Book Section:

Nolan, Richard orcid.org/0000-0002-7134-5124 (2012) Regal (Hastings) Ltd v Gulliver (1942). In: Landmark Cases in Equity. Hart Publishing Limited , Oxford , pp. 499-528.

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Regal (Hastings) Ltd v Gulliver (1942)

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A. INTRODUCTION

ALMOST 70 YEARS have passed since the House of Lords' decision in *Regal (Hastings) Ltd v Gulliver*,[1] and over 40 years since it figured so prominently in *Boardman v Phipps*,[2] yet little is known about the very strange course of the proceedings in *Regal*. At first instance, and in the Court of Appeal, *Regal* was argued and decided as a case at common law for negligence, money had and received, or misfeasance. It was not treated as a case in equity, let alone a leading case in equity, until it reached the House of Lords. Yet the facts found by the trial judge make it as plain as could be that *Regal* was a case where the defendant directors had material conflicts of duty and interest. Strangely, these conflicts were never presented in argument as the basis for a decision. Instead, the House of Lords ultimately decided the case by applying in a perfectly orthodox fashion the principle that a fiduciary may not make an unauthorised profit out of his position. And the highly unsatisfactory course of the proceedings demonstrates the need for this principle to support the rules governing a fiduciary's conflict of duty and interest, and the goals served by those rules. The directors in *Regal* were far from the innocent victims of harsh law rigidly applied.

In order to establish and understand these points, it is vital to go back into the records of the case—the pleadings and other documents, and the judgments of the High Court and the Court of Appeal—which are still preserved in the Library of the House of Lords. The judgments of the High Court and the Court of Appeal in *Regal* have never been reported,

[1] *Regal (Hastings) v Gulliver* [1942] 1 All ER 378, [1967] 2 AC 134n (HL). Citations in subsequent footnotes are to the Official Reports.

[2] *Boardman v Phipps* [1967] 2 AC 46 (HL).

despite the importance of the case.[3] Yet to read a final appellate decision in isolation from the proceedings and judgments in the lower courts is to invite misunderstanding, and all the more so in a case such as *Regal* where House of Lords reversed the decisions of both the High Court and the Court of Appeal. The exigencies of wartime may account for the lack of reporting. The writ which began the *Regal* case was issued on 15 December 1939, just over three months into the Second World War, and the case was heard in war-torn London. Indeed, the oral judgment of the High Court in *Regal* was interrupted by an air raid.[4] Yet the connected case of *Luxor (Eastbourne) Ltd v Cooper* is reported at all of its stages, in the King's Bench Division, the Court of Appeal and the House of Lords.[5] But whatever the explanation for this lack of reporting, and it is unlikely ever to be known, facts come before judgments, whether reported or unreported; and the facts of *Regal* merit careful examination.

B. FACTS

The plaintiff company, Regal, owned and operated a freehold cinema in Hastings. Regal was part of a group that ran several cinemas on the South Coast of England in the 1930s. (My mother, who was growing up in Sussex at that time, was a regular patron of the Regal in Littlehampton.) Together, these cinemas were known as the Bentley Circuit, after Mr Walter Bentley, who was the leading light in the business, managing director of Regal and its majority shareholder.

In 1935, as the threat of another war in Europe was growing, business was still good for Regal, and it wished to acquire leases of two other local cinemas, the Cinema de Luxe, Hastings, and the Elite Cinema in

[3] It appears that the judgment of the Court of Appeal in *Regal* was examined by the Supreme Court of Canada in *Peso Silver Mines Ltd v Cropper* [1966] SCR 673, 682–83, (1966) 58 DLR (2d) 1, 8–9 (Cartwright J). But that is the only reference to a consideration of the earlier proceedings discovered so far. Some other prominent equity cases have suffered a similar fate of much comment based on limited and inadequate reports. Two such are *Jacobus Estates Ltd v Marler* (1913) 114 LT 640n (HL) and *Nocton v Lord Ashburton* [1914] AC 932 (HL). In *Jacobus*, even the decision of the House of Lords itself is inadequately reported. Again, the full text of the pleadings, arguments, judgments and speeches in those cases are available in the Appeal Books of the House of Lords.

[4] See the judgment of Wrottesley J, reported in the documents put before the House of Lords (the 'Appeal Book'), 77. The *sang-froid* of the judge and the reporter is beautifully illustrative of the times. There is simply an italicised insertion within the judgment: '*At this point an air raid warning sounded and the Court adjourned*.' After that, the judgment resumed with the words: 'I think when the interval occurred I had reached the point that …' The court kept calm and carried on.

[5] *Luxor (Eastbourne) Ltd v Cooper* [1939] 1 All ER 623 (KBD); [1939] 4 All ER 411 (CA); [1941] AC 108 (HL).

St-Leonards-on-Sea. Mr Bentley had been looking to sell his interests in the business for a couple of years before that, but no acceptable deal had yet materialised.[6] So Regal intended to run all three cinemas when the acquisition of the two new leases was first mooted, but the possibility of selling all the cinemas (including the Cinema de Luxe and the Elite) was always, and explicitly, a possibility.[7]

The directors of Regal did not want to expose the company to the risks of running the Cinema de Luxe and the Elite, so it formed a subsidiary company, Hastings Amalgamated Cinemas Ltd ('Amalgamated'), with a nominal capital of 5,000 £1 shares, to take a lease of those two cinemas.[8] As the speeches in their Lordships' House make clear, the original scheme was for only 2,000 of these shares to be issued and paid up in cash (others were to be issued for services rendered), but the owner of the cinemas declined to grant a lease to Amalgamated if it only had a cash capital of £2,000. There were two possible ways forward which were acceptable to the lessor of Cinema de Luxe and the Elite. One possibility was for the directors of Regal to guarantee the rent payable by Amalgamated in respect of the two cinemas. Unsurprisingly, the directors were loath to do this, and they certainly had no duty to offer such a guarantee. The other possibility was to put £5,000 cash capital into Amalgamated. Though it later became a matter of some dispute, it was held that Regal could not afford to put more than £2,000 into Amalgamated. So four of Regal's directors and its solicitor each subscribed for 500 shares in Amalgamated, and the fifth director found some outsiders to take up another 500. This would provide a total of £5,000 in cash capital for Amalgamated: £2,000 from Regal, plus six tranches of £500.

At the time these arrangements were being made, London and Southern Super Cinemas Ltd made an offer to acquire the freehold of the Regal Cinema in Hastings and the Luxor Cinema in Eastbourne, as well as the two leasehold cinemas in Hastings once they had been acquired by Amalgamated.[9] The motivation for that offer may well have been the sudden death, on 11 September 1935, of Mr Walter Bentley, which would have sent a signal to other cinema operators that the businesses would likely be put up for sale.[10] In the event, this offer was considered by the boards of both Regal and Hastings Amalgamated on the same day—2 October 1935—and at

[6] Appeal Book, 72C–E (Wrottesley J).

[7] Appeal Book, 73E–74D (Wrottesley J); Case for the Appellants in the House of Lords, [10]–[14].

[8] Appeal Book, 74B–C, 76D–77A (Wrottesley J).

[9] Appeal Book, 79E–81E (Wrottesley J); Case for the Appellants in the House of Lords, [28]–[30]. These negotiations later formed the subject matter of *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108.

[10] Appeal Book, 80C–E (Wrottesley J). The directors of Luxor were the same individuals as the directors of Regal.

the same meetings the boards passed the necessary resolutions to capitalise Amalgamated as described above.[11] On 7 October 1935, Amalgamated acquired leases of the Cinema de Luxe and the Elite,[12] and the next day, the offer from London and Southern was accepted, subject to contract, by the solicitor acting for both Regal and Amalgamated.[13] However, just over two weeks later, on 24 October 1935, the shares in Regal, together with the 3,000 shares in Amalgamated which were not owned by Regal, were sold to another bidder, Oxford & Berkshire Cinemas Ltd.[14] The directors had apportioned part of the total consideration received from Oxford & Berkshire to the sale of shares in Amalgamated,[15] and this apportionment meant that each defendant made a profit of £1,402 1*s* 8*d* from the sale of his 500 shares in Amalgamated.[16]

Under its new owners, Regal sued its five former directors and its former solicitor. The action against the solicitor, Mr Garton, failed, as he had purchased shares in Amalgamated with the consent of Regal's board. The action against four of the directors (Messrs Bobby, Griffiths, Bassett and Bentley) succeeded finally in the House of Lords, having failed in both the High Court and the Court of Appeal. These four were the directors who had taken the shares in Amalgamated on their own behalf. The fifth and final director, Mr Gulliver, did not take shares for his own benefit but as nominee for others, so the House of Lords held that he had made no profit personally for which he could be accountable to Regal.

C. THE STRANGE COURSE OF PROCEEDINGS: PLEADINGS, COUNSEL AND ARGUMENTS

The clearest indication that there was something very odd about the start of the proceedings in *Regal* comes, ironically, at the very end of those proceedings, in the final speech given by Lord Porter.[17] He noted that Regal's pleaded case was never drawn as a claim for an account of profits in equity,

[11] Appeal Book, 82B–84E (Wrottesley J); Case for the Appellants in the House of Lords, [31]–[32].

[12] Case for the Appellants in the House of Lords, [35].

[13] *Ibid*, [35].

[14] This is the name given to the purchaser company in the *Regal* case itself, but in the related case of *Luxor (Eastbourne) Ltd v Cooper* (n 9) 133, Lord Wright appeared to indicate that the sale was made to a company called 'Union Cinemas Ltd'. Lord Wright might, perhaps, have been referring to the company that bought Luxor (Eastbourne) Ltd, though he in fact made no distinction between Luxor and Regal.

