PURCHASE OF TRUST PROPERTY BY A TRUSTEE WITH THE APPROVAL OF THE COURT

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I. Introduction

It has long been established that a trustee must not place himself in a position in which a conflict might arise between his duty to manage the trust estate exclusively for the benefit of the *cestuis que trust* and his own personal interests. It is not easy for a trustee who is faced with a decision between two courses of action, one of which will result in material benefit to himself, to lay aside all thought of personal gain and exercise his judgment solely for the good of those on whose behalf he holds the trust property. The policy of courts of equity has therefore been to try to put the trustee beyond the reach of temptation by holding that any transaction tainted by a conflict of interest and duty is voidable at the option of the beneficiaries.[1] The well-known rule that a trustee may not purchase the trust property follows from this broad principle that a conflict of interest and duty will not be tolerated.

There are a number of well-recognized exceptions to the general rule forbidding the acquisition of the trust estate by the trustee. A trustee may be authorized to buy the property which he holds upon trust either by the trust instrument[2] or by statute[3] or by the beneficiaries themselves, if they are *sui juris*.[4] Where an enforceable contract for the sale of any property has been entered into between a vendor and a purchaser and the purchaser is afterwards brought into a fiduciary relationship with the vendor in respect of that property, the purchaser is not precluded by the subsequent fiduciary relationship from taking the benefit of the contract by completing the pur-

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[1] 'The Court strives anxiously to prevent a person from being placed in a position in which his interest shall pull him one way and his duty shall pull him the other: and that is the very reason why persons standing in a position in which they have duties towards others are not allowed to maintain an interest of their own adverse to that duty'—Fry J. in *Boswell v. Coaks* (1883) 23 Ch. D. 302, 310.

[2] *Halsbury's Laws of England* (2nd ed. 1939) xxxiii, 282. *Underhill's Law of Trusts and Trustees* (11th ed. 1959) 390: The terms of the authority which the settlor gave must be strictly complied with: *Smith and Others v. Green* (1903) 22 N.Z.L.R. 976.

[3] Statutory authority is seldom given. Note the provisions of ss. 68 and 107 of the Settled Land Act 1958 (Victoria).

[4] The purchasing trustee must, however, be able to show (i) that before the consents were given he made full and frank disclosure of all facts of which he knew (and, perhaps, ought to have known) relating to the value of the property, (ii) that the beneficiaries were independently advised, (iii) that the price paid represented the full value of the property and (iv) that the trustee did not take advantage of special knowledge gained by him.

chase in strict accordance with the agreed terms.[5] Finally[6] a trustee may purchase the trust property if he obtains the consent of a competent court. It is the object of this paper to consider the circumstances under which courts of equity will approve such purchases.

II. Approval of Purchase by a Trustee

Arising out of its inherent jurisdiction in matters relating to trusts, a court of equity has the power to approve a purchase of trust property by a trustee.[7] The permission of the court may be sought firstly when there are beneficiaries who are unable to consent to the transaction because they are infants or are under some other disability or are unborn or unascertained persons, or secondly when the beneficiaries, though *sui juris* and absolutely entitled, are not in agreement as to what should be done. It is convenient to consider these two situations separately.

(a) *Beneficiaries under a disability*

If there are infant beneficiaries, or beneficiaries under some other disability it is, of course, impossible for the trustee to obtain from them a valid consent to a purchase by the trustee of the trust property.[8] In such a case the only thing the trustee can do if it is desirable that he should buy the trust estate himself because he is willing to offer terms more advantageous to the beneficiaries than would be offered by anyone else is to seek the permission of the court. This was clearly laid down by Sir R. P. Arden M.R. (afterwards Lord Alvanley) in *Campbell v. Walker*.[9] After holding that any trustee who

[5] *Re Mulholland's Will Trusts, Bryan v. Westminster Bank Ltd* [1949] 1 All E.R. 460.

[6] There are a number of other relatively unimportant exceptions. A trustee to preserve contingent remainders may buy: *Parkes v. White* (1805) 11 Ves. Jun. 209; 32 E.R. 1068. So may a trustee whose only duty is to convey to the beneficiary: *Pooley v. Quilter* (1858) 4 Drew. 184, 189; 62 E.R. 71, 73. *Sinnett v. Darby* (1887) 13 V.L.R. 97.

[7] Halsbury, *loc. cit.;* Underhill, *op. cit.* 390, 398; *Lewin on Trusts* (15th ed. 1950) 802; *White and Tudor's Leading Cases in Equity* (9th ed. 1928) ii, 688; *Williams on Vendor and Purchaser* (4th ed. 1936) ii, 958; K. S. Jacobs, *The Law of Trusts in New South Wales* (1958) 249; *per* Stout C.J. *(obiter)* in *Smith & Others v. Green* (1903) 22 N.Z.L.R. 976, 986: 'No doubt a Court may, under special circumstances, permit a trustee to become a purchaser.' Jurisdiction is sometimes conferred under modern statutes: *e.g.* England: Trustee Act 1925, s. 57, or Variation of Trusts Act 1958 (Underhill, *op. cit.* 398). Victoria: Trustee Act 1958, s. 63. New Zealand: Trustee Act 1956. In South Australia the Trustee Act 1936-1953, s. 49, expressly empowers the Supreme Court to authorize a sale of trust property by a trustee to himself on being satisfied by such evidence as it deems sufficient that the transaction will be advantageous to the beneficiaries, but the power cannot be exercised contrary to an express prohibition in the trust instrument. The section was invoked in *In re James, deceased* [1949] S.A.S.R. 143; [1949] A.L.R. 637.

