

Proprietary relief in *Boardman v Phipps*

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1 Introduction

The extent to which acquisitive breaches of fiduciary obligation trigger a constructive trust remains one of the most difficult and controversial issues in equity and the law of restitution. The cases are now in such a confused state that a decision of the Supreme Court is necessary.¹ When the opportunity arises the court will have to deal with the leading authority of *Boardman v Phipps*.² The case is known to generations of law students as the leading case illustrating the harshness, even unfairness, of equity's strict prophylactic duty of fiduciary loyalty. However, in recent years it has become as important, if not more so, in the debate over the role of the constructive trust in cases of wrongful fiduciary gain. As a decision of the House of Lords, *Boardman* cannot be ignored but precisely what it decides has proved a difficult question to answer.

The main reason for the difficulty is that lack of clarity in the reports of the case, coupled with ambiguity in the judgments, has generated considerable confusion over whether a constructive trust was in fact recognised or whether the defendants were made personally liable to pay the claimant the value of the net profit they derived from their breach of fiduciary obligation. The difference is crucial given the far-reaching consequences that flow from the recognition of a proprietary claim. This article resolves the confusion by returning to the printed case papers submitted by the litigants to the House of Lords.³

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1 *FHR European Ventures LLP v Mankarious* [2013] EWCA Civ 17, [2014] Ch 1 [116] (Sir Terence Etherton C). We will not have to wait long for a decision of the Supreme Court. Permission to appeal the decision of the Court of Appeal in the FHR case was granted by the Supreme Court by Order dated 3 July 2013. The appeal is scheduled for a three day hearing in June 2014.

2 [1967] 2 AC 46 (HL).

3 A copy of these papers was deposited with and survives at Lincoln's Inn library; where House of Lords printed case papers were regularly deposited until recently. The papers include: the Petition of Appeal to the House of Lords, Case for the Appellants, Case for the Respondent, Writ of 1 March 1962, Statement of Claims, Defence Statement, Order of Mr Justice Wilberforce, Notice of Appeal to Court of Appeal, and Order of Court of Appeal. My thanks to Sarah Wheeler and Guy Holborn of Lincoln's Inn library for supplying me with a copy of the papers and further information regarding the deposit of such papers with the library.

the trustees, although Ethel, who suffered from senile dementia, took no active role in the trust affairs at the material time.

The residuary estate included 8000 shares in Lester & Harris Ltd., an underperforming private company with issued share capital of 30,000 £1 ordinary shares. Boardman, the trust's solicitor and first defendant/appellant, and Tom Phipps, a trust beneficiary and second defendant/appellant, attended the company's annual general meeting in December 1956 as representatives of the trust holding. Boardman sought information regarding the company and attempted, unsuccessfully, to get Tom Phipps elected onto the board of directors. Following the meeting, the defendants concluded that the best way to protect the trust shareholding was to gain control of the company. Mr Fox was keen to see control of the company in friendly hands but was of the firm opinion that the trust should not purchase further shares 'under any circumstances'.⁶ The terms of the trust, moreover, did not permit it.⁷ The only way this legal impediment could be removed was by application to the court to sanction the purchase of further shares. That was something a court was unlikely to do,⁸ either under its inherent emergency and salvage jurisdiction,⁹ or under the powers conferred by s 57 of the Trustee Act 1925.¹⁰ First, the trust was close to termination since the residuary estate was distributable to the remaining beneficiaries upon the death of Ethel Phipps, whose health was deteriorating rapidly.¹¹ Second, the trust had no money with which to make the investment.¹² Third, the purchase of further shares in a poorly run company is likely to have been considered speculative and imprudent.¹³ Boardman and Tom Phipps therefore proposed to purchase further shares in the company with their own funds and at their own risk.

There followed three stages of negotiations for the shares. Phase 1 took place between January and April 1957, during which time Boardman made an offer to purchase Lester & Harris shares at £3 per share. The offer was accepted by the holders of 2925 shares. Phase 2 ran from April 1957 to October 1958. During this phase of negotiations, in which it was proposed to divide the assets of the company between the Phipps family and the other principal shareholder group, Boardman obtained information about the factories of Lester & Harris in Coventry and Nuneaton and its property in Australia. He also obtained detailed trading accounts of the English and Australian arms of the business. Throughout this phase

6 [1967] 2 AC 46 (HL) 73.

7 The investment powers of the trustees were limited to the purchase of the trustee securities listed in the Trustee Act 1925, s 1.

8 [1967] 2 AC 46 (HL) 76 (Viscount Dilhorne), 119 (Lord Upjohn).

9 In *Re New* the Court of Appeal upheld the exercise of the jurisdiction to sanction the repurchase of shares by some trusts in a reconstituted company. However, the reconstitution carried little risk to the trusts since the new company was the same as the old except for a larger capital and the power to issue debentures. The courts, said Romer J, 'will not be disposed to sanction transactions of a speculative or risky character' [1901] 2 Ch 534 (CA) 545. Subsequently, the Court of Appeal refused to exercise the jurisdiction to sanction acts by trustees merely because they were considered desirable and beneficial to a trust: see *Re Tollemache* [1903] 1 Ch 955 (CA) 956, where Cozens-Hardy LJ described *Re New* as the 'high water mark of the exercise by the court of its extraordinary jurisdiction in relation to trusts'. The jurisdiction was interpreted restrictively in the years immediately prior to *Boardman*: see *Re Chapman* [1954] AC 429 (HL) 454 (Lord Morton).

10 The section permits a court to confer on trustees a power to make investments not otherwise authorised if it 'is in the opinion of the court expedient'. The Variation of Trusts Act 1958, s 1, which extended the court's powers, was inapplicable.

11 Ethel Phipps died in November 1958, although the estate was not distributed to the remaining beneficiaries until early 1960. The delay in distribution was the result of events unconnected to the litigation.

12 [1967] 2 AC 46 (HL) 108-09 (Lord Hodson), 119 (Lord Upjohn).

13 Lord Upjohn thought a court would have considered the purchase of further shares to be 'throwing good money after bad': *ibid* 119. Similar views were expressed by Viscount Dilhorne and Lord Cohen: *ibid* 92, 103.

These papers, which were not thought to have survived,⁴ demonstrate that a constructive trust was indeed recognised and underpinned the claimant's recovery. However, ultimately the claimant did not seek a transfer of the shares acquired in breach of fiduciary obligation but was content with a personal claim for the value of the net profits made on the shares.

The printed case papers also facilitate a better understanding of the foundation of the constructive trust that was recognised. The orthodox view has long been that, if a constructive trust was recognised in *Boardman*, it must have been triggered by the mere acquisition of gain in breach of fiduciary obligation. However, closer examination of the case reveals that one of three additional elements arguably influenced the recognition of a constructive trust: (1) a finding that the gain was acquired by a fiduciary acting as an agent for his principal; (2) a finding that the gain was obtained by exploiting trust property; or (3) a finding that the gain derived from an opportunity of the claimant. Although it is now possible to confirm that a constructive trust was recognised in *Boardman* the case cannot therefore stand as authority for the broad principle for which it is commonly cited, namely, that the mere acquisition of gain in breach of fiduciary obligation triggers a constructive trust. In *Boardman* at least something more was required, although what that 'something' was did not receive a uniform answer.

2 Background

(A) THE SOLICITOR AND THE UNGRATEFUL BENEFICIARY

Thomas Gray Boardman succeeded at most things. He was the recipient of a Military Cross for his part in an assault on a German stronghold during the Normandy landings in 1944. He was a solicitor and successful businessman who served on the boards of numerous companies, including the National Westminster Bank of which he was chair between 1983 and 1989. He was a Conservative Member of Parliament between 1967 and 1974, after taking the previously safe Labour seat of Leicester South-West, and held the offices of Minister for Industry (1972–1974) and Chief Secretary of the Treasury (1974) in the Heath government. He was made a life peer in 1980 and was active in the House of Lords until shortly before his death in 2003.⁵ Yet to many people, particularly law students, Tom Boardman is known as the unfortunate solicitor of the Phipps family trust, whose best intentions put him on the wrong side of an ungrateful beneficiary and the harsh application of equitable doctrine.

In the year that Boardman landed on the Normandy beaches the trust that was to cause him so much trouble came into effect. Charles William Phipps died leaving his residuary estate to provide an annuity for his wife, Ethel, for her life and thereafter to be distributed five-eighteenths to each of his three sons (Richard, John and Tom) and three-eighteenths to his daughter (Mrs Noble). Ethel Phipps, Mrs Noble and an accountant, Wilfred Fox, were

4 *Sinclair Investment (UK) Ltd v Versailles Trade Finance Ltd (in administrative receivership)* [2010] EWHC 1614 (Ch) [47] (Lewison J). It seems the papers have not survived in the House of Lords Parliamentary Archive. Nor, apparently, have the trial documents or the Order of Wilberforce J survived in the archives of the Royal Courts of Justice: M Conaglen, 'Thinking about Proprietary Remedies for Breach of Confidence' [2008] IPQ 82, 86.