[15] Appeal Book, 83–84, 89–90 (Wrottesley J); 108–09, 115 (Lord Greene MR); Case for the Appellants in the House of Lords, [36].

[16] Case for the Appellants in the House of Lords, [36]–[37].

[17] *Regal* (n 1) 157–58. There is also a hint in the speech of Lord Russell, *ibid*, 143.

but as three common law claims. The prayer for relief in the statement of claim in fact made three *alternative* claims:

(a) a claim for damages for negligence of £8,142 10*s*;[18]
(b) a claim for £8,412 10*s* as money had and received by the defendants to the plaintiff's use; and
(c) a claim of £8,412 10*s* damages for misfeasance against the sixth defendant, the solicitor Mr Garton.[19]

It is hardly surprising, therefore, that the trial of the case in 1940 was listed and heard in the King's Bench Division, rather than the Chancery Division. The whole tenor of the case, before it reached the House of Lords, was that of an action at common law. Viscount Sankey noted that '[a]s to the duties and liabilities of those occupying such a fiduciary position, a number of cases were cited to us which were not brought to the attention of the trial judge.'[20] What in fact happened was stranger still. Neither the High Court nor the Court of Appeal cited any authority whatsoever: a reader will search the judgments in those courts in vain for the name or facts of a single authority. In both the King's Bench Division and in the Court of Appeal, *Regal* was decided on its facts and in accordance with what must have been taken as clearly settled principle. It is a reminder in the strongest terms, if one were needed, of just how the course of a case, and the law it considers and creates, is shaped by the way the case is presented and argued by counsel.

Counsel for Regal at trial was the appropriately named leading advocate, and former Labour Attorney-General, Sir Patrick Hastings KC. Beatrice Webb described him as 'an unpleasant type of clever pleader and political *arriviste*, who jumped into the Labour Party just before the 1922 election, when it had become clear that the Labour Party was the alternative government and it had not a single lawyer of position attached to it'.[21] His Conservative former friends were no kinder.[22] But whatever his political beliefs, and even if his political motivations were base, they at least serve to remind us that we should not view the past through rose-tinted spectacles. More significantly, perhaps, and though he was seen as a 'lawyer of position', even by his critics, it is fair to say that he was not a Chancery lawyer: his famous cases involved mainly crime, fraud, libel.[23] All of these require great forensic skill and mastery of cross-examination, but not much knowledge of equity.

[18] This figure may well be a misprint in the prayer for relief, instead of £8,412 10*s*.
[19] Lord Porter's summary of the claims (*Regal* (n 1) 157–58) is slightly misleading in regard to the third claim, which was a claim for misfeasance only against Mr Garton, not against all the defendants. There was also an irrelevant fourth additional claim for £233 15*s* against Mr Garton for money had and received to the use of the plaintiff.
[20] *Regal* (n 1) 137.
[21] N and J Mackenzie (eds), *The Diary of Beatrice Webb, Volume 4 (1924–1943)* (London, Virago, 1985) 19–20.
[22] P Hastings, *The Life of Patrick Hastings* (London, Cresset Press, 1959) 114.
[23] *Ibid.*

How much use Sir Patrick could make of his skills as an advocate in a case such as *Regal* was limited by the facts, the pleadings and the law. The state of company law at the time also limited the scope for success in a pleaded case of negligence. In 1935 when the events at issue happened, and equally in 1940 when they were under investigation at trial, the standard of care and skill expected of directors was taken to be the very relaxed standard established in *Re Brazilian Rubber Plantations & Estates Ltd*[24] and *Re City Equitable Fire Insurance Co*[25]: in the performance of his duties, a director did not need to exhibit a greater degree of skill than might reasonably be expected from someone with his knowledge and experience. Indeed, this standard began to rise only decades later.[26] The low threshold of liability meant that it was very difficult—in practical terms, impossible—to show the directors had been negligent in failing to obtain better terms for Regal in the acquisition of the Cinema de Luxe and the Elite Cinema. Given this concatenation of the facts, the pleadings and the law, the case of negligence as advanced by Sir Patrick Hastings was doomed to fail. And fail it did. The action for money had and received fared no better. The trial judge, Wrottesley J, took the view that the claim for money had and received could succeed on proof of fraud—that is, if the defendants were shown to have made their respective profits 'corruptly'. This was fatal to the claim for money had and received. First, there was an express refusal by the trial judge to find fraud as a matter of fact.[27] Secondly, the pleaded case did not allege fraud, which precluded any finding of fraud, though it was left to the Court of Appeal to re-assert this rule.[28]

Leading counsel for the defendants at trial were Mr AT Denning KC, Mr Wynn Parry and Mr Cartwright Sharp KC, with Mr TF Davis appearing for the fifth defendant, Harry Bentley. It is not often realised that Lord Denning, as he later became, appeared for Mr Gulliver both in the High Court and the Court of Appeal, before wartime duties took him elsewhere so that he could not appear in the case before the House of Lords. Clearly, the defendants thought it worthwhile to retain very eminent counsel, as they might when faced with the reputation of Sir Patrick Hastings on the other side, though they could not then have realised quite what prominent careers on the bench lay before both Mr Denning and Mr Wynn Parry. Both of them surely would have seen the weakness of the plaintiff's arguments:

[24] *Re Brazilian Rubber Plantations & Estates Ltd* [1911] 1 Ch 425.

[25] *Re City Equitable Fire Insurance Co* [1925] Ch 408.

[26] See *Norman v Theodore Goddard* [1991] BCLC 1028 (Ch D); *Re D'Jan of London Ltd, Copp v D'Jan* [1994] 1 BCLC 561 (Ch D); *Equitable Life v Bowley* [2003] EWHC 2263 (Comm), [2004] 1 BCLC 180 (QBD); and, now, Companies Act 2006, s 174.

[27] Appeal Book, 94 (Wrottesley J, summing up).

[28] Appeal Book, 119 (du Parcq LJ). The slightly earlier comments of du Parcq LJ (on the same page) about the absence of fraud were cited in the House of Lords by Viscount Sankey: *Regal* (n 1) 136. See now CPR 16 PD 8.2.

one may have become a judge of the King's Bench Division, but he was most certainly aware of equitable doctrine; the other became a judge of the Chancery Division. But neither of them had to point out to the plaintiff, or to the court, the inadequacies of Sir Patrick's presentation of the case.

In the Court of Appeal and the House of Lords, Sir Patrick Hastings' place was taken by Mr AT Miller KC. But only in the House of Lords was Regal's argument founded squarely on breach of fiduciary duty: counsel for Regal set out *in extenso* the authorities on breach of fiduciary duty for the first time only in their written Case for the House of Lords.[29]

One other point emerges clearly from that written case, which, if better known, would have served to quiet much of the speculation in subsequent years. Regal's case 'was not a case of an investment being offered to Regal from some outside source and bona fide rejected by Regal'.[30] This point was explicitly made in reaction to a part of the judgment of Lord Greene MR in the Court of Appeal, where he made the following remarks:[31]

> To say that the Company was entitled to claim the benefit of those shares [in Amalgamated] would involve this proposition: Where a Board of Directors considers an investment which is offered to their company and *bona fide* comes to the conclusion that it is not an investment which their company ought to make, any director, after that Resolution is come to and *bona fide* come to, who chooses to put up the money for that investment himself, must be treated as having done it on behalf of the Company, so that the Company can claim any profit that results to him from it. That is a proposition for which no particle of authority was cited; and goes, it seems to me, far beyond anything that has ever been suggested as to the duty of directors, agents, or persons in a position of that kind.

Regal's case, in other words, as presented in the House of Lords, where questions of fiduciary duty were finally and explicitly in issue, never even purported to comprehend facts such as those later at issue in *Peso Silver Mines Ltd v Cropper;*[32] and the alleged contradiction between the two cases is at most apparent, not real.[33]

The case for Regal was in fact put much more narrowly: this was a case where the directors' profit stemmed from two key facts which made the profit attributable to their position in a sufficiently direct and close fashion

[29] Case for the Appellants in the House of Lords, [44]–[48]. The question of liability of the directors for profits was rather briefly canvassed in the Court of Appeal (Appeal Book, 111 and 115–17, Lord Greene MR), but the treatment of the issue is without any authority and is deeply problematic for other reasons, namely, the mischaracterisation of the case as involving simply the rejection of an opportunity by Regal that could consequently be taken by the directors (see below and the text to n 31), and the confusion of liability for the directors' profits with some breach of a duty, owed to Regal, to acquire the shares in Amalgamated (addressed in the text to n 62 and following).

[30] Case for the Appellants in the House of Lords, [46].

[31] Appeal Book, 116; Case for the Appellants in the House of Lords, [45].

[32] *Peso Silver Mines Ltd v Cropper* [1966] SCR 673, (1966) 58 DLR (2d) 1.

[33] See further the text to n 136 and following.

as to render them accountable to the company for the profit.[34] The two facts were as follows. First of all, '[i]t was only because the Respondents [defendants] controlled both Regal and [Hastings] Amalgamated that they were able to allot shares in [Hastings] Amalgamated as they were minded',[35] and so were able to sell those shares at a profit. Secondly, it was vital to the defendants that Regal remained involved in the transactions (the capitalisation of Amalgamated and the acquisition of the leases of the Cinema de Luxe and the Elite Cinema) through which the defendants made their profits. The purchase price for the shares in Regal and Amalgamated was calculated on the basis that the freehold cinema owned by Regal was worth £77,500 as a going concern, free from encumbrances, and the cinemas leased at a rack rent by Amalgamated were worth £15,000 on the same basis.[36] The leases of the Cinema de Luxe and the Elite Cinema held by Amalgamated, to which £15,000 value was ascribed, had, however, been acquired only a few days before the share sale for no capital premium: they were simply rack rental leases.[37] It is hard, indeed impossible, to see how such an uplift in capital value of £15,000 over a few days could be achieved other than by the leases becoming part of a wider set of valuable business assets—including, crucially, Regal's assets.[38]

So the notion that *Regal* concerned the bona fide rejection of an opportunity followed by the directors' own personal and profitable realisation of that opportunity is misplaced and confusing. To represent the case in those terms—as a case where there was simply an opportunity to subscribe for 3,000 shares in Amalgamated, which was rejected by Regal but taken by Regal's directors and solicitor to their profit—is simply wrong. Other factors— including the directors' control of both Regal and Amalgamated, as well as the continued involvement of Regal in the scheme—were necessary, indeed crucial, causes of the profits in question. Lord Russell alluded

[34] *Regal* (n 1) 153 (Lord Macmillan). The requirement of a close connection between position and profit importantly serves to constrain the scope of the 'no unauthorised profits' rule, and so goes to meet some of the concerns about overly broad application of the rule. See generally in this regard, M Conaglen, *Fiduciary Loyalty* (Oxford, Hart Publishing, 2010) 209.