[8] *Franks v. Bollans* (1868) L.R. 3 Ch. 717. It must be remembered that if any beneficiary has encumbered his share the encumbrancer's consent must also be obtained.

[9] (1800) 5 Ves. Jun. 678, 681; 31 E.R. 801, 802.

purchases the trust property, however fair he may be, is liable to have his purchase set aside if the beneficiaries apply to the court within a reasonable time to have the property resold, he proceeded to suggest how trustees might protect themselves, saying:

> The only thing a trustee can do to protect his purchase is, if he sees, that it is absolutely necessary, the estate should be sold, and he is ready to give more than any one else, that a bill should be filed, and he should apply to this Court by motion to let him be the purchaser. That is the only way he can protect himself; and there are cases, in which the Court would permit it; and if only £500 was offered; and the trustee will give £1,000. The consequence would be, the Court would do that, which this rule is calculated to procure. The Court would divest him of the character of trustee; and prevent all the consequences of his acting both for himself and for the *Cestuy que trust;* for the reason of the rule is, that no man shall sell to himself: a case, in which it is impossible for the Court to know, that he did not do all he ought to have done.

Although it was not necessary to his decision the Master of the Rolls outlined the procedure which a trustee should follow in such circumstances.[10] He said that a bill should be filed, and the trustee should be able to show that he would be prepared to pay more than the amount of the highest offer. The court would then: (a) examine all the circumstances of the transaction, (b) ascertain who had the conduct of the sale, and (c) endeavour to find out whether there was any reason to suppose that a better sale could be made. If satisfied with the results of such enquiries, someone other than the trustee would be instructed to prepare the particulars of sale, and the trustee would be permitted to bid.

An example of the operation of the principles laid down in *Campbell v. Walker* is to be found in *Farmer v. Dean.*[11] In the latter case trustees for sale put up part of the trust property, called the Brickhouse estate, for sale by auction in June 1862. It was not sold, but was bought in for £3,150. The trustees could not afterwards obtain a purchaser at that price. The plaintiff, who was one of the trustees, was willing to give £3,150 for the property, and he filed a bill against his co-trustee and against the beneficiaries, some of whom were infants, praying that he might be at liberty to buy the Brickhouse estate. He was able to show that it would be for the benefit of all parties interested that he should become the purchaser at that price. Sir John Romilly M.R. said simply 'I have looked into this matter, and I think that the Plaintiff may take a decree giving him liberty to purchase'.[12]

When the court sanctions a purchase of trust property by trustees

[10] (1800) 5 Ves. Jun. 678, 682; 31 E.R. 801, 803.
[11] (1863) 32 Beav. 327; 55 E.R. 128.
[12] (1863) 32 Beav. 327, 328; 55 E.R. 128.

and it appears that unborn children may be beneficiaries under the trust, the court will declare the unborn children to be trustees of their interests for the benefit of the purchasing trustees, and will appoint some person to transfer the interests of such children on their behalf.[13] In *Woodhill v. Woodhill*[14] an originating summons had been taken out asking for the court's approval of a purchase by one of the trustees of portion of the trust estate. The three trustees and the adult beneficiaries (all of whom consented to the proposed purchase) were made plaintiffs and the infant beneficiaries were joined as defendants. At the hearing, the question was raised whether an unascertained class of unborn children would be bound by the proposed order, and whether the three trustees could represent the interests of that class. Counsel for the plaintiffs then applied for leave to amend by striking out the purchasing trustee as a plaintiff and adding him as a defendant, and asked for an order that the other two trustees should represent the unascertained class. Harvey J. accordingly ordered that for the purposes of the suit the non-purchasing trustees should represent the interests of the unborn children.

(b) *Beneficiaries Sui Juris*

If the beneficiaries under the trust are of full age and capacity and they object to the proposed purchase of the trust property, the trustee is in a most difficult position. It might well be argued that the beneficiaries are the best judges of their own interests, and that the court should not interfere with their refusal to allow the trustee to purchase. Indeed, Lewin[15] goes so far as to state that the court has no jurisdiction on behalf of *cestuis que trust* who are *sui juris* to authorize a trustee to bid. *Ex parte James*[16] is cited in support of the proposition. In that case the purchase of a bankrupt's estate by the solicitor to the Commission of Bankruptcy had been set aside, and a resale of the property ordered. The Lord Chancellor, Lord Eldon, would not allow the solicitor to bid at the resale without the prior consent of all interested parties freely given with knowledge of all the facts. He said:

> With respect to the question, now put, whether I will permit Jones to give up the office of solicitor, and to bid, I cannot give that permission. . . . On the other hand I do not deny, that those interested in the question may give the permission. The rule is, that a trustee shall not become the purchaser, until he enters into a fair contract, that he may become the purchaser, with those interested.[17]

[13] *Irving and Others v. Irving* (1901) 18 W.N. (N.S.W.) 63.
[14] (1917) 17 S.R. (N.S.W.) 647.
[15] Lewin, *op. cit.* 801.
[16] (1803) 8 Ves. Jun. 337; 32 E.R. 385.
[17] (1803) 8 Ves. Jun. 337, 352; 32 E.R. 385, 390.