5 For further details of Tom Boardman's business and political life, see 'Boardman' in *Who was Who* (online edn OUP 2007); 'Lord Boardman' *The Times* (London, 12 March 2003) 35; 'Obituary of Lord Boardman Tory Minister Charged with Managing the Government's Emergency Measures during the Three Day Week' *The Daily Telegraph* (London, 12 March 2003) 29; 'Lord Boardman: Discreetly Rightwing Tory Minister and NatWest Chief' *The Guardian* (London, 12 March 2003) 27; 'Lord Boardman: Conservative Minister and Chairman of NatWest' *The Independent* (London, 12 March 2003) 18; 'Boardman to Lord it at Nat West' *The Guardian* (London, 27 January 1983) 20.

Boardman represented to the chair of Lester & Harris, Mr Smith, that he was acting for the trust. Phase 3 began in October 1958 when Mr Smith informed Boardman he was prepared to sell his shares and to recommend to his associates they do likewise. This led to the purchase of 14,567 shares by the defendants at £4 10s per share. A further 4494 shares were purchased at the same price and 2925 shares were purchased pursuant to the earlier offer of £3 per share. During this phase Ethel Phipps died, at which point the residuary estate vested absolutely in the remaining beneficiaries under the will.

Having taken control, Boardman installed himself as chair of the company and liquidated its unprofitable assets. This generated total capital dividends of £5 17s 6d per share, £3 per share being paid in 1960 following the sale of the Australian business and £2 17s 6d per share being paid in 1961 following the sale of the Coventry factory.

(B) THE RELIEF CLAIMED

Following the payment of the second capital distribution, Boardman approached the claimant John Phipps, a beneficiary under the will and the brother of Tom Phipps, and offered to purchase his shares in Lester & Harris. At this point John Phipps questioned the defendants' conduct and issued a writ claiming:

- (1) a declaration that the defendants held five-eighteenths of the shares for him as constructive trustees;
- (2) an account of profits made by the defendants on the shares; and
- (3) an order that the defendants transfer to the claimant the shares held by them as constructive trustees for the claimant and pay to the claimant five-eighteenths of the profit found to have been made by the defendants on the taking of the account.¹⁴

Wilberforce J, a unanimous Court of Appeal (Lord Denning MR, Pearson and Russell LJJ) and a bare majority of the House of Lords (Lords Cohen, Hodson and Guest, Viscount Dilhorne and Lord Upjohn dissenting) held that Boardman and Tom Phipps stood in a fiduciary relationship to the trust¹⁵ and had breached their fiduciary obligations.¹⁶ They were, accordingly, accountable.

3 The nature of the defendants' accountability

(A) SOURCES OF REMEDIAL CONFUSION

Much of the disagreement over the nature of the relief ordered in *Boardman* can be traced to differing reports of the trial Order and the seemingly inconsistent language used in the various judgments. The All England Reports state that Wilberforce J made an Order 'for the declaration sought by para (i) of the claim in the statement of claim (viz, a declaration of the constructive trusteeship . . .) and for an account of profits as claimed in para (ii) of the claim in the statement of claim'.¹⁷

14 Writ dated 1 March 1962; amended statement of claim 18 July 1963, claims 1-3. The relief claimed is reported accurately in both trial reports: [1964] 2 All ER 187 (Ch) 189; [1964] 1 W.L.R. 993 (Ch) 1005.

15 There was no consensus as to the underlying foundation of the defendants' fiduciary positions: see below nn 84-89 and accompanying text.

16 There is a similar lack of consensus regarding the aspect of the fiduciary obligation of loyalty that was breached by the defendants. Some thought there had been a breach of the no-profit rule while others thought both the no-profit and the no-conflict rules had been breached. The no-conflict aspect was not pleaded at trial but introduced by Lord Denning MR in the Court of Appeal, almost as an afterthought: [1965] Ch 992 (CA) 1020.

17 [1964] 2 All ER 187 (Ch) 208.

There is no considered discussion of the Order in the appeals. However, Lord Justice Pearson,¹⁸ Lord Cohen¹⁹ and Lord Guest²⁰ each referred to the Order as declaring the defendants held five-eighteenths of the shares 'as constructive trustees' and were accountable on that basis. Moreover, the defendants were characterised as 'constructive trustees' on three occasions in the House of Lords – once by Lord Hodson²¹ and twice by Lord Guest. The Lester & Harris shares, said the latter:

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.²²

Having considered the facts and surveyed the law, Lord Guest expressed 'no hesitation in coming to the conclusion that the appellants hold the Lester & Harris shares as constructive trustees and are bound to account'.²³

On the other hand, the report in the Weekly Law Reports does not state that a constructive trust was declared. Rather, it reports that Wilberforce J declared the defendants 'were accountable' with '[f]urther consideration of Order to transfer the shares held by the defendants . . . and payment of profit found on taking of the account adjourned'.²⁴ In the absence of further consideration of the transfer of the shares during the rest of the litigation, and in the absence of any evidence that the shares were in fact transferred, this might be taken to imply that no constructive trust was recognised.

Some judgments in *Boardman* also contain references to the defendants' liability to account for profits rather than their liability to account for the shares or 'as constructive trustees'. Thus, at trial Wilberforce J stated that the question for determination was whether the defendants were fiduciaries 'so as to be accountable to the trust for any profit which they made'.²⁵ In the House of Lords, Lord Hodson expressed 'the proposition of law involved' in the case in similar terms²⁶ while Lord Cohen concluded that the claimant was fortunate 'in that the rigor of equity enables him to participate in the profits'²⁷ and that each appellant is 'accountable to the respondent for his *share of the net profits* they derived from the transaction'.²⁸ Indeed, a passage in the judgment of Lord Denning MR in the Court of Appeal suggests that payment of the defendants' net profits rather than the transfer of the shares was sought by the claimant:

18 [1965] Ch 992 (CA) 1021.

19 [1967] 2 AC 46 (HL) 99.

20 *Ibid* 112.

21 *Ibid* 105.

22 *Ibid* 114.

23 *Ibid* 117. Lord Upjohn, dissenting, also formulated the defendants' liability in terms of constructive trusteeship but could 'see nothing to make them constructive trustees': *ibid* 129–30.

24 [1964] 1 WLR 993 (Ch) 1018. The Order of Wilberforce J is similarly reported in the report of each appeal in the Law Reports: [1965] Ch 992 (CA) 993, 1007; [1967] 2 AC 46 (HL) 46, 47, 61.

25 [1964] 1 WLR 993 (Ch) 1006, see also 1019.

26 [1967] 2 AC 46 (HL) 105.

27 *Ibid* 104.

28 *Ibid* (emphasis added). But compare Lord Cohen's earlier formulation of the issue for determination which he identified as whether the defendants were '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*': *ibid* 100 (emphasis added).

the plaintiff [claims the defendants] ought not to be allowed to retain *the profit they have made on the shares* and ought to account for it to the estate and that he, the plaintiff, should have his 5/18ths. He does not suggest any dishonesty or bad faith on their part. He simply says that in the circumstances they are *accountable for the profit*. He acknowledges that they have done a lot of hard work and are entitled to full and generous remuneration for what they have done; but he says *they should not take the whole of this large profit for themselves*.²⁹

It is also notable that the principle of *Regal (Hastings) v Gulliver*³⁰ was influential and considered dispositive of the case by Wilberforce J,³¹ Pearson LJ,³² and the members of the majority in the House of Lords.³³ In *Regal* the directors were personally liable to the company for profits made on the sale of shares in a subsidiary, the shares having been acquired by the directors in breach of fiduciary obligation, notwithstanding that the company itself was financially disabled from purchasing the shares. Lord Porter was clear that the shares themselves never became the property of the company³⁴ while Lord Wright referred favourably to *Lister & Co v Stubbs*³⁵ as authority for the proposition that the relationship between principal and fiduciary in secret profit cases 'is that of debtor and creditor, not trustee and *cestui que trust*'.³⁶ The cases, he said in a passage quoted by Lord Cohen in *Boardman*,³⁷ establish the general rule that 'an agent must account for net profits secretly . . . acquired by him in the course of his agency'.³⁸ Reliance on *Regal* by the majority in *Boardman* is therefore arguably inconsistent with the recognition of a constructive trust triggered by the simple appearance of gain acquired in breach of fiduciary obligation.

(B) THREE INTERPRETATIONS

The lack of remedial clarity in *Boardman* has generated three competing interpretations of the case.

