of Appeal that the confidential information acquired in this case which was capable of being and was turned to account can be properly regarded as the property of the trust. It was obtained by Mr. Boardman by reason of the opportunity which he was given as solicitor acting for the Trustees in the negotiations with the chairman of the company, as the correspondence demonstrates. The end result was that out of the special position in which they were standing in the course of the negotiations the Appellants got the opportunity to make a profit and the knowledge that it was there to be made.

The Appellants argue that this is not enough, and in support of the contention rely on the authority of *Aas* v. *Benham* [1891] 2 Ch. 244. This case was concerned with a partnership of ship brokers, and the defendant carried on the business of ship builder using knowledge acquired in the partnership business. A claim against him to account to the partnership for the profits of his business as ship builder failed. Lord Lindley said that it is not the source of the information but the use to which it is put which is important—

" To hold that a partner " (or trustee) " can never derive any personal benefit
" from information which he obtained as a partner would be manifestly
" absurd."

It was held that the defendant was not liable to account because the profit was made outside the scope of the partnership and that in no sense was the defendant acting as the agent of the partners. Similarly the Appellants contend that the purchase of the shares in question was outside the scope of the fiduciary relationship existing between them and the trustees.

The case of partnership is special in the sense that a partner is the principal as well as the agent of the other partners and works in a defined area of business so that it can normally be determined whether the particular transaction is within or without the scope of the partnership.

It is otherwise in the case of a general trusteeship or fiduciary position such as was occupied by Mr. Boardman, the limits of which are not readily

defined, and I cannot find that the decision in the case of *Aas* v. *Benham* assists the Appellants although the purchase of the shares was an independent purchase financed by themselves. *Aas* v. *Benham* was a case depending on the alleged relationship of principal and agent as it exists between one partner and another. There was no such relationship here but the position of an agent is relevant and the expression " self-appointed agent" used by the learned judge is a convenient way to describe someone who, assuming to act as agent for another, receives property belonging to that other so that the property is held by the self-constituted agent as trustee for such other. Such a case was *Lyell* v. *Kennedy* (1889) 14 App. C. 437 H.L. Thus the learned judge found that the Appellants were in the same position as if they had been agents for the trustees in the technical sense for the purpose of using the trust shareholding to extract knowledge of the affairs of the company and ultimately to improve the company's profit-earning capacity.

Keech v. *Sandford* 1726 Select Cases in Chancery and K.B. 61 was a case in which it was impossible for the *cestui que trust* to obtain the renewal of a lease, nevertheless the trustee was held accountable for renewal obtained by him. Similarly in *Regal* v. *Gulliver* [1942] 1 All.E.R. 378, from which some of your Lordships have cited passages, the directors of Regal were held accountable to the company for the profit they made in acquiring shares when the opportunity fell to them as directors of the company not withstanding the fact that it was impossible for Regal to take the shares owing to lack of funds.

Regal v. *Gulliver* differs from this case mainly in that the directors took up shares and made a profit thereby, it having been originally intended that the company should buy these shares Here there was no such intention on the part of the Trustees. There is no indication that they either had the

money or would have been ready to apply to the court for sanction enabling them to do so. On the contrary, Mr. Fox, the active trustee and an accountant who concerned himself with the details of the trust property, was not prepared to agree to the trustees buying the shares and encouraged the Appellants to make the purchase. This does not affect the position. As *Keech* v. *Sandford* shows the inability of the trust to purchase makes no difference to the liability of the Appellants, if liability otherwise exists. The distinction on the facts as to intention to purchase shares between this case and *Regal* v. *Gulliver* is not relevant. The company *(Regal)* had not the money to apply for the shares upon which the profit was made The directors took the opportunity which they had presented to them to buy the shares with their own money and were held accountable. Mr. Fox's refusal as one of the trustees to take any part in the matter on behalf of the trust, so far as he was concerned, can make no difference. Nothing short of fully informed consent which the learned judge found not to have been obtained could enable the Appellants in the position which they occupied having taken the opportunity provided by that position to make a profit for themselves.

Likewise it is no answer to the Respondent's claim that there was no contract of agency and that the Appellants were at all times acting for themselves without concealment and indeed with the encouragement of one of the trustees, namely, Mr. Fox.

If they received confidential information from Lester & Harris in their capacity as representing the trustees it matters not whether or no there was a true agency. I refer again to the passage from Lord Wright's judgment in *Regal* v. *Gulliver* at page 392 when he speaks of " an agent, a director, a " trustee or other person in an analogous fiduciary position " and, as an illustration, says that the most usual and typical case of this nature is that of principal and agent.

The relevant information is not any information but special information which I think must include that confidential information given to the Appellants which is so fully detailed in the judgment of Wilberforce, J. There is a passage in *Aas* v. *Benham (supra)* in the judgment of Bowen L.J. which I think is of assistance although the learned Lord Justice was dealing with partnership not trusteeship: he was explaining some observations of Cotton L.J. in *Dean* v. *MacDowell* 8 Ch. D. 345. These were " Again, if " he " (that is, a partner) " makes any profit by the use of any property of " the partnership, including, I may say, information which the partnership " is entitled to, there the profit is made out of the partnership property ". Bowen, L.J. commented: "He is speaking of information which a partner- " ship is entitled to in such a sense that it is information which is the property, " or is to be included in the property of the partnership—that is to say, " information the use of which is valuable to them as a partnership, and the " the use of which they have a vested interest. But you cannot bring the " information obtained in this case within that definition." *Aas* v. *Benham* is an important case as showing that a partner may make a profit from information obtained in the course of the partnership business where he does so in another firm which is outside the scope of the partnership business. In that case the partnership business was ship-broking and the profit made was in a business which had no connection with that of the partnership. This shows the limitation which must be kept in mind in considering the sense in which each partner is the agent of the partnership, but does not assist the Appellants. Mr. Boardman continued to be in a fiduciary position up to and including the time when the shares were purchased (March, 1959), and the scope of the trust concerning which his fiduciary relationship existed was not limited in the same way as a partnership carrying on a particular business.

It cannot, in my opinion, be said that the purchase of shares in Lister *&* Harris was outside the scope of the fiduciary relationship in which Mr. Boardman stood to the trust.