The statement scarcely seems to support the suggestion that the court has no *jurisdiction* although it is, of course, strong authority for saying that as a matter of practice permission should not be given. The point was considered by the Supreme Court of Victoria in *Scott v. Murray*.[18] Trust property was to be sold by auction and a trustee-executrix desired to bid on her own account. The trustees had the conduct of the sale under the direction of the court. The beneficiaries, who were evidently *sui juris,* opposed the application. Lewin's statement that the court had no jurisdiction to grant leave to bid was cited by counsel, but A'Beckett J. said: 'I think that, so far as the question of jurisdiction is concerned, it may be putting the matter too strongly to say that the Court has no jurisdiction to authorise a trustee to bid at a sale'.[19] He then apparently assumed jurisdiction in the matter as permission was refused on other grounds.

Underhill[20] suggests that no application by a trustee for permission to purchase can succeed in the face of opposition by any beneficiary[21] but he does not refer specifically to cases in which the beneficiaries are *sui juris.* The better view seems to be that adopted by Williams,[22] namely, that although the court will not in the first instance give leave for the trustee to buy the trust property or to bid at the sale, there may be circumstances in which permission will be granted, as, for example, when it can be shown that it is virtually impossible to find another buyer at an adequate price and that there are good reasons for not postponing the sale until the market is more favourable. Thus, in *Tennant v. Trenchard*[23] trustees had very extensive powers under a deed of trust. It was provided that any trustee who advanced money to the settlor, or who paid off any part of a certain mortgage debt should be entitled to 'a charge by way of mortgage' on the trust property. One of the trustees advanced considerable sums to the settlor and paid off part of the mortgage debt. He later filed a bill against all those interested under the settlement praying an account of what was due to him and, in default of payment, that the defendants might be foreclosed. Lord Hatherley L.C. decided on two grounds that the plaintiff trustee was not entitled to foreclose; firstly, on the broad principle that his duty being to do everything possible to preserve the estate, a foreclosure would necessarily involve him in a conflict of interest and duty, and secondly, on the narrower ground that on the true construction of the deed, the trustee was not entitled to such a mortgage as would empower him

[18] (1888) 14 V.L.R. 708. [19] *Ibid.* 710. [20] *Op. cit.* 398.

[21] Unless, in cases when the application is made under the Trustee Act 1925, the court considers such opposition to be capricious and unreasonable.

[22] Williams, *op. cit.* 959. Also K. S. Jacobs, *op. cit.* 249. 'The Court would be reluctant to approve a sale in the face of objections from any of the beneficiaries.'

[23] (1869) L.R. 4 Ch. 537.

to foreclose, but only to a simple charge. A sale of the trust estate under the direction of the Judge was ordered and the plaintiff applied for leave to bid at that sale. The application was opposed by some of the beneficiaries and the Lord Chancellor refused to allow the trustee to bid. He said:

> The rule is, that if those who are interested in the estate insist that a trustee ought not to be allowed to bid, the Court will certainly give so much weight to their wishes as to say that until all other ways of selling have failed he shall not be allowed to buy. But if the Court is satisfied that no purchaser at an adequate price can be found, then it is not impossible that the Plaintiff may be allowed to make proposals and to become the purchaser.[24]

In *Scott v. Murray*[25] A'Beckett J. did not question the correctness of the principle which Lord Hatherley had laid down, and considered that there is a clear rule of practice that the court will refuse leave to trustees to bid at a sale of the trust property when the beneficiaries oppose the application unless a sale to the trustees be the very last resort.

In the New Zealand case of *Throp v. Trustees, Executors, and Agency Company of New Zealand, Limited, and Others*[26] the Supreme Court refused to permit a trustee to purchase part of the trust estate against the wishes of two of the beneficiaries. Trustees of a will held the testator's estate, which comprised a sheep station, upon trust for sale and conversion. They had power to postpone sale and to carry on the testator's business of a sheep farmer for so long as they thought fit. The residue of the estate was to be held in trust for the testator's four children of whom the plaintiff trustee was one. All the beneficiaries were of full age and capacity. Under a power contained in the will the plaintiff trustee had been employed as manager of the sheep station until 1939. The trustees decided in 1943 to offer that property for sale by auction. No bid was received, but after the sale a private offer was made which was unacceptable. Some months later the plaintiff offered to buy the station property for £35,000. The offer was conditional upon the approval of the court being obtained and was accepted by the plaintiff's co-trustee. An application for approval was filed on 15 October 1943. On 1 November 1943 the Servicemen's

[24] *Ibid.* 547. A slightly different version of this statement, which is worth reproducing, is found in the Law Journal Reports (1869) 38 L.J. Ch. 661, 664. 'In the first place, I hold the rule to be (I purposely avoid at present saying more) that if those interested in the estate say they believe it to be contrary to their interests that one who is their trustee should be allowed to bid, that estate not having been put up for sale, and no attempt having been made to dispose of it in any other way, the Court will certainly give weight to their objection, and say that until it is distinctly demonstrated to the Court that other ways of selling it have failed, it will not interfere with the reasonable right which they have to object to the trustee being allowed to come into competition as purchaser or bidder at the sale.'

[25] (1888) 14 V.L.R. 708.

[26] [1945] N.Z.L.R. 483.

