THE THEORETICAL BASIS OF THE TRUSTEE'S DUTY OF LOYALTY

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The law imposes a high duty of loyalty on a trustee. The author explores the exact nature of the duty and suggests that the law has not been applied with sufficient strictness by the Canadian Courts.

INTRODUCTION

> It is an inflexible rule of Court of Equity that a person in a fiduciary position . . . 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.[1]

This passage from the judgment of Lord Herschell in *Bray* v. *Ford*[2] is perhaps one of the best known statements in the law of trusts, or more generally, if more obscurely, in the law of "fiduciary relations." It is less well known that the action was one for libel, in which the House of Lords was asked to and did order a new trial on the ground that a misdirection at trial had occasioned a substantial wrong or miscarriage of justice. What Lord Herschell said can be read as part of the ratio of his judgment in the sense that it was a factor in his line of reasoning. He did not however explain himself more fully and reading the passage against the facts of the case does not throw more light on it. Like many a maxim the passage leaves unclear more than it explains, and in particular it leaves unanswered the question of the theoretical basis of the trustee's duty of loyalty.[3]

Lord Herschell stated that a trustee is not entitled to make a profit and that he cannot put himself in a position where his interest and duty conflict. Is he stating two separate, though perhaps overlapping, rules? Is he stating a single rule in two different ways? Is he stating one basic rule and a derivative from it, and if so which is the basic rule and which is the derivative? In applying the rule respecting a conflict of duty and interest are the courts looking for an actual, a possible or only a theoretical conflict? In many cases, whatever the answers to these questions, the actual decisions would not change. This is true, for example, where a trustee buys trust property at a clear undervalue. In other cases the answers may be all important. Suppose the case of a board of trustees who are advised by investment counsel. The trustees use the information that they acquire to invest themselves, but their personal investment has no effect on their decisions as trustees or on the purchase price of trust investments. It may be that there is no actual conflict of duty and interest, but there may be a possible or theoretical one and it could be said that the trustees are using their trust position to make a private profit. The purpose of this paper is to look at some of the leading cases in England and Canada to see if the judgments throw any light on these basic questions.

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1 [1896] A.C. 44, 51 (H.L.).

2 *Ibid.*

3 The dictum also raises the thorny question of when a person is in a fiduciary position. That is outside the scope of the present inquiry, though it will be necessary to give it some consideration.

A. *THE ENGLISH LAW*

It would seem that the original basis for judicial intervention in England was the possibility of a conflict of duty and interest. The first case of significance is, of course, *Keech* v. *Sanford.*[4] In that case a trustee attempted to renew a lease on behalf of his beneficiary, but the lessor refused because the beneficiary was an infant. When the trustee then renewed for himself it was decided that he must hold the new lease on trust for the infant. This decision could have been arrived at either on the basis that the trustee used his existing position as lessee to secure a renewal for himself, thus using his trusteeship to make a profit, or on the basis that a renewal for himself involved a conflict of duty and interest. The gist of the Lord Chancellor's reasons is found in the opening sentence of his judgment:

> I must consider this as a trust for the infant; for I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to the *cestui que* use.[5]

The implication is that the trustee would allow his own personal interest to interfere with his duty to the trust; the general principle invoked is that of conflict of duty and interest. Moreover, on the facts, it is clear that it is sufficient that the situation in question could have led to a conflict. There was "clear proof" that the trustee had attempted to renew for the infant. It was argued that he had thereby discharged his duty, and so was free to pursue his personal interest. The Lord Chancellor thought the attempt to renew was irrelevant, saying that the general "rule should be strictly pursued, and not in the least relaxed."[6]

Eight years later the same philosophy was reflected in *Robinson* v. *Pett.*[7] In that case Pett was appointed executor of a will, and was also given a legacy of £100. Unlike the other executor he was not to lose that legacy if he renounced the executorship. He did in fact renounce the executorship, and was paid £100. He did a considerable amount of work for the estate and claimed £400 for his trouble. His claim was rejected. Lord Talbot, L.C., said:

> It is an established rule that a trustee, executor, or administrator, shall have no allowance for his care and trouble: the reason of which seems to be, for that on those pretences, if allowed, the trust estate might be loaded, and rendered of little value.[8]

Here again the conflict principle is evident. The strict application of the principle was also emphasized by the fact that the court was not impressed by evidence that Pett had greatly assisted the estate, even to the extent of neglecting his own affairs.

The next two cases of importance are decisions of Lord Eldon. In the first, *Ex parte Lacey,*[9] an assignee in bankruptcy bought part of the estate and some of the debts owed to it. In the second, *Ex parte James,*[10] the solicitor to an assignee bought part of the estate and both he and the assignee bought the debts. In both cases it was decided that the "beneficiaries" could set aside the sale of the estate and that the debts could not be purchased and held by the assignees or the solicitor for

4 (1726), Sel. Cas. T. King 61; 25 E.R. 223 (L.C.).
5 *Id.*, at 62.
6 *Ibid.*
7 (1734), 3 P. Wms. 249; 24 E.R. 1049 (L.C.).
8 *Id.*, at 251.
9 (1802), 6 Ves. Jun. 625; 31 E.R. 1228.
10 (1803), 8 Ves. Jun. 337; 32 E.R. 385.

their own use. Lord Eldon proceeded on the basis of the conflict rule. In *Ex parte Lacey*[11] he said that a trustee could not buy the trust property for himself:

> A trustee, who is entrusted to sell and manage for others, undertakes in the same moment, in which he becomes a trustee, not to manage for the benefit and advantage of himself.

He also emphasized the general nature of the rule, and underlined the fact that the courts would not analyse each particular case to see if what the trustee did was "morally" justifiable:

> This doctrine as to purchases by trustees, assignees, and persons having a confidential character, stands much more upon general principle than upon the circumstances of any individual case. It rests upon this; that the purchase is not permitted in any case, however honest the circumstances, the general interests of justice requiring it to be destroyed in every instance; as no court is equal to the examination and ascertainment of the truth in much the greater number of cases.[12]

Both these cases seemed to follow *Keech* v. *Sanford*[13] lines. They could have been decided upon the use of a position of confidence to make a profit, but were in fact decided by an application of the conflict rule, with no opportunity given the defendant to justify his action once it was apparent a conflict could have arisen.

The first, though rather slight, indication of some variation in the judicial approach appeared in *Hamilton* v. *Wright*.[14] That case again invloved an assignee in bankruptcy who bought an annuity payable by the estate he was administering. After his death his representatives tried to enforce the annuity, but it was decided by the House of Lords that, on the appellant obligor paying the amount for which Wright had purchased the annuity, the respondents had no further claim against him. Lord Brougham, who delivered the principal judgment, pursued in the main traditional views. The situation arising on the purchase of the annuity involved a conflict of interest and duty; actual loss did not need to be shown, but merely that what the trustee did had a tendency to interfere with his duty; the courts would not in a particular case investigate the propriety of a transaction. However one passage in the judgment can be read as heralding the appearance of a rule against profiting out of the office of trustee:

> Nor is it only on account of the conflict between his interest and his duty to the trust that such transactions are forbidden. The knowledge which he acquires as trustee is of itself a 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. . . .[15]

The significance of this passage should not be over-rated. Although often cited its interpretation is a matter of doubt,[16] and it appears in a judgment otherwise based on orthodox views. Nonetheless it does talk of a trustee making a profit out of his position and this is said to be *another* reason for imposing liability.

