

# UNDERSTANDING THE “SELF DEALING” RULE IN EQUITY

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Two of the most common disabilities in equity are said to be prohibitions against “self-dealing” and the requirement of “fair dealing”. This paper examines the prohibition against self-dealing. Although it is well known that this prohibition exists, there is considerable controversy surrounding its boundaries and its operation. The reason for this is that there is nothing unique about the self-dealing rule. Rather, there is no *single* doctrine of self-dealing. Rather the so-called 'self-dealing rule' is commonly used in a number of different senses to describe a number of different rules, with different rationales.

## **The 'self-dealing' rule**

The most famous expression of the self-dealing and fair dealing rules is that of Megarry V-C in *Tito v Waddell (No 2)*<sup>1</sup>

The self-dealing rule is . . . that if a trustee sells the trust property to himself, the sale is voidable by any beneficiary *ex debito justitiae*, however fair the transaction. The fair-dealing rule is . . . that if a trustee purchases the beneficial interest of any of his beneficiaries, the transaction is not voidable *ex debito justitiae*, but can be set aside by the beneficiary unless the trustee can show that he has taken no advantage of his position and has made full disclosure to the beneficiary, and that the transaction is fair and honest.

The same approach is taken in Australia. In *Clay v Clay*,<sup>2</sup> a joint judgment of the High Court of Australia, said the following:

The "fair-dealing rule" provides that a transaction whereby the beneficial interest of a beneficiary is purchased by the trustee is not voidable *ex debito justitiae*, but may be set aside, unless the trustee can show that no advantage has been taken...the "self-dealing rule" is that the sale by the trustee of the trust property to himself is voidable by any beneficiary *ex debito justitiae*.

These statements represent the orthodoxy in England and Australia in relation to self-dealing and fair dealing. But, closely examined, a *single* doctrine of self-dealing is, in fact, an illusion. There are several entirely different situations which are described in the cases and included in a single description of “self-dealing”. They are as follows:

1. A trustee, having legal title over an asset purports to convey title to himself or herself.

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\* A version of this paper will appear in J Glister and P Ridge *Fault Lines in Equity* (paperback, 2013).

<sup>1</sup> [1977] Ch 106 at 241.

<sup>2</sup> [2001] HCA 9; (2002) 202 CLR 410 at [51]-[52].

2. A trustee purports to enter a transaction to sell a trust asset to a nominee of the trustee.
3. A trustee purports to enter a transaction which will extinguish or overreach the rights of the beneficiary of the trust.
4. A company director purports to sell company assets to himself or herself.
5. A company director purports to sell company assets to a nominee.

In all of these cases the outcome of the case is easily resolved by reference to well established doctrines without resort to a description such as “self dealing” and without resort to verbal formulae such as whether the transfer is voidable *ex debito justitiae*. That is not to say that it is an error to refer to any of these instances as involving 'self-dealing'. But there is grave danger when the same label is used to describe different phenomena which have different effects.

### 1. *A trustee purports to convey title to himself or herself*

This self-dealing scenario has deep roots. The orthodoxy quoted above from *Tito v Waddell* and *Clay v Clay* can be traced back as far as Lord Chancellor King.<sup>3</sup> The immediate difficulty with this notion of a beneficiary having a power to set aside the transaction is that this is a nonsense. There is no *transaction* to set aside. A purchase of property requires two parties. A sale of an asset by a legal owner to himself has no effect on legal relations. Millett LJ succinctly described this as the “two party rule”.<sup>4</sup>

There are no real exceptions to the two party rule. However, one apparent exception is subsection 72 (3) of the *Law of Property Act 1925 (UK)*<sup>5</sup>: “*After the commencement of this Act a person may convey land to or vest land in himself.*” In *Rye v Rye*<sup>6</sup> the question before the House of Lords was whether that subsection permitted two tenants in common of land to grant a lease by parol so that one freeholder could evict the other. At common law it has long been established that *nemo potest esse tenens et dominus*.<sup>7</sup> Could subsection 72(3) have altered this principle? If so, it would mean that a smaller estate in land would not merge into a larger estate held by the same person.<sup>8</sup> That person would accept something which is already his own and would owe duties to himself or herself in relation to it.<sup>9</sup> Although Lord MacDermott found the question to be difficult, in the leading speech Viscount Simonds said that his mind recoiled against so “fanciful and whimsical” a construction of the statute and held that

<sup>3</sup> See M Conaglen *Fiduciary Loyalty* (2010) at 126, citing *Whitackre v Whitackre* (1725) Sel Cas t King 13 at 13; 25 ER 195.