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The confidential information which the Appellants obtained at a time when Mr. Boardman was admittedly holding himself out as solicitor for the trustees was obtained by him as representing the trustees, the holders of 8,000 shares of Lister *&* Harris. As Russell, L.J. put it " the substantial " trust shareholding was an asset of which one aspect was its potential use " as a means of acquiring knowledge of the company's affairs or of nego- " tiating allocations of the company's assets or of inducing other shareholders " to part with their shares ". Whether this aspect is properly to be regarded as part of the trust assets is, in my judgment, immaterial. The Appellants obtained knowledge by reason of their fiduciary position and they cannot escape liability by saying that they were acting for themselves and not as agents of the trustees. Whether or not the trust or the beneficiaries in their

stead could have taken advantage of the information is immaterial, as the authorities clearly show. No doubt it was but a remote possibility that Mr. Boardman would ever be asked by the trustees to advise on the desirability of an application to the court in order that the trustees might avail themselves of the information obtained. Nevertheless, even if the possibility of conflict is present between personal interest and the fiduciary position the rule of equity must be applied. This appears from the observations of Cranworth, L.C. in *Aberdeen Railway* v. *Blackie* (supra).

In the later case of *Bray v. Ford* [1896] A.C. at page 51 Lord Herschell stated the rule in a way which has peculiar application to the facts of this case, when he said:

> " It is an inflexible rule of a Court of Equity that a person in a
> " fiduciary position, such as the respondent's is not, unless otherwise
> " expressly provided, entitled to make a profit; he is not allowed to
> " put himself in a position where his interest and duty conflict. It
> " does not appear to me that this rule is, as has been said, founded
> " upon principles of morality. I regard it rather as based on the con-
> " sideration that, human nature being what it is, there is danger, in such
> " circumstances, of the person holding a fiduciary position being swayed
> " by interest rather than by duty, and thus prejudicing those whom he
> " was bound to protect. It has, therefore, been deemed expedient to
> " lay down this positive rule. But I am satisfied that it might be
> " departed from in many cases, without any breach of morality, without
> " any wrong being inflicted, and without any consciousness of wrong-
> " doing. Indeed, it is obvious that it might sometimes be to the
> " advantage of the beneficiaries that their trustee should act for them
> " professionally rather than a stranger, even though the trustee were
> " paid for his services."

It is said that the Appellants never had the necessary facts pleaded against them to raise the question of conflict of interest so that they did not have the opportunity of dealing with allegations which would be relevant thereto: I cannot see what further facts were relevant to be raised other than those to which reference has been made in the judgments in the court below and in the speeches of your Lordships. The question whether or not there was a fiduciary relationship at the relevant time must be a question of law and the question of conflict of interest directly emerges from the facts pleaded, otherwise no question of entitlement to a profit would fall to be considered. No positive wrong-doing is proved or alleged against the Appellants but they cannot escape from the consequences of their acts involving liability to the Respondent unless they can prove consent. This they endeavoured without success to do for, although they gave the Respondent some information, that which they gave was held by the learned judge to be insufficient and there is no appeal against his decision on this point.

I agree with the decision of the learned judge and with that of the Court of Appeal which, in my opinion, involves a finding that there was a potential conflict between Boardman's position as solicitor to the trustees and his own interest in applying for the shares. He was in a fiduciary position *vis-à-vis* the trustees and through them *vis-à-vis* the beneficiaries. For these reasons in my opinion the appeal should be dismissed; but I should add that I am

in agreement with the learned Judge that payment should be allowed on a liberal scale in respect of the work and skill employed in obtaining the shares and the profits therefrom.

Lord Guest

MY LORDS,

The first Appellant is a solicitor and the second Appellant is a beneficiary under a Will made by his father who died in 1944. The will directed the trustees to pay an annuity to the widow and the residue was to be divided among his children in these proportions: 5/18ths was to go to the second Appellant; 5/18ths to the estate of a deceased son; 5/18ths to the Respondent and 3/18ths to a daughter, Mrs. Noble. The trustees under the Will were the widow, Mrs. Noble and a Mr. Fox, a chartered accountant.

The Respondent obtained an order from Wilberforce, J. (as he then was) declaring that the Appellants held 21,986 shares of £1 each in a company Lester and Harris, Ltd., as constructive trustees for the Respondent and ordered an account of the profits made by the Appellants to be taken and a declaration of a proper sum to be allowed to the Appellants for their work and skill in obtaining the shares and profits. The Court of Appeal unanimously affirmed the decision of Wilberforce, J.

Among the trust assets was a controlling interest in the family business of Phipps and Son, Ltd., textile manufacturers, and also 8,000 out of 30,000 shares of £1 each in a private company, Lester and Harris, Ltd., which also manufactured textiles and had factories at Coventry and Nuneaton and also in Australia.

In 1956 Boardman as solicitor to the trust decided that the recent accounts of Lester and Harris were very unsatisfactory and that something should be done to improve the position and with this in view the Appellants attended the Annual General Meeting of the company held in December, 1956, having obtained proxies from Mrs. Noble and Mr. Fox. They were not satisfied with the answers given at the meeting regarding the state of the company's affairs. They then decided that the only way to improve the position was to endeavour to obtain control of the company and with this in view to make an offer for all the outstanding shares in Lester and Harris. This was the first phase of a series of three in the negotiations which culminated in their purchasing all the outstanding shares in May, 1959. Their avowed object was thereby to improve the value of the trust holding in Lester and Harris. Mr. Fox was informed of their intentions and although he gave no formal consent he raised no objection, as he thought that to have the Lester and Harris shares in friendly hands could not but work to the advantage of the trust. Mrs. Noble was also informed and she raised no objection. The widow was not informed. She was at this time 83 and suffering from senile dementia and unable to attend to trust affairs. There was never any question at this time of the trustees buying the shares, which in fact they had no power to do. But there is no doubt that at this time Boardman, in his relations with Mr. Fox and Mrs. Noble, was acting as solicitor to the trust. When he attended the Annual General Meeting he acted as agent for the trustees and in his relations with Lester and Harris prior to and including the formal offer for the shares he was purporting to act for the trustees and in their interests. In this first phase Boardman obtained information from the company as to the prices at which shares had recently changed

hands. And on 24th January, 1957, after informing the directors of their intentions the Appellants made an offer of £2 5s. 0d. per share to the members of Lester and Harris which was conditional on acceptance by not less than 15,500 holders of shares. This offer was subsequently increased on 25th February, 1957, to £3 per share. This offer only received acceptance from 2.925 shareholders. Thus ended phase 1 of the negotiations.