Parker v. *McKenna*,[17] decided in 1874, gave even more prominence

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11 *Supra*, n. 9, at 626.
12 *Supra*, n. 10, at 345.
13 *Supra*, n. 4.
14 (1842). 9 Cl. & Fin. 110; 8 E.R. 357 (H.L.).
15 *Id.*, at 124.
16 See *Boardman* v. *Phipps*, [1967] 2 A.C. 46 (H.L.). Lord Guest based his judgment on the profit rule, relying *inter alia* on the dictum. Lord Upjohn, dissenting, applied the conflict principle and emphasized that Lord Brougham spoke of knowledge being used to *injure the trust*.
17 (1874), L.R. 10 Ch. App. 97.

to the profit principle. In that case the directors of a bank entrusted with the duty of selling shares ended up buying some of the shares themselves. The court had no difficulty deciding that they had to account for a profit made by them on a re-sale of the shares. The judgments of Lord Cairns and James, L.J., do not proceed on exactly the same grounds. The Lord Chancellor stated the conflict rule and continued:

> The Court will not inquire, and is not in a position to ascertain, whether the bank has or has not lost by the acts of the directors. All that the Court has to do is to examine whether a profit has been made by an agent, without the knowledge of his principal, in the course and execution of his agency. . . .[18]

This passage could be interpreted as treating the prohibition against making a profit as an offshoot of the conflict rule. James, L.J., in an oft cited passage, referred only to the former rule:

> . . . it appears to me very important, that we should concur in laying down again and again the general principle that in this Court no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal; that that rule is an inflexible rule, and must be applied inexorably by this court, which is not entitled, in my judgment, to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to such an inquiry as that.[19]

The contrast between these two judgments muddies the water a little further. The inflexible nature of the law is maintained, but a question is more clearly raised of whether the profit and conflict rules are independent of each other or whether the former is an offshoot of the latter.[20]

The profit principle achieved even greater independence in *Aberdeen Town Council* v. *Aberdeen University*.[21] The council was the trustee of certain lands. Acting through an agent it bought the lands and then acquired certain fishing rights which the Crown was prepared to grant only to the owner of the land. The House of Lords held that both the lands and the fisheries were to be held for the original beneficiaries. None of the five judgments referred to the conflict rule. On the other hand in three of the judgments it was stated that a trustee could not hold for his own benefit any benefit obtained as a result of his being a trustee.[22] The basis for the acquisition of the fisheries was clearly the ownership of the trust lands. It does not appear that the trustees were under any duty to acquire them, so that no conflict could arise. However a separate profit principle would provide ample justification for the imposition of liability.

The nineteenth century thus saw the growth of two principles whose relationship was uncertain. The twentieth century has done nothing to alleviate the confusion. Some cases have been decided on the orthodox conflict approach, others discussed both the conflict and profit rules, and in some instances only the latter rule was relied on. One of the leading examples of the application of the conflict rule is *Wright* v. *Morgan*.[23] A testator devised certain lands to trustees, two of whom were his sons Harry and Douglas. The sons were also beneficiaries under the trust,

18 *Id.*, at 118.
19 *Id.*, at 124-25.
20 The third judge, Mellish, L.J., did not really add anything to the controversy.
21 (1877), 2 App. Cas. 544 (H.L.).
22 *Id.*, at 549, 553, 556.
23 [1926] A.C. 788 (P.C.).

and, in addition, if the trustees decided to sell, the lands were to be first offered to Harry, the price to be determined by independent valuation. Douglas bought Harry's beneficial interest and his "option." When the trustees decided to sell, the lands were offered to and brought by Douglas. Some of the other beneficiaries applied to have the sale set aside and were eventually successful in the Privy Council. The rule that a trustee could not purchase trust property was said to be based on the principle that "equity will not allow a person, who is in a position of trust, to carry out a transaction, where there is a conflict between his duty and his interest."[24] By taking an assignment of and exercising the "option" Douglas had placed himself in such a position. Although the will contemplated a purchase by a trustee, it was not by Douglas. His interest and duty could clash in deciding such things as the date of sale or time of payment, and the court apparently thought, if allowed at all, such a potential conflict should be allowed only to the person named by the testator.

Although only a decision of the Chancery Division, *Williams* v. *Barton*[25] is perhaps an equally important example of the application of the conflict rule. The defendant was one of two trustees of a will. He was employed by a firm of stockbrokers and was paid half of the commission earned by the firm on work he introduced. On two occasions the defendant's firm was employed to value trust securities, on the first occasion the defendant persuading the plaintiff, his fellow trustee, not to use the firm employed by the testator. The defendant took no part in the actual valuation or in the fixing of the fee. The plaintiff sued for and recovered the commission paid to the defendant. At the outset Russell, J., stated that the basis of the claim was "that in retaining such moneys the defendant is making a profit out of his trusteeship."[26] In the course of his judgment he referred to the "salutary rule of equity that a trustee may not make a profit out of his trust,"[27] and he concluded that "this increase of remuneration is a profit made by the defendant out of and by reason of his trusteeship, which he would not have made but for his position as trustee."[28] However in the most significant passage in his judgment he indicated he thought that the basic principle at stake was that of the conflict of duty and interest. After analysing the facts he said:[29]

> From this it seems to me evident that the case falls *within the mischief which is sought to be prevented by the rule.* The case is clearly one where his duty as trustee and his interest in an increased remuneration are in direct conflict. As a trustee it is his duty to give the estate the benefit of his unfettered advice in choosing the stockbrokers to act for the estate; as the recipient of half the fees to be earned . . . on work introduced by him his obvious interest is to choose or recommend . . . [his own firm] for the job.

In this passage Russell, J., maintains the paramount nature of the conflict rule. The defendant made a profit out of his position as trustee, but the basic reason for holding him liable was the conflict of duty and interest involved.

Unfortunately this relationship between the conflict and profit rules

24 *Id.*, at 797.
25 [1927] 2 Ch. 9 (Ch.D.).
26 *Id.*, at 9.
27 *Id.*, at 11.
28 *Id.*, at 12.
29 *Id.* (italics added).

was not kept clearly in perspective in some of the other cases. This is true, for example, in what are now the two leading cases on the issue of trustees becoming directors of companies on the basis of their trust shares. In the first, *In re Macadam,*[30] two trustees, exercising a power to appoint directors, appointed themselves. It was held that they were accountable to the trust estate for the directors' fees received by them. In a review of the cases Cohen, J., emphasized that a trustee could not use his position to make a profit, but in discussing *Williams* v. *Barton*[31] he did refer to the passage quoted immediately above, observing that the last sentence applied to the facts of the case before him. In the final paragraph of his judgment both rules were referred to:

> I think that the root of the matter really is: Did he acquire the position in respect of which he drew the remuneration by virtue of his position as trustee?[32]

Later in the same paragraph Cohen, J., said:

> . . . the opportunity to receive that remuneration was gained as a result of a discretion vested in the trustees, and they had put themselves in a position where their interest and duty conflicted.[33]

This does not retain the paramountcy of the conflict rule as clearly as did *Williams* v. *Barton.*[34] The profit rule is said to be the "root of the matter" and Cohen, J., may be read as raising it, or bringing it closer to, a level of equality with the conflict rule.