Settlement and Land Sales Act 1943, which imposed price controls on all sales of land, came into force. The plaintiff's application did not come before the court until July 1944, and the agreement had to be amended to comply with the provisions of the Land Sales Act. The plaintiff's brother had grudgingly consented to the proposed sale to the plaintiff, but his sisters objected on the grounds (i) that they were not satisfied that the price was adequate, (ii) that they wished to preserve the trust property as an investment, (iii) that the time was not propitious for the sale, (iv) that the property had been inefficiently managed and would not realize its proper value, (v) that the reduced value was due to the plaintiff's mismanagement, (vi) that all avenues for effecting a sale at a proper price had not been explored and (vii) that full information had not been supplied. The plaintiff's co-trustee did not recommend the sale. There was, however, evidence given by responsible and informed persons that the price was adequate.

Kennedy J. pointed out that to approve the sale would amount, in effect, to a compulsory sale by two unwilling beneficiaries of their shares to a trustee. After considering the cases, he reached the conclusion that as it was not necessary to sell at that particular time and that as the proposed sale was objected to by two of the beneficiaries, the court should not then make the order asked for, but should leave it to the plaintiff to apply again at a later date. Costs were awarded against the plaintiff. It is of interest to note that there is no suggestion anywhere in the judgment that the court lacked the jurisdiction to approve the sale against the will of the beneficiaries. The arguments of counsel are unfortunately not reported, so that it is not possible to tell whether the point was raised. Provided that all the parties were represented before the Court, any question of jurisdiction in such a case would now be disposed of in New Zealand by the far-reaching provisions of section 65 of the Trustee Act 1956, which provides:

> (1) Notwithstanding anything to the contrary in the instrument (if any) creating the trust, and notwithstanding the wishes of any trustee or person beneficially interested, the Court may, in any proceedings in which all trustees and persons who are or may be beneficially interested are parties or are represented, direct a sale or lease of any property subject to the trust on such terms, and subject to such provisions and conditions (if any) as the Court may think fit.
> (2) Nothing in this section shall restrict any other power of the Court.

The result of the cases seems to be that the court has jurisdiction to approve a sale of trust property to trustees even though the beneficiaries, being *sui juris* and absolutely entitled, object to the transaction. There is, however, a settled rule of practice that the greatest weight must be given to any objections made by the beneficiaries, and in the face of such objections a sale to the trustees would

probably be approved only in exceptional cases in which it could be clearly shown (a) that it would be to the advantage of the estate for the trustees to buy, no other person being prepared to offer as much, (b) that every other means of effecting a sale had been tried and (c) that cogent reasons existed for selling at that particular time and that it would be impossible or inexpedient to wait to see whether the market became more favourable.[27]

III. Approval of Purchase by Relatives of a Trustee

In appropriate cases the court will sanction the purchase of the trust property by the wife or a relative of a trustee.[28] Presumably the same factors would be taken into consideration as when approving a sale to the trustee himself.

IV. Mode of Sale

It seems that in *Campbell v. Walker*[29] Sir R. P. Arden M.R. considered it necessary that the trust property should always be offered for sale by auction when trustees seek permission to buy. No doubt an auction is most desirable, bearing in mind the fact that the object of the court is to satisfy itself that it is in the best interests of the beneficiaries that the property should be sold to the trustees.[30] It is hard to

[27] Williams, *op. cit.* 959; *Scott v. Murray* (1888) 14 V.L.R. 708. In England joint tenants are, of course, trustees for sale (Law of Property Act 1925, s. 36) and all tenancies in common since 1925 are equitable only and take effect behind a trust for sale (Law of Property Act 1925, s. 34; Settled Land Act 1925, s. 36, sub-s. 4). When joint tenants or equitable tenants in common disagree, the property may be sold in exercise of the statutory trusts for sale and the proceeds divided in the proper proportions: *Bull v. Bull* [1955] 1 Q.B. 234; [1955] 1 All E.R. 253. If one of the co-owners unreasonably withholds his consent, an application to the court may be made by the other under s. 30 of the Law of Property Act 1925. If one of the co-owners wishes to buy the property *himself* and the other will not agree to the transaction, it appears that the would-be purchaser is in the same position as a trustee seeking to purchase the trust property against the wishes of one of the beneficiaries. The only course open to him would be to apply to the court for permission to buy and it would seem that the court would have to apply the principle laid down by Lord Hatherley L.C. in *Tennant v. Trenchard* (1869) L.R. 4 Ch. 537 (page 19 *supra*). The position of joint tenants and tenants in common is different in Victoria: Property Law Act 1958 (Victoria), Part IV, especially s. 225.

[28] See *Heywood v. Pryor* (1906) 23 W.N. (N.S.W.) 44.

[29] *Supra*, n. 9.

[30] This view was held by some United States courts. See, for example, the dictum of Thomas J. in *Clay v. Thomas* (1917) 178 Ky. 199; 198 S.W. 762; 1 A.L.R. 738, 743. 'In some cases, . . . a trustee, especially if he be one not vested with the power of sale, may be empowered by a court of equity to become a bidder at the sale of the trust property. But we think, that, practically without exception, the exercise of such authority by the court is always confined to cases where the trust property is sold at public sale, where the bidding is competitive, and where the court rightfully has jurisdiction of the persons of both the trustees and *cestui que trust*, as well as of the *rem* in a proceeding justifiably brought for the purpose of securing the aid or procuring the advice of the court in carrying out the trust.'

But see *contra* a note in (1931) 29 *Michigan Law Review* 952, 953: '. . . the cases generally say, . . . that the court has authority to grant such permission not only to bid against others at a public sale directed by a decree of the court, but may also authorize a private sale to him when it appears to be advantageous to the trust estate.'

see how trustees can satisfactorily prove to the court that they should be allowed to buy the trust estate unless they compete for it at a public auction or, when the estate has previously been auctioned and passed in, they offer an amount equal to or greater than the reserve price.