<sup>4</sup> *Ingram v Inland Revenue Commissioners* [1997] 4 All ER 395 at 423. See also *The People's Prudential Assurance Co Ltd v The Australian Federal Life and General Assurance Co Ltd* (1935) 35 SR (NSW) 253 at 265; *Clay v Clay* [2001] HCA 9; (2002) 202 CLR 410 at [51]-[52].

<sup>5</sup> See also s 44 of the *Property Law Act 1969 (WA)*, s 24 of the *Conveyancing Act 1919 (NSW)* and s 49 of the *Property Law Act 1952 (NZ)*.

<sup>6</sup> [1962] AC 496.

<sup>7</sup> No person can be a tenant and a landlord.

<sup>8</sup> Cf Blackstone's Commentaries, vol. II, 177

<sup>9</sup> As Lord Denning expressed the point at [1962] AC 496 at 514: “If A grants a tenancy to himself A, can he mutter a notice to quit to himself and expect the law to take any notice of it?”

there had been no suggestion in any of the textbooks that the subsection had given birth to such a “monstrous child”.<sup>10</sup>

There are two possible explanations for section 72(3), neither of which alters the effect of the two party rule. The first explanation is that the purpose of the statutory provision was to liberalise the barring of entails, not to alter the common law two party rule. A sale to oneself could rid the title of an entail and permit sale outside the family. A second possible explanation,<sup>11</sup> also concerned with conveyance rather than contract, is that it was possible at common law to convey to a grantee for uses for the benefit of the grantor, so that when the *Statute of Uses* 1535 executed the use the grantor would have conveyed to himself. The argument might be that when the 1925 statute repealed the *Statute of Uses*, the 1925 statute was concerned not to abolish the possibility of the creation of a trust upon an executed use. In either case, the effect of section 72(3) could hardly be to permit a person to make a conveyance of his own title (whether held absolutely or on trust) to himself or herself alone.

There are, however, provisions in two jurisdictions which seem to permit a trustee to sue himself or herself. In Western Australia, s 57 of the *Trustees Act 1962* and in Queensland *Trusts Act 1973*, s 59, provides that

a trustee of any property in that capacity may sue, and be sued by, himself in any other capacity whatsoever, including his personal capacity; but in every such case the trustee shall obtain the directions of the Court in which the proceedings are taken, as to the manner in which the opposing interests are to be represented.

It appears that this provision was taken directly from s33A of the *Trustee Act 1956* (NZ). Whatever the purpose of a provision such as this, it does not mean that a trustee can enter contracts with himself or herself. As Bryson JA (Spigelman CJ and Ipp JA agreeing) said in *Minister Administering National Parks & Wildlife Act 1974 v Halloran & Ors*:<sup>12</sup>

The documents relating to these transactions speak as if there were dealings between two persons, Pacinette in its own interest and Pacinette as trustee of the Pacinette Property Trust; there can be no contractual relationship in that form, whether for the issue of ordinary units or for their redemption in consideration of the purchase of real property. A trustee cannot contractually deal with itself so as to sell trust property to itself in some capacity other than as trustee; the closest approximation to such a transaction which conceptually can take place is that a trustee can discharge itself from a trust obligation in respect of a property, but only if it has authority under the constitution of the trust or in some other way to do so. Such events are commonly referred to as self-dealing but this use of language is not entirely accurate. On the false

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<sup>10</sup> [1962] AC 496 at 505-506.

<sup>11</sup> Speculated by B McPherson ‘Self-dealing Trustees’ in Oakley (ed) *Trends in Contemporary Trust Law* (1996) 135 at 142 and suggested by the High Court of Australia in *Clay v Clay* [2001] HCA 9; (2002) 202 CLR 410 at [51]-[52].