The opening of phase 2 was a letter, dated 26th April, 1957, from Boardman to Mr. Smith, Chairman of the Board of Lester and Harris, in

which the suggestion was made that the assets of the company should be divided between the Harris family and the trustees, one suggestion being that the Harris family should be the sole owners of the Australian venture of the company and the trustees should own and control the English side of the business. During this phase Boardman obtained from the company extensive and valuable information as to the value of the company's assets. This information is fully detailed in the judgment of Wilberforce, J. [1964] 1 W.L.R. 1013. In obtaining this information Boardman was avowedly acting on behalf of the trustees; in fact the operation suggested could only have been achieved by the trustees after a successful application to the Court buying shares in Lester and Harris and by a reorganisation of that company. Between April, 1957, and October, 1958, voluminous correspondence took place between Boardman and Smith during which Boardman suggested that, if agreement could not be reached, legal proceedings might have to be taken to protect their minority interests. These negotiations proved abortive.

Phase 3 began in October 1958. The widow died on 19th November, 1958. On 7th October, 1958, Smith informed Boardman that he was prepared to sell his shares and to recommend his associates to sell their shares to the Appellants at £5 each. A conditional agreement for the sale of these shares was made on 10th March, 1959. Subsequently on 26th May, 1959, the Appellants gave notices making unconditional agreements to buy 14,567 shares held by Smith and his associates at the price of £4 10s. 0d. per share. This, in addition to the earlier agreements to purchase 2,925 at £3 and the purchase of a further 4,494 shares at £4 10s. 0d. each made the Appellants holders in all of 21,986 shares.

The 21,986 shares in Lester and Harris are the shares of which the courts below have held the Appellants to be constructive trustees and in respect of which as to 5/18ths the Appellants are accountable to the Respondent for the profits arising from such purchase.

The question, and the only question before this House, is whether the Appellants are constructive trustees of these shares. I make no distinction between the two Appellants. They have never asked to be dealt with separately and they must be treated as co-venturers.

Boardman set the ball rolling in his capacity as solicitor to the trustees and, in my view, he continued to act in this capacity throughout the negotiations. The three phases of the negotiations were continuous and designed to the same end, namely, the purchase of the controlling interest in Lester and Harris. This is stated explicitly by the Appellants in their Defence "3. The first defendant at all material times acted as solicitor to the second " defendant " (the Respondent) " as well as to the trustees." This admission was repeated in the Appellants' printed case and could scarcely have been

withheld having regard to the terms of the correspondence. Boardman would never have been able to obtain all the information which was obtained in phase 2 unless he had been acting for the trustees. This information enabled him to put forward the offer of £4 10s. 0d. per share which was fully acceptable to Smith. I take the view that from first to last Boardman was acting in a fiduciary capacity to the trustees. This fiduciary capacity arose in phase 1 and continued into phase 2, which glided into phase 3. In saying this I do not for one moment suggest that there was anything dishonest or underhand in what Boardman did. He has obtained a clean certificate below and I do not wish to sully it. But the law has a strict regard for principle in ensuring that a person in a fiduciary capacity is not allowed to benefit from any transactions into which they have entered with trust property. If Boardman was acting on behalf of the trust, then all the information he obtained in phase 2 became trust property. The weapon which he used to obtain this information was the trust holding. And I see no reason why information and knowledge cannot be trust property. In *Hamilton v. Wright* [1842] 9 Cl. & F. III at page 124 Lord Brougham said:

" The knowledge which he acquires as trustee is of itself sufficient
" ground of disqualification, and of requiring that such knowledge shall

" not be capable of being used for his own benefit to injure the trust;
" the ground of disqualification is not merely because such knowledge
" may enable him actually to obtain an undue advantage over others."

In *Regal (Hastings) Ltd.* V. *Gulliver and Others* [1942] 1 A.E.R. 378 Viscount Sankey at page 382 says:

" *Imperial* v. *Hampson* ' (sub. nom. *Imperial Hydropathic Hotel Co.*
" ' *Blackpool* v. *Hampson* 1882 23 Ch. D. 1)' makes no exception to the
" general rule that a solicitor or director, if acting in a fiduciary capacity,
" is liable to account for the profits made by him from knowledge
" acquired when so acting."

Aas v. *Benham* (1891) 2 Ch. p. 244 is another case where the use of information by a person in a fiduciary capacity was challenged.

The position of a person in a fiduciary capacity is referred to in *Regal (Hastings) Ltd.* v. *Gulliver* (supsit) by Lord Russell of Killowen [1942] 1 A.E.R. at page 386 where he said:

" My Lords, with all respect I think there is a misapprehension here.
" The rule of equity which insists on those, who by use of a fiduciary
" position make a profit, being liable to account for that profit, in no
" way depends on fraud, or absence of bona fides; or upon such ques-
" tions 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."

Again on page 389 Lord Russell quotes with approval from the judgment of the Lord Ordinary in *Huntington Copper Co. v. Henderson* 4 R. 294 to the following effect—

" Whenever it can be shown that the trustee has so arranged matters
" as to obtain an advantage whether in money or money's worth to
" himself personally through the execution of his trust, he will not be
" permitted to retain, but be compelled to make it over to his constituent."

Lord Wright in the same case [1942] 1 A.E.R. 392 said—

" That question can be briefly stated to be whether an agent, a
" director, a trustee or other person in an analogous fiduciary position,
" when a demand is made up him by the person to whom he stands
" in the fiduciary relationship to account for profits acquired by him
" by reason of his fiduciary position, and by reason of the opportunity
" and the knowledge, or either, resulting from it, is entitled to defeat
" the claim upon any ground save that he made profits with the know-
" ledge and assent of the other person."

Again at page 392 Lord Wright said—

" The courts below have held that it does not apply in the present
" case, for the reason that the purchase of the shares by the respondents,
" though made for their own advantage, and though the knowledge
" and opportunity which enabled them to take the advantage came to
" them solely by reason of their being directors of the appellant com-
" pany, was a purchase which, in the circumstances, the respondents
" were under no duty to the appellant to make, and was a purchase
" which it was beyond the appellant's ability to make, so that, if the
" respondents had not made it, the appellant would have been no better
" off by reason of the respondents abstaining from reaping the ad-
" vantage for themselves. With the question so stated, it was said
" that any other decision than that of the courts below would involve
" a dog-in-the-manger policy. What the respondents did, it was said,
" caused no damage to the appellant and involved no neglect of the
" appellant's interests or similar breach of duty. However I think the
" answer to this reasoning is that, both in law and equity, it has been

" held that, if a person in a fiduciary relationship makes a secret profit
" out of the relationship, the court will not inquire whether the other
" person is damnified or has lost a profit which otherwise he would
" have got. The fact is in itself a fundamental breach of the fiduciary
" relationship. Nor can the court adequately investigate the matter in
" most cases."