That development was carried further in *Re Gee.*[35] Harman, J., quoted with approval and relied solely on Cohen's, J., statement of the profit rule. The only reference to the conflict rule in his judgment is in a discussion of the judgment of Warrington, J., in *In Re Dover Coalfield Extension.*[36] Warrington, J., had suggested that money paid for acting as a director could never be a profit for which a trustee would be required to account. Harman, J., thought that went too far. It was not true where the trustee had used his position to secure his appointment as director. He continued:

> Moreover it leaves out of account the second leg of the principle stated by Lord Herschell. The beneficiaries are entitled to the advantage of the unfettered use by the trustee of his judgment as to the government of the company in which they are interested. This they do not get if his judgment is clouded by the prospect of the pecuniary advantage he may acquire if he makes use of the trust shares to obtain or keep for himself a directorship carrying remuneration.[37]

That passage recognizes the conflict rule as applying not only in a trustee becoming, but also in his acting as a director. It is moreover stated as an addition to the profit rule, as "the second leg" of Lord Herschell's dictum. The case appears to carry even further the separation of the two rules.

There are three twentieth century English cases in which the profit rule only was applied. One, *Re Lewis,*[38] was considered in both *Re Macadam*[39] and *In re Gee*[40]. In that case the defendant had, before his father's death, been employed as a salesman by a partnership, in which his father was a partner. On his father's death in 1905 he became a

[30] [1946] Ch. 73 (Ch.D.).
[31] *Supra,* n. 25.
[32] *Supra,* n. 30, at 82.
[33] *Ibid.*
[34] *Supra,* n. 25.
[35] [1948] Ch. 284 (Ch.D.).
[36] [1907] 2 Ch. 76, 83 (Ch.D.) as referred to id., at 294.
[37] *Supra,* n. 35, at 294. For Lord Herschell's dictum see *supra,* n. 1.
[38] (1910), 103 L.T. 495 (Ch.D.).
[39] *Supra,* n. 30.
[40] *Supra,* n. 35.

partner by virtue of being a trustee of his father's will. He continued to act as salesman for the firm and in 1909 he entered into a new agreement with the partnership. Some of the beneficiaries claimed that he was required to account to the trust for his salary. The case was argued on both the conflict and profit bases, but Warrington, J., considered only the latter issue, asking whether the defendant received his salary "by virtue of his position as trustee" or "by virtue of his position as partner." He answered both the questions in the negative and so decided against the beneficiaries. By the application of the conflict rule he could have reached the opposite result. The defendant's own personal interest in getting the highest possible salary conflicted with his duty as trustee to consider only the interests of the trust. Liability could therefore have been imposed on that basis.

The second and more important case decided on the profit rule is *Regal (Hastings) Ltd.* v. *Gulliver.*[41] In that case Regal (Hastings) Ltd. (referred to hereafter as Regal) formed a subsidiary Amalgamated Cinemas Ltd. (Amalgamated) for the purpose of the acquisition by the subsidiary of two cinemas. The two companies had the same directors. Amalgamated was registered with a capital of £5,000 in £1 shares and Regal subscribed for 2,000 shares. Presumably because he thought Amalgmated under-capitalized, the owner of the two cinemas sought a guarantee from the directors before completing the transaction but the directors would not give one. Regal could not afford to take up any more shares, and, at what was in effect a joint meeting of the directors of the two companies, it was decided that the directors themselves would take up the remaining shares. The directors sold these shares at a profit and were eventually sued by Regal, then under a new directorate, for the profit.

The House of Lords unanimously decided that the directors had to account. The only judge to emphasize the conflict rule was Viscount Sankey. He stated that it was the general equitable principle,[42] but when it was argued that the directors in fact owed no duty to Regal to acquire the shares and that in the light of its financial resources it would have been a breach of trust to do so, he fell back on the rule that a fiduciary may not make a profit out of his position, without however explaining the relationship between the conflict and profit rules. The four other judges relied exclusively on the profit rule.[43] Lord Russell's judgment can be taken as representative, for the other three expressly agreed with it in the course of their own judgments.[44] Lord Russell stated that the defendants were liable "if, while standing in a fiduciary relationship to Regal, they have by reason and in course of that fiduciary relationship made a profit."[45] On the facts of the case he had no doubt that that was what had happened. Like Viscount Sankey, he also thought that the fact that the directors owed no duty to acquire the shares and that Regal had not money to buy was irrelevant:

> The liability arises from the mere fact of a profit having, in the stated circumstances, been made.[46]

[41] [1942] 1 All E.R. 378 (H.L.). Surprisingly this case was not cited in either *Re Macadam, supra*, n. 30, or in *Re Gee, supra*, n. 35.
[42] *Id.*, at 381.
[43] *Id.*, at 382.
[44] *Id.*, at 391 (Lord Macmillan), 393 (Lord Wright), and 394 (Lord Porter).
[45] *Id.*, at 385. The judgments abound with statements to this effect: see the numerous dicta quoted in *Pesos Silver Mines Ltd.* v. *Cropper*, [1966] S.C.R. 673.
[46] *Id.*, at 386.

Lord Wright perhaps put the matter even better:

> 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.[47]

To support this conclusion the two judges cited, *inter alia*, *Keech* v. *Sanford*,[48] which they took as supporting the view that even if the duty of the trustee was either non-existent or had been performed he still could be liable if a profit was made by use of his position as trustee.

In *Brown* v. *I.R.C.*[49] the House of Lords again applied the profit rule. That case raised the issue of whether a solicitor could retain for himself the interest on his trust accounts and it was decided that he could not. This conclusion was considered inevitable by the House and consequently there was no extended discussion of the law. Nonetheless two judges, Lord Reid and Lord Upjohn stated that they were applying the principle that a trustee may not make a profit out of his trust.[50]

These twentieth century decisions made the divergence of approach obvious and one would have thought that the time was ripe for an analysis by the courts of the relation between the conflict and profit rules. In *Boardman* v. *Phipps*[51] an opportunity to do this was let slip. The facts of the case are rather complicated, and the most convenient summary can be based on the judgment of Lord Guest. The trustees of a testamentary trust were the testator's widow, his daughter, Mrs. Noble and Mr. Fox, an accountant. The widow was senile and took no part in the administration of the trust. Part of the trust corpus consisted of shares in Lester and Harris Ltd. In 1956 Mr. Boardman, solicitor to the trust, decided that the recent accounts of Lester and Harris were unsatisfactory, and he and his co-appellant Tom Phipps, a beneficiary under the trust, attended a company meeting in December 1956, having obtained proxies from Mrs. Noble and Fox. As a result of that meeting they decided that to improve the position of the trust would require the purchase of the outstanding shares in the company. Mrs. Noble and Mr. Fox raised no objection to this being done, although it was clear throughout that the trustees could not afford to and indeed had not the legal power to buy any of these shares. Mr. Boardman conducted most of the negotiations, which went through three phases. He first made an unsuccessful offer, conditional on the acceptance by the holders of not less than fifteen thousand shares. He then proposed, again unsuccessfully, a division of Lester's and Harris's assets between the Harris family and the trustees. In both these instances he was purporting to act for the trust and gained valuable and confidential information about the company which would not have been disclosed to someone who did not represent a substantial shareholding. Finally Boardman and Tom Phipps bought most of the outstanding shares in their own right. Some of the beneficiaries under the trust brought an action claiming a declaration that the shares so acquired were held for the trust and for an accounting of profits.

47 *Id.*, at 392.
48 *Supra*, n. 4.
49 [1965] A.C. 244 (H.L.).
50 *Id.*, at 256 (Lord Reid) and 265 (Lord Upjohn).
51 *Supra*, n. 16.