<sup>12</sup> [2004] NSWCA 118 [54]. This point was not discussed on appeal to the High Court: *Halloran v Minister Administering National Parks and Wildlife Act 1974* [2006] HCA 3; (2006) 224 ALR 79

assumption that a trustee in its personal capacity and in its trustee capacity are different persons.<sup>13</sup>

An apparently anomalous and unjustifiable exception to the two party rule was suggested by Lord Denning in *Rye v Rye*.<sup>14</sup> His Lordship suggested that a man who is sole executor can convey to himself or herself as devisee. This principle was applied (without citation of Lord Denning's *obiter dictum*) in *Holder v Holder*.<sup>15</sup> In that case the defendant was an executor of an estate. The defendant had ineffectively renounced his executorship. Later he succeeded at auction in purchasing a farm from the estate. The other executors (and potential legatees) brought an action against him to set aside the sale. The Court of Appeal held that the sale was good and that the rule against self-dealing did not apply.

The reasons given involve some difficulty. Harman LJ was the only judge to address the problem. His Lordship argued that even though the defendant was still the executor, the defendant was not in the position of both seller and buyer because he didn't take part in instructing the valuer; he didn't assume the duties of an executor; and he had acquired no special knowledge as an executor. All of this may be true but it was arguably beside the point. The will of the deceased had created the office of executor which the defendant had accepted, and had not properly renounced. Title to the property passed to the defendant at the time he accepted the office as executor. The sale at auction was therefore to himself.

Executors with legal title to assets should not be treated any differently from trustees or any other legal owner. It is well established that the two party rule prevents a trustee, like any other person holding legal title, from purchasing from himself. In relation to trustees, Romilly MR once described such a purchase as a "*mere piece of waste paper*".<sup>16</sup>

Another attempt to defend an independent self-dealing rule was made by Lord Eldon, following the lead of Sir Richard Arden.<sup>17</sup> In *Ex parte Lacey*<sup>18</sup> Lord Eldon purported to give a second rationale for this rule. In the context of a Trustee in Bankruptcy who purchased part of the bankrupt estate at auction, Lord Eldon LC said

The rule I take to be this; not, that a trustee cannot buy from his Cestuy que trust, but, that he shall not buy from himself. ... A trustee, who is entrusted to sell and manage for others, undertakes in the same moment, in which he becomes a trustee, not to manage for the benefit and advantage, of himself. It does not preclude a new contract with those, who have entrusted him. It does not preclude him from bargaining, that he will no longer act as a trustee. The Cestuy que trust may by a new contract dismiss him from that character: but even then that transaction, by which they dismiss him, must according to the rules of this Court be watched

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<sup>13</sup> *Suncorp Insurance and Finance v. Commissioner of Stamp Duties* [1997] QCA 225; [1998] 2 Qd R 285 at 305-306 (Davies JA).

<sup>14</sup> [1962] AC 496 at 514.

<sup>15</sup> [1968] Ch 353.

<sup>16</sup> *Denton v Donner* (1856) 23 Beav 285; 53 ER 112. See also *Lewis v Hillman* (1852) 23 Beav 285 at 290; 53 ER 112 at 114; *Franks v Bollans* (1868) 3 Ch App 717; *Farrer v Farrer's Ltd* (1888) 40 Ch D 395 at 404; *Hodson v Deane* [1903] 2 Ch 647 at 653. These cases are discussed in B McPherson 'Self-dealing Trustees' in Oakley (ed) *Trends in Contemporary Trust Law* (1996) 135 at 138-141.

<sup>17</sup> *Campbell v Walker* (1800) 5 Ves 678 at 680; 31 ER 801.

<sup>18</sup> (1802) 6 Vesey Junior 625, 626-7, 31 ER 1228, 1228-9.

with infinite and the most guarded jealousy; and for this reason; that the Law supposes him to have acquired all the knowledge a trustee may acquire; which may be very useful to him; but the communication of which to the Cestuy que trust the Court can never be sure he has made, when entering into the new contract, by which he is discharged. I disavow...that the trustee must make advantage. I say, whether he makes advantage, or not, if the connection does not satisfactorily appear to have been dissolved, it is in the choice of the Cestuy que trusts, whether they will take back the property, or not if the trustee has made no advantage. It is founded upon this; that though you may see in a particular case, that he has not made advantage, it is utterly impossible to examine upon satisfactory evidence in the power of the Court, by which I mean, in the power of the parties, in ninety-nine cases out of an hundred, whether he has made advantage, or not. **Suppose, a trustee buys any estate; and by the knowledge acquired in that character discovers a valuable coal-mine under it; and locking that up in his own breast enters into a contract with the Cestuy que trust: if he chooses to deny it, how can the Court try that against that denial? The probability is, that a trustee, who has once conceived such a purpose, will never disclose it; and the Cestuy que trust will be effectually defrauded.**

The obvious problem with this reasoning is that the knowledge of the trustee is irrelevant if the two-party rule applies. If there is no transaction there is nothing to set aside.