Applying these principles to the present case I have no hesitation in coming to the conclusion that the Appellants hold the Lester and Harris shares as constructive trustees and are bound to account to the Respondent. It is irrelevant that the trustees themselves could not have profited by the transaction. It is also irrelevant that the Appellants were not in competition with the trustees in relation to the shares in Lester and Harris. The Appellants argued that as the shares were not acquired in the course of any agency undertaken by the Appellants they were not liable to account. Analogy was sought to be obtained from the case of *Aas* v. *Benham* [1891] 2 Ch. 244 where it was said that before an agent is to be accountable the profits must be made within the scope of the agency (see Lindley, L.J. 255-256). That, however, was a case of partnership where the scope of the partners' power to bind the partnership can be closely defined in relation to the partnership deed In the present case the knowledge and information

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

In the Court of Appeal the Master of the Rolls and Pearson, L.J. (as he then was) decided the case in the Respondent's favour upon the basis that the Appellants were " self-appointed agents " and thus placed themselves in a fiduciary capacity. Reference was made to *Lyell* v. *Kennedy* (1889) 14 App. Cas. 437. I prefer, however, to base my opinion upon the broader ground which was epitomised by Mr. Walton in his closing submission. Boardman and Tom Phipps, he said, placed themselves in a special position which was of a fiduciary character in relation to the negotiations with the directors of Lester and Harris relating to the trust shares. Out of such special position and in the course of such negotiations they obtained the opportunity to make a profit out of the shares and knowledge that the profit was there to be made. A profit was made and they are accountable accordingly.

I would dismiss the appeal.

Lord Upjohn

MY LORDS,

The facts have been set out so fully in the opinion of my noble and learned friend, Viscount Dilhorne, that I do not propose to say anything about the family, the trusts declared by Charles William Phipps' will or the trust holding of 8,000 shares in a textile company called Lester and Harris, Ltd. (the company). I shall content myself with a brief account of the relevant history before I examine the law.

It is convenient to follow the pattern adopted in argument on both sides and to divide this history into chapters and phases.

Chapter one begins in December, 1956, when Mr. Fox, a practising chartered accountant and the active trustee, received the accounts of the company which he thought were very unsatisfactory. So he consulted the family solicitor, the Appellant Boardman, who also advised the trustees from time to time. Mr. Fox who had already formed the impression that the directors were unfriendly to the Phipps family wanted to see the majority holding in friendly hands and not in unfriendly hands.

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It was decided that Mr. Boardman and the Appellant Tom Phipps (Tom), who was engaged in the textile industry, should go to the Annual General Meeting of the company on 28th December, 1956, with the idea of getting Tom appointed a director and they were given proxies for that purpose. Mrs. Noble, Tom's sister, another trustee, was kept in touch with events by Mr. Boardman, her mother the third trustee being too old and ill to pay any attention to trust affairs. So Tom and Mr. Boardman attended the meeting and Mr. Boardman explained that the Phipps family were very dissatisfied with the accounts. There was a good deal of argument about

the validity of certain proxy forms of the Harris family and a number of questions on the accounts put by Mr. Boardman were answered by the chairman Mr. Smith, a solicitor. Mr. Boardman proposed that Tom should be elected to the Board, but the chairman after much discussion refused to accept the motion. So the meeting ended in the defeat of the Phipps representatives and they reported to Mr. Fox that they had met with a very hostile reception.

Then there were discussions and Mr. Boardman suggested that Tom should try to buy a controlling interest in the company, but the latter felt that the operation was too big for him and wanted Mr. Boardman to come in with him and the latter agreed to do so. Mr. Fox was most happy at this idea as he could see the company getting under far more efficient management than in the past. It is of cardinal importance, and, in my view fundamental to the decision of this case, to appreciate that at this stage there was no question whatever of the trustees contemplating the possibility of a purchase of further shares in the company. Mr. Fox (whose evidence was accepted by the Judge) made it abundantly plain that he would not consider any such proposition. The reasons for this attitude are worth setting out in full: *(a)* The acquisition of further shares in the company would have been a breach of trust for they were not shares authorised by the investment clause in the will; *(b)* although not developed in evidence it must have been obvious to those concerned that no Court would sanction the purchase of further shares in a small company which the trustees considered to be badly managed. It would have been throwing good money after bad. It would also have been necessary to bring in proposals for installing a new management. Mr. Fox was a busy practising chartered accountant who obviously could not have considered it; no one from start to finish ever suggested that Tom, who was running the family concern of Phipps & Son. Ltd., would be willing to undertake this arduous task on behalf of the trustees; *(c)* The trustees had no money available for the purchase of further shares.

I think one question and answer at the trial of the action during the brief cross-examination of Mr. Fox is important on an aspect of the case with which I must deal, so that I shall set it out in full:

> " Q. When Mr. Boardman and Mr. Phipps decided to make an offer
> " for the shares themselves did they ask your consent on behalf of the
> " Trust or anything like that?
>
> " A. I do not know that they asked my consent. I was only too
> " glad. Here was I holding 8,000 shares a minority interest in a com-
> " pany where the directors were unfriendly, and, having had experience
> " in other cases of the weakness of the Companies Act with regard to
> " minority shareholders, as soon as I could see the prospect of getting
> " friendly directors and friendly shareholders I was only too glad."

I may here add, and it is a matter equally fundamental, that on the evidence there never was any suggestion at any subsequent stage that Mr. Fox or any other trustee would ever have contemplated any purchase of further shares. The reasons given above applied throughout the history right down to the end in 1959.