Suppose that instead of submitting the estate to auction trustees are allowed to submit to the court a number of valuations made by valuers of the highest repute, and to say that they will pay the amount of the highest of those valuations. Who is to know, if there is no auction, that there is not some person who, for a special reason, is prepared to pay much more than the valuation? It does appear however, that the practice has grown up of approving purchases by trustees without requiring the trust property to be auctioned.[31] The strongest evidence of value is required[32] and the court must be perfectly satisfied as to the *bona fides* of the purchasing trustee.[33] The trustee's application will usually be regarded with jealousy, even suspicion, and the court may appoint its own valuers to report on the property. It is no doubt very convenient for the parties concerned to be relieved of the trouble of putting the property up for sale by auction but it is a practice which should not be allowed to go too far. Where the property to be sold is, for example, a common type of suburban house, its value will be readily ascertainable and there will in most cases be little danger in accepting the evidence of competent valuers because there are not likely to be any special or unforeseen factors which would affect the price. Where, on the other hand, the property is a city building, an industrial site or, perhaps, a large farm, there may be many unforeseeable factors which would influence the price that could be obtained; for instance a department store or an industrial concern might be anxious to acquire a property in the particular district and might be prepared to pay a much inflated price. In such cases the court would do less than justice to the beneficiaries if it were to approve a private sale to a trustee at a valuation, and it is suggested that in cases

[31] Private sales appear to have been approved in the following cases. The reports are in each case very brief: *Irving and Others v. Irving* (1901) 18 W.N. (N.S.W.) 63; *Hordern v. Bull* (1905) 5 S.R. (N.S.W.) 518; *Re Ryrie's Settled Estates (No. 2)* (1907) 24 W.N. (N.S.W.) 87; *Woodhill v. Woodhill* (1917) 17 S.R. (N.S.W.) 647.

S. 49 of the Trustee Act 1936 of South Australia provides that the Supreme Court may authorize a sale of the trust property by the trustee to himself 'notwithstanding that the property so to be sold has not been offered for sale by public auction or otherwise.'

[32] See K. S. Jacobs, *op. cit.* 249; *In re James, deceased* [1949] S.A.S.R. 143; [1949] A.L.R. 637; *Savage v. Carruthers* [1958] Q.W.N. 21.

[33] See *In re Walder, Townsend v. Walder* (1903) 3 S.R. (N.S.W.) 375 (an application by testamentary trustees for the sanction of the court to the purchase of part of the estate by one of their number) *per* Simpson C.J. in Equity at page 376: 'I have no difficulty in sanctioning the proposed sale, for it is clear on the figures that the purchaser is giving more than the actual value of the property, and the sale is, therefore, an advantageous one for the *cestuis que trustent*. I, therefore, sanction the proposed sale and direct it to be carried into effect.'

where it seems likely that the sale price of the property to be sold could be influenced by special circumstances the court should never approve a private sale to a trustee but should insist upon an auction and give the trustee leave to bid.

When the trust property which the trustee is seeking to buy consists of shares quoted on the Stock Exchange, the court, after making sure that the proposed transaction would be for the benefit of the beneficiaries, would have to decide whether to authorize a private sale or simply to permit the trustee to buy the trust shares on the Stock Exchange in the ordinary course of business. It is unlikely that the consent of the court would ever be sought to the purchase by a trustee of a small parcel of shares of a class frequently sold on the Exchange, since there would usually be no reason why a trustee seeking such shares should not purchase a parcel not forming part of the trust property through his broker in the ordinary way. In any case it would scarcely be possible to satisfy the court that such a purchase by the trustee would benefit the trust estate as the shares would be readily saleable to strangers at the ruling market price. In the unlikely event of the trustee offering more than the market price, a private sale to him of a small parcel of shares might be approved. The problem whether or not to permit a private sale of shares quoted on the Stock Exchange would be more likely to arise if the parcel of trust shares were large enough either to constitute a controlling interest in the company or, alternatively, to be specially desirable to any person seeking to gain control of the company. The placing of a very large parcel of shares on the market could tend to lower the price, in which case the beneficiaries would be better off if a private sale to the trustee were ordered at the market price ruling on the day of the order. On the other hand, if persons desiring to acquire a controlling interest in the particular company were buying shares on the Stock Exchange, the price could well be forced up. Although no general rule can be laid down, in most cases it would probably be in the best interests of the beneficiaries to require the trust shares to be sold on the Stock Exchange, the trustee being given leave to compete for them through his broker.

An application by a trustee for permission to buy shares in a proprietary company, which shares form part of the trust estate, would present greater difficulties. To satisfy the court that the proposed purchase would produce the maximum price for the beneficiaries, the trustee would need to submit a valuation of the shares by the company's auditor (if any) or by a qualified accountant and possibly also valuations of the company's assets. The court would order further investigations and enquiries to be made if it considered the evidence as to the value of the shares inadequate. As to the mode of

effecting the transaction, in nearly all cases a private sale would have to be authorized since it is not usual to offer shares in proprietary companies for sale by tender or by public auction—indeed in many instances restrictions on the transfer of shares in the proprietary company would render such procedures almost useless. The trustee's application for leave to buy the trust shares would, however, be greatly strengthened if he could prove that the trust shares had been offered to other persons likely to be interested in buying them (for example, other shareholders in the proprietary company) and that the trustee would be prepared to pay more for the shares than the amount of the highest offer received.