At first instance, Wilberforce, J., decided in favour of the beneficiaries on the basis of a general principle "that trustees or agents shall not retain a profit made in the course of or by means of their office"[52] and relied primarily on *Regal (Hastings) Ltd.* v. *Gulliver*[53] as authority for that proposition. His decision was unanimously affirmed by the Court of Appeal,[54] two of the judges, Lord Denning and Pearson, L.J., also relying on *Regal (Hastings) Ltd.* v. *Gulliver*.[55] However, Lord Denning also indicated "another ground of liability."[56] He pointed out that if the trustees had contemplated an application to court for directions they would probably have called on Mr. Boardman for his advice. The latter 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. . . ."[57] The conflict principle appears here as separate and distinct from the profit rule.[58]

The welcome simplicity of the decisions in the lower courts disappeared in the House of Lords. The House upheld the decision of the Court of Appeal, but only by a majority of three to two. Of the three majority judgments only that of Lord Guest spoke solely of the "profit" rule, and as did the lower courts, he relied mainly on *Regal (Hastings) Ltd.* v. *Gulliver*.[59] Lord Cohen also applied the profit rule on the authority of *Regal*, but like Lord Denning, added conflict of duty and interest as another ground of decision. He apparently thought this required some actual or possibility of actual conflict as opposed to a mere theoretical conflict and found it in the fact that Mr. Boardman, if consulted by the trustees, would not have been able to give unprejudiced advice as to how they should act. Lord Hodson's judgment is more difficult to follow. He opened it with an approval of the profit rule as stated by Lord Wright in Regal, but followed that almost immediately by a statement of the conflict rule by Lord Cranworth in *Aberdeen Ry. Co.* v. *Blaikie*.[60] He then discussed the question of whether and how far a fiduciary may be liable for the use of knowledge obtained while so acting, and concluded that whatever the limit, Boardman was liable because the knowledge he had acquired was trust property or the equivalent of trust property. He ended his judgment however, on a conflict basis, saying that although the chances of Boardman being asked to advise on the purchase of the shares by the trust were remote, nonetheless the possibility of a conflict was enough to bring the rule into operation. In the end the judgment seems to be based on the conflict rule, with the important proviso that a remote possibility of a conflict is enough to warrant the courts' intervention.

Of the two dissenting judgements Viscount Dilhorne apparently recognized two rules, but decided that neither applied to the case. The knowledge Boardman and Phipps acquired was not trust property, nor did their saying that they represented the trust amount to the use of a

52 [1964] 2 All E.R. 187, 202 (Ch.D.).
53 *Supra*, n. 41.
54 [1965] Ch. 992 (C.A.).
55 *Supra*, n. 41.
56 *Supra*, n. 54, at 1020.
57 *Ibid.*
58 This part of Lord Denning's judgment is however to be read with caution for two reasons. First, the conflict point was not raised at trial and no evidence was adduced: see below. Second, he relied on *Tornroos* v. *Crocker & Croquip Ltd.* (1956), 3 D.L.R. (2d) 9 (B.C.C.A.). That case was reversed on appeal to the Supreme Court of Canada [1957] S.C.R. 151: see further *infra*, text to n. 89 ff.
59 *Supra*, n. 41.
60 (1854), 1 Macq. 461, 471 (H.L.) as quoted *supra*, n. 16, at 106.

fiduciary position. Equally there was no evidence of a conflict of interest and duty and he pointed out, as did Lord Upjohn, that this was not raised in the pleadings nor was it an issue at trial. He took it, however that the trust having consistently indicated it was not interested in acquiring the shares there never was any possibility of Boardman being asked to advise it on their purchase. Lord Upjohn, the other dissenting judgment, made his view of the law clear early in his judgment:

> The relevant rule for the decision of this case is the fundamental rule of equity that a person in a fiduciary position 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.*[61]

He then explained what he meant by "may conflict."

> 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.[62]

On this basis Lord Upjohn considered two main arguments. On the first, conflict of interest and duty he agreed with Viscount Dilhorne. The second was that the trustees had used the trust to gain the information they needed in buying the shares. Lord Upjohn said that information was in general not property at all. A trustee was only prevented from using information acquired as a trustee for his own benefit if, regardless of the fact that he was a trustee, it would be a breach of confidence to communicate it to anyone, or if, being in a fiduciary capacity, its use would involve a conflict of duty and interest.[63] Neither of these rules applied on the facts of the case.

Lord Upjohn's judgment brings into clear focus the issue of the relation between the conflict and the profit principles. Unfortunately the majority judgments did not really deal with the problem. Nonetheless in the light of *Boardman* v. *Phipps*,[64] and some of the earlier cases, particularly *Regal (Hastings) Ltd.* v. *Gulliver*,[65] English law appears to have adopted the view that there are two rules, one that trustees may not place themselves in a position where there is a possible conflict of duty and interest and the second that they may not make a profit out of their position as trustees. Though often overlapping one of these rules may on occasion apply when the other does not. As we have seen, in *Re Lewis*[66] the application of the profit rule did not impose liability, but that the conflict principle probably would have. Equally if in *Boardman* v. *Phipps*[67] there was no conflict, there still was a use of fiduciary position to make a profit.

The decision also confirmed that where he is being held to account on the basis of the profit rule the the only defence open to a trustee is that he made a full and frank disclosure to his beneficiaries. The bona fides of Boardman and Phipps was not questioned. There was no duty on them to acquire the shares for the trust. The trust did not suffer any damage as a result of their buying the shares; indeed it benefited because of the

61 *Supra*, n. 16, at 123 (italics added).
62 *Id.*, at 124.
63 As we saw earlier, Lord Upjohn in *Brown* v. *I.R.C.*, *supra*, n. 49, adopted the profit rule. He would however say, as he did of *Regal (Hastings) Ltd.* v. *Gulliver*, *supra*, n. 41, that the case was easily decided on the profit rule and there was no need to discuss its relation to the conflict rule.
64 *Supra*, n. 16.
65 *Supra*, n. 41.
66 *Supra*, n. 38.
67 *Supra*, n. 16.

value of its shares and the returns thereon were increased as a result of the take-over. The trust could not itself have bought these shares, having no legal authority, and, in any event, not having the money. These facts were all considered to be irrelevant. Having made the profit, the defendant had to account. This was the application of orthodox principle, illustrated in the cases from *Keech* v. *Sanford*[68] to *Regal (Hastings) Ltd.* v. *Gulliver.*[69]

In the past the conflict rule has been equally rigorously applied. Lord Upjohn's dissent raised some question whether that should continue to be so, for he emphasized that the rule should only be applied if there was a real possibility of a conflict. That view was reflected in the decision of the Court of Appeal in the more recent case of *Holder* v. *Holder.*[70] The defendant, Victor Holder, was one of three executors named in his father's will. He made it clear to the other executors and to the legatees that he wished to buy two farms forming part of the estate. He was advised that he should not act as executor and purported to renounce. He had taken no part in the administration of the estate other than signing nine cheques and some insurance documents *pro forma.* The other executors arranged for the sale of the farms by public auction in July 1961 and Victor bought them. He was late in completing the contract and the plaintiff, Frank Holder, the elder brother of the defendant and a legatee under the will, pressed the executors to forfeit his deposit. Victor eventually completed in June 1962. The plaintiff issued a writ in January 1964 claiming that the sale be set aside or an accounting.