(i) Broad proprietary constructive trust principle

The first interpretation is premised on the assumption that the defendants were declared constructive trustees of the shares for the claimant. It is assumed to follow that, since the defendants acted honestly and caused the trust no loss (indeed, the trust benefitted from the defendants' actions), the mere appearance of gain acquired in breach of fiduciary obligation must be sufficient to trigger a constructive trust. Thus, in *Sinclair Holdings SA v Versailles Trade Finance*,³⁹ Rimer J, as he then was, agreed that *Boardman* demonstrates:

unauthorised profits acquired by a fiduciary in breach of his fiduciary duty are (if identifiable) held by the fiduciary upon a constructive trust for the person to whom the fiduciary duty is owed, who thereby obtains an immediate proprietary interest in them.⁴⁰

29 [1965] Ch 992 (CA) 1016 (emphasis added).

30 [1942] 1 All ER 378 (HL), reproduced [1967] 2 AC 134n.

31 [1964] 1 WLR 993 (Ch) 1010-12.

32 [1965] Ch 992 (CA) 1022 (Pearson LJ). See also the briefer references to the case by Lord Denning: *ibid* 1019.

33 [1967] 2 AC 46 (HL) 103 (Lord Cohen), 108-09 (Lord Hodson), 117 (Lord Guest).

34 *Regal* (n 30) 395.

35 (1890) 45 Ch D 1 (CA).

36 *Regal* (n 30) 393.

37 [1967] 2 AC 46 (HL) 101-02.

38 *Regal* (n 30) 392.

39 [2007] EW11C 915 (Ch).

40 *Ibid* [105].

Similarly, in *Attorney General for Hong Kong v Reid*, the Privy Council considered that *Boardman* demonstrates 'the extent to which equity is willing to impose a constructive trust on property obtained by a fiduciary by virtue of his office'.⁴¹ The remedial principle of *Boardman* is therefore broad and simple: the acquisition of gain in breach of fiduciary obligation is sufficient to trigger a constructive trust.⁴²

(ii) Purely personal relief

The second interpretation of *Boardman* rejects the claim that a constructive trust was recognised. Rather, it is argued that *Boardman* involved nothing more than the recognition of a purely personal claim to five-eightieths of the value of the net profits derived by the defendants from the purchase of the shares. The defendants were not, and were never declared to be, proprietary constructive trustees of the shares.⁴³

Those pressing this interpretation focus on the report of the Order in the Weekly Law Reports, noting that nothing in 'the words of the court's order contain the least indication of a proprietary liability'.⁴⁴ They also argue it is important not to place 'too much reliance . . . on the mere language of constructive trusteeship'.⁴⁵ Not only do the speeches in the House of Lords 'collectively blur the distinction'⁴⁶ between personal liability to account and constructive trusteeship, but the language of constructive trusteeship does not of itself indicate any concrete conclusion. For these reasons, it is said, *Boardman* is best interpreted 'only as authority for personal liability and not as one involving a proprietary constructive trust'.⁴⁷

(iii) Declaration of proprietary constructive trusteeship possible but irrelevant

In recent years those anxious to limit the reach of proprietary claims have provided a third interpretation of *Boardman*. They accept that some aspects of the case have a 'proprietary flavour' and may indicate a constructive trust was formally recognised. However, they dismiss a proprietary claim as unnecessary and irrelevant. Thus, it is said that, while the views of reasonable people 'may differ about whether the remedy awarded . . . was or was not proprietary',⁴⁸ the point was never argued and 'apparently did not matter'.⁴⁹ Most notably, there is nothing to suggest that the shares were transferred to the claimant and

41 [1994] 1 AC 324 (PC) 338. The New Zealand Court of Appeal had been much more cautious, noting that while *Boardman* involved the recognition of a constructive trust 'it would be a mistake to assume that by a side wind their Lordships . . . intended to overrule *Lister & Co v Stubbs*: *Attorney General for Hong Kong v Reid* [1992] 2 NZLR 385, 391.

42 For similar interpretations of *Boardman* see *Force India Formula One Team Ltd v Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch), [2012] RPC 29 [376] (Arnold J); *Dyson Technology Ltd v Curtis* [2010] EWHC 3289 (Ch) [183]–[187] (Grant J); *Clearview International Ltd v Pll H Com Ltd* [2008] EWHC 1494 (Ch) [97] (Judge Purle QC); *Daly v Hubner* (Ch, 9 July 2001) [185], [187] (Etherton J); *News International plc v Clinger* (Ch, 17 November 1998) [220]–[221] (Lindsey J); *Carlton v Halestrap* (1988) 4 BCC 538 (Ch) 540 (Morritt J); *Islamic Republic of Iran Shipping Lines v Denby* [1987] 1 Lloyd's Rep 367 (QB) 371 (Leggatt J); *Normalec Ltd v Britton* [1983] FSR 318 (Ch) 322 (Walton J). The final case is particularly interesting as a decision of Sir Raymond Walton QC, who appeared as lead counsel for the claimant in *Boardman*.

43 *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), [2006] FSR 17 [1546] (Lewison J).

44 P B H Birks, 'Personal Restitution in Equity' [1988] LMCLQ 128, 133.

45 D Crilly, 'A Case of Proprietary Overkill' [1994] RLR 57, 61.

46 *Ibid.*

47 D Hayton, 'Developing the Law of Trusts for the Twenty-First Century' (1990) 106 LQR 87, 102. More recently, Professor Hayton has argued that *Boardman* should be interpreted as a case recognising a proprietary constructive trust: D Hayton, 'No Proprietary Liability for Bribes and Other Secret Profits?' (2011) 25 Tru LJ 3.

48 *Sinclair* (n 4) [47].

49 *Ibid* [43], [44], [47]. Lord Neuberger MR expressed agreement with this point on appeal: *Sinclair Investment (UK) Ltd v Versailles Trade Finance Ltd (in Administrative Receivership)* [2011] EWCA Civ 347, [2012] Ch 453 [70].

there was no risk that the defendants were or might become bankrupt thereby limiting the value of a personal claim. This, it is said, explains the lack of clarity on the constructive trust point: it was not the subject of debate or considered observation because nothing turned on its recognition or absence. If recognised, the constructive trust was but a convenient mechanism for reaching an outcome identical to one which could have been reached without a constructive trust. Since nothing turned on the point, *Boardman* has little authoritative value on the issue of constructive trusts.

4 What was ordered?

(A) THE ORDER OF WILBERFORCE J AND ITS TREATMENT IN THE APPEALS

The second interpretation, that a purely personal claim was ordered but there was no proprietary constructive trusteeship, can be discounted immediately. The Order of Mr Justice Wilberforce dated 25 March 1964, a copy of which is included in the House of Lords printed case papers, states:

THIS COURT DOTH DECLARE that the Defendants Thomas Gray Boardman and Thomas Edward Phipps hold five eighteenthths of the 21,986 Ordinary Shares of £1 each in Lester & Harris Limited mentioned in the Statement of Claim as constructive trustees for the Plaintiff

AND THIS COURT DOTH ORDER that the following account and inquiry be taken and made that is to say

- (1) An Account of the profits come to the hands of the Defendants Thomas Gray Boardman and Thomas Edward Phipps and each of them from the said shares and
- (2) An Inquiry what sum is proper to be allowed to the Defendants Thomas Gray Boardman and Thomas Edward Phipps or either of them in respect of their or his work and skill in obtaining the said shares and the said profits in respect thereof

AND IT IS ORDERED that no proceedings be taken on the said Account or on the said Inquiry . . . until after the expiry of the [time limit] for serving notice of appeal from this Order and if notice of appeal is served within such period then until after the disposal of the said appeal.

AND IT IS ORDERED that the Defendants Thomas Gray Boardman and Thomas Edward Phipps do pay the Plaintiff his costs of this Action . . .

THE further consideration of this Action is adjourned.

No proceedings were taken on the Account or the Inquiry since the defendants issued notice to appeal to the Court of Appeal, within the prescribed time limit, on 2 July 1964, and sought to have the Order set aside. The Court of Appeal dismissed the appeal and declared that 'the said Order dated 25th March 1964 be affirmed'.⁵⁰ The defendants appealed this Order to the House of Lords. Both the Order of Wilberforce J and the Order of the Court of Appeal were submitted to the House as part of the printed case. The only question for determination by the House, the appellants submitted, was 'whether the Appellants are accountable to the Respondent as constructive trustees of certain shares in Lester & Harris Limited which were purchased by them'.⁵¹

It is therefore clear that the defendants formally were declared constructive trustees of five-eighteenthths of the shares and that this declaration was affirmed in successive appeals.

⁵⁰ Order of the Court of Appeal, 26 January 1965.

⁵¹ Case for the appellants, para 2.

The report of the Order in the Weekly Law Reports is misleading since it omits reference to the declaration of the constructive trusteeship as sought in paragraph one of the Statement of Claim, stating simply that the defendants were 'accountable'. However, it reports that consideration of the relief claimed in paragraph three of the Claims, which included the transfer of the shares, was adjourned. This creates the impression that no decision was reached on the defendants' constructive trusteeship. We can now be sure that it was.