V. Stage at which application for leave to bid should be made

If a trustee intends to apply to the court for leave to bid at an auction of the trust property he should do so at an early stage, before the auctioneers are appointed and before the particulars and conditions of sale are settled. The reason is that the court must take the conduct of the sale out of the hands of the trustee so as to lessen the possibility of any dishonest manipulation of the sale to the advantage of the trustee and to the detriment of the beneficiaries.[34] If the trustee were allowed to arrange the sale himself and then bid:

> it would lead to all the mischief of acting up to the point of the sale, getting all the information, that may be useful to him, then discharging himself from the character [of trustee] and buying the property. Infinite mischief would be the consequence in a number of cases.[35]

So, in *Scott v. Murray*[36] one of the reasons for refusing a trustee's application for leave to bid at the sale of a house forming part of the trust estate was that she had not applied until the time and mode of sale had been fixed.[37]

VI. Effect of giving leave to bid

In *Campbell v. Walker*[38] Sir R. P. Arden M.R. had said *(obiter)* that the effect of giving a trustee leave to bid would be to divest him of the character of trustee; and prevent all the consequences of his acting

[34] *Per* Sir R. P. Arden M.R. (later Lord Alvanley) in *Campbell v. Walker* (1800) 5 Ves. Jun. 678, 682; 31 E.R. 801, 803.

[35] Lord Eldon L.C. in *Ex parte James* (1803) 8 Ves. Jun. 337, 352; 32 E.R. 385, 390.

[36] (1888) 14 V.L.R. 708.

[37] *Ibid.* 711. A'Beckett J. said: 'There is, however, another reason for refusing the application, and that is that Mrs. Murray and the other trustee have the conduct of the sale, and if she had wished to bid I think application in that behalf ought to have been made by her at an earlier stage of the proceedings, when the conduct of the sale might have been entrusted to other parties. She should not go on retaining the power of fixing the time and mode of sale and other matters, and then just before the sale comes on ask for leave to bid.'

[38] *Supra*, n. 9.

both for himself and for the *cestui que trust.*[39] There was at first some doubt as to the exact meaning of those words. Was the effect of authorizing a trustee to bid at an auction of trust property merely to remove the trustee's disability to become a purchaser, still leaving him with the obligation of doing his best for the beneficiaries and using all the information he had against himself, or was the effect to discharge him completely from his fiduciary position leaving him free to act thenceforth as if he were dealing with strangers? The point was neatly raised in *Boswell v. Coaks.*[40] The facts were complicated, but may be summarized as follows: in two administration actions part of the property of the testator was ordered to be put up for sale by auction and leave was given to one Coaks, the solicitor to the executor (who was the defendant in both of the administration actions), to bid at the sale, which was to be conducted by the solicitors for the plaintiffs in both of those actions independently of Coaks. At an auction the property was not sold. Coaks and another then made proposals for the purchase of the property and subsequently obtained further information affecting its value, some of which information they did not disclose. Their proposal was later sanctioned by the court, and the transaction was duly completed. The action *Boswell v. Coaks* was brought on behalf of the unsatisfied creditors of testator to set aside the sale.

In the Chancery Division the plaintiffs contended that notwithstanding the fact that Coaks had been given leave to bid by the court he still occupied a fiduciary position towards the estate. They said that the effect of giving leave to bid was not to put an end to the fiduciary relationship so that the fiduciary could negotiate as a stranger, and that the only advantage to the fiduciary of obtaining the permission of the court to bid at the auction was to render a purchase by him no longer voidable as of right at the option of the beneficiaries; but that the transaction remained voidable upon proof of non-disclosure by the fiduciary of any material fact. The defendants argued that at the moment when leave to bid was given the fiduciary relationship was at an end and that Coaks was at once put at arm's length and was not thereafter bound to make any disclosure. In the Chancery Division Fry J. gave judgment for the defendants, holding that the effect of giving leave to bid was entirely to put an end to the fiduciary relation in which Coaks formerly stood, and to place him in the position of a mere stranger. He commented

> . . . it is said that Mr Coaks, having obtained this leave to bid, was still under his original obligation to disclose everything which it was material

[39] (1800) 5 Ves. Jun. 678, 681; 31 E.R. 801, 802.

[40] (1883) 23 Ch. D. 302. Reversed by the Court of Appeal on different grounds: (1884) 27 Ch. D. 424, and restored by the House of Lords *sub. nom. Coaks v. Boswell* (1886) 11 App. Cas. 232.

> to the vendor to know, and that if that disclosure was not made the sale could be set aside; and that the effect of the leave to bid was to limit the right to set it aside to that particular contingency. In my judgment nothing could be more inconvenient than such a rule, or more at variance with the general principles of the Court.[41]

The plaintiffs appealed to the Court of Appeal,[42] and were successful, mainly on the ground of fraud and misrepresentation by Coaks and his co-purchaser. The court did not find it necessary to consider the alleged fiduciary position of Coaks, which was the substantial question discussed before Fry J. The House of Lords, however, reversed the decision of the Court of Appeal upon the evidence, and restored the order of Fry J.[43] The question of Coaks' fiduciary relationship was again argued before the House of Lords. The Earl of Selborne L.C., with whom the other Law Lords agreed, said