[35] Case for the Appellants in the House of Lords, [46].

[36] Appeal Book, 83–84, 89–90 (Wrottesley J); 108–09, 115 (Lord Greene MR); Case for the Appellants in the House of Lords, [36]. This apportionment is very similar to the division of the total consideration in the earlier proposal to sell the cinemas themselves (rather than shares in the companies that owned them) to London & Southern Super Cinemas Ltd: *Regal* (n 1) 142 (Lord Russell).

[37] Re-amended Statement of Claim, [8].

[38] Lord Russell, like the trial judge and the Court of Appeal, took a benign—perhaps overly benign—view of this apportionment and its propriety: *Regal* (n 1) 142. But that does not affect the point made here, that even if £15,000 is properly attributable to the leases held by Amalgamated, that value could only have arisen because those leases were now, but not previously, operated in conjunction with Regal's assets.

to this point, but unfortunately without spelling out the reasons as clearly as they appear from the background documentation to his decision:[39]

> In his judgment Lord Greene MR, stated that a decision adverse to the directors in the present case involved the proposition that, if directors bona fide decide not to invest their company's funds in some proposed investment, a director who thereafter embarks his own money therein is accountable for any profits which he may derive therefrom. As to this, I can only say that to my mind the facts of this hypothetical case bear but little resemblance to the story with which we have had to deal.

And there is, in fact, another good reason why *Regal* is very different from *Peso*. This is an issue raised in the pleadings of *Regal* but never developed in any of the judgments: the question of authorisation for the directors to make the profit. But before considering this omission, there is the matter of what was said in the various judgments.

D. THE UNREPORTED JUDGMENTS

The first and most striking point is the wrong turn taken right at the start of Wrottesley J's judgment:[40]

> [I]n order to succeed the Plaintiff Company must show that the Defendants both ought to have caused and could have caused the Plaintiff Company to subscribe for these shares and that the neglect to do so caused a loss to the Plaintiff Company. Short of this, if the Plaintiffs [*sic*] can establish that though no loss was made by the Company yet a profit was corruptly made by the Directors and the Solicitor, then the Company can claim to have that profit handed over to the Company, framing the action in such a case for money had and received by the Defendants to the Plaintiffs' use.

It is hardly surprising, as noted earlier, that the directors escaped liability for negligence, given the state of directors' duties of care and skill at the time (quite aside from whether Regal was able to subscribe for the shares). It is equally unsurprising that a claim against the directors for money had and received also failed, as fraud had to be shown to establish a common law entitlement to the directors' profits as money had and received to the plaintiff's use, and fraud—that the directors made the profits 'corruptly'—was neither pleaded nor proved.[41]

Wrottesley J certainly did not think that the directors had been negligent in failing to investigate other sources of finance which would have put Regal in funds to subscribe for 5,000 shares in Amalgamated rather than

[39] *Regal* (n 1) 152–53.
[40] Appeal Book, 71C–D. See also Appeal Book, 111 (Lord Greene MR).
[41] See the text to nn 24–28.

2,000. The facts, however, were more equivocal than might be supposed. Wrottesley J was very ready to accept the directors' contention that funding from Luxor (Eastbourne) Ltd, a connected company, would have been inappropriate, as Regal and Luxor had no community of commercial interest, operating in markets (Hastings and Eastbourne) which were so far apart.[42] But surely, even in the 1930s, towns just 18 miles apart were not in utterly different commercial worlds. And there was clearly enough community of interest from the perspective of a potential purchaser of cinema businesses that, at the very same meeting where the board of Amalgamated rejected the idea of finance from Luxor, it was noted that the company's business was being marketed jointly with those of Regal and Luxor.[43] Similarly, the judge was willing to dismiss the possibility of bank funding for Regal (even though none was ever sought) on the evidence of Regal's bank manager, and to dismiss the evidence of a chartered accountant called as witness for Regal;[44] and the point was thought so clear by the Court of Appeal that it questioned whether there had really been any need to hear from the bank manager.[45]

The baleful influence of negligence reasoning may be discerned distinctly in two other ways. First, the fact that Regal was held unable to afford more than 2,000 shares in Amalgamated necessarily implied that the directors could not have failed in their duties of care and skill by failing to cause Regal to purchase all 5,000 issued shares in Amalgamated.[46] Indeed, seen from this perspective, the directors (and Mr Garton) had positively acted in Regal's best interests by purchasing the balance of 3,000 shares, because that was the only plausible means of ensuring that Amalgamated was in a position to satisfy the landlord of the Cinema de Luxe and the Elite Cinema as to its financial position and so acquire a lease of each those cinemas.[47] (It was held—rightly—that the directors had no duty to give a guarantee of rents payable under those leases, which was the only other viable way of satisfying the landlord.[48]) The second influence of negligence reasoning is that the actions of various directors are said to have inflicted no recoverable loss on Regal. Notwithstanding that these directors clearly were, at times, oblivious to the fact that their duty to act in the best interests of the company meant the best interests of *all* shareholders in the company,[49] and they did not distinguish adequately between the various interests of different

[42] Appeal Book, 83E–G.
[43] Appeal Book, 83–84 (Wrottesley J). See also *Luxor (Eastbourne) Ltd v Cooper* (n 9).
[44] Appeal Book, 89B–E, 90G, 94B.
[45] Appeal Book, 112–13 (Lord Greene MR).
[46] Appeal Book, 112, 114–15 (Lord Greene MR).
[47] Appeal Book, 87 (Wrottesley J).
[48] Appeal Book, 113–14 (Lord Greene MR).
[49] Appeal Book, 85, 90 (Wrottesley).

companies,[50] no liability resulted from these slips. The tacit assumption is that, in the circumstances, loss was the gist of the action. And, of course, in so far as the action was a claim for negligence, that would be entirely correct.[51]

The trial judgment also preserves an interesting contrast to the duties of Regal's directors: that was the duty of Mr Harry Bentley, one of the defendant directors, as administrator of his late father's estate. Harry Bentley's father, Walter Bentley, had been the leading light in Regal until his death on 11 September 1935, shortly before the material events in the case. Initially, Harry Bentley was opposed to the proposal that directors of Regal should personally take shares in Amalgamated and allocate a value of £15,000 to the leases that were to be acquired by Amalgamated when apportioning the price London & Southern proposed to pay for all the four cinemas it wished to acquire from Regal, Amalgamated and Luxor (Eastbourne) Ltd.[52] He objected that 'the allocation will give the Directors and the Solicitor a personal advantage which rightly belongs to the Company [ie, Regal] and which will cause a serious loss to his father's estate'.[53] This objection was later withdrawn, when Harry Bentley had apparently been advised by his lawyers that it was his best course of action as administrator of his father's estate to participate in the share issue by Amalgamated.[54] Indeed, Wrottesley J thought that Harry Bentley 'did no more than his duty as Administrator in falling in with the proposals of those other Directors'.[55] Now it is logically and legally consistent to say, on the one hand, that the directors had taken sufficient action to discharge their duty to Regal to investigate the opportunity for the company to subscribe for another 3,000 shares in Amalgamated, but, on the other hand, that Harry Bentley still had a duty as administrator of his late father's estate to pursue the like opportunity to subscribe for 500 shares in Amalgamated. Nevertheless, that consistency does depend crucially on the directors having made sufficient, if ultimately unsuccessful, efforts on behalf of Regal to acquire and pay for the 3,000 shares. It is impossible not to wonder whether a little more effort by the directors might have been in order when lawyers were firmly advising one of them that he should pursue the opportunity in another capacity.

[50] Appeal Book, 88 (Wrottesley J). See also the text to n 27 and following.

[51] C Walton (ed), *Charlesworth & Percy on Negligence*, 12th edn (London, Sweet & Maxwell, 2010) [1-34], [5-01]–[5-41].

[52] Appeal Book, 85–86 (Wrottesley J).

[53] Appeal Book, 86D (Wrottesley J), quoting from a letter of 3 September, 1935, written by solicitors (Messrs Bulcraig & Davis) on behalf of Harry Bentley. See also the Re-amended Statement of Claim, [11].

[54] Appeal Book, 89, 91 (Wrottesley J).

[55] Appeal Book, 91C.