(B) THE NATURE OF THE DEFENDANTS' CONSTRUCTIVE TRUSTEESHIP

Although it is clear the defendants were declared constructive trustees of the shares in the Order of Wilberforce J, and the Order was affirmed in the successive appeals, two questions remain. First, were the defendants declared *proprietary* constructive trustees of the shares in the Order? Secondly, if the defendants *were* declared proprietary constructive trustees of the shares was the proprietary nature of the constructive trusteeship recognised when the Order was affirmed in the successive appeals? The mere use of the language of constructive trusteeship is indeterminate since it may carry one of two meanings. In its more usual sense 'constructive trustee' denotes a person who holds identifiable property on constructive trust for another person who holds an equitable proprietary interest in the property subject to the constructive trust. However, the language of constructive trusteeship may also function as 'a formula for equitable relief' to denote simply that a defendant who is not a trustee in the strict sense is to be treated for a particular purpose 'as though he were'.⁵² When employed in this latter sense 'constructive trusteeship' does not describe a proprietary relationship.⁵³

The wording of the Order of Wilberforce J points to proprietary constructive trusteeship: the defendants, it was declared, 'hold' the shares as constructive trustees. Moreover, the Order was framed to grant that which the claimant sought. The complaint was that the defendants 'failed or refused to transfer to the Plaintiff 5/18ths of the shares in the Company purchased by them . . . or to account to the Plaintiff for 5/18ths of the profit made by them on such shares'.⁵⁴ The claimant therefore sought a declaration of constructive trusteeship of five-eighteenths of the shares as a means of obtaining a transfer of the shares and payment of the profits made thereon in the interim. Wilberforce J granted the declaration of constructive trusteeship and ordered an account be taken. The order to transfer the shares and pay over the profit was, however, held over until after the account had been taken and an inquiry made as to a proper sum to be awarded to the defendants for their work and skill since both the account and inquiry affected the terms on which the shares would be transferred.

There is nothing to suggest that the members of the Court of Appeal were not clear that they were affirming the defendants' proprietary constructive trusteeship. However, in the House of Lords, Lord Hodson appeared to employ constructive trusteeship not in its proprietary sense but as a formula for recognising that the defendants were accountable as if they themselves were trustees. The defendants, he said, 'are not trustees in the strict sense but are said to be constructive trustees by reason of the fiduciary position in which they stood'.⁵⁵ Drawing upon *Barnes v Addy* he went on to note the circumstances in which the

52 *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555 (Ch) 1582 (Ungoed-Thomas J).

53 Thus, it is said that a constructive trust may 'create or recognise no proprietary interest': *Giumelli v Giumelli* (1999) 161 ALR 473 (HCA) 475. See also *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 705 (Lord Browne-Wilkinson); L Smith, 'Constructive Trust and Constructive Trustees' [1999] CLJ 294, 299-300.

54 Amended statement of claim, 18 July 1963, para 23.

55 [1967] 2 AC 46 (HL) 105.

responsibilities of a trustee 'may be extended in equity to others who are not properly trustees'.⁵⁶ Having concluded the defendants had acted openly and honestly in the instant case he observed that '[i]f, however, they are in a fiduciary position they are *as trustees* bound by' the duty not to place themselves in a position of conflict with the trust.⁵⁷ The defendants' 'constructive trusteeship' therefore took its meaning from its contrast with trusteeship in the strict sense as an expression of liability to the trust. Though not strictly trustees the defendants were treated *as if they were* and were therefore accountable if they placed themselves in a position in which their personal interests conflicted with the interests of the trust.

However, such reasoning does not necessarily preclude the recognition of a proprietary claim. It tells us simply that the defendants were to be treated in the same way *as if* they were profiting trustees. It also must have been clear from the submissions of both parties that proprietary constructive trusteeship of the shares was at stake. As noted already, the claimant's complaint was that shares which belonged to him in equity had not been transferred to him by the defendants. The question to be determined by the House, said counsel for the defendants, was 'were the circumstances such that the consciences of the appellants were so affected that under the principles of equity that which in law is their property must nevertheless be held by them for the benefit of the respondent?'⁵⁸ Consequently, it is difficult to see how Lord Hodson or any other member of the House could view the constructive trusteeship in the Order of Wilberforce J in anything other than proprietary terms.

5 Was proprietary constructive trusteeship a live issue?

What, then, of the third interpretation of *Boardman* that, regardless of whether a constructive trust formally was declared, its recognition was not a live issue and 'simply did not matter'?⁵⁹ This claim is based largely on the absence of any evidence that the disputed shares were in fact transferred to the claimant.⁶⁰

It is indeed correct that the litigation did not result in a transfer of any shares to the claimant. After the House of Lords dismissed the appeal the claimant did not seek to have the shares transferred to him. Boardman retained all of his shares and remained chair of Lester & Harris until the demands of a ministerial role in the Heath government required him to relinquish the role.⁶¹ Moreover, long before the end of the litigation (and perhaps even at the trial stage), it was clear that a transfer of the shares was not in the claimant's interests. First, the shares were worth roughly half of the amount that the defendants had paid for them. In these circumstances it was unlikely the claimant would have wanted to pay the counter-restitution necessary to secure the transfer of the shares. The cost of the counter-restitution in all likelihood could not have been met fully from the dividend profits after the deduction of an allowance for the defendants' time and skill.⁶² Had the claimant wanted the shares he

⁵⁶ [1967] 2 AC 46 (HL) 105, quoting *Barnes v Addy* (1874) 9 Ch App 244 (CA) 251 (Lord Selborne LC).

⁵⁷ [1967] 2 AC 46 (HL) 105-06.

⁵⁸ *Ibid* 61.

⁵⁹ *Sunclair* (n 4) [47].

⁶⁰ See e.g. *ibid* [43].

⁶¹ Email from Nigel Boardman to the author (6 January 2012). Nigel Boardman, a practising solicitor, is the son of Thomas Boardman. On Thomas Boardman's ministerial roles, see n 5 above and accompanying text.

⁶² The cost of five-eighths of each of the three parcels of shares amounted to £28,786 while the gross capital distributions received by the defendants on the same proportion of the shares amounted to £35,885. However, the allowance that was to be deducted for the defendants' skill and work was to be assessed liberally and may have been as much as 60 per cent of the net profit: Email from Nigel Boardman to the author (6 January 2012). Mr Boardman's recollection of this aspect of the case is, however, admittedly hazy.

would have been required to dip into his own pocket to meet some of the cost of the counter-restitution. Secondly, the claimant, a farmer with little understanding of commercial matters, had never taken an interest in the family businesses and was simply 'concerned to get his share of the estate'.⁶³ Talk of the recovery of profits dominates in the judgments because the defendants' profits, rather than the shares, are what the claimant wanted.

It is, however, arguable that Wilberforce J's declaration of constructive trusteeship was more than mere window-dressing for a purely personal claim for net profits. An underlying proprietary claim to the shares may have been considered necessary to the identification and quantification of the net profit for which the defendants were personally liable. Although the shares were worth less than the amount that the defendants had paid for them, their purchase was profitable since the fall in share value was more than offset by the capital dividends received on the shares in January 1960 and June 1961 and the ordinary dividends received on the shares in the years since their purchase in 1959.⁶⁴ An underlying proprietary claim to the shares may have been considered necessary in order to capture some or all of these gains.

The problem with founding a personal claim to the profits directly on the underlying breach of fiduciary obligation is that claims to profits derived from wrongdoing are subject to cut-off points. This is the so-called 'remoteness of gain' issue. According to Birks' formulation gains consequential upon the 'first non-subtractive receipt' generally are considered too remote from the wrong to be recoverable.⁶⁵ This suggests that in *Boardman* a claim resting solely on breach of fiduciary obligation would not have allowed recovery of the capital dividends or the ordinary dividends since these were gains consequential upon the first non-subtractive receipt – the purchase of the shares in breach of fiduciary obligation.

The limits of remoteness of gain are not, however, clear and more recently less restrictive approaches have been preferred.⁶⁶ Virgo, for example, notes that in the context of breaches of fiduciary obligation there is some evidence that the remoteness of gain principle is weaker and fiduciaries may be compelled to account for gains derived indirectly as well as directly from the breach.⁶⁷ A weaker approach to remoteness is also more consistent with equity's strict policy of deterring breaches of fiduciary obligation. Applying this approach it is probable that the capital distributions in *Boardman* would not have been considered too remote from the breach of fiduciary obligation. The liquidation of unprofitable company assets was after all an expected source of profit and indeed motivated the breach of fiduciary obligation complained of. But it is more difficult to make a similar argument for the recovery of at least some of the ordinary dividends paid on the shares between 1960 and 1966, particularly those paid in the later years. Personal liability for gains made on the shares could not go on indefinitely; there had to be some cut-off point.

Such difficult questions would not need to be addressed if the shares in *Boardman* were held on proprietary constructive trust from the moment they were acquired by the defendants in breach of fiduciary obligation. In that case, since the shares were trust property, the defendants would be accountable for both the capital and ordinary dividends received thereon. The dividends would be the fruit of the trust property and therefore held

63 [1964] 1 W.L.R. 993 (Ch) 1016, 1017; [1965] Ch 992 (CA) 995, 1016.