There is a different, and possible, explanation for the result in *Holder v Holder*. It may just be possible to understand the decision as recognising a transaction by which the executor did not sell the farm to himself but instead agreed to pay a sum of money to release himself of the duties which bound him in dealing with the land as to which the title was vested in him.

Apart from cases which, properly understood, do not involve a sale by one person of rights which that person holds to himself or herself, the 'self-dealing' rule in standard two party cases is an illustration of the basis two party rule. This is a general common law principle which means that self-dealing by a trustee is simply void, and not voidable, it might be said that there is room for operation of the self-dealing doctrine and the peculiar notion of voidability *ex debito justitiae* in the context of a sale by a trustee to a nominee. I turn now to that situation.

## **2. A trustee purports to sell a trust asset to a nominee of the trustee**

A second possible defence of the orthodoxy from *Tito v Waddell* and *Clay v Clay* is that it might have meaning in a situation in which a trustee sells a trust asset to a nominee. Is it meaningful in this situation to speak of the transaction being voidable *ex debito justitiae*?

The first difficulty here is that “nominee” is not a term of art, nor a recognised legal category. Sometimes the term is used to describe an agent of the nominator. On other occasions it is used to describe a person who holds as trustee for the nominator.

In cases where a trustee purports to sell a trust asset to an agent nominee then the two party rule applies. The agent is acting for the trustee so the sale is from the trustee to himself. The transaction is simply void. There is a considerable body of authority in support of this.<sup>19</sup> As Lord President Hope, as his Lordship was then, said in the Inner

<sup>19</sup> *Re Bloye's Will Trust* (1849) 1 Mac & G 488 at 494-495; 41 ER 1354 at 1357; *Campbell v Walker* (1800) 5 Ves Jun 678; 31 ER 801; *Randall v Errington* (1805) 10 Ves Jun 423; 32 ER 909; *Ex Parte Bennett* (1805) 10 Ves Jun 381; 32 ER 893 at 900; *Watson v Toone* (1820) 6

House of the Court of Session:<sup>20</sup> “*But I know of no case, and none was cited to us, where it has been held that a nominee may contract with his principal so as to create new rights and obligations involving no third party whatever which are to be held only on his principal's behalf. That seems to me to conflict with the principle that a man cannot contract with himself.*”

A second use of “nominee” is to describe a situation in which a trustee sells an asset to a person nominated to hold the asset on trust for the trustee. So, for instance, a trustee sells a trust asset to his wife, to hold for him on trust.<sup>21</sup> It might be thought that there is a need for this transaction to be voidable *ex debitaie justitiae* to avoid the third party obtaining any benefit. Lord Eldon’s reasoning quoted above might be called in aid of this reasoning on the basis that the *prima facie* voidability of such a transaction arises because of the non-justiciability of issues of knowledge.

However, there is no need for such voidability. First, the notion that such a transaction is voidable ignores the difference between authorised and unauthorised transactions. If the trustee is authorised to sell the legal title to the third party then provided that the third party is bona fide then the third party will obtain an unimpeachable title.

Alternatively, if the transaction is unauthorised and the nominee purchases the asset with knowledge of the trustee’s lack of authority then the nominee will not be a bona fide purchaser and the nominee will hold his rights on trust for the original beneficiary. The beneficiary does not need to rely upon any voidability of the nominee’s rights. The beneficiary can simply demand conveyance of the rights.<sup>22</sup> The same outcome occurs, although more indirectly, even if the nominee purchases *without* knowledge of the beneficiary’s equitable rights. The nominee undertakes to hold the legal title on trust for the trustee who, in turn, holds his equitable rights on sub-trust for the beneficiary. It was once thought that in such a situation the sub-trustee would drop out.<sup>23</sup> The better analysis is that the sub-trust remains<sup>24</sup> but there is still no need for a voidability analysis because the beneficiary can demand that the trustee obtain a reconveyance of the legal rights from the nominee and the beneficiary can then demand conveyance of those rights. Describing the transfer to the nominee as *voidable ex debito justitiae* adds nothing to this conventional analysis.