> . . . I agree with Fry J. The leave to bid put an end to Mr Coaks' disability to purchase, on account of his mere position as solicitor on the record for the executor . . . It was contended that, when the auction failed, the leave to bid came to an end, and the disability returned. I do not think so. The whole treaty was with the Court, and grew out of the leave to bid.[44]

Care must be taken not to misinterpret *Boswell v. Coaks*. The case decides that the effect of giving a fiduciary permission to bid at the sale of the trust property is to place him at arm's length with the estate from the time when leave to bid is granted. The fiduciary is therefore under no greater obligation than a mere stranger to disclose to the vendors any information affecting the value of the property which comes to his knowledge *after* the permission to bid is obtained. From that time onwards he is in the same position as a stranger. The fiduciary must, however, make full and frank disclosure to the court of all information in his possession affecting the value of the property when he makes application for leave to bid. If, on the application to obtain leave, the fiduciary concealed any relevant information from the court there would seem to be no doubt that a subsequent purchase of the property in pursuance of that leave would be voidable.[45]

[41] (1883) 23 Ch. D. 302, 309, 310. [42] (1884) 27 Ch. D. 424.
[43] (1886) 11 App. Cas. 232. [44] *Ibid.* 242.
[45] See Williams, *op. cit.* 959. Also *Ashburner's Principles of Equity* (2nd ed. 1933) 315.
Brooke v. Lord Mostyn (1864) 2 De G. J. & S. 373; 46 E.R. 419, shows that if material facts are concealed when applying for the consent of the court to a *compromise* involving infants, the compromise will be voidable. In that case a compromise had been sanctioned by the court on behalf of an infant. It appeared that at the time of the enquiry as to whether the compromise was for the benefit of the infant, a document relative to the value of the estate—of a character rendering it doubtful whether the valuation, which throughout the enquiry was treated as correct, was not based on erroneous principles, so as to give an under value—was in the possession of the owners of the estate, but was not laid before the Master. It was held that the compromise must be set aside.

VII. Costs

In England there seems to be a difference of opinion whether the costs of a trustee who successfully applies for permission to buy the trust property may be paid out of the trust estate, or whether they must be borne by the trustee himself. Underhill[46] cites the unreported case of *Nunneley v. Nunneley*[47] in which Pearson J. ordered the costs of the application to be paid out of the estate, on the ground that the purchase was for the benefit of the beneficiaries (since the trustee offered more than the market price), and comments '. . . it is conceived that the course followed by his lordship was correct and is now the regular practice'. Lewin,[48] on the other hand, considers that except in special circumstances the court will require the purchasing trustee to pay the costs of the application.

In New South Wales it appears to be now settled that the costs of an application by a trustee to buy the trust estate must in any event be borne by the trustee. In *In re Walder, Townsend v. Walder*[49] it appears that Simpson C.J. in Equity inclined towards Underhill's view. He had sanctioned a sale of trust property to a trustee and had found that the purchaser was giving more for the property than its actual value. On the question of costs he held that the application, though to the advantage of the beneficiaries, was made largely in the interests of the purchasing trustee (as she had expended a considerable sum in improving the property) and that *therefore* she should bear her own costs of the application. Two years later, however, the Chief Justice in Equity took a different view, when the question of costs was expressly argued in *Hordern v. Bull.*[50] The plaintiffs, the trustees of the will of the late Anthony Hordern, applied for the sanction of the court to the purchase, by one of their number, of a portion of the trust estate. The will contained the usual trusts for the sale and conversion of the real estate. There were infant beneficiaries. The proposal being clearly for the benefit of the beneficiaries, the court approved the sale. Simpson C.J. in Equity held that the purchaser should pay the costs of the application, saying

> . . . it seems to me that he is coming to the Court for an indulgence, and should pay the costs of the necessary application. It is always open to an intending purchaser to protect himself by providing for the costs in his offer. He may make an offer and stipulate either that the amount offered is to cover the costs, or that it is a condition of the offer that the costs of the necessary application to the Court shall be paid by the vendors. Where he does not do so, the ordinary rule must apply and he will have to pay the costs of the application.[51]

[46] Underhill, *op. cit.* 398.
[47] 18 April 1883, (unreported).
[48] Lewin, *op. cit.* 802, n. (h).
[49] (1903) 3 S.R. (N.S.W.) 375.
[50] (1905) 5 S.R. (N.S.W.) 518.
[51] *Ibid.* 519.

Hordern v. Bull was followed in *Re Ryrie's Settled Estates (No. 2)*.[52]

No reported Victorian or New Zealand cases on the question of costs have been found. It is probable that the Victorian courts, at least, would follow the New South Wales decisions.

VIII. Procedure

The procedure to be adopted by a trustee who wishes to buy the trust property with the consent of the court will depend on the manner of the proposed sale. If there is to be an auction, the trustee should apply to the court before the sale is arranged for leave to bid;[53] but if the sale is to be by private contract he should enter into a conditional agreement, expressed to be subject to the approval of the court, with his co-trustees and with such of the beneficiaries as are *sui juris* and then file his application for consent to the sale.[54]

IX. Confirmation of prior transaction by the court

Although no English, Australian or New Zealand case directly in point has been found, there seems to be no reason why a court of equity should not in a proper case exercise its inherent jurisdiction in matters of trust to approve *ex post facto* a voidable purchase of trust property by a trustee.[55] It would be necessary to prove to the court that the transaction was and remains in the best interests of the estate and that it was and remains for the benefit of the beneficiaries. Presumably the strongest evidence of value would be required, and it is thought that the transaction would not be ratified against the wishes of any of the beneficiaries. There are a number of American cases which support the suggestion that the court may confirm a voidable purchase by a trustee[56] and Scott says:

> Not only may the court authorise a sale of trust property to the trustee personally, but after such a sale has taken place the court may approve the sale, if it still appears that the sale is for the best interest of the trust estate.[57]

It would seem that the court would not approve *ex post facto* a purchase of trust property by a trustee if the value of the property had increased between the date of the voidable sale and the date on which the application was made, as it would not then be in the interests of the beneficiaries to confirm the transaction.