64 The reports are silent as to ordinary dividends but it is clear they were received on the shares and sought by the claimant: amended statement of claims, 18 July 1963, para 21.

65 P B Birks, *An Introduction to the Law of Restitution* (revd edn Clarendon 1989) 351–55.

66 See e.g. A Burrows, *The Law of Restitution* (2nd edn Butterworths Lexis-Nexis 2002) 500–01; K Barker, 'Riddles, Remedies and Restitution: Quantifying Gain in Unjust Enrichment Law' (2001) 54 CLP 255.

67 G Virgo, 'Restitutionary Remedies for Wrongs: Causation and Remoteness' in C F F Rickett (ed), *Justifying Private Law Remedies* (Hart 2008) 301, 321–23.

on the same trust as the asset that produced them. The constructive trust route would thus have allowed the claimant to circumvent the remoteness problem because there is no cut-off point for profits derived from trust property.

A non-proprietary route (founding the claim directly on the breach of fiduciary obligation) as well as a proprietary route to the profits was mooted by the claimant in the statement of claims⁶⁸ but, given the obvious difficulty with the former, the latter underpinned the claimant's case. It also formed the basis for the account in the trial Order which ordered, without limitation, that the defendants were liable to account for any profit found to have come into their hands from the shares.

6 Agency gain as the constructive trust trigger

(A) WILBERFORCE J'S AGENCY REASONING

This leads naturally to the question of the constructive trust trigger in *Boardman*. Given that a constructive trust was likely to have been viewed as a live issue in *Boardman*, does this lead to the conclusion that the first interpretation of the case is correct, namely, that it stands for the proposition that the mere appearance of gain acquired in breach of fiduciary obligation is sufficient to trigger a constructive trust? As the remainder of this article demonstrates, it is unsafe to reduce the remedial aspect of *Boardman* to such a simple proposition. In this section we see that the trigger for the constructive trusteeship in the trial Order is not as clear as is often supposed since Wilberforce J identified an additional element, beyond the simple appearance of gain, which may have provided an accepted narrower foundation for the recognition of a constructive trust.

A key issue at trial was whether the defendants occupied a fiduciary position since they did not fall into an established category of fiduciary relationship. Both defendants attended the annual general meeting of Lester & Harris on behalf of the trust and attempted to get Tom Phipps elected as a director of the company. These acts were undertaken to protect the trust shareholding. The claimant argued that the defendants were therefore agents of the trustees and, as such, subject to fiduciary obligations. The difficulty with this analysis is there was no contract of agency between the defendants and the trustees.⁶⁹ Wilberforce J nevertheless drew upon the agency concept to establish that the defendants '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 'to strengthen the management of the company by securing representation on the board of the trust holding'.⁷⁰ Information used by Boardman during his successful negotiations for the shares was acquired while acting in the course of such agency. By making profitable use of information acquired in the execution of his fiduciary office, Boardman was accountable under the no-profit principle.

However, Wilberforce J also appears to have accepted that the negotiations for the shares, or some of them at least, were undertaken by the defendants for the trust. Having identified that the purpose of the 'self-appointed agency' was to extract information about the company and to secure trust representation on the board, Wilberforce J added that there was also an intention that the defendants 'should acquire additional shares with a view to

68 Amended statement of claim, 18 July 1963, para 20.

69 There were two reasons for this. First, in order to bind the trust all three trustees would have to join in the contract and it was quite clear that Ethel Phipps did not authorise anything. Secondly, there was anyway no intention on the part of Mr Fox and Mrs Noble to employ the defendants as agents: [1967] 2 AC 46 (HL) 100 (Lord Cohen), [1965] Ch 992 (CA) 1017 (Lord Denning MR).

70 [1964] 1 WLR 993 (Ch) 1007 (emphasis added).

obtaining control. This was no departure from the agency.⁷¹ Thus, the defendants' initial offer for the shares in 1957, which led to the purchase of 2925 shares, was considered a trust action undertaken by the defendants as agents of the trustees. Evidence of this was found in the letter of offer which represented that the defendants acted for the trust holding. Similar representations were made to the chair of Lester & Harris, who thought Boardman was acting as 'nominee' for the trust.⁷² It was 'impossible to dismiss' such representations 'as not reflecting [the defendants'] relation to the trust'.⁷³ Indeed, Mrs Noble assumed that the money to pay for the shares would come from the trust. This, apparently, further demonstrated that she 'was not contemplating [the defendants] were acting or should act outside the trust'⁷⁴ but 'clearly accepted [their] action as a trust action, and the transaction and the proposed action as trust matters'.⁷⁵ The negotiations that led to the purchase of the initial parcel of shares, moreover, could not be separated from the negotiations for the second and third parcels.⁷⁶

Although the trust could not, in the absence of a court order varying the terms of the trust, acquire any more shares beyond the 8000 shares that were part of the residuary estate and although the defendants had no mandate to carry out transactions for the trust, the theory seems to have been developed that the defendants could make recommendations and had 'authority to negotiate but not to bind the principal'.⁷⁷ This suggests that a constructive trust gave the principal what had been negotiated on his behalf by his agent. The case was therefore analogous to the numerous cases in which gain was, consistently with the fiduciary's undertaking, deemed to have been acquired as agent of the principal and therefore held for the benefit of the principal.⁷⁸ *Benson v Heathorn*⁷⁹ is illustrative. The defendant Heathorn was the director of a company established for the purpose of purchasing, building and hiring out steam vessels. Knowing that a request to purchase a ship suitable for carrying coals was imminent, Heathorn purchased the ship *Normahal* for £1340 before selling it to the company for £1500 a short time later. Heathorn was held accountable for the £160 profit. His actions 'indelibly and inextricably fixed him with the character of agent from the beginning of that transaction' so that he 'ought to be considered as having purchased the ship "Normahal" for £1340, as the agent and on behalf of the [company]'.⁸⁰

71 [1964] 1 WLR 993 (Ch) 1007.

72 Ibid 997-98.

73 Ibid 1008. The issue was considered central to the case by both parties, such representations being denied by the defendants: see amended statement of claim, 18 July 1963, para. 8; Re-amended Defence of the First and Second Defendants, 10 March 1964, paras 9, 16.

74 [1964] 1 WLR 993 (Ch) 997.

75 Ibid 1007 (emphasis added). Wilberforce J also concluded that Mr Fox thought the defendants were continuing to act for the trust: *ibid* 1008.

76 The accepted offers for the first parcel were, with the 8000 trust shares, used as leverage in later negotiations. Moreover, the defendants did not 'throw off their agency character' and Boardman 'continued throughout to represent the trust in his dealings with the directors'. This made it 'impossible to separate the activity of Boardman and Phipps in acquiring the shares from the rest of what they were doing' for and on behalf of the trust: *ibid* 1012.

77 Submission of counsel for the claimant before the Court of Appeal, suggesting the relationship 'was more like something of the estate agency nature': [1965] Ch 992 (CA) 1009.

78 See e.g. *Lees v Nuttall* [1829] 1 Russ & M 53, 39 ER 21; *affd* [1834] 2 My & K 819, 39 ER 1157; *Benson v Heathorn* [1842] Y & CCC 326, 62 ER 909; *Taylor v Salmon* (1838) 4 My & Cr 134, 41 ER 53.

79 *Heathorn* (n 78).

80 *Ibid* 340 (Knight Bruce VC). See also *Re Cape Breton Company* (1885) 29 Ch D 795 (CA) 803-06 (Cotton LJ), 811 (Fry LJ).

A related point is raised elsewhere in the judgment of Wilberforce J with regard to the negotiations for the shares during Phase 3. By this stage it seems to have been accepted that the defendants owed their duties directly to the beneficiaries, who had become absolutely entitled to the shares under the trust following the death of Ethel Phipps in November 1958.⁸¹ The claimant, Wilberforce J suggested, had lost the opportunity to join the defendants' venture since information which showed that the risks of the venture were limited and the projected profits significant was not disclosed to him as it ought to have been. The claimant was therefore justified in thinking that he had been duped, albeit unintentionally,⁸² into giving something away when 'he did not consider he was giving anything away'.⁸³

(B) REMOVAL OF THE POSSIBILITY OF AN AGENCY GAIN TRIGGER ON APPEAL

The case was viewed in very different terms in the appeals. Notably, agency played a marginal role.⁸⁴ Some, such as Lord Guest⁸⁵ and Russell LJ,⁸⁶ eschewed an agency analysis altogether.⁸⁷ Others considered 'agency' was simply 'a convenient way to describe'⁸⁸ the defendants. Lord Denning, for instance, identified the defendants' liability as a form of stranger liability flowing from their assumption of authority to act for the trust when in fact they had no such authority.⁸⁹ They were in essence agents *de son tort* and therefore agents as much as trustees *de son tort* are express trustees. Agency language indicated that the defendants owed fiduciary obligations to the trust but it was not the source of those obligations. Nor did the employment of the term necessarily imply any other legal incident commonly associated with the concept.