A further problem with Lord Eldon’s reasoning was explained in *Holder v Holder*. Danckwerts LJ rejected the argument of Lord Eldon that it is impossible to ascertain the state of knowledge of a trustee, referring to the well known statement of Bowen LJ that “*the state of a man's mind is as much a fact as the state of his digestion,*” and also to the “*almost daily experience of any judge engaged in ascertaining the knowledge and intentions of a party to proceedings.*”<sup>25</sup>

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Madd 153; 56 ER 150. See B McPherson ‘Self-dealing Trustees’ in Oakley (ed) *Trends in Contemporary Trust Law* (1996) 135 at 140.

<sup>20</sup> *Kildrummy (Jersey) Ltd v IRC* [1990] STC 657 at 662.

<sup>21</sup> *Robertson v Robertson* [1924] NZLR 522.

<sup>22</sup> *Saunders v Vautier* (1841) 4 Beav 115.

<sup>23</sup> *Grainge v Wilberforce* (1889) 5 TLR 436.

<sup>24</sup> *Nelson v Greening* [2007] EWCA Civ 1358 at [54]-[57].

<sup>25</sup> [1968] Ch 353 at 398.

In summary, in circumstances in which the trustee purports to sell the trust asset to a nominee, nothing is added to conventional understanding of trust law, and the law is only confused, by describing the situation as involving a transfer which is voidable *ex debito justitiae*.

**3. A trustee purports to enter a transaction which will extinguish or overreach the rights of the beneficiary of the trust.**

A third possible meaning of self-dealing is where the beneficiary of a trust is a party to a transaction with the trustee. Although this might, very loosely, be described as a sale by the trustee to himself or herself, the two party rule is not infringed if the contract can be construed as an agreement by the beneficiary to relinquish his equitable rights against the trustee so that the trustee will hold the legal title outright.

Although a contract between a trustee and a third party which purports to overreach the interest of the beneficiary cannot have such effect unless the trustee is acting within authority,<sup>26</sup> the interest of the beneficiary can also be overreached in cases where the beneficiary is a party to the transaction or when the beneficiary ratifies the unauthorised transfer. In relation to an attempt by the trustee to overreach the interests of the beneficiary in an unauthorised sale to a third party, that attempt is ineffective unless ratified. As O’Sullivan, Elliott and Zakrzewski have explained, ‘*this is in fact the converse of rescission. The right is to elect to divest an existing beneficial interest, whereas rescission involves regaining a title lost or obtaining a new beneficial interest in traceable substitutes.*’<sup>27</sup>

In relation to an attempt by the trustee to overreach the beneficiary’s interest in a transaction with the beneficiary, this is capable of being a valid contract. Prior to 1873, the effect of such a contract was that the beneficiary who tried to enforce the trust in the Courts of Chancery would be in breach of contract and could be sued at law. After the *Judicature Acts* the beneficiary could not bring an action on the trust, because to do so would involve circuity of action.<sup>28</sup> This instance of self-dealing plainly does not cause a contract to be voidable *ex debito justitiae*; just the opposite, as Millett LJ explained, it is a perfectly valid and enforceable contract.<sup>29</sup> It may be that some of the authorities discussed above involving purported sales by a trustee to himself or to his agent might be re-explained as situations in which the trustee is entering a transaction to extinguish the beneficial interest. Although the transaction would not be voidable simply because of the nature of the transaction as “self-dealing”, it is possible that the transaction might nevertheless be voidable for other reasons. This would depend upon application of well established principles concerning whether the trustee obtained fully informed consent to, or waiver of, a conflict of interest. On one view such a transaction would also attract the attention of the equitable doctrine of fair dealing. This paper does not consider the detail of the doctrine of fair dealing, but it suffices to note that Dr Conaglen has argued that the fair dealing doctrine is not independent of the traditional and well known rules

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<sup>26</sup> *Ingram v Inland Revenue Commissioners* [1997] 4 All ER 395 at 423 (Millett LJ); *Clay v Clay* [2001] HCA 9; (2002) 202 CLR 410 at [51].