It was conceded, erroneously in the eyes of the Court of Appeal, that the renunciation was ineffective.[71] However, even assuming the defendant still to have been an executor, the Court held against the plaintiff on the ground that he had acquiesced in the sale and that, in the circumstances of the case, the rule against a trustee buying the trust estate ought not to be applied. On the latter point Harman, L.J., emphasized the special circumstances of the case—the defendant was never in substance the executor; he took no part in the arrangements for the sale; his knowledge of the value of the farms was based on his period as tenant before his father's death: the legatees, aware of his intention to buy, never looked to him for protection. There was thus no conflict of duty and interest, and Harman, L.J., did not see why he should apply the rule against a trustee purchasing, if the reason behind did not apply to the case. Danckwerts, L.J., and Sachs, L.J., agreed and added two important observations. They doubted if Lord Eldon's reason for the rigidity of the rule—that it was impossible to adequately investigate what the trustee had done and what his state of mind was[72]—should any longer be regarded as valid. Second the rule does not prohibit such a purchase, but gives to the beneficiary under a trust the right to have the sale set aside and the courts can approve a sale in advance. In a clear case there was no reason why that approval should not be retrospective.

The reasoning in these judgments is attractive—if there is no conflict,

68 *Supra,* n. 4.
69 *Supra,* n. 41.
70 [1968] Ch. 353 (C.A.).
71 *Id.,* at 392 (Harman, L.J.), 397 (Danckwerts, L.J.), and 401 (Sachs, L.J.).
72 *Id.,* at 398 (Danckwerts, L.J.), and 402 (Sachs, L.J.).

why should a rule based on that hypothesis be applied? This argument may even be taken a step further—if there is a conflict is there any reason why the trustee cannot justify his actions? Lord Eldon's reasoning seems equally thin here. The courts can impose the burden of proving that the trust did not suffer on the trustee. If in a case like *Keech* v. *Sanford*,[73] where a conflict was possible, it is shown that the trustee has done all that he could for the trust, no injustice is done in allowing him to keep what he has acquired. Just how far the English courts will go in accepting these arguments is doubtful. To do so would represent a break with a long established tradition, and the chances are that *Holder* v. *Holder*[74] will end up as one of these cases decided on its special facts.

If in fact in relation to both the profit and the conflict the traditionally strict approach is maintained then there is one more aspect of *Boardman* v. *Phipps*[75] which becomes important. All the judges who decided against Boardman were agreed that he ought to be allowed generous remuneration for the work he had done. If a trustee acts in all good faith this is a reasonable order to make. In some cases it may give to the trustee all, or virtually all, that he has acquired. Thus in *Re Lewis*[76] if it had been decided that the son had to account because of the conflict of duty and interest, allowing him proper remuneration for the work he had done would probably have enabled him to keep all or most of what he had earned. In other cases, such as *Boardman* v. *Phipps*[77] itself, the remuneration would be much less than the profit made, but at least it would be some compensation to the honest trustee.

B. *THE CANADIAN LAW*

With one significant difference the law in Canada has followed English lines. The courts talk of both the conflict and profit principles but in general do not indicate what the relation between them is.[78] There does however seem to be a less stringent application of the principles to the facts of a particular case than is usual in England. Four decisions of the Supreme Court of Canada are illustrative of the present state of Canadian Law.

Two cases involve the application of the conflict principle, with some passing reference to the prohibition against making a profit out of a fiduciary position. The first is *Zwicker* v. *Stanbury*.[79] Canadian Pacific Railway Co. was the largest shareholder and second mortgagee of the Lord Nelson Hotel Co. Ltd. The amount owing on the mortgage at the time of the events in question was $245,000.00. The directors of the Lord Nelson Company decided that before settling their policy on the retiring or refunding of the company's indebtedness there ought to be some consultation with Canadian Pacific and authorized Smith, one of the directors and one of the defendants in the case, to open discussions with that company. Canadian Pacific indicated that it was no longer interested in continuing its connection with Lord Nelson, and that it had

[73] *Supra*, n. 4.
[74] *Supra*, n. 70.
[75] *Supra*, n. 16.
[76] *Supra*, n. 38.
[77] *Supra*, n. 16.
[78] There are some exceptions to this. One of the clearest is the judgment of Bull, J.A., in *Pesos Silver Mines Ltd.* v. *Cropper* (1965), 56 D.L.R. (2d) 117 (B.C.C.A.). See further, *infra*, text to n. 116 *et seq*.
[79] [1953] S.C.R. 438.

written off most of its investment.[80] Eventually Smith and some other directors of Lord Nelson bought first Canadian Pacific's Lord Nelson shares, and then the second mortgage, paying $120,000.00 for it. The Supreme Court of Canada decided the shares had to be surrendered to Lord Nelson and that Smith and his co-defendants could not recover more on the mortgage than the amount for which they bought it, plus interest. Kellock, J., delivered what was in effect the judgment of the Court. With respect to the shares the major problem was posed by the prospect of Lord Nelson becoming the owner of its own shares. This was solved by confining the rule in *Trevor* v. *Whitworth*[81] to a purchase by a company of its own shares in an ultra vires operation. A straight surrender of the shares avoided this problem. Kellock, J., thought that the basic issue of liability was settled by the following passage from the judgment of Lord Sankey in *Regal (Hastings) Ltd.* v. *Gulliver*:

> The respondents were in a fiduciary position and their liability to account does not depend on the proof of *mala fides*. The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect. If he holds *any property* so acquired as trustee, he is bound to account for *it* to his *cestui que trust*.[82]

This is of course a statement of the conflict rule which was not, it has been suggested, the ratio of the *Regal* case.[83] Nonetheless the principle was clearly applicable in *Zwicker* v. *Stanbury*.[84] Smith had been entrusted with the task of negotiating with Canadian Pacific on behalf of Lord Nelson; instead of fulfilling the obligations thus imposed he gave priority to his own personal interest in realizing on the opportunities arising out of these negotiations. In considering the mortgage Kellock, J., again decided that Viscount Sankey's dictum was decisive, but he also referred to the fact that the defendants had acquired the mortgage "by reason and in the course of their office of directors."[85] The headnote in *Hamilton* v. *Wright*[86] and a passage from the judgment of Lord Brougham in the same case also provided an example of the conflict—profit dichotomy.[87] In the end, however, Kellock, J., comes down squarely in favour of the conflict rule.

> These respondents considered only their own advantage. In acquiring the mortgage for their personal benefit they placed themselves in a position where they had a personal interest conflicting with the interest of the company.[88]

The second case decided almost exclusively on the conflict basis is *Crocker and Croquip Ltd.* v. *Tornroos*.[89] Crocker, Tornoos and Dietrich each held one-third of the issued shares in a private company, B.C. Equipment Co. Ltd. The articles of association required a shareholder who wished to sell to offer his shares to the remaining shareholders. If more than one such shareholder wished to buy, the shares were to be sold to them pro rata according to the number of shares they already held. Tornoos died in 1936. He left the residue of his estate, including

80 *Id.*, at p. 445.
81 (1887), App. Cas. 409 (H.L.).
82 *Supra*, n. 41, at 381, as quoted *supra*, n. 79, at 440.
83 *Supra*, text to n. 42 ff.
84 *Supra*, n. 79.
85 *Id.*, at 448, quoting Lord Russell in *Regal (Hastings) Ltd.* v. *Gulliver*, *supra*, n. 41, at 386.
86 *Supra*, n. 14.
87 *Supra*, n. 79, at 447. Both the headnote and Lord Brougham's dictum were also quoted by Viscount Sankey in *Regal (Hastings) Ltd.* v. *Gulliver*, *supra*, n. 41, at 381. The dictum is set out, *supra*, at n. 16.
88 *Id.*, at 448.
89 [1957] S.C.R. 151.

his shares in B.C. Equipment Co. Ltd., to trustees, the respondent Libbie Tornoos and the appellant Crocker, on trust for conversion and investment into trust securities only, though the trustees were empowered to retain B.C. Equipment shares for such period as they deemed to be in the interest of the estate. Dietrich died three months after Tornoos, leaving his property to his widow. Mrs. Dietrich wished to sell and, in accordance with the articles, offered her shares to Crocker and to the Tornoos' estate. The estate was advised that the shares were not a proper trustee investment and Crocker bought for himself. He later sold them to Croquip Ltd. in which his children were the only shareholders. The respondents, the then trustees of the Tornoos estate, brought an action claiming the B.C. Equipment shares owned by Croquip Ltd. The action was dismissed at trial,[90] that decision was reversed by a majority on appeal,[91] but the judgment of the trial court was restored by the Supreme Court of Canada.