81 The point is dealt with most clearly by Lord Cohen: [1967] 2 AC 46 (HL) 104.

82 Boardman was acquitted 'entirely of any intention to deceive or suppress material information' but had 'failed to appreciate the degree of explanation and the quantity of supporting documents which would be needed to enable someone coming fresh to it . . . to appraise it, or even to see that this was a matter which required careful consideration and expert advice': [1964] 1 W.L.R. 993 (Ch) 1014.

83 Ibid 1017. Wilberforce J went on to conclude that full disclosure should have been made to the claimant so he 'had the opportunity of getting his expert to look into it for him'. While it could not be said with certainty what he would have done in the circumstances 'he ought to have had the opportunity' and it could not be assumed that 'some mutually acceptable arrangement [with the defendants] would not have been reached': *ibid* 1017.

84 By this stage of the litigation even counsel for the claimant tempered their agency argument, submitting that the defendants had 'placed themselves in a special position, the nearest equivalent to which is agency': [1967] 2 AC 46 (HL) 70 (emphasis added). For detailed consideration of the agency reasoning in *Boardman*, see G. H. L. Fridman, 'Establishing Agency' (1968) 84 L.Q.R. 224, 231-39.

85 [1967] 2 AC 46 (HL) 118 (defendants placed themselves in a 'special position which was of a fiduciary character' and were accountable for the profit made out of such special position).

86 [1965] Ch 992 (CA) 1031 (fiduciary responsibilities flowed from the defendants' receipt of an 'aspect' of trust property transferred by the trustees in breach of trust).

87 Lord Upjohn was also explicit on this point, noting the defendants 'were never in fact agents': [1967] 2 AC 46 (HL) 126.

88 Ibid 108 (Lord Hodson). Lord Cohen thought the defendants were 'agents' of the trustees but acknowledged that, unlike agents in an orthodox or usual sense of the term, they had no power to affect legal relations between the trustees and third parties and for this reason the arrangement with the two active trustees was sufficient to place them in a fiduciary position *vis-à-vis* the trust: *ibid* 100.

89 [1965] Ch 992 (CA) 1017-18. See also *ibid* 1030 (Pearson LJ). Lord Denning drew upon numerous '*de son tort*' cases in which outsiders to a particular relationship were held accountable by virtue of assuming an authority they did not possess: see e.g. *Stumford's Case* (1573) 2 Leo 223, 74 ER 496 (executor *de son tort*); *Ruckham v Siddall* (1850) 1 Mac & G 607, 41 ER 1400 (trustee *de son tort*); *Gawton and Lord Ducre's Case* (1590) 1 Leo 220, 74 ER 201 (bailiff *de son tort*). His Lordship drew further support from *Ljell v Kennedy* (1889) 14 App Cas 437 (HL). However, this case was determined by application of ordinary principles of agency by ratification, the House of Lords having found that the principal had ratified the defendant's acts: *ibid* 454-56, 457.

Moreover, having examined the undertakings of the defendants and the actions of the trustees it was accepted that at no point was responsibility assumed by the defendants to negotiate on behalf of the trust.⁹⁰ Viscount Dilhorne expressly rejected the apparent assertion that the acquisition of the shares was a trust action⁹¹ while Lord Cohen could 'not understand why' it had been said that the defendants 'were making the initial offer as agents for the trustees'.⁹² That was inconsistent with the evidence. There simply was a 'sound business arrangement' by which the defendants used the trust to extract useful information to assist in their purchase of the shares while the trustees saw control of the company pass to friendly hands and realised a profit without assuming the risk of loss.⁹³ However, the defendants made a vital mistake. On the occasions they *did* represent the trust they obtained information that was crucial in the negotiations for the shares and the opportunity to purchase such shares. They used the same without the consent of the trust beneficiaries (who were the principals following the death of Ethel Phipps) and were therefore accountable. This, admittedly, was harsh on the defendants while the claimant was the fortunate, even undeserving, recipient of an 'unreasonably large amount'.⁹⁴ However, this was necessary in order to 'do nothing to whittle away . . . the absolute responsibility' that fiduciary duties impose.⁹⁵

7 'Property' as the constructive trust trigger

The affirmation of the Order of Wilberforce J in the appeals coupled with the undermining of a possible agency gain foundation for the defendants' constructive trusteeship might be taken to suggest that the simple appearance of gain acquired in breach of fiduciary obligation was considered sufficient to trigger a constructive trust. However, information acquired by Boardman and Tom Phipps and exploited when negotiating for the shares, as well as the opportunity to obtain the shares, was characterised as trust property throughout the litigation. This opens up the possibility that 'property' rather than the simple appearance of fiduciary gain triggered the constructive trust. In Birksian terminology there was a 'pre-existing proprietary base', albeit an intangible one. It is, however, important to note that two distinct approaches to property in information and opportunity were taken in *Boardman*. Only one of these approaches – the minority approach – is consistent with a proprietary base analysis.

(A) THE MINORITY APPROACH

A minority of judges in *Boardman* treated information acquired by Boardman as property of the trust in the same sense as any other subject matter of a trust. Thus, Lord Hodson dissented 'from the view that information is of its nature something which is not properly to be described as property' and concluded that confidential information acquired by

90 Thus, it was pointed out that Boardman corrected Mrs Noble's misunderstanding that the trust was to fund the purchase of the shares, that thereafter Mrs Noble acquiesced in the defendants' plans and that Mr Fox, who would never have consented to the acquisition of the shares for the trust, positively encouraged Boardman's actions: [1965] Ch 992 (CA) 1017 (Lord Denning MR), [1967] 2 AC 46 (HL) 75–76, 84 (Viscount Dilhorne), 96, 100 (Lord Cohen), 108–09 (Lord Hodson).

91 [1967] 2 AC 46 (HL) 75–76.

92 *Ibid* 96.

93 [1965] Ch 992 (CA) 1022 (Pearson LJ). See also [1967] 2 AC 46 (HL) 117 (Lord Guest).

94 [1965] Ch 992 (CA) 1030 (Pearson LJ); [1967] 2 AC 46 (HL) 104 (Lord Cohen).

95 [1967] 2 AC 46 (HL) 105 (Lord Hodson). Similarly, Russell LJ expressed sympathy for defendants whom he considered victims of 'principles of equity whose rigidity is necessary if cases deserving of no sympathy are not to escape': [1965] Ch 992 (CA) 1032.

Boardman was 'properly regarded as the property of the trust'.⁹⁶ Similarly Lord Guest, who did not limit his observations to confidential information, saw 'no reason why information and knowledge [acquired by Boardman from his position] cannot be trust property'.⁹⁷ His Lordship, moreover, characterised the purchase of the shares as a transaction entered into with trust property.⁹⁸ In effect, the defendants were viewed as having made a gain by speculating with trust property. This suggests a constructive trust was viewed as vindicating the trust's ownership of the information by granting the same incidents of ownership in the assets purchased through its exploitation.⁹⁹

The reasoning of Lords Hodson and Guest reflects the majority view on this point in the Court of Appeal and follows the argument made by the claimant before the House. The claimant submitted there was a proprietary link between information and opportunity belonging to the trust and the shares purchased through their exploitation. Information and opportunity acquired by Boardman, either by reason of his agency or (following the reasoning of Russell LJ in the Court of Appeal)¹⁰⁰ by use of the trust shareholding, became trust property and were held by the appellants as constructive trustees.¹⁰¹ When such information and opportunity were exploited to purchase the shares, the shares were likewise 'held by [the defendants] as constructive trustees for the beneficiaries under the Will'.¹⁰² This property foundation was, from the beginning, set up as the stronger alternative to a claim based on mere breach of fiduciary obligation.¹⁰³ The claimant's case, Pearson LJ said in the Court of Appeal, 'is based solely on property rights'.¹⁰⁴

(B) THE MAJORITY APPROACH

This is not how the majority of judges in *Boardman* conceived of property in information and opportunity. For the majority, if information and opportunity were to be characterised as property at all it was for the limited purpose of denoting who, as between the trust and the defendants, was entitled to their beneficial use. At trial Wilberforce J asked 'whether the knowledge of which profitable use was made can be described as the property of the trust'.¹⁰⁵ His conclusion was that information was 'essentially the property of the trust' but only 'so far as the expression can be used'.¹⁰⁶ Crucial to the issue was *Regal (Hastings) v Gulliver*,¹⁰⁷ which Wilberforce J read as providing a 'positive answer'¹⁰⁸ to the question of whether opportunity-related information can be described as 'property'.

96 [1967] 2 AC 46 (HL) 107.

97 Ibid 115.

98 Ibid.

99 See e.g. *Attorney General v Lau Lok* [1984] HKLR 275, 290 (suggesting *Boardman* was a case involving the tracing of trust property converted to the defendants' own use).