So chapter 1 closes and chapter 2, phase 1, begins with an offer to all shareholders on 24th January, 1957, by the Appellants to purchase their shares at the price of £2 5s. 0d. cash. The offer was conditional on the

acceptance by holders of at least 15,500 shares. Though they portrayed themselves as representing the Phipps Trust it is quite clear that the offer was by these two personally. Indeed, I cannot see that it matters whether the offer could have been construed as made on behalf of the Trustees; only those to whom it was addressed could have complained and it was, for the reasons already mentioned, clear that the Appellants had no authority to make any offer on behalf of the Trustees and did not intend to do so. Then there followed counter offers by the Harris group and in a well-known pattern in take-over bids the Appellants finally offered £3 a share. In response to this and their earlier offer they received acceptances of 2,925 shares only. Naturally the acceptance of these offers was not made unconditional. It should be stated here that though this offer was formally made to the Trustees in respect of their shareholding, it is common ground that in these offers and the later offers in 1958/9 it was never intended that it should be accepted. So phase 1 closes.

Phase 2 of chapter 2 opens on 26th April, 1957, when in this state of deadlock Mr. Boardman wrote to Mr. Smith suggesting that a " possible " solution might, therefore, be to divide the Group so that the Harris family " and the Directors own the whole of one part, and the Phipps interests own " the balance. ..." This led to very complicated and protracted negotiations until the late summer or early autumn of 1958 but I can deal with them quite shortly assuming as I am prepared to do everything against the Appellants.

Throughout this period it is obvious that the Appellants were representing themselves as acting on behalf of the trustees though in fact they had no authority to do so. This is obvious not only from the vast mass of correspondence when Mr. Boardman, who wrote all the letters on behalf of himself and his co-Appellant, made it clear that he was so acting but from the fact that if negotiations had fructified into definite proposals they could not have been accepted by the Appellants but only by the trustees.

The trustees would then have had to consider the matter and if they approved in principle they would have had to obtain the consent of the Court; probably, too, some petition to the Companies Court would also have been necessary to sanction a reconstruction of the company.

Throughout phase 2, therefore, it is perfectly clear that the Appellants were obtaining by reason and by reason only of their purportedly representing the biggest minority holding in the company, that is the trustees' 8,000 shares, a great deal of information about the company. How much information they obtained is set out in the judgment of Wilberforce, J. (as he then was) though in connection with the question whether Mr. Boardman had in a certain letter made a full disclosure to the Respondent of information he had obtained, a point not now relevant:

> " Secondly, it wholly failed to make available or to indicate the
> " existence of the mass of knowledge which Boardman had accumulated.
> " Let us just see what the information was. The information which
> " he had by March, 1959, consisted of, amongst other things, the follow-
> " ing: The 1956 balance sheet; the information as to the company's
> " site in Australia and the Australian turnover, and the information as
> " to the Nuneaton site, obtained in May, 1957, the information through

" looking round the Nuneaton premises in June of 1957 ; the company's
" valuation of all fixed assets, the site plan of the Coventry factory, the
" insurance plans as regards the rest, obtained in November, 1957 ; the
" valuation of the Australian fixed assets obtained at the same time ;
" the certificate of Smith that no special features existed affecting values,
" given at the same time ; the Jackson Stops' valuation based on infor-
" mation supplied by the company and based on a visit to the company's
" premises accompanied by a director; the chairman's statement that
" £42,000 had been spent on new plant since 1954; the figures as to
" the company's external liabilities given in May, 1958 ; the information
" allocating assets and liabilities to separate factories, August 1958;
" information regarding future purchases and sales and as regards the

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" position of executives, August, 1958; the accountants' meeting on
" profits and turnover, and the trading profits for the last five years
" coupled with Fox's analysis made towards the end of 1958; the
" chairman's assurance that no material alteration had taken place on

" those figures; the Australian accounts for the years 1957 and 1958

" . . . ."

It will be seen from this that Mr. Fox himself, acting not as trustee, but as accountant to the Appellants, made detailed analyses of the profits of the company for five years, so obviously he knew exactly what was going on.

Counsel for both parties agreed that phase 2 really merged or slid into phase 3. Both the Phipps and Harris families were getting tired of this war of attrition and negotiations seemed to be getting nowhere. Mr. Smith and Mr. Boardman had a meeting on 13th August, 1958, when the suggestion was made that the Appellants should buy 16,000 shares of the Smith side at £5 a share and then sell the Coventry business to that side for £50,000, but this was not acceptable to the Appellants. After further discussion Mr. Smith in a letter of 13th October, 1958, resurrected the idea of the Appellants making an offer for the whole of the remaining share capital of the business and a little later suggested £5 a share. It was in consequence of this that Mr. Fox made the analysis of profits already mentioned in the judgment of Wilberforce, J. Finally, after more negotiations the Appellants, on the 10th March, 1959, purchased 14,567 shares held by Mr. Smith and his friends for £4 10s. 0d. per share and after a visit to Australia in April, 1959, they purchased at the same price a further 4,494 shares in the company making them the holders of 21,986 out of the 22,000 shares outside the trust holding of 8,000. At the same time the conditional acceptance of the 2,925 shares bought at £3 a share in 1957 was made unconditional. The purchase price was raised by the Appellants through financial circles in London and the whole of the costs of these protracted negotiations including of course the visit to Australia were borne by the Appellants. Not one penny was charged or sought to be charged to the trustees.

In these circumstances the Respondent rather surprisingly seeks to hold the Appellants accountable to him for his 5/18ths share of the 21,986 shares so purchased, on the footing that the Appellants are constructive trustees of these shares for and on behalf of the Trust. So I turn to the relevant

law upon which this claim is based, but start by stating what is not in dispute, that the conduct of the Appellants and each of them has never been anything except utterly honest and above board in every way. If they or either of them are accountable it is because of the operation of some harsh doctrine of equity upon consciences completely innocent in every way.

Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case. The relevant rule for the decision of this case is the fundamental rule of equity that a person in a fiduciary capacity must not make a profit out of his trust which is part of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict. I believe the rule is best stated in *Bray* v. *Ford* (1896) A.C. by Lord Herschell at page 51, who plainly recognised its limitations:

> " It is an inflexible rule of a Court of Equity that a person in a " fiduciary position, such as the respondent's, is not, unless otherwise " expressly provided, entitled to make a profit; he is not allowed to " put himself in a position where his interest and duty conflict. It does " not appear to me that this rule is, as has been said, founded upon " principles of morality. I regard it rather as based on the considera- " tion that, human nature being what it is, there is danger, in such " circumstances, of the person holding a fiduciary position being swayed " by interest rather than by duty, and thus prejudicing those whom he " was bound to protect. It has, therefore, been deemed expedient to " lay down this positive rule. But I am satisfied that it might be " departed from in many cases, without any breach of morality, without

> " any wrong being inflicted, and without any consciousness of wrong- " doing. Indeed, it is obvious that it might sometimes be to the " advantage of the beneficiaries that their trustee should act for them " professionally rather than a stranger, even though the trustee were " paid for his services."