The High Court also considered the case for Regal on the basis that the directors had 'corruptly' made their profit and should pay it over to the company.[56] What the court meant by 'corruptly' is never spelt out, but it appeared to mean either that the directors intended to deprive the company of a profit (which was an argument going nowhere, given that fraud had not been proven),[57] or that the directors (and Mr Garton) had a 'practical certainty' of their eventual profit at the time they bought their shares in Amalgamated.[58] Notwithstanding the very tight timing of events,[59] Wrottesley J did not think the directors' profit could be treated as a 'practical certainty' on the fateful day, 2 October 1935, when they bought their shares in Amalgamated and committed whatever breach of duty, if any, there might be.[60] This does seem, admittedly at the distance of over 70 years, a very generous finding of fact: London & Southern had made an offer for the cinemas by 2 October 1935, and, as very soon became clear, Oxford and Berkshire was interested in them; and if either transaction proceeded, the directors stood to make their profit. (It cannot be imagined that a particular profit derived from a particular purchaser had to be in mind for the profit to be a 'practical certainty'.) So findings of fact generous to the defendants were judged by a criterion of liability that was very narrow; it was hardly surprising, therefore, that the defendants emerged unscathed. All very different from the House of Lords, where questions of good faith or 'corrupt' behaviour were irrelevant to the defendants' ultimate liabilities.[61]

In the Court of Appeal, Lord Greene MR took the case in the alternative: either it was about misfeasance by the directors in failing to realise for Regal the opportunity to buy the extra 3,000 shares in Amalgamated, or else it was about the directors (and Mr Garton) having bought the 3,000 shares while acting in the matter of their office.[62] Both claims, according to Lord Greene, relied crucially on the existence of a duty on the directors to acquire the 3,000 shares in Amalgamated for Regal.[63] So even though the second of the alternatives looks like a claim based simply on abuse of position, it was not: it was a claim based on the directors' failure to perform their duties and thereby profit from their failure. Lord Greene firmly followed Wrottesley J in holding that the directors no longer had

[56] See the text to n 40.
[57] Appeal Book, 94 (Wrottesley J, summing up). See also *ibid*, 90F, as regards Mr Bobby.
[58] Appeal Book, 85 (Wrottesley J).
[59] See the text to n 11.
[60] Appeal Book, 87. Lord Greene MR in the Court of Appeal agreed: *ibid*, 107.
[61] *Regal* (n 1) 144 (Lord Russell).
[62] Appeal Book, 111.
[63] *Ibid*, 111.

any such duty by the time they invested in Amalgamated,[64] so both claims were bound to fail.

As regards the first claim, Lord Greene thoroughly investigated the financial position of Regal and concluded that the directors had made a *bona fide* decision to cause Regal to acquire just 2,000 shares in Amalgamated, and that terminated any duty they had in respect of the remaining 3,000 shares. Indeed, Lord Greene found the directors' reasons very convincing. As regards the second claim, Lord Greene re-emphasised that the directors would be accountable only if they had a duty to acquire the 3,000 shares in Amalgamated for Regal at the time they in fact acquired the shares for themselves. They would still have had such a duty if, for example, they had rejected the opportunity on behalf of Regal in bad faith or dishonestly. But that was not so, and the claim failed. So, for Lord Greene, the case turned crucially on that duty, and whether the directors actually breached it: he did not see the case in terms of a conflict of duty and interest, just in terms of breach (or not) of a duty to acquire the 3,000 shares in Amalgamated. To put the point in more general terms, he did not see the case in terms of the risk of harm but in terms of the infliction of harm. That is hardly surprising given the flawed way in which the case was put to him. But it omits to address fiduciary law and its key concern, as will be seen below.

Mackinnon LJ agreed with the Master of the Rolls, but chose to focus exclusively on the directors' alleged negligence in failing to procure the 3,000 shares in Amalgamated for Regal.[65] Again, it is hardly surprising that claim failed given the prior findings of fact. Du Parcq LJ confined himself to agreement with the Master of the Rolls, and to some observations on the pleading and proof of fraud.[66]

These, then, are the judgments which formed the flawed but inescapable background to the case when it reached the House of Lords by special leave of their Lordships.[67] The whole case had been presented in the lower courts as a failure by the directors to act in a proper way. The emphasis was always on the infliction of harm, even though the harm, if inflicted deliberately or 'corruptly', might entitle Regal to the profits made by the directors and Mr Garton. And the findings of fact were such that the allegations of failure to act and resultant harm, let alone deliberate harm, could only fail. The case was never presented as a failure by the directors to refrain from action in certain circumstances where there was the risk of harm because of the directors' conflict of duty and interest. Even in written arguments for the House of Lords, counsel for Regal submitted only that the directors had made a profit from their position and were therefore, and without proof

[64] *Ibid*, 111–15.
[65] Appeal Book, 117–18.
[66] Appeal Book, 119–20.
[67] The Court of Appeal refused leave to appeal to the House of Lords: Appeal Book, 120.

of bad faith, accountable in equity for that profit.[68] In these circumstances, the House of Lords had to approach the case as one where liability turned simply on what the directors had actually done, albeit in good faith and without negligence:[69] their Lordships had to take the case as it came before them, not as it might have been put to them. Thus it was that the decision of the House of Lords had to be founded on the directors' abuse of their position.[70] But the case could have been made very differently: there are significant omissions from the arguments as put.

E. THE STRANGE COURSE OF THE PROCEEDINGS: OMISSIONS

The most obvious omission from *Regal* is of more historical than practical interest. That is the omission of any argument founded on equitable principles until the proceedings before the House of Lords. Leading and easily accessible texts of the day were in no doubt of the existence of potential claims in equity on facts such as those of *Regal*.[71] The clearest contemporaneous statement of the law, published just a year before the issue of proceedings in *Regal*, and following earlier such statements, is in the sixteenth edition of *Palmer's Company Law:*[72]

> Directors, as we have seen, are agents of the company, and it is a well settled rule that an agent cannot, without the knowledge and consent of his principal, be allowed to make any profit out of the matter of his agency beyond his proper remuneration.

There might well have been some considerable dispute about the strength of any such argument on the facts; but it is very hard to see why the prima facie relevance of such arguments were overlooked until so late in the day. Unfortunately, it is impossible to resolve that question at this distance in time. The Appeal Books of the House of Lords contain the best evidence of counsels' various submissions in *Regal*, and the stage at which they were made; but neither the Appeal Books nor any other available evidence

[68] Case for the Appellants, particularly [5], [44]–[48]. There is, at [5], a brief and entirely unparticularised suggestion that the directors placed themselves in a position of conflicting duty and interest, but this is only an addendum to the submission that the directors made a profit from their position. Furthermore, the suggestion (so far as it exists) of a conflict is not developed at all in the rest of the Case for the Appellants.

[69] *Regal* (n 1) 136–37 (Viscount Sankey), 143 (Lord Russell) and 153 (Lord Macmillan).

[70] See Conaglen (n 34) 116–17.

[71] E Vinter, *A Treatise on the History and Law of Fiduciary Relationship and Resulting Trusts together with a Selection of Selected Cases*, 2nd edn (London, Stevens 1938) 182–90; Lord Wrenbury, *Buckley on the Companies Acts*, 11th edn (London, Stevens 1930) 742; A Topham, *Palmer's Company Law*, 16th edn (London, Stevens 1938) 182–83, 195–97.

[72] Topham (n 71) 182.

record why those particular submissions were made, nor why other possible submissions were omitted or even overlooked.

Other important omissions persisted throughout the proceedings in *Regal*; and these omissions had a profound influence on the way the case came ultimately to be decided, and so on the future shape of the law. There are at least three such omissions in the arguments, and consequently in the judgments, that emerge from the much more detailed picture of the facts found both in the pleadings and in the judgments of the lower courts. Two involve significant conflicts of duty and interest. These are clear conflicts, unlike any supposed conflict between an alleged duty incumbent on the directors of Regal to arrange new finance for the company, so it could subscribe for £5,000 worth of shares in Amalgamated,[73] and the directors' self-interest in making a personal investment in Amalgamated. This supposed conflict has been the subject of much unprofitable speculation but is something of a red herring: clear findings of fact are against it.[74] The third, more easily explicable, omission involves the question of authorisation for otherwise conflicted action by the directors, something raised in the original pleadings[75] but not developed in written arguments or the judgments. A final, less important, omission concerns discretionary relief from liability by the court under section 372 of the Companies Act 1929,[76] again something raised in the pleadings[77] but not developed further in the record.

The first example of such a conflict revealed by the facts of the case concerns the original capitalisation of Amalgamated. There was a proposal that a related company, Luxor (Eastbourne) Ltd, might subscribe for the 3,000 shares in Amalgamated that were to be issued in addition to the 2,000 shares issued to Regal. That proposal was very quickly dismissed in favour of what then occurred, namely, the allotment of the 3,000 shares to Regal's directors and solicitor. The directors readily agreed that Luxor's participation would be inappropriate, given the distance from Eastbourne to both Hastings and St Leonards-on-Sea, which meant that Luxor had no real business interest in the cinemas in those two towns which Amalgamated was to acquire.[78] Now the view the directors put may well have been true—and giving effect to that view might well not have caused Regal any loss—but that is to miss the point entirely.

[73] Wrottesley J considered whether Regal might have raised money by issuing some new preference shares or by borrowing (Appeal Book, 86–87). In the Court of Appeal, Lord Greene MR was scathingly dismissive of both possibilities (Appeal Book, 112–14).

[74] *Ibid.*

[75] Defence of Gulliver, [10] and [17]; Amended Defence of Bobby, Griffiths and Bassett, [4] and [14]; Amended Defence of Bentley, [4] and [17].

[76] Companies Act 1929, s 372 was the statutory predecessor at the material times of what is now Companies Act 2006, s 1157.

[77] Defence of Gulliver, [18]; Amended Defence of Bobby, Griffiths and Bassett, [15]; Amended Defence of Bentley, [19].

[78] Appeal Book, 83E–G (Wrottesley J).