It is instructive to contrast the majority judgment of Davey, J.A., (as he then was) in the British Columbia Court of Appeal, and that of the Supreme Court, delivered by Kellock, J. Davey, J.A., proceeded on the general principle that for a trustee to be liable in such a case "it is sufficient if the trustee's interest might have interfered with the due discharge of his duty to the estate."[92] Here Crocker in buying the Dietrich shares for himself became the holder of two-thirds of the shares and so acquired almost complete control of the company, leaving the Tornoos estate in the vulnerable position of a minority shareholder in a two man company. In considering what action the trust ought to have taken on Mrs. Dietrich's offer it was obvious that his own interest and his duty to the trust conflicted. Davey, J.A., rejected several attempts to take the case out of the general principle. He decided that it was irrelevant whether in fact an independent trustee could have better protected the estate or whether the estate had suffered any loss. He also rejected an argument based on the fact that, the shares not being a proper investment, the trust could not have brought them. In his view that did not end the conflict. In such circumstances a prudent independent trustee would have explored every possibility of action that would have protected the trust. He might have considered an application to the court to have it, in the exercise of its salvage jurisdiction, approve the purchase; he might have tried to persuade Mrs. Dietrich to withdraw her offer; or might have tried to come to some arrangement with Crocker, the prospective majority shareholder, to protect the trust estate, for example an agreement whereby the trustees were paid by Crocker for the surrender of the trust's pre-emptive rights.

In the Supreme Court of Canada Kellock, J., also accepted the principle "that a trustee may not place himself in a situation where his interest and his duty conflict."[93] He however asked whether Crocker had any duty to the estate and decided that he had not. His main reason for reaching that conclusion was that a court would not have exercised its inherent salvage jurisdiction to approve a purchase of the shares by the estate. That surely is not the point. The material question is whether *at the time the Dietrich offer was made* an application to

90 [1955] 2 D.L.R. 815 (B.C.S.C.).
91 *Supra*, n. 58 (B.C.C.A., Davey and O'Halloran, JJ.A., Bird, J.A., dissenting).
92 *Id.*, at 25.
93 *Supra*, n. 89, at 155.

a court was worth consideration, and Crocker's decision about that could well have been influenced by his own personal interest. Kellock, J., also disapproved of the suggestion about an arrangement for the sale of the trust's pre-emptive rights, but, with respect, this was based on a misunderstanding of what Davey, J.A., said. Kellock, J., said an arrangement whereby Crocker bought the trust's "interest" would have resulted in a trustee buying from his own estate. Davey, J.A., did not suggest that. In making his suggestion he was considering what "would have undoubtedly occurred to prudent business men acting as trustees *if Crocker had not been one of them*."[94] There was no suggestion that Crocker buy from himself as trustee, but that, because of his personal interest, Crocker did not pursue all the avenues a prudent trustee would have pursued. It is suggested that Davey, J.A., correctly and Kellock, J., wrongly applied the conflict principle. Davey, J.A., emphasized the circumstances at the time Crocker bought the Dietrich shares and, without the benefit of hindsight, there was clearly at that date a real possibility of a conflict. The decision of the Supreme Court apparently accepted the basic principle, but applied it in a rather curious manner to the case before it.[95]

The next decision, *Midcon Oil and Gas Limited* v. *New British Dominion Oil Co. Ltd.*[96] shows the Supreme Court again moving away from the strict English position. New British, the beneficial owner of certain oil and gas leases, entered into an agreement with Midcon for the exploration of these assets. On completion of drilling in the manner agreed upon New British was to assign a one half interest to Midcon. New British was to act as operator and it was assumed that it was empowered, with the consent of Midcon, to sell the gas which was eventually produced. To provide a market Brooks, the president of New British, took a major part in the establishment of a chemical company, Northwest Chemicals Ltd., in which he and New British acquired substantial share holdings, and New British sold some of the gas to this company. Sales were also made to the city of Medicine Hat. Midcon claimed that one half of the shares obtained by New British were held on constructive trust for it. That claim was rejected by both the Trial[97] and Appellate Divisions[98] of the Alberta Supreme Court, and their decision was affirmed by the Supreme Court, though only by a majority of three to two. Locke, J., delivered the majority judgment. He gave altogether three reasons for rejecting the claim. These will be considered separately, though a warning should be given at the outset that the reasons are so intertwined in the judgment that there is some danger of distortion in treating them separately.

Locke's, J., first, and perhaps least important, reason was that

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94 (1956), 3 D.L.R. (2d) 9, 24 (italics added).

95 Kellock, J., made passing reference to two other matters which perhaps should, for the sake of completeness, be mentioned. He pointed out that the trust had not the legal authority or the money to buy the Dietrich shares: [1957] S.C.R. 151, 155. On the English authorities, at least, it is clear that the inability of the trust to buy is, to put it at its weakest, not decisive. In considering the salvage jurisdiction Kellock, J., thought that the testator, aware of the share structure of the company, but failing in his will to authorize the company shares as a proper investment, must have contemplated the situation that had arisen—*id.*, at 158. That might be the basis for an argument that the tesator permitted the conflict that arose. Such permission would however need to be more expressly stated than it apparently was and Kellock, J., seemed to confine his remarks on this point to the issue of the salvage jurisdiction.

96 [1958] S.C.R. 314.

97 (1956), 19 W.W.R. 317 (Alta. S.C.).

98 (1957), 21 W.W.R. 229; 8 D.L.R. (2d) 369 (Alta. App. Div.).

Midcon, after some question had been raised about New British's authority to sell the gas, ratified the two contracts with Northwest and Medicine Hat. That step, which was probably a business necessity,[99] did not automatically preclude a claim for the Northwest shares. The sales of the gas raised the question of the proper interpretation of the original agreement to decide the scope of New British's authority. Midcon's claim to the Northwest shares raised an entirely different set of legal issues. This analysis of the effect of ratification is strengthened by the fact that the trial judge found it was done "without prejudice to [the] claim to participate with the corporate defendant in any share of the interest acquired or to be acquired by"[100] New British.