It is perhaps stated most highly against trustees or directors in the celebrated speech of Lord Cranworth L.C. in *Aberdeen Railway* v. *Blackie* (1854) 1 Macq. 461 at 471 where he said:

> " And it is a rule of universal application that no one having such " duties to discharge shall be allowed to enter into engagements in " which he has or can have a personal interest conflicting or which " possibly may conflict with the interests of those whom he is bound " to protect."

The phrase " possibly may conflict" requires consideration. In my view it means that the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict.

Your Lordships were referred at length to the decision of this House in *Regal (Hastings) Ltd.* v. *Gulliver and Others* [1942] 1 A.E.R. 378. That is a helpful case for its restatement of the well-known principles but the case itself bears no relation to the one before your Lordships. The facts

were very different and I summarise them from the opinion of Lord Russell of Killowen at page 383. The plaintiff company (Regal), the owner of a cinema, was contemplating the purchase of the leases of two other cinemas which were to be transferred to a subsidiary company formed by Regal called Amalgamated. Concurrently Regal was contemplating the sale of all three cinemas to a third party. The intention of the directors was that Regal should subscribe for shares in Amalgamated and then Regal would sell those shares to the third party. There was some trouble over providing a guarantee ; the transaction was changed so that the directors of Regal subscribed for shares in Amalgamated instead of Regal itself and then those directors sold those shares to the third party, thereby making an immediate and handsome profit of £2 16s. 1d. per share. That was an obvious case where duty of the director and his interest conflicted. The scheme had been that Regal would make the profit, in fact its directors did. It was a clear case and does not really assist in the present case. It had long been settled in *Keech* v. *Sandford* that the inability of a beneficiary to obtain the renewal of a lease which was trust property and a renewal of which has always been considered to be trust property did not permit the purchase of that property by the trustee himself. That bears no relation to this case. This case, if I may emphasise it again, is one concerned not with trust property or with property which the persons to whom the fiduciary duty was owed were contemplating a purchase but in contrast to the facts in *Regal* with property which was not trust property or property which was ever contemplated as the subject matter of a possible purchase by the trust.

There has been much discussion in the Courts below and in this House upon the observations of their Lordships in the *Regal* case. In my view, their Lordships were not attempting to lay down any new view on the law applicable and indeed could not do so for the law was already so well settled. The whole of the law is laid down in the fundamental principle exemplified in Lord Cranworth's statement I have already quoted. But it is applicable, like so many equitable principles which may affect a conscience, however innocent, to such a diversity of different cases that the observations of judges and even in your Lordships' House in cases where this great principle is being applied must be regarded as applicable only to the particular facts of the particular case in question and not regarded as a new and slightly different formulation of the legal principle so well settled. Therefore, as the facts in *Regal* to which alone their Lordships remarks were directed were so remote from the facts in this case I do not propose to examine the Regal case further

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Two further matters must be mentioned. First, that Tom was at all material times merely a residuary legatee of an undivided aliquot share of his father's estate ; as such he was *prima facie* under no fiduciary relationship to the trustees or his co-beneficiaries *(Kennedy* v. *de Trafford* (1897) A.C. 180).

There must be special circumstances, therefore, to place him in such a relationship. However, in the rather peculiar circumstances of this case and by refusing the offer made to him in the Court of Appeal to sever from Mr. Boardman I think he must have elected to be treated on the same footing as Mr. Boardman.

Secondly, as to the position of Mr. Boardman himself. There is no doubt that from time to time he acted as solicitor to the Trust and to the family and he was therefore throughout in a fiduciary capacity at least to the Trustees. Whether he was ever in a fiduciary capacity to the Respondent was not debated before your Lordships and I do not think it matters. I think, again, that some of the trouble that has arisen in this case, it being assumed rightly that throughout he was in such a capacity, is that it has been assumed that it has necessarily followed that any profit made by him renders him accountable to the trustees. This is not so. A solicitor who acts for a client from time to time is no doubt rightly described throughout as being in a fiduciary capacity to him but that means fundamentally no more than this, that if he has dealings with his client, e.g. accepts a present from him or buys property from him, there is a presumption of undue influence and the onus is on the solicitor to justify the present or purchase (see, for example, *Manchester* v. *Byrne* [1952] 1 A.E.R. at page 1368). That principle has no relevance to the present case. There is no such thing as an office of being solicitor to a Trust *(Saffron Walden* v. *Rayner* 14 Ch. D. 406 per James, L.J. at page 409). Though these remarks of James, L.J. were admittedly *obiter* they represent the law. It is perfectly clear that a solicitor can if he so desires act against his clients in any matter in which he has not been retained by them provided, of course, that in acting for them generally he has not learnt information or placed himself in a position which would make it improper for him to act against them. This is an obvious application of the rule that he must not place himself in a position where his duty and his interest conflict. So in general a solicitor can deal in shares in a company in which the client is a shareholder, subject always to the general rule that the solicitor must never place himself in a position where his interest and his duty conflict; and in this connection it may be pointed out that the interest and duty may refer (and frequently do) to a conflict of interest and duty on behalf of different clients and have nothing to do with any conflict between the personal interest and duty of the solicitor, beyond his interest in earning his fees.

My Lords, the judgments of Wilberforce, J. (as he then was) and Lord Denning, M.R. and Pearson, L.J. (as he then was) proceeded upon the footing that by acting as self-appointed agents the Appellants placed themselves in a fiduciary capacity to the trustees and became accountable accordingly. That they were never in fact agents has been demonstrated by Lord Denning in his judgment and I desire to add nothing thereto except to say I agree with him. But as I have already pointed out it seems to me that this question whether this assumption of office leads to the conclusion that the Appellants were accountable requires a closer analysis than it has received in the lower courts.

This analysis requires detailed consideration:

3. The facts and circumstances must be carefully examined to see whether in fact a purported agent and even a confidential agent is in a fiduciary relationship to his principle. It does not necessarily follow that he is in such a position (see *In re Coomber* [1911] 1 Ch. page 723).