The directors of Regal were under a duty to further, as they in good faith thought most appropriate, the interests of Regal when deciding how to capitalise a company, Amalgamated, which was formed by Regal and in which Regal would be the largest single shareholder.[79] Yet there was a real risk that the performance of that duty might be compromised by their self-interest, namely, their wish to invest personally in Amalgamated. It is the existence of a non-trivial risk which invokes and justifies the fiduciary rules prohibiting unauthorised conflict of duty and interest, not the realisation of that risk or the infliction of harm.[80] It is no answer to say that the directors genuinely thought they were doing the right thing. That will satisfy their duty of good faith action; but it will not satisfy the objectively framed rules against conflicts of duty and interest:[81] again, the very reason for the rules is that the directors' subjective judgement may well be clouded—and not necessarily consciously clouded—by the existence of a countervailing interest, usually self-interest.[82]

Another, more serious, conflict of duty and interest arose from the eventual sale of the cinemas to Oxford & Berkshire Cinemas Ltd. As noted earlier,[83] the total sale price was apportioned between the shares in Regal and the shares in Amalgamated on the assumption that the leases held by Amalgamated were worth £15,000 free of encumbrances, and the lease held by Regal was worth £77,500 on the same basis. It was not entirely clear where the figure of £15,000 came from. Wrottesley J accepted that it came from a Colonel Burton and his associate, acting for the originally anticipated purchaser of the various cinemas (London and Southern Super Cinemas Ltd), and that Mr Garton accepted it on behalf of the companies, though it might have been the other way around.[84] Even if London & Southern did suggest the figure, it was the duty of the directors of Regal (and of Amalgamated) to consider whether it was appropriate, not just to

[79] This is the general duty of the directors to do what they, in good faith, believe will best further the interests of the company, as applied to the facts. The duty is well-evidenced in case law (see the summary of this duty, and of the proper purpose doctrine, in *Regentcrest plc v Cohen* [2001] 2 BCLC 81 (Ch D) [120]–[125] (Jonathan Parker J). The duty is now embodied in Companies Act 2006, s 172, though with some modifications that are immaterial for present purposes.

[80] *Ex parte James* (1803) 8 Ves 337, 345; 32 ER 385, 388 (Lord Eldon); *Bray v Ford* [1896] AC 44 (HL) 52 (Lord Herschell). See, generally, Conaglen (n 34) chs 4, 5 and 7(V). Contrary suggestions for reform have been made, inter alia, by Professor Langbein: 'Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest' (2005) 114 *Yale Law Journal* 929. For cogent criticism of these suggestions, see Conaglen (n 34) 211–13.

[81] *Ex parte James* (n 80), 345; 388 (Lord Eldon); *De Bussche v Alt* (1878) 8 ChD 286, 316 (per curiam); *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 ChD 339, 369 (Fry LJ); *Bray v Ford* (n 80) 48 (Lord Watson), 52 (Lord Herschell). See, generally, Conaglen (n 34) 66.

[82] Conaglen (n 34) chs 4 and 5.

[83] See the text to n 15.

[84] Appeal Book, 83–84, 89–90.

accept it blindly.[85] That figure, even if originally suggested by London & Southern, then found its way into an agreement for sale to a rival purchaser, Oxford & Berkshire Cinemas Ltd; and it is very difficult to see how that could have occurred unless the defendants had suggested the figure when preparing the contract with Oxford & Berkshire. (Exactly what did happen is not recorded, but the connection between the original apportionment and the final contract is clear.[86]) Equally, and again as noted earlier, the shareholders in Amalgamated had a vital interest in this apportionment. There was, therefore, a plain conflict—or, at the very least, a real sensible possibility of a conflict—between the duty incumbent on the directors of Regal as regards the apportionment and their self-interest in the outcome of that apportionment. What is, perhaps, the strangest thing about this conflict is that Regal (and its lawyers in the case) should have been alerted to it by Harry Bentley's objection to the original apportionment,[87] even though that objection was made in the context of the offer from London & Southern and was framed as an objection to the profit the directors stood to make, rather than their conflict of duty and interest which lay behind that profit.

Now the lower courts were at pains to stress the integrity and propriety of the apportionment,[88] and the House of Lords, so far as it touched on the matter, was content to accept that view in *Regal*,[89] though just over a year earlier Viscount Simon had described the apportionment in far less positive terms.[90] However, once again, the mere fact that a court, after the event, believes in the directors' integrity is no reason why the conflicts rules do not apply to what happened.[91] It is worth repeating: the directors' action based on their honest belief satisfied their duty of good faith action; but it cannot, of itself, satisfy the conflicts rules which exist to guard against the risk of clouded judgement.

The conflicts rules may seem harsh as they apply to facts such as those outlined above. But it is always necessary to remember Lord Normand's admonition,[92] that the rules do not prohibit a fiduciary from making a profit *per se*: they prohibit him or her from making an *unauthorised* profit. While it may seem—indeed it may well be—unduly harsh to require a director to forgo any chance whatsoever of personal profit from circumstances

[85] Appeal Book, 108–09 (Lord Greene MR).
[86] Appeal Book, 115 (Lord Greene MR).
[87] See the text to n 52.
[88] Appeal Book, 89–90, 108–09 (Wrottesley J).
[89] *Regal* (n 1) 142 (Lord Russell).
[90] *Luxor (Eastbourne) Ltd v Cooper* (n 9) 112.
[91] See the cases cited in n 81 and the text to n 112. Note also RP Meagher, WMC Gummow and JRF Lehane, *Equity: Doctrines and Remedies* 4th edn (Sydney, Butterworths 2002) para [5-110].
[92] *Dale v IRC* [1954] AC 11 (HL) 27.

in which he or she has a conflict of interest and duty, or where the profit stems from the director's position as such, it is certainly not too harsh to prohibit those activities *in the absence of permission*.[93] The conflicts rules serve to protect the fiduciary's vulnerable principal in circumstances where the principal is at risk; but the rules also respect the principal's autonomy by allowing the principal to waive them.

Two consequences flow from this. First, there is the immediate question of why the issue of authorisation was not pursued in *Regal* itself. Secondly, there is the more general question of the importance of authorisation mechanisms in fiduciary doctrine. The first can usefully be addressed now. The second is better deferred until consideration of the legacy left by *Regal*.

In the various defences of the former directors of Regal, Article 22 of the company's articles was recited, and it was said that reference would be made to that article.[94] This pleading was misconceived, for two reasons. First, the article, on its correct construction, authorised the directors to make contracts validly with the Company—that is, Regal—and participate in the profits of a contract with the Company, only provided certain procedural steps were taken. But that was irrelevant to what happened. The directors never contracted with the plaintiff, Regal, neither did they participate in the profits of a contract with Regal. The directors made a profit by first contracting with Amalgamated for the allotment and issue of shares in that company, and by subsequently selling those shares to a third party (Oxford and Berkshire Cinemas Ltd). Article 22 did not encompass or authorise any of that. The other reason why Article 22 proved irrelevant was its procedural aspects. The authorisation granted by the article would apply only if certain procedural steps were taken, the most important of which was that any director interested in a contract should not vote on any matter concerning it. Even if Article 22 had been prima facie applicable to the circumstances, it would have been impossible to use the article to validate what happened, because all the decisions about the relevant events were taken for Regal by the very directors who had a personal interest in them. In the circumstances, therefore, the only way the directors of Regal could have been released from their fiduciary duties, so as to take the opportunity to invest in Amalgamated without being accountable to Regal for it, was to seek the permission of the company in general meeting, something that never happened.[95]

[93] See the text to n 124 and following.

[94] Amended Defence of Bobby, Griffiths and Bassett, [4], [14]; Defence of Gulliver, [10], [17]; Amended Defence of Bentley, [4], [17]. All those pleadings indicated ([4], [10] and [4] respectively) that the articles of Amalgamated made similar provision (in fact, its Art 18), but the pleadings did not state that reference would be made at trial to the articles of Amalgamated.

[95] *Regal* (n 1) 150 (Lord Russell).

The final, and less notable, omission in the proceedings was the complete failure to pursue any claim for discretionary relief from liability under section 372 of the Companies Act 1929. All the directors had, in their respective defences, raised the possibility of relief under section 372. Of course, in the High Court and the Court of Appeal, there was no need to address section 372, as the directors were not held liable in the first place. There is no clue why the claim for relief was not even pursued in the House of Lords. Maybe there was some doubt as to whether the section operated to allow the possibility of relief from liability to account for profits, rather than compensate for losses, a question that persisted until the decision, decades later, in *Coleman Taymar Ltd v Oakes*.[96]

F. THE IMPLICATIONS OF REVISITING *REGAL:* CORRECTING SOME MISUNDERSTANDINGS

The initial reaction to *Regal* was muted. Contemporaneous notes in the *Law Quarterly Review* and the *Conveyancer and Property Lawyer* were not critical of their Lordships' decision in the case, neither do they appear surprised by it.[97] The case did not even earn a note in the *Cambridge Law Journal* or the *Modern Law Review*. Indeed, *Regal* seemed to lead a rather quiet life until the decision of the House of Lords in *Boardman v Phipps*.[98] But after that, *Regal* became a very prominent case, and the subject of much criticism.[99]

The directors of Regal were not the hapless victims of an unjust rule. They had quite deliberately put themselves in situations where their duty and self-interest were plainly in conflict. These conflicts were not as apparent in the case as they should have been because the case was not at all well argued for Regal in the High Court and the Court of Appeal, and in the House of Lords only a salvage operation was possible: the proceedings in the Lords were, after all, an appeal not a re-hearing. Wrottesley J found the very facts which constituted the conflicts: there is no question here of illegitimate departure from the facts as found at trial. What happened, rather, was a failure to marshal those facts into the appropriate submissions which could then have led to a judicial decision that actionable conflicts of duty and interest had indeed occurred.

[96] *Coleman Taymar Ltd v Oakes* [2001] 2 BCLC 749 (Ch D).

[97] (1942) 58 *LQR* 434 and (1942) 6 *Conv* 287.