The second reason given by Locke, J., was that New British owed no fiduciary duty to Midcon. Paragraph 20 of the agreement said that neither a partnership nor an agency was created between the parties. While he agreed that this did not absolve New British of all obligations, Locke, J., decided that, on the facts the duty was no higher than that of acting in good faith,[101] and that the policy behind the rule in *Keech* v. *Sanford*[102] had no application to type of relationship in question. Rand, J., delivering the dissenting judgment of himself and Cartwright, J., found that there was a fiduciary relationship for, in agreeing to New British marketing the gas, Midcon "reposed in . . . [it] that reliance and confidence which constitute a trust relation."[103] This, it is suggested, is the more acceptable conclusion. There were probably a number of reasons for the parties to specify that they were not partners or agents. As Locke, J., conceded, that did not preclude all obligation and the fiduciary duty that would normally arise where one person is selling on behalf of another would have needed clearer exclusion. There also is little doubt that a clear possibility of a conflict of duty and interest arose on the facts. New British's share interest in the purchasing company could easily have raised personal interests in conflict with its duty to secure the best price for the gas. The fact that Locke, J., found the price fair is beside the point, unless *Holder* v. *Holder*[104] is accepted as being of more general application. Even then there were a number of other aspects of the contract which would have required consideration:

> The conflict was not limited to the mere price of the gas; in the business itself of Northwest Chemicals the joint owners had an interest: the exploitation of Etizkom, including the operation of the pipe-line, was, to a substantial degree, put in dependence on the success as well as the continued harmonious attitude of the new company. Decisions on policy of the latter might have consequences seriously prejudicial to the interests of New British as operator as contrasted with those as shareholder. . . .[106]

The final reason for Locke's, J., decision was that, even if the duty owed to Midcon extended beyond acting in good faith, New British was still not liable. The test he applied was whether a profit had been made out of a fiduciary position. He accepted the findings of the lower courts that New British's shares had been obtained not because it was the operator, but because it was the "primary promoter of the chemical company". New British was, however, a primary promoter because it

99 See *supra*, n. 96, at 336, per Rand, J.
100 *Supra*, n. 97, at 327.
101 *Supra*, n. 96, at 326. He gave as an example of a breach of such a duty a sale at an undervalue.
102 *Supra*, n. 4.
103 *Supra*, n. 96, at 329.
105 *Supra*, n. 70.
106 *Supra*, n. 96, at 335, per Rand, J.

was the operator. Again it is suggested that what Rand, J., had to say is to be preferred:

> Without the interest in the gas, fertilizer production would have remained to him [Brooks] an unknown process and an unguessed-at industrial opportunity. It was the control of this vital ingredient that gave him a negotiating standing, and admitted him to the group of investigators. . . . In the face of all these matters of fact, the view that the promotion of the new enterprise was as a severed and disparate interest of New British, as if marketing of the gas was an incidental feature, as if the Etzikom field indeed had not existed at all, becomes untenable.[107]

But even if that be wrong, the acceptance of the possibility of a fiduciary duty should have also raised the question of the application of the conflict rule. On that ground the argument for holding New British liable would have been even stronger.

The fourth Supreme Court case, *Pesos Silver Mines Ltd.* v. *Cropper*,[108] is also an example of a less stringent approach than that of the English cases. Cropper was a director of Pesos. In early 1962 the company was offered a number of claims in an area adjoining some claims it already owned. Mainly for financial reasons, and acting in good faith, the directors decided not to buy. Sometime later, when the matter "had passed out of his mind,"[109] the claims were offered to Cropper personally. He and a group of associates bought them and were eventually sued by Pesos who claimed that they were constructive trustees of the profit they had made. The trial judge, the British Columbia Court of Appeal by a majority[110] and the Supreme Court of Canada[111] unanimously dismissed the claim.

The Supreme Court considered only the profit rule. Both counsel accepted the law as laid down in *Regal (Hastings) Ltd.* v. *Gulliver*,[112] and Cartwright, J., after citing passages from all the judgments in that case, concluded that the rule to be applied was that a director could not be allowed to retain a profit obtained by reason of his position as a director. That rule did not apply to the *Pesos* facts. After the Board had turned down the original offer, Cropper was approached as a private individual, not in his capacity as a director, and so he had not made the profit *out of* or in *the execution* of his office. This conclusion was supported by a comment Lord Russell had made on a portion of Lord Green's, M. R., judgment in the Court of Appeal in the *Regal* case.[113] Lord Greene said that to hold the directors liable in that case would have meant that if the board, acting in good faith, rejected an offer, it would never be open to a director to take up in his own right. Lord Russell commented that "the facts of this hypothetical case bear but little resemblance to the story with which we have had to deal."[114] Cartwright, J., agreed with Bull, J. A.,[115] who had inferred that Lord Russell would probably not have held the director liable in the circumstances outlined by Lord

107 *Id.*, at 334.
108 [1966] S.C.R. 673.
109 *Id.*, at 677. The Supreme Court apparently accepted the respondent's evidence on this point: see the decision of the British Columbia Court of Appeal, *supra*, n. 78, at 150. In the light of the letter written to the Superintendent of Brokers (*infra*, text to and contents of n. 119) and the short period of time within which all of the events took place, this is a questionable finding.
110 *Supra*, n. 78.
111 *Supra*, n. 108.
112 *Supra*, n. 41.
113 *Id.*, at 391 as referred to *supra*, n. 108, at 682-83.
114 *Ibid.*
115 *Supra*, n. 78, at 157.

Greene, circumstances which were virtually on all fours with the facts of the *Pesos* case.

It is instructive to compare the Supreme Court decision with that of the British Columbia Court of Appeal. Bull, J.A., giving the judgment of himself and Maclean, J.A., stated he was considering two *alternative* arguments, the first that Cropper had made a profit out of his position as director and the second that he had made a profit in circumstances where there was conflict of interest and duty.[116] This clear separation of the two rules is weakened by the fact that the existence of the conflict rule is supported by a dictum from Viscount Sankey in *Regal (Hastings) Ltd.* v. *Gulliver*,[117] and, as we have seen, his judgment in the end was probably decided on the profit rule[118] and that was clearly the basis for the decisions of the other judges in that case. However, the existence of the conflict rule not really being in doubt Bull's, J.A., judgment is a welcome statement of what is only too often assumed in the cases.

There was a division in the Court on the application of the profit rule. Bull, J.A., reached the same conclusion as the Supreme Court. Norris, J.A., dissented, holding that what Cropper had done was in the course of his duties as director. One of the main reasons for this was a letter written to the Superintendent of Brokers by one of the directors associated with Cropper in the purchase of the claims, at the time the purchase took place.[119] Norris, J.A., interpreted the letter to mean that the purchase was in fact being made to protect Pesos and so the purchasers were acting as Pesos' directors. That is not an unreasonable conclusion to draw from the language of the letter. However, Bull, J.A., was not prepared to draw that inference. Unfortunately the letter was not referred to in the Supreme Court for, if it had been, it would have been much more difficult for the Court to have decided that a profit was not made in the course of Cropper's acting as a director.