4. Once it is established that there is such a relationship, that relationship must be examined to see what duties are thereby imposed upon the agent, to see what is the scope and ambit of the duties charged upon him.

3. Having defined the scope of those duties one must see whether he has committed some breach thereof and by placing himself within the scope and ambit of those duties in a position where his duty and interest may possibly conflict. It is only at this stage that any question of accountability arises.
4. Finally, having established accountability it only goes so far as to render the agent accountable for profits made within the scope and ambit of his duty.

Before applying these principles to the facts, however, I shall refer to the judgment of Russell L.J. which preceded on a rather different basis. He said ([1965] 2 W.L.R. at page 870):

> " The substantial trust shareholding was an asset of which one aspect
> " was its potential use as a means of acquiring knowledge of the
> " company's affairs, or of negotiating allocations of the company's
> " assets, or of inducing other shareholders to part with their shares.
> " That aspect was part of the trust assets."

My Lords, I regard that proposition as untenable.

In general, information is not property at all. It is normally open to all who have eyes to read and ears to hear. The true test is to determine in what circumstances the information has been acquired. If it has been acquired in such circumstances that it would be a breach of confidence to disclose it to another then Courts of Equity will restrain the recipient from communicating it to another. In such cases such confidential information is often and for many years has been described as the property of the donor, the books of authority are full of such references; knowledge of secret processes, " know-how ", confidential information as to the prospects of a company or of someone's intention or the expected results of some horse race based on stable or other confidential information. But in the end the real truth is that it is not property in any normal sense but Equity will restrain its transmission to another if in breach of some confidential relationship.

With all respect to the views of Russell, L.J. I protest at the idea that information acquired by trustees in the course of their duties as such is necessarily part of the assets of trust property which cannot be used by the trustees except for benefit of the trust. Russell, L.J. referred to the fact that two out of three of the trustees could have no authority to turn over this aspect of trust property to the Appellants except for the benefit of the trust; this I do not understand, for if such information is trust property not all the trustees acting together could do it for they cannot give away trust property.

We heard much argument upon the impact of the fact that the Testator's widow was at all material times incapable of acting in the trust owing to disability. Of course trustees must act all of them and unanimously in matters affecting trust affairs, but they never performed any relevant act on behalf of the Trust at all; I quoted Mr. Fox's answer earlier for this reason. At no time after going to the meeting in December, 1956, did Mr. Boardman or Tom rely on any express or implied authority or consent of the trustees in relation to trust property. They understood rightly that there was no question of the trustees acquiring any further trust property by purchasing further shares in the company, and it was only in the purchase of other shares that they were interested.

There is. in my view, and I know of no authority to the contrary, no general rule that information learnt by a trustee during the course of his duties is property of the trust and cannot be used by him. If that were to be the rule it would put the Public Trustee and other corporate trustees out of business and make it difficult for private trustees to be trustees of more than one trust. This would be the greatest possible pity for corporate trustees and others may have much information which they may initially acquire in connection with some particular trust but without prejudice to that trust can make it readily available to other trusts to the great advantage of those other trusts.

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The real rule is, in my view, that knowledge learnt by a trustee in the course of his duties as such is not in the least property of the trust and in general may be used by him for his own benefit or for the benefit of other trusts unless it is confidential information which is given to him (1) in circumstances which, regardless of his position as a trustee, would make it a breach of confidence for him to communicate to anyone for it has been given to him expressly or impliedly as confidential, or (2) in a fiduciary capacity, and its use would place him in a position where his duty and his interest might possibly conflict. Let me give one or two simple examples. A, as trustee of two settlements X and Y holding shares in the same small company, learns facts as trustee of X about the company which are encouraging. In the absence of special circumstances (such, for example, that X wants to buy more shares) I can see nothing whatever which would make it improper for him to tell his co-trustees of Y who feel inclined to sell that he has information that this would be a bad thing to do. Another example: A as trustee of X learns facts that make him and his co-trustees want to sell. Clearly he could not communicate this knowledge to his co-trustees of Y until at all events the holdings of X have been sold for there would be a plain conflict, reflected in the prices that might or might possibly be obtained.

My Lords, I do not think for one moment that Lord Brougham in *Hamilton v. Wright* 9 Cl. & F. at page 124, quoted in the speech of my noble and learned friend, Lord Guest, was saying anything to the contrary; you have to look and see whether the knowledge acquired was capable of being used for his own benefit *to injure* the trust (my italics). That test can have no application to the present. There was no possibility of the information being used to injure the trust. The knowledge obtained was used not in connection with trust property but to enhance the value of the trust property by the purchase of other property in which the trustees were not interested.

With these general observations on the applicable principles of law let me apply them to the facts of this case.

chapter 1. At this stage the Appellants went to the meeting with the object of persuading the shareholders to appoint Tom a director; admittedly they were acting on behalf of the trustees at that meeting. It is the basis of the Respondent's case that this placed the Appellants in a fiduciary relationship which they never after lost or, as it was argued, it " triggered " off a chain of events " and gave them the opportunity of acquiring know-ledge so that they thereafter became accountable to the trustees. From this it must logically follow that in acquiring the 2,925 shares they became constructive trustees for the trust.

My Lords, I must emphatically disagree. The Appellants went to the meeting for a limited purpose which failed. Then the Appellants' agency came to an end. They had no further duties to perform. The discussions which followed showed conclusively that the trustees would not consider a purchase of further shares. So when Chapter 2 phase 1 opened I can see nothing to prevent the Appellants from making an offer for shares for themselves, or, for that matter, I cannot see that Mr. Boardman would have been acting improperly in advising some other client to make an offer for shares (other than the 8,000) in the Company.

In the circumstances the Appellants' duties having come to an end they owed no duty and there was no conflict of interest and duty, they were in no way dealing in trust property. Further, of course, they had the blessing of two trustees in their conduct in trying to buy further shares.

So had phase 1 of Chapter 2 been successful I can see nothing to make them constructive trustees of the shares they purchased for the trust.

Consider a simple example. Blackacre is trust property and next to it is Whiteacre; but there is no question of the trustees being interested in a possible purchase of Whiteacre as being convenient to be held with Blackacre. Is a trustee to be precluded from purchasing Whiteacre for himself because he may have learnt something about Whiteacre while acting as a trustee

of Blackacre? I can understand the owner of Whiteacre being annoyed but surely not the beneficial owners of Blackacre, they have no interest in Whiteacre and their trustees have no duties to perform in respect thereof.