[98] *Boardman v Phipps* (n 2). According to Westlaw and Lexis searches, *Regal* was cited just nine times in the 24 years before the decision of the House of Lords in *Boardman* in late 1966.

[99] The leading critic of *Boardman*, and consequently *Regal*, was Professor Gareth Jones, 'Unjust Enrichment and the Fiduciary's Duty of Loyalty' (1968) 84 LQR 472. This criticism of these cases is itself controversial, because it proceeds by reference to the norms of unjust enrichment.

Such misplaced criticism demonstrates the dangers that flow from the poor, or incomplete, reporting of cases, particularly those that come to be leading cases. There may well be good reasons for the lack of reporting at the time. The United Kingdom was in the middle of the greatest war in history, and law reporting was not, perhaps, as assiduous as in better days. Also, the decisions of the High Court and the Court of Appeal in *Regal* did not appear to develop the law. There was neither citation nor discussion of any authority in any of the judgments below the House of Lords, just the application to the facts of what were taken to be clear principles. Important points had been omitted from the arguments and the judgments. All this would tend to suggest that the judgments were not worth reporting (particularly at a time well before the easy electronic dissemination of information) because they were principally concerned with allegations of fact. But it is harder to justify the continuing failure to report the lower decisions—and thus obscure the wealth of highly informative material they contain—once the case had reached the House of Lords, and certainly once the case became a key authority in *Boardman v Phipps*.[100] If the Official Reports could print the decision of the House of Lords in *Regal* as a note to *Boardman*, it is a shame that they did not publish the judgments of the lower courts in *Regal*.

The *Regal* litigation also emphasises some features of a case law system that commentators often overlook, perhaps because they make the system seem much less robust than is comfortable. The selection of counsel has a great impact on the way a case is presented, and consequently on what propositions of fact and law come to be decided by a court. This is unavoidable, but should be borne in mind: it is one of the reasons why cases should never be read in the same way as statutes. All texts depend on their respective contexts, but cases even more so than statutes. And yet it has been the fate of *Regal* to be addressed very much divorced from its context.

Another feature of the case law system is the importance of a judge's background and knowledge. It is, again, comforting to believe that any judge, given the assistance of counsel, can entirely satisfactorily dispose of any case. But that requires an astonishing knowledge on the part of the judge, and no slips from counsel. The probability of serious error in such circumstances is much greater than in a system that recognises the reality of expertise. This is not to criticise the judge, however: he or she has to decide whatever case is heard in front of him or her. Rather, it shows the continued need for specialised divisions within a court, or even specialist courts, while leaving open the flexibility of transfers from one forum to another where that proves appropriate.

[100] *Boardman v Phipps* (n 2).

Lastly, *Regal* has been criticised as effectively allowing the purchasers of the companies to obtain a rebate of the purchase price: the directors had to pay Regal the profits made by selling their shares in Amalgamated, and this meant that the directors, as vendors, got less in return for their shares and the purchaser got shares in Regal that were more valuable because of the monies received by the company from the directors. But there is no reason why the general law of fiduciary duties should be distorted by the effects of corporate personality. Regal should not be denied a claim just because its shareholders changed. If the purchasers bought an asset, a company, that was more valuable than the vendors thought, because the company had claims against the vendors (or some of them), so be it. The vendors can always protect themselves by appropriate indemnities or provisions for adjustments to the consideration monies. And let it not be forgotten, the vendors, rather than the purchasers, are in a much better position than the purchasers to know what claims the company has and take action accordingly.

In short, sympathy is wasted on the directors of Regal. They were in an undoubted conflict of duty and interest, and they were in a position to protect themselves from the consequences of that fact through the terms of the sale of Regal to Oxford & Berkshire Cinemas Ltd. After all, the directors could simply have refused to sell their shares in Amalgamated unless those terms were acceptable, and the purchasers clearly would not have bought the shares in Regal without also acquiring the directors' shares in Amalgamated.

G. THE IMPLICATIONS OF REVISITING *REGAL*: UNDERSTANDING THE LAW

A full re-examination of *Regal* makes it clear that, even given generous findings of fact, the case involved significant conflicts of interest, and not just abuse of position.[101] That is not how the case is commonly seen, however. It has been described as 'the apotheosis of a strict no-profit rule which is not dependent on a conflict requirement'.[102] Neither is it how the House of Lords decided the case, given the way counsel presented it. The speeches of their Lordships rest clearly on the principle that no one shall make an unauthorised profit from his fiduciary position, rather than a prohibition on similarly unauthorised conflicts of duty and interest.[103] Viscount Sankey did re-state the rule governing conflicts of duty and interest,[104] and Lord Wright seems to have had the conflicts rule on his

[101] See above, section E.
[102] E Ferran, *Company Law and Corporate Finance* (Oxford, OUP, 1999) 190.
[103] Conaglen (n 34) 116–17.
[104] *Regal* (n 1) 137, and see Conaglen (n 34) 116–17.

mind;[105] but their decision was founded on the prohibition of unauthorised profits, not the conflicts rules. Nevertheless, there were clear conflicts of interest inherent in the findings of fact made by Wrottesley J at trial of the case; and the influence of these conflicts is latent in their Lordships' reasoning.

The fact that the House of Lords need not have relied on the no-profit principle if the conflicts of duty and interest in the case had been clearly identified and put to the House raises the more general question of whether there is any need for, or justification of, a rule prohibiting profits made by a fiduciary from his or her position, as distinct from the rule governing conflicts of duty and interest. (Obviously, if a fiduciary makes profits from assets subject to the fiduciary relationship, he or she is accountable for them as a steward of those assets, quite independently of any prohibition on profits made from a fiduciary position.[106]) The irony is that while this question remains generally important within fiduciary doctrine, it has now been answered, and in the negative, by section 176(4) of the Companies Act 2006 so far as the law of directors' duties is concerned—the area of law immediately at issue in *Regal* itself.

Section 176(4) itself may change the law as articulated in *Regal*, but it should not actually have changed the result in the case had the facts been presented so as to highlight the conflicts which actually existed. But it is possible (though rare) to conceive of a case where no conflict exists between a fiduciary's duty and self-interest, and yet the fiduciary still makes a profit from his or her position. Is it appropriate that if the fiduciary is not a director, there should be liability? Or is it better to align the general law of fiduciary duties with section 176(4), a possibility still open in Australia without the necessity (unlike in England) of a final appellate court departing from its own previous (or inherited) jurisprudence?[107]

Some have suggested than the prohibition of unauthorised profits arising from a fiduciary's position is the historical key to fiduciary duties, rather than the prohibition on unauthorised conflicts of duty and interest.[108]

[105] *Regal* (n 1) 154, and see Conaglen (n 34) 116–17.

[106] See eg *Brown v IRC* [1965] AC 244 (HL), and cases as old as *Rushworth's Case* (1676) 2 Freem Chy 13, 22 ER 1026.

[107] As regards Australian law, see *Chan v Zacharia* (1984) 154 CLR 178, 204–05 (Deane J); *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 559 (joint judgment of the Justices). In England, the Supreme Court has inherited, for want of a better word, the jurisprudence of the House of Lords, but the Supreme Court possesses the power to depart from decisions of the House of Lords and its own previous decisions: Supreme Court, *Practice Direction* 1.1.6, adopting (inter alia) the *Practice Statement* of 1966.

[108] J Getzler, 'Rumford Market and the Genesis of Fiduciary Obligations' in A Burrows and Lord Rodger (eds), *Mapping the Law* (Oxford, OUP, 2006) 577. The argument does have difficulty in explaining why such profits should be prohibited without either relying on the prohibition of conflicts, or making sweeping—but notoriously vague—appeals to subjective morality.

If the legacy of such history still endured, the abolition of the prohibition on unauthorised profits would surely be of paramount concern. Whatever the merits of that position in explaining the early history of fiduciary duties, it is as clear as anything in a subject as hotly contested as this, that the modern foundation of fiduciary duties is the prohibition on unauthorised conflicts of duty and interest.[109] The law might or might not have ultimately originated in the prohibition of profits, but if it did, it has moved on and found a new actuating principle.[110]

In other words, it is right now to regard the conflicts rules as central, and the profit rule as peripheral. But in that case, is there any reason to justify retention of the profit rule in general fiduciary law? The course of the *Regal* litigation provides the best answer. The rule prohibiting a fiduciary from making an unauthorised profit is a very necessary buttress to the rules governing a fiduciary's conflict of duty and interest.

The starting point of any justification of the rule prohibiting unauthorised profits must therefore be the justification of the conflicts rules themselves. That is an enormous subject which has generated much controversy and many different views; and space does not allow a full airing of those views here.[111] It is doubtful that every possible application of fiduciary duties can be justified by one single principle unless the principle is expressed in vague and conclusory terms, for example that fiduciary duties are justified by reference to the reasonable expectations of the parties. What follows is an effort to be more specific, albeit at the risk of omission.

The conflicts rules are duties that remove specified conduct from the realm of the permissible, because it would tend to jeopardise performance of a task that has been undertaken by a person or, occasionally, imposed on him or her. Some tasks that are simple and closed can quite adequately be controlled by specific duties to act or to refrain from action in stated circumstances. Such rules, however, are very ill-suited to controlling tasks where the person performing the task has a measure of discretion as to how that is done. For example, it is exceptionally difficult to stipulate specifically for the conduct to be undertaken by a trustee managing a trust fund or a by director managing a company without abolishing the managerial freedom the trustee or director was meant to have: there are so many different circumstances that may arise in the course of conducting the undertaking, and so many different, unobjectionable ways of performing the undertaking.[112] At first sight, it would appear that the law could use broad, open-textured,

[109] See Conaglen (n 34) 120–25.

[110] Indeed, the very enactment of Companies Act 2006, s 176(4) is itself evidence of this policy choice.