100 [1965] Ch 992 (CA) 1031. Russell LJ reasoned that one aspect of the trust's shareholding was the leverage it gave in negotiations and its potential use as a means of acquiring useful knowledge about the company. This 'aspect of trust property' was placed in the hands of the defendants in breach of trust 'and must in those hands have remained part of the trust assets'.

101 Case for the respondent, para 31, reasons 7-8.

102 Ibid reason 9.

103 Amended statement of claim, 18 July 1963, para 20.

104 [1965] Ch 992 (CA) 1031.

105 [1964] 1 WLR 993 (Ch) 1011 (emphasis added). This is not necessarily the same as asking whether information is property.

106 Ibid 1012 (emphasis added).

107 *Regal* (n 30).

108 [1964] 1 WLR 993 (Ch) 1011.

Regal makes no reference to 'property' in opportunity-related information. The liability of the directors rested squarely on the no-profit rule: information about the opportunity to purchase shares in the subsidiary came to the directors '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'.¹⁰⁹ By exploiting the opportunity, the directors thus made a profit from their fiduciary position and were, accordingly, accountable. However, no liability attached to one director, Gulliver, who did not personally exploit the information about the opportunity to purchase the shares. Gulliver passed the information to third parties which, though donees of the information, were free to exploit the information and to purchase the shares.¹¹⁰ The opportunity-related information was therefore 'property' only to the extent that it denoted entitlement to its exclusive beneficial use as between the company and its directors. It did not denote entitlement as between the company and the world at large.

This is how 'property' in information was understood in *Asas v Benham*,¹¹¹ also relied upon by Wilberforce J. It is also how property in opportunity is understood in modern corporate opportunity cases. Corporate opportunity is described as 'property' for the purpose of excluding from its exploitation a director who resigns from the company to which the opportunity is said to 'belong'.¹¹² 'Property' expresses the idea that in the context of the bi-partite relationship between former director and company the opportunity is the company's to exploit and the former director is excluded, notwithstanding that he no longer owes the company fiduciary obligations.¹¹³ The fact that opportunity is characterised as property for this purpose does not, however, necessarily imply any other incident commonly associated with the beneficial ownership of a resource. For instance, opportunity is not necessarily to be regarded as 'property' for the purpose of generating liability in knowing receipt since in this context the recognition of property in something as nebulous as commercial opportunity may risk an over-extension of the personal liability of strangers to fiduciary relationships and uncertainty in commercial dealings.¹¹⁴ In this context, at least, 'property' is understood as a contingent rather than a unitary concept. A resource may be property for one purpose but not another.

In the Court of Appeal in *Boardman*, Lord Denning MR expressly adopted Wilberforce J's conclusions on property in the opportunity-related information and, having observed that knowledge acquired in furtherance of a fiduciary's undertaking is 'property' in the sense that an employee invention is the property of his employer,¹¹⁵ agreed that such knowledge 'could properly be described as "the property" of the trust'.¹¹⁶ Reference to

109 *Regal* (n 30) 387 (Lord Russell). See also *ibid* 389, 391–92 (Lord Macmillan), 393 (Lord Wright), 395 (Lord Porter). Viscount Sankey established liability to account by application of the no-conflict rule: *ibid* 381–82.

110 *Ibid* 382 (Viscount Sankey), 389–91 (Lord Russell).

111 [1891] 2 Ch 244 (CA). The aspect of this case dealing with property in information is discussed in detail in D Kershaw, 'Does it Matter How the Law Thinks About Corporate Opportunities?' (2005) 25 LS 532, 549–51.

112 *CMS Dolphin v Simonet* [2002] BCC 600 (Ch) [96] (Lawrence Collins J); *Laphorne v Eurofi Ltd* [2001] EWCA Civ 993 [22] (Tuckey LJ).

113 See e.g. *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) [1355] where Lewison J noted a post-office director 'may be liable for the diversion of a business opportunity . . . because the business opportunity itself is to be treated as the property of the company (in the sense of an intangible asset) and hence is treated for this purpose as trust property' (emphasis added). See also *CMS Dolphin* (n 112) [95]–[96]; *Thermanian Ltd v Norman* [2009] EWHC 3694 (Ch) [14] (Judge David Donaldson QC).

114 *Commonwealth Oil & Gas Co Ltd v Baxter* [2009] CSIH 75, [2010] SC 156 [16]–[19] (Lord Hamilton P), [94]–[95] (Lord Nimmo Smith). But cf *CMS Dolphin* (n 112) [100]–[105].

115 [1965] Ch 992 (CA) 1018–19.

116 *Ibid* 1019. The use of parentheses ('the property') suggests an acknowledgment of the peculiarity of Wilberforce J's finding of property in the information, to which Lord Denning deferred and considered 'decisive of the case'.

employee inventions is particularly instructive. Prior to *Boardman*, information comprising a non-patented employee invention had been described on numerous occasions as 'property' held on trust for the employer.¹¹⁷ However, it was also accepted that this was 'not a perfectly accurate'¹¹⁸ characterisation since the invention does 'not have the character of property such as one usually finds a trust attaching to'.¹¹⁹ Nevertheless, treating an employee invention as trust property encapsulated the positive and negative obligations of the employee to take whatever steps were necessary to place the invention at the disposal of the employer and to exclude himself from its benefit.¹²⁰

A majority of the House of Lords was explicit as to the qualified nature of the claimant's property rights in the information. Viscount Dilhorne, who considered *Aas v Benham*¹²¹ to be a case which 'throws some light on this question',¹²² did not think the Phase 2 information 'was property of the trust in the same way as shares held by the trust were its property'.¹²³ Lord Cohen agreed that information is 'not property in the strict sense'.¹²⁴ 'In general', said Lord Upjohn in an oft-quoted passage, 'information is not property at all'. Even confidential information, he said, 'is not property in any normal sense'.¹²⁵

For the majority of judges in *Boardman*, information was therefore 'property', if at all, in a limited sense. It was property for the limited purpose of indicating that those owing fiduciary obligations to the trust were excluded from its exploitation but it did not indicate a set of incidents more commonly associated with 'property'. Nor did it imply that the principal's right to exclude was a right *in rem*. Rather it was in essence a right *in personam* exercisable against a person or a closed list of persons, being those owing fiduciary obligations to the trust.

8 Appropriation of 'opportunity' as the constructive trust trigger

If the above analyses are correct, then five of the seven judges finding for the claimant arguably recognised that the presence of an additional element, beyond the mere acquisition of gain in breach of fiduciary obligation, was necessary to trigger the constructive trust so recognised. However, both Lord Cohen and Lord Denning MR undermined the agency foundation of Wilberforce J and adopted a qualified property analysis that cannot be understood as having provided an orthodox proprietary base. It may be that both of their Lordships accepted that a simple breach of fiduciary obligation was, without more, sufficient to trigger a constructive trust of the shares. It certainly is possible to read the speech of Lord Cohen and the judgment of Lord Denning MR in this way. However, there is nothing to indicate an intention of either to overrule *Lister* by a side wind, something which would be necessary were it to be accepted that a simple breach of fiduciary obligation is sufficient to trigger a constructive trust. Moreover, the reasoning employed might be read as supporting a narrower constructive trust trigger.

117 *British Celanese Ltd v Moutrieff* [1948] Ch 564 (CA). See also *Sterling Engineering Co v Patchett* [1955] AC 534 (HL) 543-44 (Viscount Simonds), 547 (Lord Reid); *Triplex Safety Glass Co v Scorab* [1938] Ch 211 (Ch) 217-18 (Farwell J).

118 *Moutrieff* (n 117) 581 (Lord Greene MR).

119 *Ibid*.

120 *Ibid*. Thus, 'it is for the employer to say whether it shall be patented, and he can require the employee to do what is necessary to that end': *Patchett* (n 117) 544 (Viscount Simonds).

121 *Aas v Benham* (n 111).

122 [1967] 2 AC 46 (HL) 90. Although he did not refer to *Aas v Benham*, the reasoning of Lord Cohen suggests a similar understanding of the nature of the 'property' in question: *ibid* 100-03.

123 *Ibid* 89-90.

124 *Ibid* 102.

125 *Ibid* 127-28.

Lord Cohen, who had the casting vote in the House of Lords,¹²⁶ placed great emphasis on the fact that:

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.¹²⁷

Responding to the argument that the defendants were not accountable since information used in the purchase of the shares could never have been used for the same purpose by the trust, Lord Cohen said that this did not:

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 . . . 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.¹²⁸

Lord Denning similarly characterised the present case as one in which a fiduciary had acquired knowledge for the use of his principal but had turned it to his own use. Consequently, Boardman had 'gained an unjust benefit by the use of his principal's property' (in the qualified sense).