<sup>27</sup> D O’Sullivan, S Elliott and R Zakrzewski *The Law of Rescission* (2009) at [1.58].

<sup>28</sup> *Hirachand Punamchand v Temple* [1911] 2 KB 330 at 337 (Vaughan Williams LJ).

<sup>29</sup> *Ingram v Inland Revenue Commissioners* [1997] 4 All ER 395 at 424 (Millett LJ).

relating to conflict of interest and profiting from a fiduciary position. The doctrine of fair dealing, on this argument, is a misnomer: it is not concerned with substantive fairness at all.<sup>30</sup>

#### **4. A company director purports to sell company assets to himself or herself.**

In *J J Harrison (Properties) Ltd v Harrison*<sup>31</sup> a director of a property company, Peter Harrison, acquired a property from the company at an undervalue. Harrison failed to disclose to the other voting directors that a planning application had been made and that the architects were confident that it would be granted. Harrison later made vast profits from developing and selling the land. When, many years later, the non-disclosure was discovered the company brought an action against Harrison for breach of fiduciary duty seeking an account of profits, a constructive trust over the profits and equitable compensation. The Court of Appeal held that Harrison held the land on constructive trust for the company.

The first point to note about this result is that the doctrine applies whether or not the director is the person to whom the company assets are conveyed. It does not matter whether the company assets are conveyed as a result of “self-dealing” by the director or whether they are sold as a result of dealing by a director with a third party who has knowledge of the director’s lack of authority. In both cases, there is a great deal of authority in support of the proposition that the person who receives an asset of the company, with knowledge that it is transferred without authority, holds that asset on constructive trust for the company.<sup>32</sup> The best known decision for this general proposition is *Rolled Steel Products (Holdings) Ltd v British Steel Corporation*.<sup>33</sup> In that case, Rolled Steel Products (Holdings) Ltd owed £400,000 to another company, S Ltd, owned by one of the Rolled Steel directors. S Ltd itself owed twice that sum to the British Steel Corporation.<sup>34</sup> The Rolled Steel director was a personal guarantor of S Ltd’s debt to Rolled Steel. Rolled Steel and British Steel devised a proposal for British Steel to lend money to Rolled Steel which would be used to repay Rolled Steel’s debt to S Ltd. S Ltd would then use those funds to repay (in part) the debt it owed to the British Steel. Rolled Steel would also give British Steel security for the debt owed to it.

The effect of the proposed arrangements was that Rolled Steel would discharge its debt to S Ltd and S Ltd would discharge part of its debt to British Steel, reducing the contingent liability of the Rolled Steel director. This arrangement was possible by the security given by Rolled Steel to British Steel and by a loan to Rolled Steel from British Steel. Although the director of Rolled Steel was personally interested in this proposal he did not declare an interest and voted in favour of the proposal. Subsequently the Rolled Steel security was called upon by British Steel. When Rolled Steel was placed into receivership, the receiver sought recovery of the payments made

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<sup>30</sup> M Conaglen ‘A Re-Appraisal of the Fiduciary Self-Dealing and Fair-Dealing Rules’ (2006) 5 CLJ 366.

<sup>31</sup> [2001] EWCA Civ 1467; [2002] BCC 729.

<sup>32</sup> *Russell v Wakefield Q Waterworks Co.* (1875) LR 20 Eq 474 at 479; *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 405; *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400 at 408; *Re Sharpe*; *Masonic and General Life Assurance Co v Sharpe* [1892] 1 Ch 154 at 172; *Soar v Ashwell* [1893] 2 QB 390 at 398.

<sup>33</sup> [1986] Ch 246.

<sup>34</sup> For simplicity, the British Steel group companies are treated interchangeably here.

pursuant to the security. This claim failed because Rolled Steel was still under an obligation to repay money borrowed from the British Steel Corporation's subsidiary. However, the Court of Appeal held that the payments under the guarantee were held on constructive trust because the British Steel subsidiary had received them with knowledge of the lack of authority.

One puzzle is why a trust arises in these cases. If a third party knows<sup>35</sup> that a company director has no authority to sell company assets then the company is not bound by any contract which the agent makes with the third party<sup>36</sup> unless the company chooses retrospectively to ratify it.<sup>37</sup> In relation to any conveyance of company assets, the company can bring a personal claim against the third party recipient for unjust enrichment at the company's expense.<sup>38</sup> Given the existence of a personal claim, why is there a need for a constructive trust?

