13. Constructive trusts – secret profits

Fiduciary making unauthorised profits

Reading: Hudson, sections 12.5

(a) The basis of liability: avoidance of conflicts of interest
Keech v. Sandford (1726) 2 Eq Cas Abr 741, per Lord King LC:
“This may seem hard, that the trustee is the only person of all mankind who might not have [the trust property]; but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease …”

Bray v Ford [1896] AC 44, [1895-99] All ER Rep 1009, 1011, per Lord Herschell:
“It is an inflexible rule of the court of equity that a person in a fiduciary position … is not, unless otherwise expressly provided [in the terms of the that person’s fiduciary duties], entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as had been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule.”

See, e.g. Parker LJ in Bhullar v Bhullar [2003] 2 BCLC 241, para [17] referring to the “ethic” in these cases.

(b) The leading case
Boardman v. Phipps [1967] 2 AC 46

(c) The defence of authorisation and the issue as to who may authorise secret profits
Regal v Gulliver [1942] 1 All ER 378 (directors may not authorise other directors)
Queensland Mines v. Hudson (1978) 18 ALR 1; (1979) 42 MLR 771
Industrial Development Consultants v Cooley [1972] 2 All ER 162

The corporate opportunity doctrine

(a) Authorisation predicated on appropriate disclosure
Regal v Gulliver [1942] 1 All ER 378 (directors may not authorise other directors)
Queensland Mines v. Hudson (1978) 18 ALR 1; (1979) 42 MLR 771

(b) Where there was no maturing business opportunity
Island Export Finance Ltd v Umunna [1986] BCC 460
Balston v Headline Filters Ltd [1990] FSR 385

(c) Where there is an opportunity and insufficient disclosure is made
Industrial Development Consultants v Cooley [1972] 2 All ER 162
Crown Dilmun v Sutton [2004] 1 BCLC 468