It is phase 2 of Chapter 2 that gives rise to difficulty.

If that phase had come to a successful conclusion one of two things would have happened.

The Appellants would have had to communicate everything they knew to the trustees; the latter might then have ratified their actions and proceeded to carry out the proposals provisionally agreed between the Appellants and Mr. Smith. No doubt old Mrs. Phipps would have had to be removed from her position as a trustee. Had all this happened *cadit quaestio.* But supposing the trustees had decided against the proposals. The Appellants' agency not having been ratified they never became agents. Admittedly they had learnt much about the Company but on this hypothesis they had communicated that information to the trustees who decided to make no use of it.

I will assume that at this stage the Appellants remained in a general fiduciary capacity to the trustees in the *Manchester* v. *Byrne* sense as described above, but what particular fiduciary duties remained upon the Appellants? Surely their particular relationship came to an end, and why should they not be entitled to use that information for the purchase of shares in the Company if the trustees were not interested? I can see nothing to prevent the Appellants making use of it, for there is no longer any conflict between duty and interest. They have performed their duty. This is in marked contrast to *Keech* v. *Sandford,* where the beneficiary was interested, and to the facts in *Regal* where the directors acted so as to deprive their beneficiary of a profit in respect of property of which the beneficiary has contemplated the purchase and which the directors as trustees should have preserved at all costs.

However, we know this did not happen and phase 3 started.

My Lords, I believe the only conflict between the duty and interest of the Appellants that can be suggested is that having learnt so much about the company and realised that in the hands of experts like Tom the shares were a good buy at more than £3 a share they should have communicated this fact to the trustees and suggested that they ought to consider a purchase and an application to the Court for that purpose.

This, so far as I can ascertain, was suggested for the first time in the judgment of Lord Denning M.R. [1965] 2 W.L.R. at page 861 A.

Had this been an issue in the action this might have been a very difficult matter, but it never was. There is no sign of any such case made in the pleadings; but what is much more important is that from start to finish in all three Courts there was no suggestion of this in argument on behalf of the Respondent; and what is most important of all, there is no suggestion in cross-examination of either of the trustees or of the Appellants that the latter were under any such obligation. Mr. Fox must in fact have known all about these negotiations and the value of the shares at this time. In these circumstances can it really be asserted that by failure (if, indeed, they did so fail; we simply do not know) formally to tell the trustees that the shares were worth more than had previously been thought the Appellants had placed themselves in a position where their interest might possibly conflict with their duty.

For my part unless the trustees, which means in fact the active trustee Mr. Fox, had communicated some change of policy as to the purchase of further shares I cannot conceive why the Appellants should have thought themselves under any duty to communicate to the trustees the fact that they, the Appellants, were prepared to pay £4 10s. 0d. for the shares, for that is all that had happened over the intervening Chapter 2 phase 2 negotiations. That does not mean that the shares would have been worth purchasing by the Trustees at £4 10s. 0d. for no Court would have sanctioned that purchase unless Tom was willing to enter into a contract to run the

Company for a period and, of course, he need not have done so. In principle I cannot see any difference between this situation and the end of Chapter 1. It was nice for the trustees to know that the Appellants were willing to expend more of their own money in buying the non-trust shares in pursuance of the general scheme to get rid of the Smith faction but had no further relevance.

However this may be, all this was an issue, as I have said, never explored.

My Lords, it would, in my opinion, be most unjust to the Appellants to draw any inference against them in such circumstances without giving them any opportunity of explaining the situation as it really occurred in 1958. We do not know what would have been said on this point in the witness box, but it is not unlikely Mr. Fox would have said: " I knew all about " it but I was still inflexibly opposed to a purchase of more shares. All " along I hoped the Appellants would buy them ". Had he said that, it would seem to me perfectly clear that there would be no possible conflict between the Appellants' duty and interest.

I cannot condemn the Appellants unheard on this point.

Apart from that, what was the position? The Appellants were able to offer a greatly increased price in phase 3 by reason of the knowledge they had acquired but they were not acquiring trust property or, so far as the evidence goes, any property which the trustees had any idea of purchasing. The inference I draw is that the trustees were still giving their blessing to the idea that the Appellants should purchase the majority holding so that it should be in friendly hands.

As a result of the information they acquired, admittedly by reason of the trust holding, they found it worth while to offer a good deal more for the shares than in phase 1 of Chapter 2, I cannot see that in offering to purchase non-trust shares at a higher price they were in breach of any fiduciary relationship in using the information they had acquired for this purpose.

I cannot see that they have, from start to finish, in the circumstances of this case, placed themselves in a position where there was any possibility of a conflict between their duty and interest except in respect of the one matter which I have considered and rejected on the facts of this case. While I have not answered my earlier analysis specifically I think I have done so in the course of this judgment except No. 4 which, in my view, does not arise.

I have dealt with the problems that arise in this case at considerable length but it could, in my opinion, be dealt with quite shortly.

In *Barnes* v. *Addy* L.R. 9 Ch.A. 244 Lord Selborne L.C. said at page 251:—

> " It is equally important to maintain the doctrine of trusts which is
> " established in this Court, and not to strain it by unreasonable con-
> " struction beyond its due and proper limits, There would be no
> " better mode of undermining the sound doctrines of equity than to
> " make unreasonable and inequitable applications of them."

That, in my judgment, is applicable to this case.

The trustees were not willing to buy more shares in the Company. The active trustees were very willing that the Appellants should do so themselves for the benefit of their large minority holding. The trustees, so to speak, lent their name to the Appellants in the course of prolonged and difficult negotiations and, of course, the Appellants thereby learnt much which would have otherwise been denied to them. The negotiations were in the end brilliantly successful.

And how successful Tom was in his reorganisation of the Company is apparent to all. They ought to be very grateful.

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In the long run the Appellants have bought for themselves with their own money shares which the trustees never contemplated buying and they did so in circumstances fully known and approved of by the trustees.

To extend the doctrines of equity to make the Appellants accountable in such circumstances is, in my judgment, to make unreasonable and unequitable applications of such doctrines.

I would allow the appeal and dismiss the action.

(P/31334) Dd. 196965 100 11/66 St.S.