Only Bull, J.A., considered the conflict rule at any length. He decided it did not apply, mainly because the company had decided it was not interested in the claims before Cropper bought them. He pointed out that if the purchase had been made before the company had reached a decision Cropper might well have been liable. It is suggested however that the mere fact that the company had decided not to buy is not decisive. The approach to the company was made "in the early spring of 1962" according to Bull, J.A., and the Supreme Court,[120] possibly, according to Norris, J.A., as late as April;[121] the purchase was made by Cropper by at least June 13,[122] and perhaps as early as the beginning of May.[123] With the purchase taking place so soon after the rejection by the board there was on the facts a real possibility of a conflict, of Cropper having succumbed to the temptation to turn the offer down as a director and take it up personally. In such a case according to orthodox doctrine, the fact that the directors acted in good faith

116 *Id.*, at 153.
117 *Supra*, n. 41.
118 *Supra*, text to n. 42 *et seq.*
119 See *supra*, n. 78, at 132-33, where the letter is set out in full.
120 *Id.*, at 140 (B.C.C.A.) and *supra*, n. 108, at 676.
121 *Supra*, n. 78, at 121.
122 This was the date on which the letter was written to the Superintendent of Brokers: *Id.*, at 132.
123 A company to take over the claims was formed by Cropper and his associates on May 8: *id.*, at 122.

would be irrelevant. Bull's, J.A., attempt to distinguish some of the other cases is not satisfactory. Of *Keech* v. *Sanford*[124] he said that the "trustee took unto himself property that had been trust property but which was impossible, although desired, to be continued as such."[125] The Pesos facts were not substantially different. Although the claims had never been owned by Pesos they were close to other claims it did own and it seems that there was no doubt of Pesos's desire to purchase, but that it was prevented because of its financial position. If in *Keech* v. *Sanford*[126] it did not matter that it was impossible to acquire the property the trust desired, so also it ought not to have mattered in the Pesos case. *Regal (Hastings) Ltd.* v. *Gulliver*[127] was distinguished on the ground that "the full acquisition of the property was conceived and wanted by the company but other circumstances made it impossible to take that portion which the directors personally took."[128] Given Pesos' interest in the claims that comment covers the case exactly; indeed in both the *Pesos* and *Regal* cases the circumstances preventing the purchase was lack of funds. Bull, J.A., could, and, it is submitted, ought to have decided that there was a conflict of duty and interest. If he had, he then would have had to deal with the question of whether the directors were to be allowed to justify their acquisition by relying on the *bona fides* of their decision to reject the offer or whether the traditional inexorable application of the rule was to be followed. Unfortunately it was not necessary for him to consider this and, even more unfortunately, the conflict rule was not considered at all by the Supreme Court. Once again the result in both courts shows the Canadian Courts treating fiduciaries with greater compassion than they are treated in England.

CONCLUSIONS

In both England and Canada, perhaps more by default rather than by conscious decision, two separate rules respecting a trustee's duty of loyalty have developed, the first that he may not retain a profit made out of his position and the second that he may not retain a profit made in circumstances where there is a conflict of his interest and duty. Often the application of these rules will yield the same result. On the other hand in such cases as *In re Gee*[129] in England and *Crocker and Croquip Ltd.* v. *Tornroos*[130] in Canada the application of one will impose liability, while the other would not. It is important therefore for the courts to clearly distinguish them. Although the separation may have come about by default it is one which ought to be maintained. In the two cases just referred to there was no question of a position being used to make a profit, yet there was a real possibility of a conflict and there is no disagreement that beneficiaries need protection in such a case. On the other hand, on Lord Upjohn's interpretation of the facts in *Boardman* v. *Phipps*[131] there was no conflict, but

124 *Supra*, n. 4.
125 *Supra*, n. 78, at 156.
126 *Supra*, n. 4.
127 *Supra*, n. 41.
128 *Supra*, n. 78, at 156.
129 *Supra*, n. 38.
130 *Supra*, n. 89.
131 *Supra*, n. 16.

surely the use by trustees of their position to gain information to secure a personal profit ought to make them liable to the trust.

Where there seems to be a difference between the two countries is in the application of the rules to the facts of a particular case. In a case such as *Midcon Oil and Gas Limited* v. *New British Dominion Oil Co. Ltd.*,[132] there is little doubt that an English court would have decided that the profit was made out of the fiduciary position; and there is even less doubt that it would have found a conflict of interest and duty on the facts of *Crocker and Croquip Ltd.* v. *Tornroos.*[133] That stricter approach is needed, it suggested, to protect those to whom the fiduciary owes his duties. The differing attitudes to the issue of the strict application of the rules were revealed in the judgments in the British Columbia Court of Appeal in *Pesos Silver Mines Ltd.* v. *Cropper.*[134] Bull, J.A., after referring to the inflexible nature of the rules said:

> . . . in this modern day and country when it is accepted as commonplace that substantially all business and commercial undertakings, regardless of size or importance, are carried on through the corporate vehicle with the attendant complexities involved by interlocking, subsidiary and associated corporations, I do not consider it enlightened to extend the application of these principles beyond their limits. That the principles, and the strict rules applicable to trustees upon which they are based, are salutary cannot be disputed, but care should be taken to interpret them in the light of modern practice and way of life.[135]

Norris, J.A., was of exactly the opposite opinion:

> . . . it seems to me that the complexities of modern business are a very good reason why the rule should be enforced strictly in order that such complexities may not be used as a smoke screen or a shield behind which fraud might be perpetrated. . . . It might as well be said that such an argument if given effect to would open the door to fraud, and weaken the confidence which ordinary people should have in dealing with corporate bodies. In order that people may be assured of their protection against improper acts of trustees it is necessary that their activities be circumscribed within rigid limits.[136]

This is the road the courts ought to follow for surely the greater the issues, the more complex the circumstances, the more it is necessary that fiduciaries should be continually reminded of the high demands made of them. Some argument may be made for distinguishing the trustee/beneficiary, director company relationship from that of the parties in the *Midcon* case. That case involved a dispute between two commercial companies who took the care to define their relationship very precisely. Should not that then be definite of their reciprocal rights and obligations? Attractive though that may be, it is just as desirable to maintain confidence and high standards of conduct in such circumstances and the strict application of the duty of loyalty achieves that end.

If the law was firmly established on these lines, as it is in England, the question of whether the fiduciary can, despite the fact he is prima facie accountable, explain his conduct so as to relieve himself from liability, becomes even more important. If he has made profit out of his position there seems to be no defence open other than full disclosure. It is the mere use of his position which makes him liable and

132 *Supra*, n. 96.
133 *Supra*, n. 89.
134 *Supra*, n. 115.
135 *Id.*, at 154-55.
136 *Id.*, at 139.

that ought to be the law. It is more difficult to justify the imposition of the conflict rule where, although there was a real possibility of a conflict, the fiduciary in fact did all that could have been expected of him to protect the trust. *Keech* v. *Sanford*[137] is the classic example. The trustee there had discharged his duty, and the argument that it would be difficult for the court to delve into the facts of that, or any other such case, is not totally persuasive. It is perhaps a better argument to say that a trustee ought not to conduct himself as to impose such a burden on his beneficiary. The prudent and careful trustee, where he sees the possibility of a conflict, ought to consult his beneficiaries in advance, and get their informed and independently advised consent.[138] Alternatively he may secure court approval for his proposed actions.[139] This may operate rather harshly on the honest trustee who does not take these precautions and it is sometimes little consolation that he will be allowed something by way of remuneration for any work he has done. However the execution of a trust requires more than honesty, and a sensitive mind, seeing a possible misconstruction of its acts, would probably secure approval in advance in any case. The Canadian Courts have unfortunately allowed the duties of fiduciaries to fall below this high level; it is to be hoped that the trend will be reversed.

137 *Supra*, n. 4.
138 See the comments of Lord Russell and Lord Wright in *Regal (Hastings) Ltd.* v. *Gulliver*, *supra*, n. 41, at 389, 394, quoted by Norris, J.A., *supra*, n. 78, at 139-140. This, it is suggested, is the course that could have been followed by New British in the *Midcon* case.
139 See, for example, the comments in *Holder* v. *Holder*, *supra*, n. 80, at 398, 402.