The answer suggested by the Court of Appeal in *JJ Harrison* is that the trust arises by manifestation of consent, in the same way as a trustee who makes an express declaration of trust by conduct.<sup>39</sup> Although, as a director, Harrison was not a trustee, he assumed the same duties as those of a trustee in relation to company property.<sup>40</sup> When the company asset was transferred to Harrison he became a trustee because these duties were then related to a particular asset.<sup>41</sup>

Another possible answer is that the trust arises as a response to the same event as the personal claim.<sup>42</sup> It is the unjust enrichment of the third party at the expense of the company which gives rise to the company's personal claim for restitution. Indeed, the claim that the rights are held on trust might be thought to be a more perfect means of obtaining restitution since the claimant has a power to obtain the very enrichment held

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<sup>35</sup> It is possible that the doctrine also extends to situations in which the third party only has notice of the director's lack of authority: see *Nelson v Larholt* [1948] 1 KB 339, and also *Eddis v Chichester Constable* [1969] 2 Ch 345 at 358. These cases are difficult to reconcile with the principle that carelessness does not preclude a contract from arising by ostensible authority only dishonesty or irrationality will suffice: see *Akai Holdings Ltd (In Liq) v Thanakharn Kasikorn Thai Chamkat (Mahachon)*, Hong Kong Final Court of Appeal, 8 November 2010, Lord Neuberger.

<sup>36</sup> *Heinl v Jyske Bank (Gibraltar) Ltd* [1999] Lloyd's Rep. Bank. 511 at 521 (Nourse LJ citing dicta of Slade and Browne-Wilkinson L JJ in *Rolled Steel Products (Holdings) Ltd v British Steel Corp. Ltd* [1986] Ch 246 at 295, 297, 304). Contrast the situation of ostensible authority when a third party has no knowledge of the lack of authority but who relies upon the agent's position as director: *Auxil Pty Ltd and Anor v Terranova & Ors* (2009) 260 ALR 164 at [176]; *Akai Holdings Ltd (In Liq) v Thanakharn Kasikorn Thai Chamkat (Mahachon)*, Hong Kong Final Court of Appeal, 8 November 2010, Lord Neuberger.

<sup>37</sup> *Heinl v Jyske Bank (Gibraltar) Ltd* [1999] Lloyd's Rep. Bank. 511 at 533.

<sup>38</sup> *Criterion Properties plc v Stratford Properties LLC* [2004] UKHL 28; [2004] 1 WLR 1846, 1848 [4] (Lord Nicholls); *Primlake Ltd (in liq) v Matthews Associates* [2006] EWHC 1227 (Ch) [335].

<sup>39</sup> The subjective views of the trustee being irrelevant: *Twinsectra Ltd v Yardley* [2002] 2 A.C. 164 at [71]; *Re Kayford Ltd* [1975] 1 WLR 279; *Multi Guarantee Co Ltd* [1987] BCLC 257; *Mills v Sportsdirect.com Retail Ltd* [2010] EWHC 1072 (Ch) at [53]-[54].

<sup>40</sup> [2001] EWCA Civ 1467; [2002] BCC 729 at [25]. See also *Re Lands Allotment Co* [1894] 1 Ch 616 at 631, 638; *Cook v Deeks* [1916] AC 555 at 564; *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 405; *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400.

<sup>41</sup> See also *Re Sharpe; Masonic and General Life Assurance Co v Sharpe* [1892] 1 Ch 154 at 172; *Soar v Ashwell* [1893] 2 QB 390 at 398.

<sup>42</sup> *Nelson v Larholt* [1948] 1 KB 339 at 342-343.

by the defendant. In this light, the trust which arises might be better described as a resulting trust rather than a constructive trust.<sup>43</sup> An analogous case is *Nelson v Nelson*.<sup>44</sup> In that case, Mrs Nelson transferred land into the name of her children in order to obtain a subsidised government loan. Just as a director can transfer company assets in circumstances in which the company has no intention to benefit the recipient, so too Mrs Nelson had no intention to benefit her children by conferring the use and enjoyment of the property upon them. Her intention was to make a paper transfer but to reserve the use and enjoyment of the land to herself. After the property was sold, her daughter denied that she had any interest in the proceeds of sale. Deane and Gummow JJ quoted from Professors Scott and Fratcher and explained that such a result would unjustly enrich the daughter.<sup>45</sup> The award made by the High Court of Australia was that the proceeds were held on resulting trust (subject to conditions).