[111] See the full treatment in Conaglen (n 34) ch 9.

[112] R Cooter and B Freedman, 'The Fiduciary Relationship: Its Economic Character and Legal Consequences' (1991) 66 *New York University Law Review* 1045.

open-ended positive duties (for example, a duty to act in someone else's best interests) in order to control managers without unduly limiting their discretion. However, such rules would be very difficult to apply, and uncertain in their application: bad faith must be specifically pleaded;[113] to plead bad faith without good prima facie evidence can have severe consequences for counsel,[114] and bad faith is difficult to prove.[115] This sort of broad duty would, therefore, be correspondingly likely to inhibit managerial activity generally. In short, such a duty would be ineffective against the wrongdoer, but might also inhibit the dutiful. Consequently, English law has instead quite rationally concluded that it is more efficient to allow the manager's discretion to stand, rather than to direct it, but to forbid certain conduct that is inherently risky, human nature being what it is.[116]

Now in a case such as *Regal*, conflicts of duty and interest undoubtedly existed, but they were not easily or well identified in the course of the litigation. As a case is decided on facts pleaded by one party and either admitted by the other or determined by the court, a failure to allege and argue the facts necessary to demonstrate a profit made in conflict of duty and interest would result in the case being dismissed on that ground, and the profit retained by the fiduciary. There are two responses to this: what might be called the 'purist' and the 'realist' approaches. The purist response essentially says 'so be it': if it is difficult or impossible to identify a conflict then the claim should fail as there is no reason why the making of a profit from position alone should be stigmatised, as compared to the making of a profit in a situation where the vices of conflicts are evident. This was the position taken by Lord Upjohn in *Boardman v Phipps*.[117] The realist response is essentially that 'when a fiduciary has made an unauthorised profit out of his fiduciary position there will *commonly* or *ordinarily* be a conflict between duty and interest',[118] so that 'the likelihood of there being a conflict in such circumstances is treated as sufficient justification for equity to prohibit all unauthorised profits, without requiring strict proof in every case that there was a conflict'.[119] So the rule against unauthorised profits is, on this view,

[113] CPR 16 PD 8.2.

[114] The Bar Standards Board's Code of Conduct, para 704(c). See also *Medforth v Blake* [2000] Ch 86, 103 (Scott V-C).

[115] See *Ex parte James* (n 80) (Lord Eldon).

[116] See further, R Nolan, 'The Legal Control of Directors' Conflicts of Interest in the United Kingdom: Non-Executive Directors Following the Higgs Report' (2005) 6 *Theoretical Inquiries in Law* 363, 372–73, republished in J Armour and JA McCahery (eds), *After Enron: Improving Corporate Law and Modernising Securities Regulation in Europe and the US* (Oxford, Hart Publishing, 2006) 367.

[117] *Boardman v Phipps* (n 2) 128–29, as regards the principle, and 129–34, as regards the application of the principle to the facts of the case.

[118] Conaglen (n 34) 120.

[119] *Ibid*, 120–21.

a deliberately over-inclusive rule fully justified by the paramount need to prohibit unauthorised conflicts of duty and interest.

Any over-inclusivity requires proper justification, however. The conflicts rules themselves have been criticised as too wide in their ambit; so much more so, then, the no-profits rule.[120] All these rules seek to counteract the risk that harm may be done, rather than redress harm that has been done.[121] Their prima facie application is therefore justified by evidence that there is a real risk of harm. That risk is inherent in the very formulation of the conflicts rules, that there must be a real possibility that a fiduciary might prefer his interest over his duty, and in the very fact that a profit has been made by the fiduciary from his office. But the risk is clearly there in cases covered by the no-profits rule: and *Regal* is an excellent example of just such a case, as has been shown. Vitally, however, operation of the rules is mitigated to an appropriate level by the curative effect of consent.[122] Consent is the key issue.

The best justification for the realist approach, therefore, lies in seeing the rule as a penalty default, like the prohibition of conflicts of duty and interest itself.[123] Both rules in fact allow a fiduciary to make a profit, even where the fiduciary has a conflict of duty and interest or makes the profit from his or her position, but only if the fiduciary makes full and frank disclosure to the principal and the principal consents.[124] In other words, the risks inherent in both types of case are not sufficient to warrant an absolute prohibition, but they are enough in each case to warrant strict procedural regulation, even though the risks addressed by the rule against unauthorised profits are less clearly visible than the risks addressed by the rule against conflicts of duty and interest.

Such a justification for prohibiting a fiduciary from making an unauthorised profit from his or her position has force, however, only if the

[120] Professor Gareth Jones wrote a classic critique (above n 99). More recent critiques are summarised in Conaglen (n 34) 208–13. These critiques have some, albeit obiter, support in authority: *Murad v Al-Saraj* [2005] EWCA Civ 959, [2005] WTLR 1573 [82]–[83] (Arden LJ) and [121]–[122] (Jonathan Parker LJ).

[121] See, generally, Conaglen (n 34) ch 4.

[122] It is not appropriate to mitigate application of the rules by allowing the fiduciary to prove that what he did in prima facie violation of the rules was in fact beneficial to the fiduciary's principal. The fiduciary almost invariably is at an informational advantage vis-à-vis his principal, so it is far too easy for the fiduciary to portray his own actions as proper. This operates to the disadvantage of that principal in particular, and weakens the protection afforded by the rules in general where, *ex hypothesi*, there is a real risk of harm that warrants control. Contra, Langbein (n 80).

[123] As regards penalty defaults, see eg I Ayers and R Gertner, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' (1989) 99 *Yale Law Journal* 87; M Whincop, 'Of Fault and Default: Contractarianism as a Theory of Anglo-Australian Corporate Law' (1997) *University of Melbourne Law Review* 187.

[124] See eg *Regal* (n 1) 150 (Lord Russell); *Peso Silver Mines Ltd v Cropper* (1965) 56 DLR (2d) 117 (British Columbia CA) 139 (Norris JA); *New Zealand Netherlands Society v Kuys* [1973] 1 WLR 1126 (PC); *Guinness plc v Saunders* [1990] 2 AC 663 (HL).

mechanisms for gaining the principal's consent are workable and realistic: if the means of obtaining consent are too difficult, the prohibition comes in substance, if not in form, to be absolute, and consequently hard to justify. The way in which consent is given therefore becomes a vital issue which deserves much more attention, even though that is not a simple matter given that consent mechanisms vary from one fiduciary relationship to another.

In many fiduciary relationships, where the principal is *sui juris* and a single person (or a few persons jointly) it is easy to obtain the principal's consent: the fiduciary simply has to make full and frank disclosure of material information to the principal and receive consent (or not). But the process for gaining consent is more complex in two key situations where the fiduciary is not usually dealing with such an easily identifiable principal: the trustee of a trust when, as is so often the case, the beneficiaries are not all *sui juris*; and the director of a company.

It is usual in express trust deeds to provide mechanisms for consent to be obtained otherwise than from the beneficiaries, commonly from disinterested trustees or from some third party such as a protector. In any professionally-drawn trust instrument, it would be highly unusual not to find such provisions—they exist as standard in common and influential precedents.[125] And even if no such provision exists, it is now easier to apply to court for an order in its inherent administrative jurisdiction for the requisite consent.[126] In the light of these facts, the rule against unauthorised profits does not seem too strict, though there may well still be scope for improving the ways in which trustees can seek consent where their beneficiaries are not all *sui juris* and the trust instrument makes no suitable provision.

The case of company directors is now exceptional as they are governed by statutory duties[127] rather than general fiduciary law, even though the relevant statutory duties are still to be interpreted with reference to general fiduciary law.[128] Those statutory duties now have their own specific regimes stipulating how consent may be given for a director to act in what would otherwise be a breach of duty,[129] though these consent regimes are not

[125] See eg Lord Millett (ed), *Encyclopaedia of Forms & Precedents*, 5th edn (London, Butterworths, 2010 re-issue) vol 40(1), paras [1855], [3825], [4903]; J Kessler and L Sartin, *Drafting Trusts and Will Trusts: A Modern Approach*, 10th edn (London, Sweet & Maxwell, 2010) 566 (as recommended by the Society of Trusts and Estates Practitioners).

[126] CPR 64 PD 64A.1A.

[127] Companies Act 2006, Pt 10, ch 2.

[128] Companies Act 2006, s 170(4).

[129] Companies Act 2006, ss 175(4)–(6), 180(4), 232(4). Broadly, a company's board may be empowered to relieve a director of the company from his or her duty under Companies Act 2006, s 175 (conflicts of duty and interest in directors' dealings with third parties); but authority relieving the director from his or her duty under Companies Act 2006, s 176 (receipt of benefits by a director from third parties in consequence of his or her position) should come from the members of the company. It is highly doubtful that a company's articles can alter this position: see n 131 below.

without their own problems.[130] Company law, therefore, can no longer be used to judge whether general fiduciary law is too strict in prohibiting unauthorised profits.

There is just one indication in company law of policy dissatisfaction with the general rule prohibiting a fiduciary from making unauthorised profits out of his or her fiduciary position. That is section 176(4) of the Companies Act 2006. Section 176(4) restricts the operation of the statutory prohibition (on the receipt of benefits by a director from third parties in consequence of his or her position) to situations where there is a reasonable possibility of a conflict of duty and interest. The prima facie prohibition in section 176, like the fiduciary rule prohibiting unauthorised profits, would be very strict—most likely too strict—if it were not limited in some way. But consent mechanisms are far preferable to a narrowing of the cause of action in situations where, *ex hypothesi*, the company is at a severe informational disadvantage vis-à-vis the company which the director can exploit. The restriction in section 176(4) would simply not have been necessary or warranted if there were a generally workable way for a director to gain consent to depart from his or her duty under the section: as things stand, the better view is that a director must seek any such consent from the company's members,[131] which is not at all practicable other than in companies that are very closely held.