[52] (1907) 24 W.N. (N.S.W.) 87. Also K. S. Jacobs, *op. cit.* 249.
[53] Ashburner, *op. cit.* 315.
[54] As in *Throp v. Trustees, Executors, and Agency Company of New Zealand, Limited, and Others* [1945] N.Z.L.R. 483.
[55] O. R. Marshall, 'Conflict of Interest and Duty' (1955) 8 *Current Legal Problems* 91, 95. *Heywood v. Pryor* (1906) 23 W.N. (N.S.W.) 44. (Purchase by a trustee's wife confirmed.)
[56] *Scott on Trusts* (2nd ed. 1956) ii, 1211.
[57] *Ibid.*

X. Improvements

If a trustee effects permanent improvements on the trust property out of his own money and subsequently obtains the permission of the court to buy the property, the value of the improvements may be allowed as having already been paid on account of the purchase price.[58]

XI. Attitude of the United States Courts

Following Sir R. P. Arden's *dictum* in *Campbell v. Walker*[59] Chancellor Kent in *Davoue v. Fanning*[60] said

> The only way for a trustee to purchase safely, if he is willing to give as much as anyone else, is by filing a bill, and saying, so much is bid, and I will bid more and the court will then examine into the case and judge whether it be advisable to let the trustee bid.

Some United States courts have expressed doubts as to whether they can properly authorize a trustee to purchase the trust estate from himself,[61] but there is no doubt that the better opinion now is that the trustee may properly purchase if he obtains the consent of the court.[62] The purchase may either be by public auction or by private contract.

The *Restatement* asserts:

> The trustee can properly purchase trust property for himself with the approval of the court. The court will permit a trustee to purchase trust property only if in its opinion such purchase is for the best interest of the beneficiary. Ordinarily the court will not permit a trustee to purchase trust property if there are other available purchasers willing to pay the same price that the trustee is willing to pay.[63]

Some states have passed statutes providing that the court may approve sales of trust property to trustees if satisfied that such action is in the best interests of the beneficiaries.[64]

XII. Conclusions

The following conclusions are offered:

1. A court of equity has the power to approve a purchase of trust property by a trustee.

[58] *In re Walder, Townsend v. Walder* (1903) 3 S.R. (N.S.W.) 375.

[59] (1800) 5 Ves. Jun. 678, 682; 31 E.R. 801, 803. [60] (1816) 2 Johns Ch. 252, 261.

[61] *In re Holley's Estate* (1930) 211 Iowa 77; 232 N.W. 807. Noted in (1931) 29 *Michigan Law Review* 952 and (1930-1931) 15 *Minnesota Law Review* 843. *Adams v. Kennard* (1925) 122 Ore. 84; 222 Pac. 1092; 227 Pac. 738; 253 Pac. 1048.

[62] Scott, *op. cit.* 1210.

[63] American Law Institute, *Restatement of the Law* (Second) Trusts, para. 170; comment on pp. 434-435.

[64] Scott, *op. cit.* ii, 1212, n. 13, citing Massachusetts: Ann. Laws, c. 203, s. 16; New Jersey: S., 3A: 19-4; Pennsylvania Stats. Ann. (Purdon) tit. 20, ss. 320, 966, 1741, 3112.

2. If any beneficiary is under a disability the trustee cannot buy the trust estate without the court's permission unless he is expressly authorized to do so either by the trust instrument or by statute or unless an enforceable contract was entered into before the fiduciary relationship arose.

3. If the beneficiaries are of full age and capacity and refuse to consent to a proposed sale of the trust property to a trustee the court will only authorize the transaction if:

(a) it is virtually impossible to find another buyer at an adequate price, and
(b) it would be to the advantage of the estate for the trustee to buy, and
(c) there are cogent reasons for selling at the particular time, and
(d) it would be impossible or inexpedient to wait to see whether the market became more favourable.

4. The sale should generally be by public auction, but if there are no doubtful factors affecting the value of the property, and that value can be readily and accurately ascertained, a private sale may be permissible.

5. If a trustee intends to apply for leave to bid at an auction of the trust property he should do so before the auctioneers are appointed and before the conditions of sale are settled, in order that the court may take the conduct of the sale right out of his hands.

6. Provided that the trustee makes full disclosure to the court of all circumstances affecting the value of the property at the time when he applies for leave to bid, he may, after being granted leave, negotiate as a stranger.

7. A trustee to whom permission to buy the trust estate is granted by the court will usually be required to pay the costs of the application unless he stipulates otherwise in his original offer.

8. The court has jurisdiction to approve *ex post facto* a voidable purchase of trust property by a trustee. The transaction would probably not be confirmed if the value of the property had risen between the date of the improper purchase and the date of the application for confirmation.

9. Although some United States courts have decided the contrary, the general principle that a court of equity may approve a purchase of trust property by a trustee seems to be accepted.