This suggests the defendants' constructive trusteeship may have been triggered not by the mere acquisition of gain in breach of fiduciary obligation but by the defendants' misuse of an opportunity or knowledge pursued or acquired on behalf of the claimant, notwithstanding that such information or opportunity was not the property of the claimant in an orthodox sense but only in some peculiar sense. Indeed, it will be recalled that elements of the judgment of Wilberforce J appear to suggest that the claimant was viewed as having been deprived of the opportunity to participate in the venture.¹²⁹ Some support for this interpretation can be found in the recent case of *FHR European Ventures LLP v Mankarious*.¹³⁰ In this case, Sir Terence Etherton C, having quoted from the speech of Lord Cohen, placed *Boardman* in the second category of Lord Neuberger's *Sinclair* categorisation of cases in which fiduciary gain triggers a constructive trust.¹³¹ As such, it was a case in which 'the benefit has been obtained by the fiduciary by taking advantage of an opportunity which was properly that of the principal'.¹³²

¹²⁶ Lord Cohen had retired as a Lord of Appeal in Ordinary in 1960 but continued to sit in the House by invitation. In *Boardman*, which was his last case, 'his four colleagues being equally divided, it fell to him, much to his anxiety, to give the casting decision': R Wilberforce, 'Cohen, Lionel Leonard, Baron Cohen (1888–1973)' in *Oxford Dictionary of National Biography* (revd online edn 2004).

¹²⁷ [1967] 2 AC 46 (HL) 101.

¹²⁸ *Ibid* 102–03.

¹²⁹ See above nn 81–83 and accompanying text.

¹³⁰ [2013] EWCA Civ 17, [2013] 3 All ER 29 [89]–[96].

¹³¹ See *Sinclair* (n 49) [88]–[89]. The categories identified were: (1) 'the asset or money is or has been beneficially the property of the beneficiary'; and (2) the fiduciary 'acquired the asset or money by taking advantage of an opportunity or right which was properly that of the beneficiary'. In all other cases the claimant is limited to a personal claim for the value of the gain derived by the fiduciary from the breach of fiduciary obligation.

¹³² *FHR European Ventures* (n 130) [83], [94].

9 Conclusion

The House of Lords printed case papers shed considerable light on the issue of proprietary relief in *Boardman v Phipps* and lead to a significant re-evaluation of this aspect of the case. We now know that: (1) a proprietary constructive trust of the shares was recognised in the Order of Wilberforce J and affirmed by the Court of Appeal and by a majority of the House of Lords; (2) in the end, the claimant did not seek to have the shares transferred to him but rather sought payment of the value of five-eighteenths of the net gain that the defendants derived from the purchase of the shares; and (3), arguably, the recognition of a constructive trust was a live issue since it facilitated recovery by allowing the claimant to capture profits some or all of which he could not otherwise have captured had his claim rested directly on a breach of fiduciary obligation. These three findings explain why both the language of constructive trusteeship and the language of accountability for net profits run throughout the case. The claimant wanted the net profits but their recovery was premised, at least in part, on the recognition of a proprietary constructive trust of the shares.

It is, however, more difficult to pin down the precise event that triggered the constructive trust on which the claimant's recovery rested. Of the seven judges that found for the claimant four (Lords Hodson and Guest and Pearson and Russell LJ) appear to have adopted approaches consistent with the view that a constructive trust of the shares simply vindicated a pre-existing and continuing proprietary interest of the claimant. While Lord Neuberger did not appear to appreciate this in *Sinclair*, straining as he did to explain away *Boardman* on other grounds,¹³³ the judgments of a majority of those finding for John Phipps are (at least in form)¹³⁴ consistent with his Lordship's categorisation of cases in which fiduciary gain triggers a constructive trust. Whether the notion of an intangible proprietary base should play a role in the future classification of the cases is, however, doubtful. First, the majority view on the 'property' issue in *Boardman*, which included three of their Lordships, was inconsistent with an intangible proprietary base analysis. Secondly, the approach is inconsistent with the modern consensus against deducing outcomes by classifying a resource, particularly an intangible resource, as property.¹³⁵ Thirdly, in this context 'property' is a slippery concept with a low predictive yield; it is likely to generate uncertainty rather than clarity.¹³⁶

¹³³ *Sinclair* (n 49).

¹³⁴ An important normative distinction is that in the 'property' cases that Lord Neuberger had in mind the fiduciary's acts removed value from the principal and channelled it, via the hands of a third party, into the fiduciary's own hands: see *Re Caerphilly Colliery Company (Pearson's Case)* (1877) 5 Ch D 336 (CA); *Re Canadian Oil Works Corporation v Hay (Hay's Case)* (1874-75) 10 Ch App 593 (CA) (not cited by Lord Neuberger but cited in argument by counsel). In such cases the fiduciary's taking of gain undermines the objectives of the fiduciary relationship in a way in which acquisitive breaches of fiduciary obligation that cause no correlate loss to the principal do not.

¹³⁵ Thus, it is now accepted that whether an intangible is 'property' for a given purpose is a conclusion that depends to a significant degree on context. The important issue is not whether a resource is or has been labelled 'property' but the purpose for which it is or has been so labelled. On this functional view a resource may be 'property' for one purpose but not another. For illustrations see *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) [1373]-[1387] (Lewison J) (discussing and illustrating this point with reference to licences), *Gry v News Group Newspapers Ltd* [2011] EWHC 349 (Ch), [2011] 2 WLR 1401 [77] (Vos J) ('It is sometimes convenient to regard actions brought to protect commercially confidential information . . . as intellectual property claims. That does not mean they will be regarded as such for all purposes'), *Phillips v News Group Newspapers Ltd* [2012] UKSC 28, [2013] 1 AC 1 [20] (Lord Walker) (confidential information may be 'intellectual property' for the purpose of the Senior Courts Act 1981, s 72, even though in general it is not property in a strict sense).

¹³⁶ See A Hicks, 'Constructive Trusts of Fiduciary Gain: *Litter* Revived?' [2011] Conv 62, 67-68.

Wilberforce J, on the other hand, appeared to view the negotiations for the shares as trust actions. The recognition of a constructive trust was thus presented in a manner that was consistent with a line of cases in which the fiduciary's gain was, in line with his undertaking to further a particular objective of his principal, deemed to have been acquired for his principal in furtherance of that objective. This would have provided an uncontroversial foundation for the constructive trust in *Boardman* were it not for the fact that this aspect of the analysis of Wilberforce J was inconsistent with the evidence and rightly undermined in the appeals.

The approaches of Lord Cohen and Lord Denning MR are less clear in terms of the foundations on which they rested the constructive trust. By rejecting the foundations of the agency and property approaches, both approached the matter in a manner that was more consistent with the recognition of the principle that a mere breach of fiduciary obligation is sufficient to trigger a constructive trust. However, the speech of Lord Cohen and the judgment of Lord Denning should, nevertheless, be interpreted more restrictively. 'Property', albeit in some imprecise and qualified sense, was always in the background and both thought the claimant had been deprived of an opportunity or benefit or 'property' of some kind. A restrictive interpretation would also avoid the disservice of attributing to two eminent equity judges the recognition of a constructive trust, without discussion of the point or consideration of the relevant authorities, on grounds that were controversial if not impossible to square with existing principle. The problem with restricting proprietary relief by reference to the concept of 'opportunity', however, is that (like 'property') it involves a degree of artifice and is somewhat uncertain.¹³⁷

In the end analysis, *Boardman* was a case with peculiar facts that was pleaded in a peculiar way.¹³⁸ This, it seems, led to the recognition of divergent (though equally peculiar) constructive trust triggers, none of which were entirely satisfactory. Perhaps more importantly, although there was no consensus as to the constructive trust trigger in *Boardman*, the above analysis makes it possible to identify what did *not* trigger the constructive trust: a mere breach of fiduciary obligation. Along with *Keech v Sandford*¹³⁹ and *Tyrrell v Bank of London*,¹⁴⁰ *Boardman* has been taken by some to form a spine of authority, extending over three centuries, which supports the principle that the mere acquisition of gain in breach of fiduciary obligation triggers a constructive trust.¹⁴¹ The present article completes the removal of the whole of that spine.¹⁴²

137 *FHR European Ventures* (n 130) [84] (Ietheron C).

138 It is important not to underestimate the impact of the written and oral arguments of counsel on judicial reasoning; see R Buxton, 'How the Common Law Gets Made: Hedley Byrne and Other Cautionary Tales' (2009) 125 LQR 60.

139 (1726) Sel Cas Ch 61, 25 ER 223.

140 (1862) 10 HL Cas 26, 11 ER 934 (HL).

141 See e.g. *Reid* (n 41) 332, 338; Lord Peter Millett, 'Bribes and Secret Commissions Again' [2012] CLJ 583, 605–11.

142 As to *Keech* see A Hicks, 'The Remedial Principle of *Keech v Sandford* Reconsidered' [2010] CLJ 287. As to *Tyrrell*, see P Watts, 'Tyrrell v Bank of London – An Inside Look at an Inside Job' (2013) 129 LQR 326, especially the forceful critique of Lord Peter Millett's analysis of *Tyrrell* at 552–56.