In summary, the existence of the rule prohibiting a fiduciary from making an unauthorised profit from his position—the great legacy of *Regal*, though a great irony too, as the case involved clear unauthorised conflicts of duty and interest—is justifiable, given the consent mechanisms which mitigate the operation of the rule. The purist position (to do without the rule) is undoubtedly elegant and, as such, tempting. The case for the realist position, however, is well-made by the strange course of the *Regal* litigation itself, where conflicts of duty and interest would undoubtedly have gone

[130] G Morse (ed), *Palmer's Company Law*, looseleaf edn (London, Sweet & Maxwell, December 2010 release) paras [8.2909]–[8.2910], [8.3001]–[8.3008].

[131] Companies Act 2006, s 180(4)(a). A company's articles may make provision for dealing with a director's conflicts of interest (Companies Act 2006, ss 180(4)(b), 232(4)); and that must surely extend to authorising receipt and retention of a benefit arising from the director's action in accordance with such authority if the authority is to have any practical utility. But it is doubtful whether the articles can authorise, or make provision for authorising, acceptance or retention of a benefit which falls only within s 176, and not s 175 (such as a bribe or a commission), even though Companies Act 2006, s 176(4) means that accepting the benefit must be reasonably capable of giving rise to a conflict if any liability at all is to be established under s 176. See *Companies Act 2006: Explanatory Notes* (DTI 2006) [302], [344]–[346]. The contrary view is that while Companies Act 2006, s 176 itself does not allow a company's board to authorise a director to accept a benefit from a third party, the company's articles can still confer the necessary power on its board: Morse (ed) (n 130) paras [8.3007]–[8.3008]. But the uncertainty of the law alone is enough to inhibit the creation of sensible mechanisms, when they are appropriate, for a board of directors to authorise one of its members to depart from what would otherwise be his or her duty under s 176.

unremedied were it not for the rule. The profits in *Regal* were in fact an entirely accurate signal of latent conflicts, and the course of the proceedings was equally a warning that such conflicts are not always properly identified and presented. The realist position allows a rule that is deliberately over-inclusive, to guard against the risks of latent or unarticulated conflicts. But it must never be forgotten that the breadth of the rule is mitigated, and adequately mitigated, by consent mechanisms, as indeed is the apparent (though in all events lesser) harshness of the rule against unauthorised conflicts of duty and interest.[132]

One final point is worthy of note, though it is more of historical interest because section 175 of the Companies Act 2006 now governs the point. Even before the introduction of that section, a company's board could use its powers of management under the company's articles to authorise a director to make a profit to the exclusion of the company, subject always to such procedural constraints as stipulated by those articles or the general law, for example in relation to voting by directors with a personal interest (or countervailing duty) in the decision.[133] If the company validly used such power to decline the opportunity to make the profit, an individual director would no longer be under any duty with regard to it, and so could not suffer from a conflict of duty and interest with regard to it.[134] But this is not what happened in *Regal*, something Lord Russell was at pains to point out.[135]

Such facts did arise, however, in *Peso Silver Mines Ltd v Cropper*.[136] The Supreme Court of Canada accepted the law in *Regal*, but the court distinguished *Regal* on its facts. The defendants in *Peso* had acted entirely in good faith in connection with the board's decision not to pursue an opportunity; and they could therefore arrange for their own company to take the opportunity perfectly lawfully and they could keep the resulting profits. There was, in fact, no need to distinguish *Regal* in that way. Indeed, it is a rather odd distinction: as has been seen, the lower courts were unwilling to find that the directors acted in anything but good faith, and the House of Lords took the case on that basis. There is a much more basic difference between *Regal* and *Peso*. The facts of *Peso* involved simply the valid rejection of a

[132] See further Conaglen (n 34) 211–13.

[133] See, eg, Table A (1929) reg 72; Table A (1948) reg 84; Table A (1985) (SI 1985/805) regs 70 and 85 *et seq*. These (and similar) articles were not struck down by any of the applicable statutory provisions governing the exclusion or modification of directors' duties and liabilities: Companies Act 1929, s 152 (the first such operative provision), Companies Act 1948, s 205, Companies Act 1985, s 310 (original) or ss 309A–309C (as amended): *Movitex Ltd v Bulfield* [1988] BCLC 104 (ChD). See now Companies Act 2006, s 232, especially sub-s (4). As regards the general law, see *Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd* [2003] 2 BCLC 153 (ChD) [92]–[95] (Leslie Kosmin QC).

[134] Even the Company Law Review misunderstood this: *Final Report*, para [3.22]. Compare Meagher, Gummow and Lehane (n 91) [5-120].

[135] See the text to n 39.

[136] *Peso Silver Mines v Cropper* (n 32).

business opportunity by the company, so that it could subsequently be taken perfectly lawfully by a director acting in his personal capacity. In *Peso*, the power to take that decision was vested in the board, subject to procedural constraints, and was duly exercised by the board in good faith. In *Regal*, authority (if any) had to come from the general meeting as residual holder of power in the company.[137] All of Regal's directors were interested in the relevant opportunity, and thus could not pass a board resolution that would effectively waive the opportunity and so allow the directors to take it for their own benefit.[138] Furthermore, Regal's articles did not specifically allow (or make provision to allow) its directors to put themselves in a position where duty and interest might conflict in any way other than making (or being interested in) a contract with the company.

H. CONCLUSIONS

The history of *Regal* is, therefore, a strange one. It was pleaded and argued in a very unsatisfactory fashion. It began life as a case argued at common law, focused on loss caused by actions in which there were inadequately pleaded hints of bad faith. Only in the House of Lords did it become an equity case, let alone a leading case in equity. The citation and use of authority by the courts was utterly absent until the case reached the House of Lords. Indeed, the whole approach to the law by the King's Bench Division and the Court of Appeal is astonishing; and that is not an anachronistic criticism: the authorities examined in the case itself, when it reached the House of Lords, were well-established before the 1940s and quite clear enough to call into question the lower courts' treatment of the law. The trial judge was very generous to the defendants in his findings of fact, and the Court of Appeal, though it had much less latitude to revisit the facts, was clearly well-disposed to the directors. That is significant in some ways and not in others. It should lay to rest the historical myth of courts determined to stigmatise directors; but the law has to be understood on the facts as found.

[137] *Regal* (n 1) 150 (Lord Russell). As regards the residual powers of the general meeting, see *Barron v Potter* [1914] 1 Ch 895.

[138] Art 22 of Regal's articles disenfranchised a director in any board decision on a contract with the company in which he was interested, subject to immaterial exceptions. Neither Regal's express articles, nor the provisions of Table A (1929) incorporated into its articles by reference, disenfranchised directors on a decision to waive an opportunity to contract with a third party (such as Amalgamated) and thereby allow the directors to contract with the third party for their own benefit. However, as a matter of general principle, a board resolution to that effect passed by directors in conflict of duty and interest would be ineffective to preclude a subsequent claim by Regal: see now *Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd* [2003] 2 BCLC 153 [92]–[95] (Leslie Kosmin QC).

The legacy of *Regal* is, if anything, stranger. The case has become widely understood as standing for a harsh and inflexible rule prohibiting fiduciaries from making any profit from their respective offices, with, so far as company directors are concerned, the sole and scant possibility of seeking permission from the members of the company in general meeting. In fact *Regal* was a case where there were clear and vital conflicts of duty and interest, rather than just abuse of position; but those conflicts were not articulated and argued as they should have been. And any consent to the conflicts of duty and interest inherent in those transactions—or to any profit made by the directors from the transactions and by virtue of their position—would have to have come from the members of company simply because all of the directors were interested in the relevant transactions. Nevertheless, the House of Lords responded to the inadequate presentation of the case by adopting and applying the strict rule that a fiduciary shall not make any unauthorised profit from his or her position. The consequence of that was decades of criticism and eventual statutory relaxation of the strict rule, in so far as company directors are concerned, by section 176(4) of the Companies Act 2006. The criticism, at least, might have been reduced or avoided if *Regal* had been better understood. And the strictness of the rule would have been better mitigated by consent mechanisms, which were not precluded in *Regal* either by doctrine or policy, rather than by narrowing the scope of the rule itself through section 176(4) of the Companies Act 2006. The skewed course of the proceedings in *Regal* has indeed had some significant and enduring consequences.

Citation: Regal (Hastings) Ltd v Gulliver [1967] 2 AC 134. This information can be found in the Textbook: Evans, Equity and Trusts, 3rd edition, Lexis Nexis, 2012, pp. 142-3 [12.40]. The defendants were the directors of Regal, a company which operated a cinema. Regal created HAC, intending it to be a subsidiary, to acquire two cinemas nearby. :*:*However, because of lack of money, the directors and solicitors personally paid for 60% of the shares in HAC. Nicholas Broomfield explains â€˜Lord Sumption had affirmed a limited power of the court to pierce the corporate veil in circumstances where a party was abusing corporate personality to evade their obligations.â€™ The â€¦ Continue reading "Fiduciary Duties: Rigour at all times". This post is only available to members. FHR European Ventures & ors v Mankarious & ors [2013] EWCA Civ 17. Stephens Scown | |. Lee Bolton Monier-Williams | |. In Regal, Ds were four directors of the C company who earned profit by exploiting a business opportunity for themselves. Held: Directors of the companies are fiduciaries and therefore similarly liable to account for profits made in the conduct of their duties (also approved by HoL in Boardman v Phipps). The directorsâ€™ profits on these shares were profits made from their offices as directors. Therefore, they were required to account for them to the company. This judgment of the HoL followed the principle of Keech v Bullard and Bray v Ford. Leave a Reply Cancel reply. Connect with