Whichever answer is given to the question of why a trust arises in the case of an unauthorised disposition of a claimant's asset, it is clear that the answer is not confined to circumstances in which the defendant is engaged in 'self-dealing' nor is it confined to situations in which the defendant is a fiduciary.

### ***5. A company director purports to sell company assets to a nominee.***

As we saw above, in the scenario of a trustee who sells trust assets to a nominee, the word "nominee" is not a term of art. There are two possibilities in the case of an unauthorised sale by a company director of company assets. First, the nominee of the company director could be an agent for the company director. In that case, the situation is identical to the case of a company director conveying company assets to himself or herself. The unauthorised sale would not have any effect unless ratified and any conveyance of title would be held on trust for the company either by application of principles of unjust enrichment or, possibly, by the argument that the director's conduct manifests an intention to hold the asset on trust for the company.

Secondly, the nominee of the company director could be a person who agrees to purchase the company asset and hold on trust for the company director. If the nominee knows that the asset has been transferred without authority then, as explained above, the contract between the nominee and the company can be avoided and the asset would be held by the nominee on trust for the company. Alternatively, if the nominee does not know that the transfer is unauthorised, then the nominee would hold on trust for the company director who would, in turn, hold his equitable interest on trust for the company (for the reasons explained above).

## **Conclusion**

The purpose of this paper has been to shine a torch on the so-called principle against fiduciary self-dealing. Examined closely, there is no such doctrine nor is there a single consequence that the sale is voidable *ex debito justitiae*. Instead, the situations considered as "self dealing" are a disparate group of cases involving of a number of

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<sup>43</sup> R Chambers *Resulting Trusts* (2007).

<sup>44</sup> (1995) 184 CLR 538.

<sup>45</sup> (1995) 184 CLR 538, 564. See also Toohey J at 597.

different but well established rules, none of which is capable of being generalised to relationships commonly regarded as fiduciary.

A better approach to this area of the law would be to consider each instance of purported self-dealing in its own context. The different contexts apply different principles and conflation of all the principles into a “rule” against self-dealing is, at best, unhelpful. In summary, the principles are:

1. If the case is one involving an attempted sale, or conveyance, by any person to himself or his agent then if the sale is of no more than the same rights that the person already holds then it is void.
2. If the sale is an authorised transaction by a trustee to a nominee to hold on trust for the trustee, then the interest of the beneficiary will be overreached by the transaction.
3. If the ‘sale’ is between the trustee and the beneficiary and it can be construed as an agreement by the beneficiary to relinquish his equitable rights then the agreement will be valid and the trustee will hold the rights absolutely, subject to well know rules of avoidance which are unconcerned with substantial fairness but which are sometimes compendiously, and confusingly, described as “fair dealing”.
4. If the sale is an unauthorised transaction by a trustee to a nominee to hold on trust for the trustee, then:
  - a. if the nominee was not a bona fide purchaser for good faith the nominee will hold on trust directly for the beneficiary; or
  - b. if the nominee was a bona fide purchaser for good faith of the legal title then the nominee will hold the title on trust for the trustee who will hold his equitable rights on sub-trust for the beneficiary. The beneficiary can compel conveyance of the legal rights to herself by demanding that the trustee obtain conveyance from the nominee and then by executing the trust.
5. If the purported sale and conveyance is of company assets by a director from the company to herself, without authority, then the sale will be ineffective (unless ratified by the company) and the director will hold those assets on trust for the company.
6. If the sale and conveyance is of company assets by a director, without authority, to a nominee to hold on trust for the director, then:
  - a. if the nominee had knowledge of the lack of authority of the company director then there will not be an effective contract (unless the company chooses to ratify) and the nominee will hold any asset conveyed on trust directly for the company;

- b. If the nominee director had no knowledge of the lack of authority of the company director (and possibly also no notice) then the contract will be valid and the nominee will hold the assets on trust for the director, who will hold them on sub-trust for the company (as explained in 3b above).